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Engage

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James Madison by Chester Harding, National Portrait Gallery, Smithsonian Institution

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Letter from the Editor...

Engage, the journal of the Federalist Society for Law and Public Policy Studies, is a collaborative effort involving each of the Society's fifteen Practice Groups. The Federalist Society's Practice Groups spark a level of debate and discussion on important topics that is all too often lacking in today's legal community. Through their programs, conferences and publications, the Practice Groups contribute to the marketplace of ideas in a way that is collegial, measured, and open to all.

Volume 7, Issue 1 is dedicated almost exclusively to original articles produced by Society members and friends. Former United States Supreme Court Chief Justice William Rehnquist is featured prominently in a number of articles, including a look at the development of modern judicial conservatism and an analysis of the Rehnquist Court decisions concerning freedom of speech. In addition, this issue features an extensive study of the right to health in international law. Volume 7, Issue 1 also presents the second installment of a series entitled "Ninth Circuit Split: Point/Counterpoint." "A Court United: A Statement of a Number of Ninth Circuit Judges" is the follow-up to Diarmuid F. O'Scannlain's article from the October 2005 issue.

Upcoming issues of Engage will feature other original articles, essays, book reviews, practice updates and transcripts of programs that are of interest to Federalist Society members. We hope you find this and future issues thought-provoking and informative.

The Journal of the Federalist Society for Law and Public Policy Studies

E n g a g e

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The Journal of the Federalist Society's Practice Groups

Editor
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Administrative Law and Regulation

DaimlerChrysler Corp. v. Cuno and the Constitutionality of State Tax Incentives for Economic Development

*By Kristin E. Hickman**

In October 2005, legal scholars, economists, and other experts gathered in Minneapolis at an event co-sponsored by the University of Minnesota Law School and the Federalist Society's Tax Subcommittee and Minneapolis Lawyer's Chapter to discuss issues raised by *DaimlerChrysler Corp. v. Cuno*, on which the Supreme Court heard oral arguments on March 1, 2006. Essays written in conjunction with this symposium are forthcoming shortly in the *Georgetown Journal of Law and Public Policy*. The following summarizes *Cuno*'s background and some of the topics discussed in Minneapolis.

The power to tax is one of the most fundamental elements of state sovereignty. Yet the States must employ that power with due recognition for requirements and limitations imposed by the United States Constitution. As the Supreme Court has noted on several occasions, there is "much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation."[1]

In *DaimlerChrysler Corp. v. Cuno*, the plaintiffs as citizens and taxpayers challenged the constitutionality of an Ohio state-level investment tax credit for economic development. The case comes from the Sixth Circuit, which declared the Ohio investment tax credit to be in violation of the Commerce Clause of the United States Constitution.[2] To some extent, the *Cuno* case merely reflects a long standing debate over the constitutionality, efficacy, and wisdom of state tax incentives as a mechanism for economic development.[3] *Cuno* has brought new attention to these old debates, however, and additionally offers fresh fodder for consideration and commentary.

Background

The story of the *Cuno* case is a familiar one in today's business climate. In the late 1990s, DaimlerChrysler decided to expand its capacity to build Jeeps. DaimlerChrysler already had an assembly plant in Toledo, Ohio. So DaimlerChrysler approached Toledo municipal and Ohio state government officials to inquire about tax incentives that might be available should the company choose to expand its facilities in Toledo rather than across the border in nearby Michigan.[4]

The Ohio Revenue Code includes a non-refundable investment tax credit against Ohio corporate franchise tax for new machinery and equipment installed in Ohio facilities and also allows municipalities to offer personal property tax waivers to businesses that invest designated enterprise zones certified by the state as economically depressed.[5] After working with local and state officials, DaimlerChrysler accepted a $280 million incentive package that included, but was not limited to, assistance in securing the investment tax credit and a ten-year, 100% personal property tax waiver in exchange for building its new facility in Toledo.[6]

Charlotte Cuno, a self-described Toledo resident, homeowner, and taxpayer, joined several similar plaintiffs from Ohio and Michigan in suing DaimlerChrysler, the State of Ohio, the City of Toledo, local school boards, and various individual government officials over that incentive package.[7] The plaintiffs alleged that the state investment tax credit and local property tax exemptions granted to DaimlerChrysler violated the Commerce Clause by "providing preferential treatment to in-state economic activity."[8]

The federal district court dismissed the plaintiffs' suit for failure to state a claim upon which relief may be granted.[9] On appeal, however, the Sixth Circuit found the investment tax credit, but not the property tax waiver, in violation of the Commerce Clause.[10] Both sides petitioned for Supreme Court review of the Sixth Circuit's conclusions. Thus far, the Supreme Court has granted only the petitions of DaimlerChrysler and various state and local government defendants for review of the investment tax credit piece of the Sixth Circuit's decision. The Court has left pending the petition of Charlotte Cuno and her fellow plaintiffs concerning the corresponding property tax waiver.

In granting DaimlerChrysler's petition, the Court ordered the parties to brief the question, "Whether the respondents have standing to challenge Ohio's investment tax credit." The Court's raising of this issue *sua sponte*, together with its treatment of the petitions for certiorari, suggests that the Court may be looking to overturn the Sixth Circuit's decision on standing grounds while avoiding what I consider the more difficult Commerce Clause issue.[11] Frustrating though such an outcome would be to the *Cuno* plaintiffs, the standing question raised by the Court may represent the best means by which the Court could overturn the Sixth Circuit, avoid far-reaching economic policy implications, and at least for now remove the federal judiciary from the debate.

Such an outcome would in all likelihood merely postpone the inevitable, however. The *Cuno* plaintiffs could proceed with their case in Ohio state court. Other litigants have relied on the Sixth Circuit's analysis in challenging tax incentive programs in other states. Unless all state courts rule against the plaintiffs in such cases, the Supreme Court most likely will be petitioned eventually to resolve a conflict among state supreme courts on the same Commerce Clause issue.

Background

Article I, section 8 of the United States Constitution grants Congress the power to "regulate Commerce. . .among the several States."[12] The goal of the Commerce Clause was to control economic rivalry among the states and to create "an area of trade free from interference by the States."[13] It was not, however, intended to eliminate the "power of the States to tax for the support of their own governments"[14] or to nationalize state taxing authority.[15]

Nevertheless, the "dormant" Commerce Clause precludes states from utilizing their taxing authority in a manner that interferes with interstate commerce.[16] "No State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce. . .by providing a direct commercial advantage to local business.'"[17]

The *Cuno* case is merely the latest in a line of Supreme Court jurisprudence to consider the relationship between the Commerce Clause and state tax policy.[18] The relevant Court opinions to date reflect a case-by-case approach toward policing the boundary between the Commerce Clause and state tax policy that even the Court admits leaves "much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation."[19]

Edward Zelinsky has argued that the Court's distinction between discriminatory and nondiscriminatory state taxation is indeterminate, with "no convincing basis under the dormant Commerce Clause for declaring some state taxes discriminatory and others not."[20] Zelinsky suggests that even the most basic and fundamental decision by a state to reduce its overall corporate tax rate to encourage new business development would be susceptible to invalidation under the Court's current dormant Commerce Clause analysis.[21] Peter Enrich acknowledges the "slippery slope" nature of the Court's jurisprudence, yet suggests that the Court will use its discretion on a case-by-case basis to avoid "needless intrusions upon state [tax] policymaking."[22]

While DaimlerChrysler clearly highlighted these scholarly concerns for the Sixth Circuit,[23] that court largely sidestepped that debate. Instead, the Sixth Circuit followed the Supreme Court's case-by-case lead, looking only to whether the challenged provisions offered "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."[24]

Looking first at the investment tax credit, the court acknowledged that the credit was equally available to both in-state and out-of-state businesses.[25] Despite this equal availability, however, the court noted that corporations would be subject to unequal tax treatment based on in-state or out-of-state investment decisions.[26] Someone paying Ohio taxes would receive a credit against Ohio taxes due in exchange for further Ohio investment, while a similar Ohio taxpayer that chose to invest in Michigan instead would not. Because "the economic effect of the Ohio investment tax [wa]s to encourage further investment in-state at the expense of development in other states," the court held the tax investment credit unconstitutional under the Commerce Clause.[27]

The Sixth Circuit dismissed the argument that the personal property tax exemption created a discriminatory economic effect, however. Here, the court identified "fundamental differences" between tax credits and exemptions: "[u]nlike an investment tax credit that reduces pre-existing income tax liability, the personal property tax exemption does not reduce any existing property tax liability."[28] Thus, the court concluded, a taxpayer's decision not to invest in Ohio simply means that the taxpayer will not be subject to the property tax at all, just like the taxpayer for whom the property tax has been waived. Recognizing that "any discriminatory treatment between a company that invests in Ohio and one that invests out-of-state cannot be attributed [to] the Ohio tax regime," the court held the property tax exemption constitutional.[29]

The Sixth Circuit expressly rejected the defendants' attempt to apply a categorical framework to the *Cuno* case, noting that the Supreme Court itself had not yet adopted such an approach. Moreover, the court dismissed the defendants' comparison of the investment tax credit to a constitutionally permissible direct subsidy. While the court acknowledged that a direct subsidy would have the same economic effect as the tax credit—an effect the court concluded to be impermissible—the court nonetheless distinguished the tax credit as constitutionally infirm due to the "fact that the tax credit involves state regulation of interstate commerce through its power to tax."[30] Ultimately, the court's stated reason for continuing down the analytical slippery slope was that the Supreme Court has provided no basis for arresting that slide.

Implications

While the relationship between the dormant Commerce Clause and state tax policy will strike many followers of Supreme Court jurisprudence as a dry and esoteric issue, the *Cuno* decision could have far-reaching impact. Ohio is not the only state with a potential *Cuno*-style problem. Most states have enacted various tax incentive provisions designed to encourage economic development.[31] Some of these other states face litigation similar to the *Cuno* case. The Sixth Circuit's opinion calls into question existing tax statutes and economic development policies of many if not most states, as well as the future of state tax policy, and raises important questions about the role of the courts in guiding state tax decision-making.

A. What Does* Cuno *Mean for the States?

Although the Supreme Court has acknowledged that states are free to compete with one another for a share of interstate commerce, the antidiscrimination principle of dormant Commerce Clause analysis developed by the Court and pursued by the Sixth Circuit in *Cuno* threatens to restrain variation and innovation severely in the area of state taxation.[32] Many if not most state tax policies aimed at encouraging business growth by their very nature entail favoring local over out-of-state investments; and the Sixth Circuit's reasoning leaves a lot of room for courts to invalidate state tax provisions.

Arguably, states could replace tax incentives with direct subsidies. Direct subsidies are generally regarded as constitutionally permissible.[33] While it is true one of the original purposes for the Commerce Clause was to eliminate the discriminatory taxation between and among the states, however, it does not logically follow that practices that produce the same economic results are acceptable as long as the state's taxing power is not implicated. And the *Cuno* court's emphasis on the discriminatory *effect* of the state tax incentive suggests that just such a distinction between tax and non-tax is not possible.[34]

Supporters of the Sixth Circuit's decision, like Peter Enrich, dismiss the importance of doctrinal clarity and contend that the courts can address these questions on a case-by-case basis.[35] Admittedly, it seems unimaginable that the courts would ever go

so far as to invalidate a general reduction in tax rates as a violation of the Commerce Clause.[36] Left unanswered, however, is the question of how states should distinguish between permissible state tax competition and unconstitutional discriminatory tax schemes in developing coherent tax systems. Given the prevalence of state tax incentives, many states are left wondering what to do in light of the Sixth Circuit's decision.

Most states have remained steadfast, continuing to offer tax incentives.[37] Other states have braced themselves for litigation, defending against constitutional challenges of tax incentives of their own.[38] In Minnesota, plaintiffs have brought suit alleging that two enterprise zone programs enacted to promote economic development—the Job Opportunity Building Zone (JOBZ) and the Biotechnology and Health Sciences Industry Zone (Biotech Zone)—violate the Commerce Clause and other provisions of the Minnesota and United States Constitutions.[39] In North Carolina, the N.C. Institute for Constitutional Law has brought suit against state and local government officials challenging on Commerce Clause and Equal Protection Clause grounds certain tax incentives and subsidies enacted to encourage Dell Computers to locate a facility in the Winston-Salem area.[40] In both the Minnesota and North Carolina cases, the plaintiffs have cited the Sixth Circuit's *Cuno* decision as supporting their claims.

The litigation in Minnesota and North Carolina is representative of the exposure to litigation many other states face as a result of the *Cuno* decision.[41] The likelihood of nationwide litigation on state tax incentive issues serves to underscore the impact and the significance of the *Cuno* decision. Far from supplying the principled guidance states need to conform their tax policies to constitutional requirements, the Sixth Circuit has instead merely contributed to the controversy and confusion.

B. Who Should Be Able to Decide?

Though the states and taxpayers are crying out for guidance, perhaps they should be careful in wishing for broader standards for evaluating the Commerce Clause implications of state tax policy. True, the case-by-case model employed by the courts offers few principles on which states can rely. But at a time when "judicial restraint" has become something of a mantra, it is perhaps unrealistic or even undesirable to ask the courts to provide a broad but arbitrary test for evaluating the discriminatory effect of a panoply of state tax exemptions, credits, and deductions. While scholars have long criticized the lack of guiding principles for addressing the relationship between tax incentives and the Commerce Clause, the Court's jurisprudence to date has at least not intruded that far into the realm of state tax competition.

Cuno arguably breaks new ground in pushing the courts further toward compelling tax uniformity among the states; but perhaps that is less due to the Court's interpretation of the Commerce Clause than the lower courts' willingness to entertain a more aggressive strain of lawsuits. One distinguishing factor between *Cuno* and the cases preceding it is the identity of the plaintiffs. In all of the cases relied upon by the *Cuno* court, the plaintiffs were states, businesses, or both—that is, parties with a broader interest in not pushing the Court's antidiscrimination analysis too far, lest they lose their own ability to participate in and benefit from state tax competition. It is in these parties' interests to pursue a careful balance between national and local interests in Commerce Clause jurisprudence.

By contrast, the *Cuno* plaintiffs have no reason to pursue or even respect such balance. Unlike plaintiffs in previous cases addressing the Commerce Clause implications of state tax policy, the *Cuno* plaintiffs do not allege that a state is using a particular tax credit or exemption to favor a local competitor's business interests over their own or otherwise to discriminate against them personally. While some taxpayer suits are motivated by idealistic dedication to lofty constitutional goals such as free speech or equal protection, the plaintiffs in *Cuno* and similar litigation are hardly motivated by similar allegiance to Commerce Clause principles. Instead, the *Cuno* case merely reflects an underlying policy disagreement between those like the *Cuno* plaintiffs who see state tax incentives as an improper allocation of state funds and a drain on state tax revenues and state government officials who remain adamant that the incentives are needed to encourage economic development; and the *Cuno* plaintiffs are simply taxpayers who disagree with the economic development policies pursued by their government officials. The Commerce Clause is merely one mechanism by which the *Cuno* plaintiffs hope that the courts will mandate the policy outcome that incentive opponents have been unable to achieve legislatively.

Opponents of state tax incentives argue that the very nature of state tax competition prevents state legislatures from ending the economic war, even though doing so would be in their own best interests. Accordingly, ending inefficient state reliance on state tax incentives may require a federal solution. But federal involvement does not necessarily entail a judicial response. The Court is ill-equipped to wade through competing economic studies of state tax incentives to develop a test for distinguishing the good from the bad. Edward Zelinsky has advocated returning the issue of state tax incentives to the political branches,[42] and Brannon Denning correspondingly urges the Court toward a minimalist resolution of the *Cuno* case.[43]

Along these lines, many have urged Congress to take action to end state tax competition.[44] With that goal in mind, former U.S. Representative David Minge of Minnesota endeavored to persuade Congress to impose an excise tax on businesses benefiting from state tax incentive programs and prohibit states from using federal funds in connection with such activities.[45] By contrast, in response to the *Cuno* decision, state governments have lobbied Congress to enact the Economic Development Act of 2005, which purports to preserve the ability of the states to pursue state tax incentive programs.[46] It is not at all clear that congressional action will be a panacea, however. As Walter Hellerstein argues, the current proposed federal legislation appears to do little more than codify the muddled Supreme Court precedent.[47] Such "guidance" could merely shift the litigation focus from constitutional attacks to statutory attacks.

C. A Mountain or a Molehill?

Taking the federal judiciary out of the equation would do nothing to resolve the policy debate over state tax incentives, however. Moreover, overturning the *Cuno* decision could remove the primary incentive for prompt congressional action and simply

return the matter to the states. Should we be worried about that outcome?

Notwithstanding the dire predictions of both sides in the economic debate over state tax incentives, it seems as plausible as not that the *Cuno* case could have very little practical impact on state government operations, regardless of how the Court resolves it. On the one hand, while some state tax incentive programs may be economically unwise, it seems unlikely that overturning the Sixth Circuit's opinion in *Cuno* and returning the matter to the states would lead to state economic Armageddon. For some time now, state and local government have been using tax incentives as a mechanism for economic development, and even if such programs are not particularly effective in achieving the desired ends, the republic has not fallen.

Moreover, even if the Court were to uphold the Sixth Circuit in *Cuno*, it is unrealistic to expect that the states will give up competing for new business. As it stands, the *Cuno* decision does not reject all state economic competition. Upholding the Sixth Circuit's opinion in *Cuno* may only cause states to adjust their policies to a new constitutional reality and shift the debate from tax incentives to direct expenditures. At a minimum, the Sixth Circuit's decision leaves open the opportunity for states to use direct subsidies instead of tax incentives to lure new business development. Indeed, Ohio is already adjusting its economic development activities in that direction in response to *Cuno*.[48]

Conclusion

Ultimately, therefore, the *Cuno* decision presents more questions than it answers. With the Supreme Court granting certiorari, it is possible that at least some answers will come soon, one way or another. It is equally conceivable, however, and probably preferable, that the Supreme Court will sidestep the heart of the issue, resolve the case on standing grounds without reaching the merits, and leave the matter of state tax incentives to the state courts and/or the political branches, at least for now. Either way, the debate over the constitutionality of state tax incentives seems likely to continue.

* Kristin E. Hickman is an Associate Professor of Law, University of Minnesota Law School. This essay draws heavily from *Foreword:* DaimlerChrysler Corp. v. Cuno *and the Constitutionality of State Tax Incentives for Economic Development*, forthcoming in the Georgetown Journal of Law and Public Policy, which was co-written by Sarah Bunce.

Footnotes

[1] Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 457 (1959).

[2] *See* Cuno v. DaimlerChrysler, Inc., 386 F.3d 738 (6th Cir. 2004).

[3] *See, e.g.*, Melvin L. Burstein & Arthur J. Rolnick, *Congress Should End the Economic War Among the States*, 10 State Tax Notes 1895 (1995); Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 Harv. L. Rev. 377 (1996); Clayton P. Gillette, *Business Incentives, Interstate Competition, and the Commerce Clause*, 82 Minn. L. Rev. 447 (1997); Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives,* 81 Cornell L. Rev. 789 (1996); Kathryn L. Moore, *State and Local Taxation: When Will Congress Intervene?*, 23 J. Legis. 171 (1997); Alan Peters & Peter Fisher, *The Failures of Economic Development Incentives*, 70 J. Amer. Planning Assoc. 27 (2004); James R. Rogers, *State Tax Competition and Congressional Commerce Power: The Original Prudence of Concurrent Taxing Authority*, 7 Regent U. L. Rev. 103 (1996); Edward R. Zelinsky, *Restoring Politics to the Commerce Clause: The Case for Abandoning the Dormant Commerce Clause Prohibition on Discriminatory Taxation*, 29 Ohio N.U. L. Rev. 29 (2002-03).

[4] *See Cuno*, 386 F.3d at 741.

[5] Ohio Rev. Code Ann. §§ 5733.33, 5709.62, 5709.631.

[6] *See Cuno*, 386 F.3d at 741.

[7] Brief of Appellants at 4-5, Cuno v. DaimlerChrysler, Inc., 386 F.3d 738 (6th Cir. 2004) (No. 01-3960); *see also* Complaint for Declaratory and Injunctive Relief at 5-7, Cuno v. DaimlerChrysler, Inc., No. CI0200006084 (Lucas Co., Ohio Mar. 28, 2000). The plaintiffs were assembled by Ralph Nader in order to attack the incentive package as a form of "corporate welfare." *See* J.T. Young, *Benedict Arnold Courts*, Wash. Times, July 24, 2005, at B4.

[8] Brief of Appellants, *supra* note 7, at 12-13.

[9] Cuno v. DaimlerChrysler, Inc., 154 F. Supp. 2d 1196, 1203-04 (N.D. Ohio 2001), *aff'd in part, rev'd in part*, 386 F.3d 738 (6th Cir. 2004).

[10] Cuno v. DaimlerChrysler, Inc., 386 F.3d 738, 746-48 (6th Cir. 2004).

[11] *See* Kristin E. Hickman, *How Did We Get Here Anyway?: Considering the Standing Question, in* DaimlerChrysler v. Cuno, 4 Geo. J.L. & Pub. Pol'y (forthcoming 2006) (arguing that the Supreme Court could deny standing to all of the plaintiffs on several independent bases).

[12] U.S. Const. art I, § 8, cl. 3.

[13] Freeman v. Hewit, 329 U.S. 249, 252 (1946).

[14] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 199 (1824).

[15] *See* Rogers, *supra* note 3, at 126.

[16] *See* Quill Corp. v. North Dakota, 504 U.S. 298, 309 (1992).

[17] Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 329 (1977) (quoting Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458 (1959)).

[18] *See, e.g.*, West Lynn Creamery, Inc. v. Healey, 512 U.S. 186 (1994); New Energy Co. of Indiana v. Limbach, 486 U.S. 269 (1988); Bacchus Imps., Ltd. v. Dias, 468 U.S. 263 (1984); Westinghouse Elec. Corp. v. Tulley, 466 U.S. 388 (1984); Maryland v. Louisiana, 451 U.S. 725 (1981); Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318 (1977).

[19] *See, e.g.*, Westinghouse, 466 U.S. at 403; Boston Stock Exch., 429 U.S. at 329.

[20] Zelinsky, *supra* note 3, at 36

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[21] *See id.*

[22] *See* Enrich, *supra* note 3, at 461. Notwithstanding his own opposition to state tax incentive programs generally, Enrich agrees that it would be a "shocking development" for some state tax policies to come under Commerce Clause scrutiny. *See id.* at 459.

[23] *See* Final Brief of Appellee DaimlerChrysler Corp., Cuno v. DaimlerChrysler, Inc., 386 F.3d 738 (6th Cir. 2004).

[24] Cuno v. DaimlerChrysler, Inc., 386 F.3d 738, 743 (6th Cir. 2004).

[25] *See id.*

[26] *See id.*

[27] *Id.* at 745.

[28] *Id.* at 747.

[29] *Cuno*, 386 F.3d at 747-48.

[30] *Id.* at 746.

[31] *See* Walter Hellerstein, *Commerce Clause Restraints on State Tax Incentives*, 82 Minn. L. Rev. 413, 421-23 (1997); Young, *supra* note 7, at B4.

[32] *See* Enrich, *supra* note 3, at 466.

[33] *See* West Lynn Creamery, Inc. v. Healey, 512 U.S. 186, 199 n.15 (1994); Hellerstein & Coenen, *supra* note 3, at 836 (discussing).

[34] *See* Enrich, *supra* note 3, at 459 ("[C]ash subsidies. . .surely distort economic decisions in precisely the same way as tax benefits.").

[35] *See id.* at 462 (quoting *West Lynn Creamery*, 512 U.S. at 201).

[36] *See id.* at 459 ("As the Court has emphasized, '[t]he simple fact is that the appropriate level or rate of taxation is essentially a matter for legislative, and not judicial, resolution.'").

[37] *See, e.g.*, Tom Ramstack, *Justices to Mull Business Tax Lures*, Wash. Times, Sept. 28, 2005; *Tax Incentives Will Be Tested by High Court*, Lincoln Journal Star, Sept. 28, 2005, at B1; *Kentucky Business Incentives*, http://www.thinkkentucky.com/kyedc/kybizince.asp (last visited Nov. 6, 2005). As Clay Gillette has noted, "[N]o state, aware of the incentive programs offered by other jurisdictions, can escape from the cycle . . . for fear that doing so will place it at a competitive disadvantage in the search for economic development." Gillette, *supra* note *3*, at 479.

[38] *See* Young, *supra* note 7, at B4 ("Unsurprisingly, other cases attempting to take advantage of this novel interpretation are already pending (with suits filed in Minnesota and Wisconsin, with additional cases expected in Nebraska, Oklahoma, and North Carolina.)").

[39] *See* Jennifer Carr & Cara Griffith, *Litigation and Tax Incentives After the Downfall of Ohio's ITC*, State Tax Notes, 367-68 (May 2, 2005).

[40] *See, e.g.*, *Dell Deal Challenge Merits Legal Answer*, Greensboro News & Record, Oct. 14, 2005, at A12; *Suit Filed in North Carolina to Enjoin Incentives Offered to Computer Manufacturing Facility*, 66 State Tax Review 1 (July 6, 2005); *Group Sues N.C. over Dell Incentives*, N.C. Observer, June 24, 2005, *available at* http://www.charlotte.com/mld/charlotte/business/11972408.htm.

[41] *See* Carr & Griffith, *supra* note 40, at 369.

[42] *See, e.g.*, Edward A. Zelinsky, *Ohio Incentives Decision Revisited*, 37 State Tax Notes 859 (Sept. 19, 2005) ("There is much to be said for. . .federal legislation producing the kind of targeted tax breaks challenged in Cuno.").

[43] Brannon Denning, *Cuno and the Court: The Case for Minimalism*, 4 Geo. J.L. & Pub. Pol'y (forthcoming 2006).

[44] *See* Burstein & Rolnick, *supra* note 3, at 1900 ("[I]t is now time for Congress to exercise its Commerce Clause power to end another economic war among the states."). *But see* Gillette, *supra* note 3, at 478 ("It. . .does not follow that federal intervention to save states from themselves is warranted.").

[45] *See, e.g., Minge Testimony at W&M Oversight Hearing on Tax Code and Economy*, 2000 Tax Notes Today 188-22 (Sept. 27, 2000); *Minge Testimony at House Budget Hearing on Unnecessary Business Subsidies*, 1999 Tax Notes Today 127 (July 2, 1999); *Minge Bill Would Tax Companies' State, Local Relocation Subsidies*, 1999 Tax Notes Today 58 (March 26, 1999); *Minge Bill, H.R. 3044, Would Tax State, Local Subsidies for Businesses*, 1997 Tax Notes Today 228 (Nov. 26, 1997).

[46] S. 1106, 110th Cong. (2005).

[47] *See* Walter Hellerstein, *Cuno and Congress: An Analysis of Proposed Federal Legislation Authorizing State Economic Development Incentives*, 4 Geo. J.L. & Pub. Pol'y (forthcoming 2006).

[48] *See* Zelinsky, *supra* note 43, at 859 (discussing congressional testimony of Ohio Lt. Gov. Bruce Johnson).

Civil Rights

The ADA Opening Doors for the Plaintiff's Bar: How Ambiguities in Title III Inhibit Access, Increase Litigation, and Hurt Business

*By Karen R. Harned and Elizabeth A. Gaudio**

"I also want to say a special word to our friends in the business community," said George H.W. Bush, on July 26, 1990, moments before he signed the Americans with Disabilities Act into law, "I know that there have been concerns that the ADA may be vague or costly, or may lead endlessly to litigation. But I want to reassure you right now that my administration and the United States Congress have carefully crafted this Act."[1]

The Americans with Disabilities Act (ADA) was an ambitious piece of legislation that sought to eliminate discrimination against the 43 million disabled Americans, by opening doors and providing access to every aspect of society—from private sector employment to public programs and activities to public accommodation.[2] There was unprecedented bipartisan support for the passage of the ADA, and a firm commitment by the Bush administration for this landmark piece of civil rights legislation.[3] Supporters hailed the ADA as the next "emancipation proclamation,"[4] which would allow people with disabilities "to boldly go where everyone else has gone before."[5]

Fifteen years later, the ADA has become everything that the business community had feared—it is vague, costly and has led to endless lawsuits. This well-intentioned legislation has become a burdensome regulatory nightmare for businesses. In particular, compliance with the ambiguous terms of Title III of the ADA (the section that regulates public accommodations) has become a major source of confusion for small businesses. Title III of the ADA bans discrimination in almost all of the country's six million privately-owned public accommodations.[6] One provision of Title III bans architectural discrimination, and barriers that block accessibility to public facilities.[7] This provision requires a set of complex new building codes that apply to both new and existing facilities and buildings.[8] These regulations require businesses in existing facilities to remove "architectural barriers" when removal is "readily achievable."[9]

This paper examines the vague "readily achievable" standard for barrier removal, by analyzing the ADA statute, the legislative history of the ADA, and conflicting interpretations of this standard by the Department of Justice (DOJ) and courts. The business community has found it both difficult and costly to comply with this ambiguous "readily achievable" standard of the ADA, which ultimately inhibits access for the disabled and opens the doors to a growing "cottage industry" of plaintiffs' lawyers more interested in extorting attorney's fees than creating accessibility.[10]

ADA Background

In 1984, the National Council on the Handicapped (National Council), an independent federal agency, assessed whether federal programs were adequately serving people with disabilities and recommended legislative proposals for the problems they found.[11] Their report, entitled *Toward Independence*, found "pervasive discrimination" against people with disabilities, including a lack of physical access to buildings and facilities.[12]

The National Council issued 45 legislative recommendations, and suggested that, "Congress should enact a comprehensive law requiring equal opportunity for individuals with disabilities, with broad coverage and setting clear, consistent, and enforceable standards prohibiting discrimination on the basis of handicap."[13] In 1988, the National Council issued a progress report on its recommendations, entitled *On the Threshold of Independence*, and created a draft bill called *The ADA of 1988*.[14] This draft bill became the framework for ADA legislation.[15]

The ADA creates regulation against discrimination in five broad areas: private sector employment (Title I); public programs (Title II); public accommodations (Title III); telecommunications (Title IV); and other areas (Title V).[16] The ADA provides individuals with disabilities "civil rights protections with respect to discrimination that are parallel to those provided to individuals on the basis of race, color, national origin, sex and religion."[17] Congress patterned the ADA after two key civil rights statutes, the Civil Rights Act of 1964 and Title V of the Rehabilitation Act of 1973.[18] The ADA was enacted "to provide clear, strong, consistent, and enforceable standards addressing discrimination against individuals with disabilities and to ensure that the Federal Government plays a central role in enforcing the standards."[19]

Title III: Statutory Requirements

Title III of the ADA prohibits discrimination against persons with disabilities in places of public accommodation.[20] It states specifically, "no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."[21]

Nearly all types of private businesses that serve the public are included regardless of size.[22] The ADA creates a comprehensive list of 12 categories that would constitute "a place of accommodation:" which includes hotels, restaurants,

auditoriums, retail establishments, modes of public transportation, museums, places of education, service centers and exercise facilities.[23]

Section 303 of the ADA deals specifically with architectural discrimination, or the failure of public accommodations and commercial facilities to design and construct facilities that are physically accessible to people who are disabled.[24] Congress directed an independent federal agency, the Architectural and Transportation Barriers Compliance Board (Access Board), to issue "minimum guidelines" for the implementation of this section; and empowered the Attorney General and the Department of Justice to issue more specific regulations.[25] The Access Board issued the Americans with Disabilities Act Accessibility Guidelines (ADAAG), which are not legally binding.[26] The Department of Justice adopted the ADAAG in its Standards for Accessible Design (DOJ Standards), and they are binding regulations.[27]

Title III of the ADA requires different structural requirements for three categories of structures: new construction, alterations and existing facilities.[28] The DOJ Standards are 92-pages of technical regulations for new construction and alterations of facilities.[29] New construction built after January 26, 1993 and alterations made to facilities after January 26, 1992 must be "readily accessible and useable by individuals with disabilities."[30] A "readily accessible" facility can be approached, entered and used by individuals with disabilities easily and conveniently. A facility under this "readily accessible" standard must strictly follow the regulations under the DOJ Standards. Any deviation from these standards constitutes discrimination under this provision.[31]

Places of public accommodation built before January 26, 1993 are required "to remove architectural barriers" to ensure access, and fair and equal treatment to individuals with disabilities.[32] Businesses are required to inspect their premises to determine if any feature is an "architectural barrier" that makes the business inaccessible according to the DOJ standards.[33] Businesses often must hire expensive ADA consultants, architects and lawyers to determine whether they have an architectural barrier in their facility in violation of these accessibility regulations.[34] Although it does not offer any grandfather clauses, the ADA subjects these existing facilities to a lower standard; they only have to remove architectural barriers if removal is "readily achievable."

The ADA defines "readily achievable" as "easily accomplishable and able to be carried out without much difficulty or expense."[35] The "readily achievable" standard is a flexible standard that is "determined on a case by case basis in light of the particular circumstances" of each business.[36] After determining that a barrier exists in their facility, each business must decide whether barrier removal is "readily achievable" by considering the following four factors:

- The nature and cost of the proposed action;
- The financial resources of the facility including the number of persons employed at the facility, the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;
- The overall financial resources of the covered entity; and
- The type of operation or operations of the covered entity.[37]

If removal of an architectural barrier is not "readily achievable," places of public accommodation must still make their facilities "available through alternative methods if such methods are readily achievable."[38]

Legislative History

On April 28, 1988, Senator Lowell P. Weicker introduced S.2345, the draft bill created by the National Council as model legislation.[39] This bill ultimately failed because of reservations raised by key sponsors.[40] On May 9, 1989, Senator Tom Harkin introduced a revised ADA bill that contained a drastically different section on public accommodations, which was renamed Title III.[41] Passage of Title III occurred as the result of two key compromises.[42]

Disability advocates criticized the narrow definition of public accommodations in the new bill that mirrored the definition found in Title II of the Civil Rights Act of 1964.[43] On the other side business and Congressional leaders like Senator Bob Dole were concerned about the remedies section,[44] which allowed individual plaintiffs a full range of remedies, including filing "a civil action for injunctive relief, monetary damages, or both in a district court in the United States."[45] This regulatory scheme paralleled the remedies found under the Fair Housing Act, which allows for both compensatory and punitive damages.[46] Attorney General Richard Thornburgh testified, "We are a litigious society. . . whether you like it or not, and there are a lot of people out there that the first thing they want to do is sue somebody, and particularly when you have provided punitive damages."[47]

In exchange for a broader scope of coverage in the definition of "public accommodations," disability advocates agreed to significant cutbacks in the remedies available to plaintiffs limiting them to only injunctive relief and attorney's fees.[48] This regulatory scheme paralleled the remedies present under the Civil Rights Act Title II. This compromise showed the intent of Congressional leaders like Senator Dole, who sought to ease the burden of excessive litigation and monetary damages on small businesses.[49]

The second compromise involved the architectural requirements required for accessibility under Title III of the ADA. In the 1988 bill, the requirements were strict and

required full accessibility for every type of building, irrespective of whether the building was new or already existing.[50] In the 1989 bill, new construction and alterations of buildings would be subject to a stricter "readily accessible" standard, while existing buildings would be subject to a lower "readily achievable standard."[51] Congress sought to explain the difference as follows:

> The concept of readily achievable should not be confused with the term "readily accessible" used in regard to accessibility requirements for alterations and new construction. While the word "readily" appears in both phrases and has roughly the same meaning in each context—*i.e.*, easily, without much difficulty—the concepts of "readily achievable" and "readily accessible" are sharply distinguishable and represent almost polar opposites in focus.
>
> The phrase, "readily accessible to and usable by individuals with disabilities" focuses on the person with a disability and addresses the degree of ease with which an individual with a disability can enter and use a facility; it is access and usability which must be "ready."
>
> "Readily achievable," on the other hand, focuses on the business operator in removing a barrier; if barrier removal cannot be accomplished readily, then it is not required.[52]

While the "readily accessible" standard was borrowed from other federal statutes and therefore tested by businesses and the public, the "readily achievable" standard was "developed during the ADA negotiation process in an effort to find terminology that would capture the concept of 'simple, relatively cheap barrier removal' such as the ramping of a single step."[53]

The Bush administration and Attorney General Thornburgh supported this ADA bill, but openly worried that "businesses could not make accurate predictions of the types of modifications required because the 'readily achievable' compliance standard was not well defined and did not exist under Section 504 of the Rehabilitation Act."[54] Thornburgh commented:

> I do not find the readily achievable language to be specific enough to answer the questions that are inherent in physical accommodations that have to be made for persons with disabilities. . .I suggest only that this area ought to be discussed in considerable detail before an undefined term is adopted at unknown cost and with unknown consequences to all the prospective accommodations that might be effected.[55]

The Congressional debates surrounding the "readily achievable" standard foreshadowed the problems that businesses currently face trying to comply with this vague and confusing standard. ADA advocates, on the other hand, recognized the tactical advantage a vague and flexible standard offered disabled advocates. Lex Frieden, the Former Executive Director of the National Council of the Handicapped, testified, "The standard is flexible, taking account the size and resources of the business. . .the beauty of this bill is that I suppose it depends on how successful a play on Broadway is as to the extent of the accommodations that one must make in order to. . .meet the readily achievable standard."[56]

In ADA hearings of the Committee of Small Business, business owners and their representatives voiced their concerns that the "readily achievable" standard was too flexible and vague for businesses to comply with. David Pinkus, a representative of the National Small Business United, testified, "We are looking for some degree of predictability of what we are supposed to do and not have the answer 'it depends'. . .we do not want the 'it depends answer.' Businesses—especially small ones—both need and deserve more certainty from their government about what will be expected of them, short of being dragged to court."[57] Kenneth Lewis, from the National Federation of Independent Business, testified, "If a business owners feels providing these accommodations is not 'readily achievable' and does not provide them, he can still be sued and face legal fees and court action before he knows if he guessed right or wrong on what the court believes is readily achievable in his particular business."[58]

The compromises behind Title III of the ADA show the intent of Congressional leaders, who sought to provide accessibility for disabled individuals and also ease the burdens to the business owners. Opponents of the "readily achievable" standard nevertheless predicted that businesses would face excessive litigation, a result antithetical to Congressional intent and the spirit of the ADA. Senator Dale Bumpers worried that this flexible standard would result in excessive and costly litigation. Bumpers observed that "the term 'readily achievable' is an unknown term of art and would therefore prove to be like the term beauty. Beauty is in the eye of the beholder and readily achievable means what some judge says it means?"[59]

Department of Justice Interpretations

Congress authorized DOJ to provide technical assistance to individuals and businesses affected by the ADA.[60] Unfortunately, DOJ has fallen short of fulfilling its obligation to provide "clear and consistent guidelines" to the business community on vague terms such as the "readily achievable" standard.

The "readily achievable" standard is not included in the 92-page DOJ Standards, but is found in other regulations in the ADA. Businesses have to make difficult and uncertain decisions on whether a barrier removal project is "readily achievable" based on their particular situation. DOJ has

published an *ADA Title III Technical Assistance Manual* to assist businesses in understanding these Title III regulations, but the manual is confusing and contains conflicting provisions.[61]

The manual provides examples of 21 modifications to architectural barriers that might be readily achievable, such as: installing ramps, making curb cuts in sidewalks, repositioning shelves, rearranging tables, widening doors, installing grab bars, creating designated accessible parking spaces and installing a raised toilet seat.[62] Some modifications, the manual explains, might not be "readily achievable" due to the cost or difficulty of a project. For example, "installing ramps" and "repositioning shelves" are listed as modifications that *may* be "readily achievable."[63] A business generally would not be required to remove a flight of stairs, however, if this would entail "extensive" ramping or an elevator.[64] Such measures would "require extensive restructuring or burdensome expense."[65] Removal or repositioning of shelves may not be "readily achievable" if "the change would result in a significant loss of selling space that would have an adverse effect on its business."[66]

Instead of providing clear standards capable of empowering small-business owners to honor their commitment to civil rights, DOJ concedes that providing clear "readily achievable" guidelines is impossible. DOJ has explicitly declined to establish any kind of numerical formula for determining whether an action is readily achievable: "It would be difficult to devise a specific ceiling on compliance costs that would take into account the vast diversity of enterprises covered by the ADA's public accommodation requirements and the economic situation that any particular entity would find itself in at any moment."[67] DOJ did indicate in its *ADA Guide for Small Businesses* that a business's size and resources are most heavily weighted when making a "readily achievable" determination.[68] Therefore, it seems that large businesses must remove nearly all architectural barriers while small businesses are given more leeway.[69] How much leeway small businesses are given is just as much a mystery as what cost threshold excuses large businesses from removing architectural barriers.

DOJ's *ADA Title III Technical Assistance Manual* states that there is "no definitive answer" to this "readily achievable" standard, because "determinations as to which barriers can be removed without much difficulty or expense must be made on a case by case basis."[70] Since there is no definitive answer to this "case by case" inquiry, businesses are uncertain of whether they comply with these standards, making them vulnerable to lawsuits based on accessibility. Businesses often hire expensive ADA lawyers to analyze these technical documents and standards to determine whether a particular barrier removal such as the installation of a ramp or an accessible bathroom is "readily achievable."

Paralyzed Veterans of America v. Ellerbe Becket Architects & Engineers, P.C.[71] illustrates the cost ambiguities that Title III imposes on both the disabled and businesses. The court criticized DOJ for not offering guidance or clarity to the standards it imposes on businesses:

> Unfortunately, while the DOJ has issued broad Standards for Accessible Design, it has not seen fit to step up to its statutorily mandated role by providing concrete guidance for architects and builders. Plaintiffs have asked the Court to enforce demanding, and controversial design requirements that the DOJ has never championed in any court or in any rulemaking procedure, and which the Department has declined to support in the present case, despite several invitations from the Court to do so. Therefore, the Court is forced to step in and decide issues which would have been far better left to the politicians in the Executive and Legislative branches.[72]

Paralyzed Veterans of America turned on whether the defendant's architects designed the sightlines for the disabled in compliance with ADA regulations.[73] The court found that the defendants acted in good faith to meet ADA guidelines when constructing the arena, and that the arena created better access for the disabled than any other arena constructed to date.[74] However, as the court put so well, "the ambiguity of the ADA regulations, and the lack of guidance and participation by the Justice Department in these matters, has created an unfortunate situation in which defendants can act in good faith and still fail to comply with the law."[75] The court continued its disapproval of DOJ's lack of involvement in assisting businesses with Title III compliance by stating:

> The [Justice] Department has not established a single, clear interpretation, but has instead left a nebulous record, comprised mostly of informal documents, press releases, announcements and correspondence. This has not provided clear guidance to architects, who have been left with at best an educated guess as to the design features required to comply with ADA regulations. The Justice Department decided against a rulemaking process, which would have left a concrete, workable record from which to discern a standard. It has further declined invitations to participate in the present litigation to explain its interpretation.[76]

As the court recognized, the lack of clear standards not only burdens businesses with unnecessary costs to try to determine how to meet the ambiguous ADA Title III standards, but it also shifts DOJ's responsibility to the courts. In the end, those the ADA seeks to help, the disabled, are actually further hindered from gaining equal access.

Both businesses and courts believe that DOJ has fallen short of fulfilling its obligations to provide "clear and

consistent guidelines" and to help businesses comply with the ADA's requirements. Congress did not create an administrative process to ensure that businesses comply with the hundreds of complicated regulations and standards such as "readily achievable" under the ADA. For example, there are no inspectors to warn businesses if they have a violation and there is no certification that a business is compliant. Businesses can hire expensive ADA consultants, architects or lawyers, but even these preventative measures cannot guarantee a judge will conclude that they are not fully compliant. "I have not found anything that's 100 percent compliant with the ADA," said Mariana Nork, senior vice president of the American Association of People with Disabilities."[77] DOJ's failure to provide effective technical assistance has increasingly made businesses vulnerable to "drive-by" lawsuits based on accessibility.

Court Interpretations: The "Readily Achievable" Standard

Courts are forced to step in and become the ultimate arbitrator in interpreting what "readily achievable" means on a "case by case basis," due to ambiguity and the lack of useful guidance by DOJ.[78] Most businesses settle at the prospect of the expensive litigation costs of an ADA case, so there is little case law to help businesses decide what types of modifications are "readily achievable."

Courts acknowledge that the "readily achievable" standard is ambiguous. In addressing the constitutionality of the term "readily achievable" in *Botosan v. Paul McNally Realty*,[79] the Ninth Circuit found that while "readily achievable" is not unconstitutionally vague the term does lack a precise meaning. Rather than clarifying the "readily achievable" standard, the court suggested that DOJ's regulations and interpretations overcome the low threshold of specificity required and provide enough information to owners of public accommodations on notice of Title III requirements.[80] The court avoided answering what most owners of public accommodations desire, articulated guidelines to evaluate whether or not removal of an architectural barrier is "readily achievable."

While courts have attempted to interpret the "readily achievable" standard, their analyses often pose more questions than answers. In *Spector v. Norwegian Cruise Line Ltd.*,[81] the Supreme Court held that Title III of the ADA applies to foreign cruise ships in U.S. waters. The Court noted, however, that these foreign cruise ships would not be subject to barrier removal and the "readily achievable" standard if these changes would make the vessel noncompliant with the International Convention of the Safety of Life at the Sea (SOLAS) or any other international legal obligation.[82] This case is important for businesses because it emphasizes that the "readily achievable" standard extends to considerations other than the cost of a modification, such as a conflicting international legal obligation.[83] The holding of the case is very narrow, and does address the question of whether a business must comply with the "readily achievable" standard for barrier removal if removal conflicted with local or state health and safety law, a discrepancy business owners often face.

In *Ass'n for Disabled Am., Inc. v. Concorde Gaming Corp.*,[84] the district court attempted to eliminate some of the ambiguity surrounding the "readily achievable" standard. The court ruled that it was not "readily achievable" to install an elevator in a casino ship to allow wheelchair-bound passengers access to the upper decks. Installation of the elevator would have cost $200,000 and put the ship out of commission for two months. Moreover, after installation of an elevator, the Coast Guard would need to recertify the ship as a commercial, passenger vessel.[85] To the court, this was clearly not "readily achievable" and not required by Title III. In regards to the "readily achievable" standard, the court noted, "Title III of the ADA only requires that places of public accommodation take remedial measures that are (1) effective (2) practical, and (3) fiscally manageable."[86]

In *Colorado Cross Disability Coalition v. Hermanson Family Ltd.*,[87] the Court of Appeals pointed out that several factors made barrier removal not "readily achievable," such as the cost of the project and the ability of the business to obtain a permit for the modifications. In this case, the plaintiff had sued a historic block of shops and restaurants in Colorado for architectural barriers that prevented access by his wheelchair and sought installation of a ramp.[88] DOJ's standards provided little guidance and stated only that ramping a single step will likely be "readily achievable," while "extensive ramping" would probably not be required.[89]

In this case of first impression for a federal appellate court, the *Hermanson* court held that a plaintiff seeking barrier removal bears the initial burden of production to present evidence tending to show that the suggested method of barrier removal is readily achievable under the circumstances.[90] If the plaintiff does so, the defendant then bears the ultimate burden of persuasion on affirmative defense that barrier removal is not "readily achievable."[91] The Court of Appeals held that the plaintiff failed to meet his initial burden of production, because he failed to produce concrete evidence that ramp installation was "readily achievable" in his particular situation.[92] The plaintiff's expert witness produced only speculative evidence of cost estimates based on similar projects and a rough sketch instead of construction plans for this new ramp.[93] Also, the plaintiff failed to present any evidence to establish the likelihood that the City of Denver would approve a proposed modification of a historical building.[94]

In *Long v. Coast Resorts*, the Court of Appeals held that a bathroom door guideline for a hotel casino was "readily achievable" because "the terrain on which it is constructed has no unique characteristics that would make accessibility unusually difficult to achieve."[95] This case highlights the difficulty that businesses have in complying with these complicated architectural requirements. Ultimately, the court held that an ADA guideline addressing wheelchair accessibility requirements for existing hotel units applied to interior bathroom doors at a hotel casino.[96] The court found

that the casino failed to comply because it misinterpreted the regulations for the bathroom door width in a sleeping cabin.[97] Guideline 9.4 required that a door width of 32 inches for doors and doorways "within all sleeping units," but Guideline 9.2 distinguishes sleeping rooms from bathrooms.[98] Magistrate had ruled that although there was a "technical violation" of the guidelines, "there has been substantial compliance with the spirit of the law."[99] The appellate court disagreed and concluded that a violation of Title III left no left "no room for equitable discretion."[100]

Effects on Small Businesses

Small businesses are paying the highest price for the confusion surrounding Title III. Taking advantage of the ambiguity in "readily achievable" and the other complexities of compliance, vexatious litigants have filed thousands of lawsuits against small-business owners.[101] The statutory framework of the ADA has opened the door to what one court described as a "cottage industry"[102] for the Plaintiff's bar, a money making scheme more focused on extorting attorney's fees from businesses than actually gaining accessibility for the disabled.

Congress provided for two remedies under Title III of the ADA, a private suit and a suit by the Attorney General to investigate public accommodations that engage in a "pattern or practice of discrimination."[103] For private actions alleging Title III violations, the law only provides injunctive relief rather than monetary damages.[104] However, the ADA contains an attorney's fee provision that is an incentive to private litigation. The provision states: "In any action. . . commenced pursuant to this Act, the court. . .in its discretion, may allow the prevailing party. . .a reasonable attorney's fee, including litigation expenses, and costs."[105]

In *Rodriguez v. Investco,*[106] the district court noted that the attorney's fee provision creates a "cottage industry" for the Plaintiff's bar, and dissuades efforts for voluntary compliance with the property owner. The court explained that it would make sense for plaintiffs to notify business owners of ADA accessibility violations, and work with these businesses for "conciliation" and "voluntary compliance" to fix these problems.[107] Plaintiffs would gain accessibility to these facilities as intended by the ADA, and obtain the same result as a lawsuit for injunctive relief. The Court noted that "one might ask whether attorney's fees should be awarded where no effort is made pre-suit to obtain voluntary compliance."[108] However, the ADA does not require plaintiffs to notify a business owner or attempt pre-suit settlement before filing suit. Rather, the ADA discourages this option because "pre-suit settlement does not vest plaintiff's counsel with an entitlement to attorney's fees."[109] Plaintiffs seeking pre-suit settlement with a business owner would also risk another plaintiff suing this facility, which often occurs.[110] The Court noted that "the current ADA lawsuit binge is, therefore, essentially driven by economics—that is, the economics of attorney's fees." [111]

The plaintiff in this case, Jorge Luis Rodriguez, has filed almost 200 lawsuits against various establishments alleging ADA violations and used the same lawyer, William Charouhis.[112] In this case, Rodriguez unsuccessfully sued Investco, a new owner of a hotel, for accessibility violations he encountered at the hotel in the past.[113] Investco had just purchased the facility weeks before, hired an ADA consultant, and was planning a large-scale renovation to make the facility ADA compliant.[114] There was no effort by the plaintiff's counsel to communicate with Investco "to encourage voluntary compliance, no warning and no offer to forebear during a reasonable period of time while remedial measures were taken."[115] "[Plaintiffs] are filing lawsuits without making an effort to resolve it beforehand," explained K.O. Herston, a defense attorney for a small business, "They never told [us] that they had a problem and never wrote a letter or anything."[116] Another defense attorney, Mike Mollenhour, used much stronger language, complaining that "from a small-business person's point of view, this falls into the category of litigational terrorism."[117]

In *Molski v. Mandarin Touch Restaurant*, the court described the modus operandi of one "vexatious litigant" seeking attorney's fees that is typical in these ADA suits: "sue, settle, and move on to the next suit."[118] Jarek Molski, a physically disabled individual who uses a wheelchair, has filed over 400 ADA lawsuits in California.[119] Molski's prayer for relief always asks for injunctive relief and damages of $4,000 a day, for each day until the facility is compliant with the ADA.[120] Molski circumvented the legislative intent of Congressional leaders who sought to restrict a plaintiff's remedy under Title III of the ADA to injunctive relief, by seeking money damages in state court under the California's Unruh Civil Rights Act and the California Disabled Persons Act while retaining federal jurisdiction under the ADA.[121] Plaintiffs can sue for injunctive relief under the ADA, and tack on state law claims for money damages under these California provisions due to the federal courts concurrent jurisdiction over related claims.[122]

Until December 2004, none of Molski's suits had ever been litigated since the small businesses in question chose a painful but livable settlement over the possibly crippling negative court judgment.[123] When the owner of Mandarin Touch Restaurant finally challenged Molski's claims, the court granted Mandarin's motion, finding Molski to be a vexatious litigant.[124] While the court's ruling prevents Molski from filing any more federal ADA Title III suits before getting the court's approval, many businesses have had to shut their doors or quickly settle with Molski or similar litigants in order to avoid expensive legal fees and litigation.[125] Small-business owners, such as George Leage, must still face Molski in state court.[126] Molski sued Leage's three restaurants in Morro Bay, California, within a span of weeks, and Leage settled one of those cases for $18,000.[127] "I'm willing to do whatever I can to abide by the law," says Leage, "but this is nothing but a money making scam."[128]

The ADA has opened the doors for plaintiffs' lawyers,

who follow this same formula of extortion against small-business owners. One of the most frequent ADA Title III litigants, Access Now, boasts on its website that as of February 2005 it had filed over 907 lawsuits.[129] Approximately 235 of these cases involved hotels, restaurants and other types of small businesses.[130] Similarly, John Mallah, representing his disabled uncle, sued over 700 Florida businesses in a three-year span.[131] Using the same complaint and boilerplate language in each suit, Mallah typically asks the businesses to settle the suit by fixing the allegation and paying $3,000-$5,000 in attorney's fees.[132]

George Louie has filed over 500 lawsuits against a variety of firms—from Sears, Blockbuster Video and McDonalds, to mom-and-pop operations.[133] Some of his individual settlements have reached $100,000, and revenues from his nonprofit corporation, Americans with Disabilities Advocates, topped $500,000.[134] He has sued 130 California wineries, and allegedly told these businesses that they could settle out of court for over $10,000.[135] He even sued his own lawyer, Paul Ren, for minor ADA violations such as a toilet being two inches from the wall and grab bars "not positioned right." In a complaint to the California State Bar, he called Ren a "set-up specialist who on four occasions asked me to visit four businesses in my wheelchair to provide a pretext for suing them."[136]

A review of the flimsy complaints produced by this "cottage industry" of plaintiffs' attorneys reveals their true intent—to harass business owners and extort attorney's fees.[137] In *Molski*, the court found that the allegations contained in the plaintiff's complaints "are contrived and not credible."[138] The court found that Molski filed boilerplate complaints against three restaurants he visited in one day, and encountered the same architectural barriers and sustained the same injuries in each facility.[139] After reviewing Molski's litigious pattern, the court concluded that "these suits were filed maliciously, in order to extort a cash settlement."[140]

Unfortunately, "serial plaintiffs, like Molski, serve as a professional pawn in an ongoing scheme to bilk attorney's fees."[141] For example, in 1999, the Citizens Concerned About Disability Access filed dozens of lawsuits on behalf of a 12-year old wheelchair-bound girl in Florida, stating that she could not get into a liquor store, a pawnshop and other businesses in Palm Beach and Broward Counties.[142] In another example, Carlisle Wilson and his two lawyers filed almost 200 ADA lawsuits in Florida in one year.[143] On one particular day, Wilson and his attorneys filed 23 identical lawsuits against Miami-Dade strip clubs.[144] Wilson claims to have visited all of these facilities in his court papers, but could not remember the specific violations at most of them.[145] "If all the complaints are identical, these people aren't really concerned patrons who want to improve access to a building," said David McDonald, an attorney for Stir Crazy, a strip club in Miami.[146] This "cottage industry" haphazardly mass produces these boilerplate complaints, which is evident in the amount of errors they contain. For example, Wilson sued four businesses and referred to each of them as "the Floridian," a downtown Floridian restaurant not involved in his current complaint; the complaints contained the wrong addresses, and confused office buildings with restaurants.[147]

While many business owners are actively trying to become ADA compliant, the lack of clear guidelines and the ability for vexatious litigants to sue over the most minor infractions, such as improper height of toilet paper dispensers, makes the task nearly impossible. Not only are small businesses incurring unnecessary expenses that are not proportional to their minor ADA infractions, but the overall goal of the ADA Title III, to provide equal access to public accommodations for the disabled, is inhibited. For example, litigious plaintiff Wilson sued Peter Pan Diner in Florida.[148] To settle the suit, business owner Peter Kourkoumeils spent $500 in minor changes at his diner, such as adding two blue disabled signs and moving a toilet dispenser one-half inch. However, Kourkoumeils had to pay Wilson's attorneys $3,500.[149] The intent of the ADA was to create accessibility, which could have been accomplished with notice and voluntary compliance of this business owner for $500. Instead, "the means for enforcing the ADA (attorney's fees) have become more important and desirable than the end (accessibility for disabled individuals)."[150]

Business owners trying to comply with the ADA are being held hostage in these "shotgun" lawsuits, and are forced to settle or face astronomical attorney's fees and litigation costs that could put them out of business. For example, litigious plaintiff Wilson sued Central Bark, a pet-supply store that had not yet opened for business for alleged ADA violations he encountered during his visits.[151] The business owner, Chris Gaba, had already spent $6,000 on a wheelchair-accessible bathroom and thousands on the entrance before opening this store, but Wilson claimed that these areas were in violation of the ADA.[152] Gaba had to complete thousands of dollars of renovations, pay his own lawyer and experts about $4,000, and pay Wilson's attorneys $2,000.[153] Dave Mock, a saddle maker and owner of Mock Brothers in California, was also sued for ADA violations and paid attorney's fees of $27,000 and $4,000 in damages.[154] Unfortunately, he was unable to make the $20,000 in ADA renovations and was forced to close the family business that was founded in 1941 by Archie Mock, Dave Mock's paraplegic uncle.[155] "Do you want to spend $20,000 to have a trial and voice your displeasure that this case is being driven by attorney's fees or pay much less to settle?" asked Fort Lauderdale attorney Paul Ranis.[156] Business owners who choose to go to trial face the possibility of their own litigation costs, as well the higher plaintiff attorney's fees if they lose.[157] For example, River City Brewing, a Sacramento bar, decided to fight an ADA lawsuit and had to declare bankruptcy after the court ordered the owner to pay $145,000 in plaintiff attorney's fees.[158]

Fixing the ADA: Courts or Congress?

Despite headline-generating cases like a 12-year old

wheelchair-bound girl suing a liquor store for discrimination,[159] support for a legislative fix to Title III remains low. The high point of Congressional involvement came after Clint Eastwood was hit with a Title III lawsuit over a historic hotel he was refurbishing in central California.[160] Spurred by abuses in his own state, Congressman Mark Foley (R-FL) introduced the ADA Notification Act which would require a person suffering from discrimination to provide formal notice of an ADA violation to a business owner 90 days before filing a Title III suit.[161] Despite gaining over 60 co-sponsors the bill never made it out of committee. Disability advocates argued that the 90-day notification requirement would undermine voluntary compliance with the ADA and would place an undue burden on a disabled person's ability to enforce their civil rights.[162] Congressman Foley has reintroduced the bill in every session since 2000 but none of these subsequent bills has made it any further than the first.

While small businesses have been thwarted in Congress, judges more familiar with vexatious litigation have begun to take an active role in reining in abusive ADA litigants. As discussed earlier some individual litigants are so obviously abusive that some courts have held them to be vexatious litigants and then required them to obtain written authorization from a judge before they could file a new ADA compliant.[163] Other courts recognize that the fuel for the litigation fire is the attorney's fees that are allowed after each settlement.[164] These courts attack the problem by using their discretionary power over attorney's fees to award significantly less than originally requested[165] or nothing at all.[166] Both of these solutions are inadequate at best since only the most egregious violators, like Molski, will get slapped with a pre-filing order and the same judges that award minuscule attorney's fees in one ADA case can use that same discretion and award virtually all requested fees in another case even though the defendants were equally culpable.[167]

A more comprehensive check on ADA litigation may come from asking the first question that should be asked in any litigation: has the plaintiff suffered any actual harm that can establish Article III standing? Judges in California,[168] Ohio,[169] and Florida[170] have all taken the Supreme Court's recent new focus on standing and used it to weed out the more disingenuous litigants. In *Harris v. Del Taco, Inc*, [171] the court dismissed a litigant's claim against a fast food restaurant that was 573 miles away from his home. The court held that the plaintiff failed to establish the sufficient intent to return to the Del Taco in question necessary to substantiate an imminent injury in fact.[172] In *Molski v. Mandarin Touch Restaurant*,[173] the court held that the distance (116 miles) between the plaintiff's home and the defendant's restaurant combined with the number of times the plaintiff visited the restaurant (once) showed that the plaintiff was not in danger of suffering irreparable and substantial immediate injury. In *Brother v. Tiger Partner*, [174] the court held that a litigant only had a general intent to return to a hotel 280 miles away from his home and that there were countless other hotels in the area for him to choose from. While this defense will not protect small businesses from all unscrupulous litigation, if properly raised it can encourage busy plaintiffs to focus their efforts elsewhere.

Conclusion

DOJ's refusal to produce clear accessibility standards coupled with the lack of political will necessary to add a notice requirement for Title III public accommodation lawsuits means small businesses will continue to bear a disproportionate burden of ADA compliance costs. Fortunately, courts are losing patience with ADA litigation abuses and are more and more open to either denying attorney's fees entirely, thus draining the litigation swamp, or entertaining standing challenges which can lead to entire suits being thrown out. For now, the courts are the best option small businesses have in reforming the ADA.

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Footnotes

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[3] Ruth Colker, The Disability Pendulum: The First Decade of the Americans with Disabilities Act 173 (2005).

[4] 136 Cong. Rec. S9689 (daily ed. July 13, 1989) (statement of Sen. Harkin).

[5] Kristina Hughes, *Michigan State U.: Michigan Rally Lauds Disabilities Act*, U-Wire (July 27, 2000) (quoting Al Swain, deputy director of the Capital Center for Independent Living), at 2000 WL 24488557.

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[7] 42 U.S.C.A. § 12182.

[8] 42 U.S.C.A. § 12182(b)(2)(A)(iv), 12183(a)(1).

[9] 42 U.S.C.A. § 12182(b)(2)(A)(iv).

[10] Rodriguez v. Investco. L.L.C., 305 F. Supp.2d 1278, 1280-81 (M.D. Fla. 2004).

[11] D. Russell Hymas, *Architectural Barriers Under the ADA: An Answer to the Judiciary's Struggle With Technical Non-Compliance*, 39 Cal. W. L. Rev. 349, 354 (2003).

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[13] *Id.*

[14] *Id.*

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[16] 42 U.S.C.A. § 12101-12213.

[17] 56 Fed. Reg. 35,545 (1991).

[18] *Id.*

[19] 42 U.S.C.A. § 12101(b)(2).

[20] 42 U.S.C.A. § 12182.

[21] 42 U.S.C.A. § 12182 (a).

[22] U.S. Department of Justice, Americans with Disabilities Act: ADA Guide For Small Businesses (1999), *at* http://www.usdoj.gov/crt/ada/smbustxt.htm.

[23] 42 U.S.C.A. § 12181(7).

[24] 42 U.S.C.A. § 12182.

[25] Hymas, *supra* note 11, at 356.

[26] *Id.*

[27] *Id.*

[28] 42 U.S.C.A. § 12183(a)(1), 12182(b)(2)(iv).

[29] 28 C.F.R. § 36 (1994); U.S. Department of Justice, ADA Standards for Accessible Design (1994), at http://www.usdoj.gov/crt/ada/stdspdf.htm.

[30] 42 U.S.C.A. § 12183(a)(1).

[31] Hymas, *supra* note 11, at 356.

[32] *Id.*

[33] 42 U.S.C.A. § 12182(b)(2)(iv).

[34] Comment Letter from Andrew Langer, Elizabeth Gaudio and Bruce Phillips, National Federation of Independent Business, to the Hon. R. Alexander Acosta, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, Docket No. 2004-DRSO1; AG Order No. 2736-2004. (May 31, 2005) (on file with the Department of Justice).

[35] 42 U.S.C.A. § 12181(9).

[36] 28 C.F.R. § 36.204(b) app. B.

[37] 42 U.S.C.A § 12181(9).

[38] 42 U.S.C.A. § 12182(b)(2)(A)(v).

[39] Colker, *supra* note 3, at 27.

[40] *Id.* at 31.

[41] *Id.*

[42] *Id.* at 172-175.

[43] *Id.* at 174.

[44] *Id.* at 172.

[45] H.R. 4498, 100th Cong. § 405 (1989).

[46] Colker, *supra* note 3, at 173.

[47] *Hearings on S. 933 Before the Comm. on Labor and Human Resources and the Subcomm. of the Handicapped*, 101st Cong. 209 (1989).

[48] Colker, *supra* note 3, at 174.

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[58] *Id.*

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[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.*

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[68] ADA Guide for Small Businesses, *supra* note 60, at 2.

[69] *Id.*

[70] ADA Title III Technical Assistance Manual, *supra* note 61, at § III-4.4200.

[71] 950 F. Supp. 393. (D.D.C. 1996).

[72] *Id.* at 394.

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.* at 399.

[77] Walter K. Olson, *The ADA Shakedown Racket,* City Journal, Winter 2004, *at* http://www.manhattan-institute.org/cfml/printable.cfm?id=1206.

[78] 28 C.F.R. § 36.204(b) app. B.

[79] *See* Botosan v. Paul McNally Realty, 216 F.3d 827, 836 (9th Cir. 2000) ("Although the definition of 'readily achievable' and its corresponding factors are no models of precision, they do not qualify as vague.").

[80] *Id.*

[81] 125 S.Ct. 2169 (2005).

[82] *Id.* at 2171.

[83] *Id.*

[84] 158 F.Supp.2d at 1365 (S.D. Fla. 2001).

[85] *Id.*

[86] *Id.* at 1363.

[87] 264 F.3d 999 (10th Cir. 2001).

[88] *Id.*

[89] ADA Title III Technical Assistance Manual, *supra* note 61, at § III-4.42.

[90] *Hermanson Family Ltd.*, 264 F. 3d at 1002.

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[110] *Rodriguez*, 305 F.Supp.2d at 1282.

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[113] *Rodriguez*, 305 F. Supp.2d at 1278.

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[118] Molski v. Mandarin Touch Restaurant, 347 F. Supp.2d 860, 865 (C.D. Cal. 2004).

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[120] *Id.*

[121] *Id.* at 862.

[122] *Molski*, 347 F. Supp.2d at 862.

[123] *Id.*

[124] *Id.* at 868.

[125] *Id.* at 863.

[126] Justin Martin, *Why the Disabilities Act Exasperates Entrepreneurs*, Fortune-Small Business, May 2005, *at* http://www.fortune.com/fortune/smallbusiness/managing/articles/0,15114,1048529,00.html.

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[128] *Id.*

[129] http://www.adaaccessnow.org/feb05.htm (last visited Jan. 13, 2006).

[130] *Id.*

[131] Olson, *supra* note 77.

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] *Id.*

[137] *Molski*, 347 F. Supp.2d at 864.

[138] *Id.*

[139] *Id.*

[140] *Molski*, 347 F.Supp.2d at 865.

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[142] Shannon O'Boye, *Disability Lawsuits Coming Under Scrutiny*, South Florida Sun-Sentinel, Aug. 26, 2001.

[143] *Id.*

[144] *Id.*

[145] *Id.*

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[147] *Id.*

[148] *Id.*

[149] *Id.*

[150] Brother v. Tiger Partner LLC, 331 F. Supp.2d 1368 (M.D. Fla. 2004).

[151] O'Boye, *supra* note 142.

[152] *Id.*

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[154] Martin, *supra* note 126.

[155] *Id.*

[156] O'Boye, *supra* note 142.

[157] Olson, *supra* note 77.

[158] *Id.*

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[161] HR 3590, 106th Cong., 2d Sess. (2000).

[162] *Id.*

[163] *Molski*, 347 F. Supp.2d at 868.

[164] Rodriguez v. Investco, 305 F.Supp.2d 1278, 1281 (M.D. Fla. 2004) (describing ADA litigation as a "cottage industry").

[165] Sanford v. Thrifty Payless, 2005 WL 2562712 (E.D. Cal. 2005).

[166] Doran v. Del Taco, 375 F. Supp.2d 1028 (C.D. Cal. 2005); Assoc. for Disabled Americans v. Integra Resort, LLC, 385 F. Supp. 1272 (M.D. Fla. 2005).

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[168] Harris v. Del Taco, 2005 WL 2757301 (C.D.Cal 2005).

[169] Young v. Mahasagar, 2005 WL 1868151 (S.D. Ohio 2005).

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Narrow Tailoring the Federal Transportation DBE Program

*By George R. La Noue**

Introduction

Under the Supreme Court's strict scrutiny test, governments must have both a compelling interest to employ a racial classification in a program and that use of race must be narrowly tailored. After *Adarand Constructors, Inc. v. Pena*,[1] the Clinton Administration took steps to buttress the Disadvantaged Business Enterprise (DBE) components in the massive federal transportation subsidy programs. The DBE classification which makes firms eligible for preferences in meeting contracting goals relies on racial, ethnic and gender presumptions about which firm owners are economically and socially disadvantaged.[2] Under its "mend, don't end" philosophy toward affirmative action, new studies and reports were created to provide the compelling interest prong for the DBE program, while some administrative revisions were made to meet the narrow tailoring test.

These program patches have survived several plaintiff challenges, but in May 2005 the 9th Circuit in *Western States Paving Co. Inc. v. Washington State Department of Transportation* (WSDOT) found WSDOT's administration of the DBE program failed the narrow tailoring test and was unconstitutional.[3] The U.S. Department of Justice (USDOJ) decided not to appeal the decision and, six months later, the US Department of Transportation (USDOT) issued new narrow tailoring requirements that it insisted applied only to federal aid recipients in the 9th Circuit states. The USDOJ and USDOT responses to the case, however, will inevitably influence the administration of DBE programs across the country.

Federal transportation subsidies to highways, rapid transit districts, ports, and airports are longstanding, huge expenditures.[4] Beginning in 1982, there has been a requirement that DBEs receive a portion of those funds. For years, the standard DBE allotment required of every recipient, unless waivers were given, was a minimum quota of 10% of all federal transportation dollars. After the Clinton Administration post-*Adarand* adjustments, the DBE program was made more flexible and each recipient was given the responsibility to determine its overall annual goal, as well as goals on particular contracts. The annual goals were to be based on measures of the availability of DBEs and non-DBEs in local markets and could be upwardly adjusted for the effects of local discrimination, if any. Some goals, therefore, were much higher than 10% and some much lower.

The availability measure is absolutely critical in the operation of a DBE program, since it determines the share of contract dollars DBEs are expected to get. If the availability percent is set too high, a large annual goal will result. Very substantial individual contract goals, then, will have to be established to meet the inflated annual goal. The impact on non-DBEs can be severe.

Concerned that the hundreds of its recipients would be over burdened by the new requirement to determine local availability and, perhaps, wishing to allow recipients to respond to local political pressures, USDOT decided to permit a wide variety of data sources and methodologies to be used for that task. These data sources create very different estimates of DBE availability[5] and USDOT has conducted no research comparing the outcomes or validity of various availability sources. As far as adjusting the goals to account for the effects of discrimination, few recipients even attempted any statistical measures. To make a goal submission proposal to USDOT, about 30% of recipients hired consultants to conduct disparity studies, but most used in-house staff to make rudimentary calculations.

This process was vigorously criticized by the General Accountability Office (GAO) in a 2001 report to Congress.[6] GAO concluded that here were flaws in the way census data and directories were used to set DBE availability because those sources "cannot adequately indicate whether a firm is truly available, that is, whether it has the qualifications, willingness, or ability to complete contracts."[7] These sources could result in an overstatement of available firms for transportation contracting and may not contain current information. Finally, GAO believed that prequalification and bidders lists "may be better sources of availability," but that recipients had misused them.[8]

GAO also reviewed 14 transportation-specific disparity studies completed between 1996 and 2000 and found that:

> the limited data used to calculate disparities, compounded by the methodological weaknesses, create uncertainties about the studies findings. . . . While not all studies suffered from every problem, each suffered enough problems to make its findings questionable. We recognize there are difficulties inherent in conducting disparity studies and that such limitations are common to social science research; however, the studies we reviewed did not sufficiently address such problems or disclose their limitations.[9]

Western States

Despite these criticisms, USDOT did not tighten its requirements for DBE goal setting and the system survived several attempts to attack it. Plaintiffs were unsuccessful in getting courts to engage in any serious analysis of whether Congress had made findings of discrimination anything like those required of state and local governments. Further, the data by which state recipients set goals were not rigorously scrutinized.[10]

Then, in *Western States*, the focus changed. The plaintiff made the obligatory challenge to Congressional findings which were brushed aside by the 9th Circuit as other courts had done. But the plaintiff also argued that WSDOT had done no study about whether there was discrimination in the transportation contracting industry in that state. Therefore, Western States argued WSDOT's use of race conscious goals, instead of race neutral means, to fulfill its DBE goals violated the equal protection clause's narrow tailoring requirement. The USDOJ intervened and vigorously defended Congress's compelling interest finding to create a national program, but agreed that Washington state had to make its own finding of discrimination to set particular race conscious goals, much to the annoyance of WSDOT and USDOT.[11] The 9th Circuit stated, "As the United States correctly observed in its brief and in oral argument, it can not be said that TEA-21 is a narrowly tailored remedial measure unless its application is limited to those States in which the effects of discrimination are actually present."[12] Otherwise, the Court noted:

> Whether Washington's DBE program is narrowly tailored to further Congress's remedial objective depends upon the presence or absence of discrimination in the State's transportation industry. If no such discrimination is present in Washington, then the State's DBE program does not serve a remedial purpose; it instead provides an unconstitutional windfall to minority contractors based solely on race.[13]

Now left holding the bag, WSDOT attempted to salvage its position by arguing that discrimination did exist in Washington because there was a fall off in DBE utilization when goals were not required; there was a slight disparity between DBE availability (11.17%) and utilization (9%) on race neutral contracts; and that it had certified DBE owners as socially and economically disadvantaged. The 9th Circuit disagreed with each argument and in its reply added burdens that states will face in justifying race conscious goals.

With regard to the fact that DBEs were less used on contracts without goals than with, the 9th Circuit very commonsensically replied, ". . .the proportion of work that DBEs receive on contracts that lack affirmative action requirements will be lower than the share that they obtain on contracts that include such measures because minority preferences afford DBEs a competitive advantage."[14]

Regarding the disparity WSDOT had shown, the 9th Circuit replied that a small disparity standing alone has no probative value in proving discrimination and, then, dealt a knockout blow to many existing disparity studies by stating:

> This oversimplified statistical evidence is entitled to little weight, however, because it does not because it does not account for factors that may affect the relative capacity of DBEs to undertake contracting work. . . . DBE firms may be smaller and less experienced than non-DBE firms (especially if they are new businesses started by recent immigrants) or they may be concentrated in certain geographical areas of the State, rendering them unavailable for a disproportionate amount of work.[15]

Few existing disparity studies meet that evidentiary standard.

With regard to DBE certification as evidence of discrimination, the 9th Circuit noted that the affidavits DBEs signed do not require them to attest that they have suffered discrimination in the transportation industry, but merely that they have been subject to some kind of racial ethnic or cultural bias at some time.[16] Citing *Croson,* the 9th Circuit affirmed, "Such claims of societal discrimination—and even generalized assertions about discrimination in an entire industry—cannot be used to justify race conscious measures."[17]

Now USDOT had a significant problem on its hand. The 9th Circuit had found there were flaws in the way most recipients operated their DBE programs. That Department did not agree with the *Western States* ruling, but USDOJ "speaks for the United States" and Justice had declined to appeal *en banc* or petition for certiorari. Recipients, without evidence of local discrimination, wondering whether their race conscious programs were now indefensible, clamored for advice from USDOT. Though all judicial rulings on the matter have found that Congress had a compelling interest in establishing the regime of preferences in federal transportation contracting, USDOJ had "unambiguously conceded that T-21's race-conscious measures can be constitutionally applied only in those states where the effects of discrimination are present."[18] In this situation, the 9th Circuit's *Western States* decision adopted the standards of *City of Richmond v. Croson*[19] and its progeny in their requirements for finding local discrimination. Congressional findings, thus, became irrelevant in administering race conscious local DBE programs.

USDOT *Western States* Interpretations

USDOT has issued two documents: "What actions must State Transportation Agencies (STAs) and FHWA take in compliance with 48 CFR part 26 for FY 2006" (hereafter actions); and "Questions and Answers Concerning Response to *Western States Paving Co. v. Washington State Department of Transportation."* (hereafter Q&A) giving its interpretation of the new obligations of recipients under *Western States*.

Both documents concede that *Western States* requires fundamental changes in the operation of DBE programs for all recipients of federal transportation funds in the 9th Circuit jurisdictions (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington). But they also try to confine these changes to recipients in the 9th Circuit. That is a technically correct interpretation, since 9th Circuit decisions are legally binding only in that Circuit. But given

statements USDOJ made in the case and its choice not to appeal the decision, it can be argued, as USDOT lawyers admit, that "the United States" has accepted at least some *Western States* rulings about narrow tailoring the DBE program. Further, the 9th Circuit decision is consistent with *Croson* and other circuit decisions about state and local preferential contracting programs. So the implications of *Western States* are national and, as one consulting company has stated, the decision provides "a blueprint for groups wishing to challenge DBE programs in other states."

While recipients can always use race neutral means to meet their goals, USDOT has changed the rules for employing race conscious goals and how availability is calculated for recipients in the 9th Circuit. The most important new rules are:

1. Recipients should ascertain the evidence of discrimination for each separate group presumed to be disadvantaged.[20]

In the past, USDOT has tried to insist that the DBE inclusive category precluded the necessity of race, ethnic and gender specific findings that *Croson* and it progeny required for state and local MWBE programs. Now in the 9th Circuit, at least, there will have to be findings about discrimination for each principal group. (Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans and women).[21] The result of this requirement is that such findings will be rarely made for smaller groups (Asian-Americans in Montana, for example) and even major groups, (particularly white women) are often times not underutilized. When some groups are excluded from the preferences and treated like non-DBEs, the politics for supporting the program inside and outside recipient agencies changes. So moving to group specific findings is very significant.

2. Disparity studies should be done with more rigor.

USDOT has said, "Recipients should exercise caution in drawing conclusions about the presence of discrimination and its effects based on small differences."[22] Further, ". . .the study should rigorously determine the effects of factors other than discrimination that may account for statistical disparities between DBE availability and participation. This is likely to require multivariate/regression analysis."[23] This guidance is enormously significant for several reasons. First, it appears to shift the burden of proof that a study must meet from the simple showing of disparities to showing the disparities were caused by discrimination after controlling for size, age, qualifications, etc. through multiple regression. Almost no existing disparity study meets that standard. Most disparity consultants do not have the necessary skills.

USDOT has also instructed recipients, "In calculating availability of DBEs, the study should not rely on numbers that may have been inflated by race-conscious programs that may not have been narrowly tailored."[24] This guidance is important because many recipients had determined DBE availability by past utilization without making any independent new assessment and thus continued to replicate preference inflated availability. Further, it undermines the logic of one of USDOT's principal defenses of DBE programs, *i.e* that when they are discontinued DBE utilization falls.

USDOT also instructed that, "The study should include an assessment of any anecdotal and complaint evidence of discrimination."[25] While most disparity studies include anecdotal data, they almost never include data about formal complaints of discrimination because such complaints are very few and after investigation only rarely found to be caused by discrimination. Both *Croson* and *Western State*s suggest that if there are few complaints of discrimination that may suggest that the "patterns of deliberate exclusion" that would constitute a compelling interest do not exist.

USDOT suggested that recipients should consider evidence such as bonding and financing, disparities in business and formation and earnings. It is not clear where this suggestion will lead. If societal discrimination and generalized assertions about discrimination in an entire industry are not a sufficient basis for a race conscious remedy as *Croson* and *Western States* affirm, then why would a DBE construction goal be a narrowly tailored remedy for finding of discrimination in the banking or surety industries?

Finally, USDOT, citing *Sherbrooke, Gross Seed,* and *Northern Contracting,* said that recipients should consider the "evidence gathering efforts that Federal courts have approved in the past."[26] But the studies in those cases did not meet the *Western States*' standards and their data were subject only to cursory judicial scrutiny.

Creating new studies according to USDOT guidance

It is clear that recipients will now have to invest in studies that will not only measure availability in a more sophisticated manner, but establish the existence of discrimination as well. This means:

1. Each state should create a disparity study that covers highways, airports, and transit recipients. If done properly, that would require separate availability measures, since different types of services are required in the different transit modes.

2. According to USDOT, "Larger transit and/or airport districts may want to conduct their own studies, since the demographics of large urban areas may differ from that of the state as a whole."[27] Perhaps USDOT has in mind that more DBE firms will be available in "large urban areas," but conversely fewer will be available in smaller areas. Thus a statewide study can not reveal what availability should be for airports in San Luis Obispo or Spokane. Further, each recipient will have its own utilization statistics.

3. The cost of these studies can be "defrayed" by federal funds. "FHWA, FTA, and FAA have all stated that the costs of conducting disparity studies are reimbursable from Federal program funds, subject to the availability of those funds."[28] It would not be unreasonable to predict that the initial round of compliance with the new *Western States* rules will be about $20 to $30 million dollars of disparity studies. The new studies will have to be done to higher standards than past studies and that will require more difficult-to-find data. Further, the life span of the study should only be about three years. Goals are set every year.

4. A new process for reviewing goals (and therefore the studies used to create the goals) has been established. According to the "action" document, all state goals will be reviewed by USDOT headquarters. "For those matters in litigation, or risk of litigation," the Office of General Counsel will review the goals.[29] Also in need of further review are situations where there is substantial change in the goal setting methodology or significant controversy about the evidence relied on. The Q&A document states that, in the 9th Circuit, recipient goals will require the concurrence of the Office of the Chief Counsel in D.C. and the FHWA and/or the FTA Offices for Civil Rights. For some reason, the FTA process has not changed. New rules probably will emerge from this new review process that will limit the discretion of recipients in establishing goals.

This new disparity study process will determine the expenditures of billions of dollars as well as shape constitutional rights in the contracting field. This suggests several policy considerations. First, USDOT should provide clearer guidance about what methodologies will produce acceptable proofs of discrimination. Fortunately, in March 2006, the U.S. Commission on Civil Rights will release its report on disparity studies which will provide some guidelines about their conduct.[30] Second, the disparity study process needs to be much more transparent. Currently, USDOT requires public comment on recipient DBE goals, but not on the studies that underlie the goals. There should be a requirement for public hearings on studies and the underlying study data should be publicly accessible. That would serve the purpose of making sure the agency has the data and that it is complete and accurate when checked by independent researchers. Few agencies ever examine the underlying data on which their preferential programs are based. Several jurisdictions have been embarrassed to find that their consultants had destroyed or lost the underlying data, leaving the jurisdiction unable to defend its DBE or MWBE program in litigation.

There may be as many as 200 individual recipients of federal transportation funds in the 9th Circuit. Each of them will be interesting case studies in the application of *Western States*. Some recipients (Arizona and Hawaii, for example) have already converted to race neutral programs, but USDOT says that all state recipients need to complete disparity studies to determine if race conscious programs are warranted. Even assuming some studies will be statewide or regional consortiums, the disparity study industry (now down to about three major providers) does not appear to have the capacity to meet the new demand. Further race conscious programs must now be approved by several layers of bureaucracy, so there will be the development of a lot of applied law in this process. Monitoring these policies on what are valid disparity studies and, therefore, valid race conscious policies will be the focus of civil rights lawyers in the 9th Circuit and elsewhere for the next several years.

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Footnotes

[1] 515 U.S. 200, (1995) (hereafter *Adarand*).

[2] The preferred racial and ethnic groups are: Black (a person having origins in any of the original racial groups of Africa); Hispanic(a person of Mexican-American, Puerto Rican, Cuban, Central or South American, or other Spanish or Portuguese origin or culture, regardless of race); Native American(an American Indian, Eskimo, Aleut or Native Hawaiian); Asian- American (Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China, Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, The Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Hong Kong, Fiji, Tonga, Kiribati, Tuvalu, Nauru, India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands and Nepal.

[3] 407 F.3d 983 (9th Cir. 2005). Western States Paving was the low bidder by $100,000 on a subcontract for a project substantially financed by T-21 funds. The prime contractor acknowledged that he selected a DBE to meet the project's 14% goals. At 983.

[4] The most recent extension of the federal transportation programs called SAFETEA-LU authorizes $244 billion to be spent between FY 2005 and FY 2010.

[5] Occasionally a recipient will report the results of measuring availability with different data sources. For New Jersey Transit, consultants reported that when census data were considered, DBE availability was 22.20%, Dun & Bradstreet data 11.82% and measuring the actual numbers of certified DBEs 8.64%. The NJT consultants solved the problem of the wide variation in availability by averaging the three sources to create an annual DBE goal of 14.22%. Final Report to Establish New Jersey Transit's FY 2006 DBE Goals, December 2005, p.12.

[6] GAO, GAO Report GAO-01-586, Disadvantaged Business Enterprises: Critical Information is needed to Understand Program Impact (June 8, 2001).

[7] *Id*. at 50.

[8] *Id*. at 31.

[9] *Id*. at 29.

[10] Gross Seed Company v. Nebraska Department of Roads and Sherbrooke Turf, Inc. v. Minnesota Department of Transportation, 345 F.3rd 964 (8th Cir. 2003) and Northern Contracting, Inc. v. Illinois Department of Transportation, 2005 U.S. District Lexis 1986 8 (N.D. Ill. 2004).

[11] *Western States* at 996.

[12] *Id*. at 998.

[13] *Id*. at pp. 997-998.

[14] *Id*. at 1001.

[15] *Id*. at pp.1000-1001.

[16] *Id*. at 1002. Even this process is entirely *pro forma*. No one asks for any details or checks the accuracy of any statement made in these affidavits used by every state DOT.

[17] *Id*. *Croson*, 488 U.S. at 488.

[18] *Id*. at 996.

[19] 488 U.S. 469 (1989).

[20] Q&A, p.4.

[21] *Western States* at 998-999.

[22] Q&A, p.4.

[23] *Id*.

[24] *Id*.

[25] *Id*.

[26] *Id*., pp. 4-5.

[27] *Id*. at 5.

[28] *Id*.

[29] Action, p.2.

[30] Disparity Studies as Evidence of Discrimination in Federal Contracting. March 2006.

CORPORATIONS

PRIVILEGE IN PERIL: CORPORATE COOPERATION IN THE NEW ERA OF GOVERNMENT INVESTIGATIONS

*BY GEORGE J. TERWILLIGER III AND DARRYL S. LEW**

Introduction

The protection against disclosure afforded attorney-client communications and attorney work product, a pillar of the American legal system, is in peril. Three principal developments have coalesced to cause this state of affairs. First, the era of vigorous government regulation and prosecution of corporations continues unabated, making names like Enron, topics such as the internal investigation, and obligations such as Sarbanes-Oxley compliance common subjects of boardroom discussion. Second, government policies and practices adopted by the Department of Justice, the Securities and Exchange Commission, and the United States Sentencing Commission strongly encourage and, arguably, practically require a corporation interested in cooperating with a government inquiry to waive the protections of the attorney-client privilege and work-product doctrine that may attach to internal corporate investigations and other corporate legal activity. And third, the majority of courts has not recognized the concept of a limited waiver of privilege, so that a corporation wishing to share some privileged information with the government to facilitate the goals of law enforcement and corporate oversight cannot do so without risking being held to have waived, as to all third parties, applicable privilege or protections regarding the entire subject matter of the privileged material and communications disclosed. The latter concern is most acute in the context of threatened parallel civil litigation undertaken by opportunistic plaintiff's counsel.

Facilitating legal compliance and reasonable government enforcement is a laudable goal. So too is fostering corporate self-policing and creating a responsible corporate culture. Encouraging corporations to investigate and share with the government the factual results of counsel's inquiry into questionable corporate conduct and practices can help achieve all of these goals. The challenge is to do so without sacrificing the core principles and protections of the attorney-client privilege and the work-product doctrine. As courts and commentators have recognized, the uncertainty surrounding the enforceability of agreements purporting to limit the scope of any waiver associated with providing privileged information to the government can serve as a disincentive for corporations to conduct internal investigations and provide the resulting facts to the government. Left unaddressed, this situation will not only do violence to a cornerstone of the legal system, but also, ultimately, impede the accomplishment of these important objectives.

This paper discusses the law, policy and practice relating to waiver of the attorney-client privilege and work-product protection in the context of government investigations, highlights the risks and what may be the unintended consequences flowing from the government's expectations regarding privilege waiver from cooperating corporate parties, and suggests means to remedy—or at least to mitigate—these risks, while at the same time fostering the achievement of important societal goals and preserving the integrity of these bedrock legal privileges.

Part I briefly defines the chief evidentiary privileges and forms of limited waiver involved when companies respond to government investigations, and surveys the actions taken by Congress and others that have put the privileges in jeopardy. Part II describes the three major positions taken by federal courts of appeals with respect to the validity of a limited waiver, and Part III describes some of the negative effects accompanying the legal uncertainty of voluntarily disclosing privileged materials to the government. Finally, Part IV both recommends legislative solutions to the problem and proposes several means by which corporate counsel might, in the absence of new legislation, maintain their companies' evidentiary privileges while still cooperating with the government.

I. Pressure To Cooperate And Waive Attorney-Client Privilege And Work-Product Protection In Connection With Government Investigations Of Alleged Corporate Wrongdoing

A. Evidentiary Privileges and Waivers: An Overview

The attorney-client privilege protects from discovery communications between an attorney and a client made in confidence in connection with the rendering of legal advice by the attorney.[1] The purpose of the privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."[2] While the privilege extends to the communication of facts by a client to his attorney, it does not protect the underlying facts or records.[3]

A client or lawyer may waive the privilege expressly or impliedly by voluntarily disclosing confidential communications to a third party.[4] In general, disclosure of any portion of a privileged communication waives the client's privilege with respect to the entire communication, and indeed with respect to any other privileged communications on the same subject matter.[5]

The work-product doctrine, on the other hand, "is distinct from and broader than the attorney-client privilege,"[6] and extends beyond confidential communications between attorney and client to include "any document prepared in anticipation of litigation by or for the attorney."[7] Courts distinguish between "fact" work product, meaning the "written or oral information transmitted to the attorney and recorded as conveyed by the client,"[8] and "opinion" work product, which encompasses "any material reflecting the attorney's mental impressions, opinions, conclusions, judgments, or legal theories."[9] As with the attorney-client privilege, the work-product protection may be waived if the attorney or client voluntarily discloses otherwise protected materials to a litigation adversary.[10] Unlike waivers under the attorney-client privilege, however, waivers of the work-product protection often do not extend beyond the actual individual work product to additional work product on the same subject matter.[11]

Courts generally use the term "limited waiver" to describe an implied waiver of an evidentiary privilege that is limited to materials voluntarily disclosed to the government and limited to the government itself.[12] In other words, such a waiver, where recognized, destroys the attorney-client privilege or work-product doctrine only as to materials actually disclosed to the government, and only with respect to the government.[13] The privilege remains operative as to other communications or materials on the same subject-matter, and, with respect to parties other than the government, as to the communications or materials disclosed. As discussed below, however, relatively few courts have endorsed the concept of limited waivers; most have concluded that such efforts at limiting the scope of waivers are ineffective, even where the government explicitly agrees to such an arrangement.

B. Waiver As an Element of "Cooperation"

Regardless of how a company's waiver of its evidentiary privileges is labeled, it is clear that such a waiver increasingly is expected by the government from corporations who wish to cooperate with government investigations.[14] In the last several years, government enforcement agencies such as the DOJ and the SEC have announced policies requiring or strongly encouraging companies to waive their attorney-client privilege and work-product protection. Steps taken by agencies, in particular the U.S. Sentencing Commission, have put companies on notice that any refusal to waive such privileges and protections could be viewed as a failure to cooperate with a government investigation and be held against the company when determining whether to charge or how to sentence a company for its alleged wrongdoing.[15]

Companies must therefore risk waiving available privileges and protections as to third parties, and possibly as to the entire subject matter of communications or work product disclosed, by complying with a request for cooperation via disclosure to the government of privileged communications and protected materials. In the wake of recent high-profile corporate accounting scandals and other developments, the government may be expected increasingly to demand such cooperation. At the same time, in light of increased regulatory and enforcement attention, companies need the advice of their counsel more than ever. In order to ensure that companies can engage in a robust pursuit of enterprise while remaining compliant with legal requirements, the communication between lawyer and client needs to be unhindered by expectations of routine waiver. Thus, critically important government objectives are served by allowing limited waivers of privilege in order to allow companies to cooperate in enforcement matters.

1. DOJ: The Thompson Memorandum

Large companies typically respond to an allegation of internal wrongdoing by retaining outside counsel to investigate the allegation and report the results. As with the proverbial road paved with good intentions, that good-faith effort to learn the facts and obtain independent legal advice can, perversely, inure to a company's detriment.

The results of an internal investigation are routinely demanded by the government as part of the price of avoiding prosecution or of mitigating punishment. In 2003, the DOJ revised its guidelines for business prosecutions in a memorandum written by Deputy Attorney General Larry D. Thompson entitled "Principles of Federal Prosecution of Business Organizations" (the Thompson Memorandum).[16] The Thompson Memorandum moves a corporation's perceived cooperativeness to center stage in deciding whether to prosecute that corporation. As the memorandum makes clear, "[t]he main focus of the revisions is increased emphasis on and scrutiny of the authenticity of a corporation's cooperation."[17]

Whether a business's level of cooperation is perceived by the DOJ as sufficiently "authentic" depends, in part, on "the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work-product protection."[18] Failure to disclose to the government the results of an internal investigation and waive attorney-client and work-product protections, therefore, is deemed evidence of less-than-authentic cooperation.[19]

The Thompson Memorandum suggests that the government's demand for such information ordinarily should be limited to the "factual internal investigation and any contemporaneous advice given to the corporation concerning the conduct at issue" (it is assumed that this is meant to refer to advice contemporaneous with the conduct), but leaves open the possibility that, in certain circumstances, prosecutors should go so far as to "seek a waiver with respect to communications and work product related to advice concerning the government's criminal investigation."[20] Current DOJ policy thus forces businesses to choose between cooperation that may include privilege waiver, potentially providing other litigation adversaries with

privileged material that they would otherwise not be entitled to receive, and facing the consequences of being deemed to have failed to cooperate in a government investigation.[21] As a practical matter, a finding of a broad subject-matter waiver or waiver as to third parties could substantially impair a company's defenses in related civil litigation and tilt the adversarial playing field decidedly against it.[22]

2. SEC: The Seaboard Report

The SEC in 2001 announced a policy that was later echoed by the (2003) Thompson Memorandum. In a formal release in which the SEC announced that it was taking no action against Seaboard Corporation because of Seaboard's "complete" cooperation with an SEC investigation, the Commission delineated a list of thirteen factors that it had considered in that matter and would in the future consider when determining whether to grant a company leniency in return for its cooperation.[23] Among the factors listed in the report (the Seaboard Report) were:

> · Whether the company "promptly, completely and effectively" disclosed the existence of the alleged misconduct to the public and regulators;
>
> · Whether the company conducted or had an outside entity conduct an internal review of the alleged misconduct; and
>
> · Whether the company "promptly" disclosed the results of the review to the SEC, including "a thorough and probing written report detailing the findings of its review."[24]

In discussing disclosure of attorney-client communications and attorney work product to the Commission, the Seaboard Report notes that waiver of such privileges and protections might be necessary as part of a company's "cooperation."[25] The Commission acknowledges the general social interest in preserving these protections, and states that the Commission has in the past been willing to limit the scope of such waivers to the Commission only and to the specific communications or work product disclosed, but nevertheless suggests that waiver will be an important factor in assessing a company's cooperation.[26] Therefore, just as the Thompson Memorandum promotes waiver in criminal investigations, so too the Seaboard Report anticipates that companies seeking to cooperate with the government will waive privileges and protections that are at the heart of their relationship with their lawyers.

3. U.S. Sentencing Commission: Revised Sentencing Guidelines § 8C2.5(g) and Commentary

Recent revisions to the United States Sentencing Guidelines (the Guidelines) are also part of the trend producing pressure on corporations to waive attorney-client privilege and work-product protection. In revisions to the Guidelines that became effective in November 2004, the U.S. Sentencing Commission (the Sentencing Commission) modified the provisions applicable to corporate cooperation with government investigations.[27] The Guidelines have always permitted a reduction in culpability score if a company reports an offense and "fully cooperate[s] in the investigation."[28] In commentary recently added to § 8C2.5,[29] however, the Commission has made clear that full cooperation may include—indeed, in some circumstances may require—waiver of attorney-client privilege and work-product protections: "Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score. . .unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization."[30]

Like the Thompson Memorandum, the Guidelines grant prosecutors (and ultimately judges) substantial discretion in determining whether "full cooperation" requires a waiver of the attorney-client privilege and work-product protection. In practice, however, prosecutors may be inclined to request waivers with increasing frequency. Only if "all pertinent information" known to a company can be disclosed without a waiver, the commentary suggests, will cooperation be possible absent one.[31]

The Guidelines thus at least permit prosecutors to seek waivers aggressively from corporate defendants. Perhaps recognizing the potential negative consequences stemming from this policy, the Sentencing Commission indicated in its notice of final priorities for the Guidelines amendment cycle ending May 1, 2006, that it will review, and possibly again amend, "commentary in Chapter Eight (Organizations) regarding waiver of the attorney-client privilege and work product protections."[32]

C. The Risks of Sharing Privileged Information with the Government

Sharing privileged information with the government is of course normally deemed a waiver of any protection applicable to materials disclosed for purposes of the government's investigation. There is also a substantial risk, however, that providing the government with attorney-client privileged communications and attorney work product will be deemed a waiver extending to all communications or work product relating to the same subject matter.[33] As a general rule, disclosure of attorney-client communications to a third party waives the privilege as to the subject matter of the communication. The government—either the governmental entity conducting the primary investigation or another governmental entity—may contend that by disclosing some privileged information, the company has waived the attorney-client privilege over any other communications concerning the same subject matter.

The risks of voluntarily disclosing confidential materials to the government are further heightened by the presence of parallel civil litigation.[34] Businesses cannot correct their own errors in order to comply with the law or voluntarily cooperate with government investigations without running the substantial risk that their confidential

information will be turned against them in subsequent civil lawsuits. Aggressive plaintiffs' lawyers often seek to obtain the materials disclosed by a company to the government as part of their efforts to establish civil liability. Thus, depending on the magnitude of the civil claims, this battle over evidentiary privileges can have serious financial consequences for a corporation and its shareholders.[35]

II. The Split of Decisional Authority Regarding Limited-Waiver Agreements

Federal case law on waivers of attorney-client privilege and work-product protection in the context of government investigations is currently "in a state of hopeless confusion."[36] Out of the welter of cases, three primary lines of authority have emerged.[37] Most federal circuits that have addressed the issue have held that the voluntary disclosure of protected materials to the government, even for the purpose of cooperating with an official investigation, operates as a waiver, and that any agreement with the government to maintain the confidentiality of such materials is ineffective. Only one jurisdiction, the Eighth Circuit, has accepted the theory of limited waiver absent an agreement with the government or reservation by the disclosing party, holding that the disclosure of privileged materials to the government for the purpose of cooperating with an official investigation does not constitute a waiver. A third group of courts has adopted a middle position, holding that the disclosure of protected materials to the government does not operate as a waiver if the purpose of the disclosure is to cooperate with an official investigation and the holder of the privilege or protection takes substantial steps to maintain its protection as to third parties.

A. Majority Rule: Disclosure to the Government Is a Waiver to All

Most circuits that have addressed the issue have held that voluntary disclosure to the government of otherwise privileged or protected materials constitutes a waiver, at least with respect to the materials produced, and perhaps with respect to all materials on the same subject matter.[38] In *Permian Corp. v. United States*, the D.C. Circuit explained:

> Voluntary cooperation with government investigations may be a laudable activity, but it is hard to understand how such conduct improves the attorney-client relationship. If the client feels the need to keep his communications with his attorney confidential, he is free to do so under the traditional rule by consistently asserting the privilege, even when the discovery request comes from a 'friendly' agency. . . .
>
> The client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit.[39]

The D.C. Circuit has consistently followed this position with respect to the attorney-client privilege,[40] but it has indicated a willingness to recognize a limited waiver with respect to the attorney work-product doctrine under certain circumstances.[41]

Numerous other circuits have followed the D.C. Circuit's lead. The First Circuit in *United States v. Massachusetts Institute of Technology* refused to "carve out" an exception to the general rule that voluntary disclosure implies a waiver of the attorney-client privilege, reasoning that such exceptions have "no logical terminus."[42] Although the First Circuit had previously suggested in dicta that it might recognize a limited waiver of the attorney-client privilege depending on the nature of any prior confidentiality agreement with the government, it has not yet found occasion to test this suggestion.[43] In addition to its holding on the attorney-client privilege, the First Circuit in *MIT* also held that disclosure waives work-product protection with respect to all parties and all future lawsuits.[44] While declining to consider whether such waivers constitute subject-matter waivers, the court stated that "disclosure to an adversary, real or potential, forfeits work product protection."[45]

Decisions in the Second Circuit are inconsistent. In some cases the court of appeals has adhered to a strict rule finding an implied waiver of the attorney-client privilege if a party discloses privileged materials to the government,[46] while in others it has concluded that the circumstances render recognition of such a waiver inappropriate.[47] In addition, with respect to the attorney work-product doctrine, *In re Steinhardt Partners, L.P.* specifically rejected the idea that work product can be subject to limited-waiver agreements, reasoning that "[a]n allegation that a party facing a federal investigation and the prospect of a civil fraud suit must make difficult choices is insufficient justification for carving a substantial exception to the waiver doctrine."[48] The court in *Steinhardt* noted, however, that it was unwilling to adopt a *per se* rule that all voluntary disclosures to the government waive the work-product protection. The court stated that it might recognize a limited waiver when "the disclosing party and the government may share a common interest in developing legal theories and analyzing information, or situations in which the SEC and the disclosing party have entered into an explicit agreement that the SEC will maintain the confidentiality of the disclosed materials."[49]

The Third Circuit, in contrast, has been straightforward in its rejection of limited waivers. In *Westinghouse Electric Corp. v. Republic of the Philippines*, the court firmly rejected limited waivers with respect to both the attorney-client privilege and the work-product doctrine.[50] In particular, the court reasoned that neither the fact that the documents were disclosed pursuant to a subpoena nor the fact that the DOJ had agreed to maintain the confidentiality of the materials altered the traditional rule that "a voluntary disclosure to a third party waives the attorney-client privilege even if the third party agrees not to disclose the communications to anyone else."[51] The court concluded

that "disclosure of work product to the SEC and to the DOJ waived the work-product doctrine as against all other adversaries."[52]

Similarly, the Fourth Circuit has rejected the concept of limited waiver of attorney-client privilege and non-opinion work-product protection. In *In re Martin Marietta*, the court held that by presenting the United States Attorney with a position paper opposing indictment, the company waived the attorney-client privilege that otherwise attached to the position paper and to "the underlying details" referenced in the paper.[53] The court also concluded that the company "has impliedly waived the work-product [protection] as to all non-opinion work-product on the same subject matter as that disclosed."[54] The Fourth Circuit made clear, however, that the subject-matter waiver did not extend to opinion work-product.[55]

The Sixth Circuit likewise has declined to recognize the limited waiver of the attorney-client privilege or attorney-work-product doctrine.[56] After surveying the relevant case law, the court in *In re Columbia/HCA Healthcare Corporation Billing Practices Litigation* concluded that a limited-waiver agreement "has little, if any, relation to fostering frank communication between a client and his or her attorney."[57] Accordingly, the court reasoned that "any form of [limited] waiver, even that which stems from a confidentiality agreement, transforms the attorney-client privilege into 'merely another brush on the attorney's palette, utilized and manipulated to gain tactical or strategic advantage.'"[58] Further, because the court found "no compelling reason for differentiating waiver of work product from waiver of attorney-client privilege," the court applied the same strict waiver rule to the attorney-work-product doctrine.[59] "'[T]he standard for waiving the work-product doctrine should be no more stringent than the standard for waiving the attorney-client privilege'—once the privilege is waived, waiver is complete and final."[60]

Finally, the Ninth Circuit also has addressed the issue of limited waivers, although only in the context of litigation between private parties. In *Weil v. Inv./Indicators, Research and Mgmt.*, one of the parties inadvertently disclosed to a party opponent "the substance of Blue Sky counsel's advice regarding registration of Fund shares pursuant to the Blue Sky laws of the various states."[61] Applying the rule that "voluntary disclosure of the content of a privileged attorney communication constitutes waiver of the privilege as to all other such communications on the same subject," the court held that the disclosure (inadvertent or not) waived the privilege.[62] In contrast to those courts endorsing the principle of subject-matter waiver, however, the Ninth Circuit restricted the scope of the waiver to "communications about the matter actually disclosed."[63]

In sum, the D.C., First, Second, Third, Fourth, Sixth, and Ninth Circuits have adopted the rule that disclosure of privileged materials to a third party operates as a waiver of the attorney-client privilege,[64] with the First, Third, Fourth, and Sixth Circuits extending the rule to the attorney-work-product doctrine.[65]

B. Minority Rule: Disclosure to the Government Is Not a Waiver

In *Diversified Industries, Inc. v. Meredith*, the Eighth Circuit adopted the contrary position that the voluntary disclosure to the government of materials protected by the attorney-client privilege waives the privilege only as to the government.[66] The court reasoned that (1) disclosure occurred in "a separate and nonpublic SEC investigation" and (2) "[t]o hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers."[67] No other circuits have joined this view, although certain district courts have followed the Eighth Circuit's reasoning.[68]

C. Middle Ground: The Relevance and Effectiveness of a Limited-Waiver Agreement

Still other courts have indicated the possibility of a compromise position. The First and Second Circuits have suggested in dicta that the disclosure of privileged materials to the government might not operate as a waiver of the privilege if the purpose of the disclosure were to cooperate with an official investigation and if the holder of the privilege or protection were to enter into a limited-waiver agreement with the government stating that it did not intend a waiver as to third parties.[69]

The District Court for the Southern District of New York and District Court for the District of Colorado have both echoed this view, stating that they would recognize a limited waiver if, when producing the materials to the government, the party asserting the attorney-client privilege reserves the right, through a protective order, stipulation, or other express means, to assert the privilege in subsequent proceedings.[70] The U.S. District Court for the Southern District of New York explained this position in the following terms:

> "It does not appear that such a reservation would be difficult to assert, nor that it would substantially curtail the investigatory ability of the [government]. . . . Moreover, a contemporaneous reservation or stipulation would make it clear that. . .the disclosing party has made some effort to preserve the privacy of the privileged communication, rather than having engaged in abuse of the privilege by first making a knowing decision to waive the rule's protection and then seeking to retract that decision in connection with subsequent litigation."[71]

This compromise position "balance[s] the policy goal of encouraging cooperation with the government. . .with the strict requirement of confidentiality."[72] This position appears

to offer a promising avenue for reconciling the competing pressures on today's corporations. Despite its promise, however, no federal court of appeals has yet applied it to uphold a limited waiver.[73]

Federal courts are clearly not uniform in their treatment of the question of whether and to what extent voluntary disclosure to the government of privileged or otherwise protected materials will operate as a waiver of the privilege or protection as to all third parties, or as to the subject matter of the materials disclosed. Indeed, some circuits, like the Second, are beset with intra-circuit conflicts. These inconsistent approaches have created uncertainty and confusion for companies confronted with demands for waiver of privilege in connection with government investigations.

III. Consequences of Not Enforcing Limited-Waiver Agreements with the Government

A. The Uncertain Validity of Limited Waivers Can Discourage Businesses From Identifying and Correcting Their Own Mistakes to Achieve Full Compliance With the Law

The government is demanding more cooperation at the same time that it is expecting improved corporate-governance practices. These goals of punishment and compliance, however, turn out to be self-contradictory if voluntary cooperation with the government unintentionally waives privileges over confidential material produced by businesses themselves. The legal uncertainty surrounding limited waivers can discourage businesses from communicating frankly with their counsel, at least in ways that are memorialized, and from affirmatively investigating and reporting on irregularities, mistakes, and outright wrongdoing.

For instance, because the validity of a limited waiver is uncertain, while the probability of being required as part of cooperation with the government to disclose to it a written or other report resulting from an internal investigation is high, businesses may be less likely to expend the money and other resources necessary for an independent analysis and report. The critical importance of preserving evidentiary privileges in order to safeguard the corporation from potentially ruinous civil litigation may thus render the choice "not between narrower and wider disclosure, but between a disclosure only to government officials and *no disclosure at all*."[74]

Civil litigants may argue that since certain federal statutes give citizens the right to act in some circumstances as "private attorneys general,"[75] the fact that they may ultimately gain access to an internal investigative report should not enter the calculus when determining the validity of limited-waiver agreements. These "private attorneys general," however, stand at cross-purposes with the government in that they demand access to information that, at least in some instances, would not exist without prior government assurances of confidentiality. A corporation's decision to produce otherwise privileged material may depend on the degree of its confidence that disclosure to the government does not mean disclosure to anyone else. Where the high risks of compulsory disclosure make it less likely that a corporation will even produce such materials, civil litigants have no real basis to complain if a court sustains the validity of a limited-waiver agreement with the government. "Insofar as the existence of the privilege creates the communication sought, the exclusion of privileged information conceals no probative evidence that would otherwise exist without the privilege."[76] Even if denied discovery of an internal report or other privileged material, in other words, private civil litigants are most likely no worse off than if the corporation had known that disclosure to the government would be unprotected and, therefore, decided not to create the report in the first place. And this result does not compromise the fairness of civil proceedings, because the underlying factual documents and employees are still accessible during discovery.[77] Rather, recognition of an effective limited waiver simply avoids tilting the playing field in civil litigation unfairly in favor of plaintiffs.

B. The Uncertain Validity of Limited Waivers Can Discourage Businesses From Voluntarily Cooperating With Government Investigations

The uncertainty regarding principles of limited waiver also can dampen corporations' enthusiasm for cooperating with government investigations. As a simple matter of cost-benefit analysis, "[f]aced with a waiver of the attorney-client privilege over the entire subject matter of a disclosure and *as to all persons*, the holder of privileged information would be more reluctant to disclose privileged information voluntarily to the government than if there were no waiver associated with the disclosure."[78] This result surely does not further the aim of law enforcement. Some voluntarily disclosed information is irreplaceable: in certain instances, "[t]he *only* way that the government can obtain privileged information is for the holder of the privilege voluntarily to disclose it."[79] Other means may not be available because it is not the case that "all privileged information has a non-privileged analogue that is discoverable with effort."[80]

Law enforcement's dependence on voluntary cooperation places in sharp relief the government's requests for waiver of attorney-client privilege and work-product protection. It makes good sense to encourage businesses to police their own activities and to report their findings to responsible government officials. Perhaps, given the high-profile abuses of a relatively few corporations, promoting genuine corporate self-governance will come to be viewed as a corporate obligation, notwithstanding the potential adverse consequences as to civil liability under current limited-waiver doctrine. Relying on such a development, however, ignores the fact that voluntary compliance with the law is now a staple of effective law enforcement regarding business activity. This situation presents a need for creative solutions that appropriately balance a respect for the law with the benefits that confidentiality brings to attorney-client relationships.

Without voluntary compliance, the complexity of federal regulations affecting business activities would require the dedication of federal and other law enforcement resources needed for other urgent priorities. Moreover, businesses themselves have a commercial interest in a playing field leveled by general business compliance with the law. Illegal behavior by a few can competitively disadvantage the majority of law-abiding companies. Thus, the latter, which maintain compliance with rigorous internal programs, can be seen as freeing public enforcement resources for use in ferreting out those who would cheat in commercial competition through law-breaking. Internal investigations, often coupled with voluntary disclosures to enforcement authorities, have become featured aspects of corporate compliance efforts. It only makes sense, as a matter of both public and legal policy, to reward and encourage companies to police proactively their own business activities. Because the current state of the law governing limited privilege waiver does not so encourage business, consideration of change is in order.

IV. Recommended Solutions and Steps to Mitigate Adverse Consequences of Waiver

The federal government's demand for "authentic cooperation," including the voluntary disclosure of protected materials, combined with the uncertainty regarding whether such disclosure will be extended to third-party civil litigants, create tensions for corporations and their counsel where there is a desire to cooperate that is counterbalanced by a duty to protect the shareholders' interests from the adverse consequences of civil litigation, including parasitic lawsuits based principally on a business's internal investigations and voluntary disclosures. Under the status quo, good-faith efforts to retain outside counsel, investigate the facts, and report the results for the guidance of corporate officers and directors may place the corporation in peril of third-party plaintiffs whose discovery efforts will be aided by the corporation's attempts to cooperate with the government.

Decisions to date, at least in courts outside the Eighth Circuit, offer little comfort for corporations contemplating a claim of privilege on a limited-waiver theory after disclosure. The conflicting approaches followed by the various circuits amply support review of the validity of limited waivers by the U.S. Supreme Court.[81] Given the uncertainties of both the timing of any such review and of the outcome of judicial intervention, however, consideration of a legislative solution to this critical legal and public policy issue is in order. Two possible legislative solutions, each discussed in detail below, are an amendment to the Securities Exchange Act of 1934 and an amendment to the Federal Rules of Evidence. Pending the adoption of such legislative fixes, however, corporate counsel might wish to adopt alternative strategies, also discussed below, that seek to provide the level of cooperation that the government now requests, while at the same time protecting the company's evidentiary privileges to the greatest extent possible.

A. Amend the Securities Exchange Act of 1934

As noted above, the SEC has indicated on several occasions that it appreciates the benefits to agencies and risks to parties of disclosing protected material. In the Seaboard Report, when discussing a company's decision to waive the attorney-client privilege and work-product protection, the Commission noted that it "recognizes that these privileges, protections and exemptions serve important social interests."[82] The Commission further noted that it had filed an amicus brief arguing that the waiver of the privileges with respect to the SEC did not necessarily waive them as to third parties, and stating that the SEC agrees that, in certain circumstances, a witness's production of protected information does not constitute a subject-matter waiver that would entitle the Commission to further privileged information.[83]

In both 2003 and 2004, acting with the SEC's support, Congress proposed legislation as part of the Securities Fraud Deterrence and Investor Restitution Act that, if adopted, would have implemented the SEC's stated position by explicitly recognizing the validity of limited waivers. The most recent version, proposed in 2004, included the following provision regarding limited waivers:

> Notwithstanding any other provision of law, whenever the [SEC] or an appropriate regulatory agency and any person agree in writing to terms pursuant to which such person will produce or disclose to the Commission or the appropriate regulatory agency any document or information that is subject to any Federal or State law privilege, or to the protection provided by the work product doctrine, such production or disclosure shall not constitute a waiver of the privilege or protection as to any person other than the Commission or the appropriate regulatory agency to which the document or information is provided.[84]

Adding such a provision to the Securities Exchange Act of 1934 would permit disclosure of protected information to government investigators and auditors without forcing a company to waive its protections as to other parties and other materials on the same subject. Although the DOJ neither supported nor opposed the provision, the SEC unequivocally supported it. Testifying on behalf of the SEC, former Director of the Enforcement Division Stephen M. Cutler argued that adoption of the provision "would help the Commission gather evidence in a more efficient manner by eliminating a strong disincentive to parties under investigation to voluntarily produce to the Commission important information."[85]

Unfortunately, the proposed legislation never became law. On June 1, 2004, the bill was discharged from the House Judiciary Committee and placed on the calendar; however, the 108th Congress adjourned without taking further action

on the bill.[86] It is unclear whether the current Congress will revive the bill or how a reintroduced bill would fare.

B. Amend the Federal Rules of Evidence

As an alternative to the stalled amendment to the Securities Exchange Act, Congress could provide a uniform rule of decision regarding limited-waiver agreements in all federal courts by exercising its power to amend the Federal Rules of Evidence. While potentially controversial,[87] such an approach would have the virtues of uniformity and clarity. Given Congress's apparent willingness to federalize attorney-client relations to a certain extent,[88] there should be little legislative reluctance to expressly recognize limited waivers by amending the Federal Rules of Evidence. Such an amendment might take the following form:

> **Rule 502. Limited-Waiver Agreements**
>
> (a) DEFINITION. For purposes of this section, a "limited-waiver agreement" means a written agreement between (i) a person or entity and (ii) a Federal Government entity, agency, or authority empowered by law to conduct criminal investigations or to pursue civil enforcement penalties or damages, pursuant to which (1) the person or entity provides to the Government entity confidential information or materials that it controls and that it reasonably believes to be privileged or immune from discovery and therefore not subject to compelled disclosure; (2) the Government agrees to protect the information or materials from disclosure to third parties; and (3) the person or entity providing the information or materials explicitly limits any potential waiver of immunities or privileges that would otherwise be wholly or partially waived by such disclosure.
>
> (b) PROTECTION OF INFORMATION. Notwithstanding any other provision of law, disclosure of information or materials to the Government subject to a limited-waiver agreement does not constitute a waiver of any applicable right, privilege, protection, or immunity, such as the attorney-client privilege and work-product protection, that would apply to the information or materials absent disclosure to the government, unless that waiver is expressed in the limited-waiver agreement. No court of the United States shall have jurisdiction to hear any motion, claim, or other action to invalidate a facially valid limitation of waiver created by this section.

Such a rule could be the basis for expressly recognizing the validity of limited-waiver agreements, thereby affording certainty to a company that chooses to cooperate with a government investigation by disclosing confidential materials. Such recognition would clarify the muddled law of limited waivers by effectively endorsing the Eighth Circuit's opinion in *Diversified*, which recognized and encouraged the use of limited-waiver agreements.

With the law thus clarified, corporations would be encouraged "to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers,"[89] no longer fearing that conducting such investigations and then cooperating with the government might lead to the waiver of their privileges and protections with respect to third parties. Corporations would be further encouraged to institute robust compliance programs that include the regular use of outside counsel to investigate and report on allegations of errors and wrongdoing, and then cooperate voluntarily with government investigations where appropriate. Instituting this new rule of evidence, therefore, would have the dual benefit of encouraging more effective self-regulation and internal best-practices, and at the same time greatly increasing the likelihood that corporations will cooperate with the government should possible criminal activity actually arise.[90]

C. Strategies to Cope with the Current Dilemma

Either of these two legislative solutions, even if proposed (or re-introduced, in the case of an amendment to the Securities Exchange Act), would of course take substantial time to enact. The practical reality is that corporate counsel will continue to be faced with the choice of waiving the company's attorney-client privilege and work-product protection or exposing the company to additional liability, or at least to the loss of opportunity to mitigate penalties arising from the government's investigations. Even when presented with such a dilemma, however, there are steps that a company can take to safeguard its protections and still cooperate with the government.

1. Negotiate a Limited-Waiver Agreement

Any time a corporation intends to disclose privileged or protected information to the government—and in particular, when it plans to share the results of an internal investigation into potential wrongdoing—it should first negotiate a limited-waiver agreement with the government. Although most courts presented with arguments for the principle of limited waiver have rejected them, some courts, as discussed above, have recognized the harm that earlier jurisprudence is causing. Further, it is worth noting that while arguments for the principle of limited waiver have most often been rejected, the cases involving negotiated agreements (as opposed to an argument that the principle should be recognized absent an agreement by the government to maintain the confidentiality of the materials disclosed) are relatively few. Moreover, in the majority of cases discussing the possibility of limited-waiver agreements, the courts have identified an inconsistency between a term or terms of the negotiated agreement and the principle itself.[91]

Under a negotiated limited-waiver agreement, the company would agree to disclose arguably privileged or

protected materials in exchange for the government's assurance that it will not disclose those materials to any third party. Particular attention should be paid to the government's rights under the agreement: limited-waiver agreements are ineffective if they are conditional or if the government has discretion to unilaterally disclose the information obtained under the agreement.[92] Negotiating a limited-waiver agreement (as opposed to simply hoping that a court will subsequently recognize the principle of limited waiver absent any such express agreement) has the benefit of, in effect, enlisting the government in support of the agreement's enforceability. Moreover, if a dispute regarding waiver arises in another matter, the limited-waiver agreement can serve as primary evidence of the corporation's lack of intent to waive more broadly as to third parties. There is thus no harm, and there may be some benefit, in attempting to negotiate a limited-waiver agreement with the government prior to any disclosure. A corporation should in any event, even if the government is unwilling to enter into a limited-waiver agreement, expressly reserve the right to assert available privileges and protections in the future.[93]

2. Adopt Strategies to Limit Disclosure and Potential Waiver to Facts Only

Regardless of whether the government is willing to negotiate a limited-waiver agreement, a corporation could offer to produce only non-opinion work-product to the government—for example, the factual results of an internal investigation—and withhold all opinion work-product and communications protected by the attorney-client privilege. Offering to provide only the factual results of an investigation may be regarded by enforcement authorities as sufficient "cooperation," while diminishing the risk of waiver of privilege or work-product protection that a broader disclosure would entail.[94] While such disclosure probably provides the government no more than what a court would allow third parties to discover, even if a limited waiver were otherwise recognized as protecting confidential attorney-client communications or opinion work-product,[95] the government likely will wish to conduct its own legal analysis of the import of relevant facts in any event, and may be satisfied by such a disclosure.

If the government deems an offer of the facts themselves to be insufficient cooperation, a corporation might take the further step of providing a "roadmap" to the government in addition to the factual results of the investigation. Such a roadmap could provide the government guidance as to what documents bear close examination, what people potentially to be interviewed are most likely to have significant information, and what leads may be pursued most productively. This method can offer a trail for the government to follow that will allow it to identify the nature and extent of possible wrongdoing and those responsible for such conduct.[96] The virtue of such guidance is that it may be viewed as a more sincere or "authentic" form of cooperation, while arguably preserving the corporation's privileges.

At the same time, it is important to recognize that analytical guidance might be viewed as opinion work-product, and that providing too much guidance to the government may be deemed a subject-matter waiver of protection as to such work product.[97] A corporation's ability to limit the scope of its waiver will likely depend at least in part on how its agreement with the government characterizes the guidance the corporation will provide. Thus, pointing the government in the right direction is arguably a limited waiver; telling the government the specific legal significance of disclosed materials could constitute a subject-matter waiver as to opinion work-product.

Each of the two recommendations above requires, at a minimum, that the corporation and its counsel be diligent in keeping fact-based, non-opinion work-product separate from opinion work-product and other communications protected by the attorney-client privilege. One effective way to achieve this separation is for the corporation's counsel to open separate matters, one (or more) for a non-privileged factual inquiry, and one (or more) for legal analysis and opinion work-product necessary to advise the corporation on its potential liabilities, defenses and options to address government investigations and potential civil litigation. Creating and maintaining separate matters will provide support for the position that the work performed in each of these contexts remains separate, and that the fruits of counsel's work in the factual investigation context can be disclosed to the government without waiving the privilege as to opinion work-product created in a separate matter.

This principle of separation might be taken further by engaging separate firms to conduct the factual inquiry and to provide legal analysis and advice. While this approach likely will add expense, it may be far less costly than the "price" attached to a wholesale waiver. The confused state of the case law and the increasingly demanding regulatory environment call for creative approaches that, while altering current "standard" practices, will afford a company maximum legal protection for its confidential materials. Bifurcating the tasks of outside counsel in conducting an internal investigation is one such method designed to facilitate the release of the facts to the authorities without operating as a waiver of evidentiary privileges that attach to legal advice and analysis.

Finally, consideration should be given to openly identifying any factual investigation or inquiry and its results as non-privileged from the outset. A corporation and its counsel may make clear to government authorities upon commencing an investigation of potential wrongdoing that the corporation makes no claim of privilege or other protection regarding the factual investigation. Absent any such claim or assertion of privilege or protection from compelled disclosure, voluntary disclosure of the factual results of such an investigation to the government should not result in a determination that there has been a waiver of any privilege or protection.

Conclusion

The current state of the law concerning waiver of attorney-client privilege and work-product protection in the context of cooperation with government inquiries serves to frustrate the important societal objectives of, first, uncovering wrongdoing and encouraging companies to police themselves, disclose their own wrongdoing and cooperate with government inquiries, and, second, of preserving privileges designed to ensure that lawyers and clients can communicate unfettered by the specter of disclosure of the client's thoughts and the lawyer's work product. Legislation is probably needed to restore the vitality of the imperiled attorney-client privilege and enable the candid communication necessary to both of these objectives. Until legislatures are persuaded to act in this regard, however, companies must adopt other strategies to deal with the competing pressures.

The current state of affairs presents an important test for responsible public officials. The existing tension between what enforcement officials have determined will constitute "cooperation" and what they expect internal self-policing to accomplish ill serves both corporations and the public. Absent reform, business entities will continue to suffer under the Hobson's choice that current public and legal policy has created.

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Footnotes

[1] *See* United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358–59 (D. Mass. 1950).

[2] Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

[3] *Id.* at 395 ("The privilege only protects disclosure of communications; it does not protect disclosure of underlying facts by those who communicated with the attorney. . . . 'The client cannot be compelled to answer the question, "What did you say or write to the attorney?" but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into this communication to his attorney.'") (quoting City of Philadelphia v. Westinghouse Elec. Corp., 205 F. Supp. 830, 831 (E.D. Pa. 1962).

[4] *See In re* Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289, 294 (6th Cir. 2002).

[5] *See, e.g.*, *In re* Martin Marietta Corp., 856 F.2d 619, 623 (4th Cir. 1988) (waiver of privilege for position paper waived privilege protection for communications underlying it); United States v. Jones, 696 F.2d 1069, 1072 (4th Cir. 1982) ("Any voluntary disclosure by the client to a third party waives the privilege not only as to the specific communication disclosed, but often as to all other communications relating to the same subject matter."); *In re* Sealed Case, 676 F.2d 793, 809 (D.C. Cir. 1982); ("[A]ny voluntary disclosure by the client to a third party breaches the confidentiality of the attorney-client relationship and therefore waives the privilege, not only as to the specific communication disclosed but often as to all other communications relating to the same subject matter.").

[6] United States v. Nobles, 422 U.S. 225, 238 n.11 (1975).

[7] *In re* Antitrust Grand Jury, 805 F.2d 155, 163 (6th Cir. 1986); *see also* Fed. R. Civ. P. 26(b)(3) (establishing work-product defense in federal civil litigation); Fed. R. Crim. P. 16(a)(2), (b)(2) (stating defense in federal criminal cases).

[8] *In re* Antitrust Grand Jury, 805 F.2d at 162.

[9] *Id.* at 163–64.

[10] *See Nobles*, 422 U.S. at 239 & n.14; Westinghouse Elec. Co. v. Republic of the Philippines, 951 F.2d 1414, 1429-30 (3d Cir. 1991) (holding that work-product protection was waived where a company made disclosures to the Securities and Exchange Commission (SEC or the Commission) and the Department of Justice (DOJ) during the course of investigations).

[11] *See, e.g.*, *In re* United Mine Workers of America Employee Benefit Plans Litig., 159 F.R.D. 307 (D.D.C. 1994); Fleet Nat'l Bank v. Tonneson Co., 150 F.R.D. 10, 16 (D. Mass. 1993); Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1190-91 (D.S.C. 1974). *But see Martin Marietta*, 856 F.2d at 625 (holding that once the corporation made testimonial use of privileged documents by disclosing them to the government during settlement negotiations, the corporation "impliedly waived the work-product privilege as to all non-opinion work-product on the same subject matter as that disclosed.").

[12] *See* Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1978) (*en banc*) (holding that the voluntary disclosure of otherwise privileged materials in a "separate and nonpublic SEC investigation" effected "only a limited waiver of the privilege").

[13] Under the heading of "limited waiver," some courts distinguish between a "selective" waiver, which "permits the client who has disclosed privileged communications to one party to continue asserting the privilege against other parties," and a "partial" waiver, which "permits a client who has disclosed a portion of privileged communications to continue asserting the privilege as to the remaining portions of the same communications." *Westinghouse*, 951 F.2d at 1423 n.7 (citations omitted); *accord Columbia/HCA*, 293 F.3d at 294 n.5. Because partial waivers seldom arise in practice, this paper adheres to the more generic (and widely used) term "limited waiver" as shorthand for the claim that a third party may not discover privileged materials voluntarily disclosed to the government pursuant to an official investigation.

[14] There is no general duty to cooperate or make disclosure to the government in the context of an investigation. In appropriate circumstances, a company can thus reasonably elect not to disclose privileged material.

[15] The policies and practices of these government entities are not the only factors contributing to erosion of the attorney-client privilege. For example, recent legislation imposes requirements on publicly traded companies' outside auditors that, in practice, have led to demands by those auditors that the companies waive attorney-client and work-product privileges as part of any audit of the companies' financial statements. *See, e.g.*, 15 U.S.C § 7262(b) (2004).

[16] Memorandum from Deputy Attorney General Larry D. Thompson to United States Attorneys re: "Principles of Federal Prosecution of Business Organizations," (January 20, 2003), *available at* <http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm>.

[17] *Id.* at 1.

[18] *Id.* at 3.

[19] *Id.* at 6-8.

[20] *Id.* at n.3.

[21] In what one hopes will be a move by the DOJ to revisit its policy on requiring waivers, on October 21, 2005, acting Deputy Attorney General Robert D. McCallum, Jr. directed all United States Attorneys and Heads of Department Components to establish written waiver review procedures for their districts or components. Memorandum from Acting Deputy Attorney General Robert D. McCallum, Jr. to United States Attorneys and Heads of Department Components re: "Waiver of Corporate Attorney-Client and Work Product Protection," (October 21, 2005). The memorandum requires federal prosecutors to obtain approval from the United States Attorney or other supervisor before seeking waivers of the attorney-client privilege or work product protection. The memorandum also acknowledges that waiver procedures adopted in different districts or departmental components may vary. The memorandum does not indicate that the DOJ will stop requiring waivers of attorney-client privilege and work product protection from business organizations. By elevating the decision to request such waivers to the discretion of individual United States Attorneys or other supervisors, the memorandum might fairly be read as signaling closer scrutiny of such requests and providing an avenue for a more limited use of them.

[22] The DOJ, unsurprisingly, does not view the impact of the Thompson memorandum in the same way, and denies that privilege waivers are being forced on companies. *See* Mary Beth Buchanan, *Effective Cooperation by Business Organizations and the Impact of Privilege Waivers*, 39 Wake Forest L. Rev. 587, 597-98 (2004); Interview with United States Attorney James B. Comey Regarding the Department of Justice's Policy on Requesting Corporation under Criminal Investigation to Waive the Attorney Client Privilege and Work Product Protection, Vol. 51, No. 6, United States Attorneys' Bulletin (Nov. 2003).

[23] *See* Securities and Exchange Commission, Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship and Cooperation to Agency Enforcement Decisions, Securities Exchange Act of 1934 Release No. 44969, Accounting and Auditing Enforcement Release No. 1470, October 23, 2001.

[24] *Id.*

[25] *Id* n.3.

[26] *Id.* In fact, since the Seaboard Report was issued, its factors have been used much more often as a sword by the SEC to fine companies for lack of "cooperation" (including cases where the SEC found that there was no underlying wrongdoing) than as a shield by companies to avoid being charged or receive reduced charges.

[27] In a recent holding, the Supreme Court concluded that Guidelines are advisory, rather than binding, thus somewhat reducing their influence. United States v. Booker, 125 S. Ct. 738 (2005). How this modification will affect the application to corporate defendants of the section and commentary in question remains to be seen.

[28] U.S.S.G. § 8C2.5(g).

[29] Section 8C2.5, "Culpability Score—Self Reporting, Cooperation, and Acceptance of Responsibility," deals with determining the "culpability score" for an organizational defendant.

[30] Federal Sentencing Guidelines Manual § 8C2.5(g), comment.

[31] It bears note, of course, that the Guidelines apply only after a corporation is convicted of an offense. Nevertheless, they may influence the government's decisions, and a corporation's conduct, in the course of an investigation or case.

[32] *See* 70 Fed. Reg. 37145 (June 28, 2005). The Sentencing Commission has received several comment letters regarding the privilege waiver issue, including one signed by an author of this paper, among other former senior DOJ officials. *See* Letter from Former Department of Justice Officials to the Honorable Ricardo H. Hinojosa, Chairman, U.S. Sentencing Commission (Aug. 15, 2005), *available at* <http://www.abanet.org/poladv/dojlettertoussc.pdf> (urging the Sentencing Commission to remedy the Guidelines amendment dealing with privilege waiver because it is "eroding and weakening the attorney-client and work-product protections afforded by the American system of justice").

[33] *See* n.5, *supra*.

[34] *See* SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1374 (D.C. Cir. 1980) ("The civil and regulatory laws of the United States frequently overlap with the criminal laws, creating the possibility of parallel civil and criminal proceedings, either successive or simultaneous. In the absence of substantial prejudice to the rights of the parties involved, such parallel proceedings are unobjectionable under our jurisprudence.").

[35] It bears note, however, that a business may not be able to shield relevant factual information in its possession from disclosure via a claim of privilege or protection in any event, even if materials reflecting that information constitute attorney work product. *See*, *e.g.*, Fed. R. Civ. P. 26(b)(3) (noting that "a party may obtain discovery of documents and tangible things. . .prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney. . .)" upon a showing of "substantial need" and an inability to obtain the substantial equivalent without "undue hardship"). Where a business's efforts to correct its errors and comply with the law involve an investigation into the facts of its potential wrongdoing, the facts it discovers thus may be discoverable by a civil adversary regardless of whether it discloses them to the government.

[36] *Columbia/HCA*, 293 F.3d at 295 (citation omitted).

[37] The Tenth and Eleventh Circuits have not yet ruled on the validity of limited-waiver agreements, although district courts in each circuit have issued holdings that may be interpreted as supporting a limited waiver. A district court in the District of Colorado upheld a

limited waiver of the attorney-client privilege because a bank "took substantial steps to ensure" confidentiality absent a formal agreement, the bank was not to obtain a benefit for itself, and the bank did not seek to protect the privilege against any other federal regulatory agency. *In re* M & L Bus. Mach. Co., Inc., 161 B.R. 689, 696 (D. Col. 1993). Similarly, the Northern District of Georgia held that attorneys approved of by the SEC to investigate were not performing legal services for the company and therefore no evidentiary privileges were waived. Osterneck v. E. T. Barwick Indus., 82 F.R.D. 81, 85 (N.D. Ga. 1979).

[38] *See* Permian Corp. v. United States, 665 F.2d 1214, 1219–20 (D.C. Cir. 1981); United States v. Massachusetts Inst. of Tech., 129 F.3d 681, 686 (1st Cir. 1997); *In re* John Doe Corp., 675 F.2d 482, 489 (2d Cir. 1982); *Westinghouse*, 951 F.2d at 1425 (3d Cir.); *Martin Marietta.*, 856 F.2d at 623 (4th Cir.); *Columbia/HCA*, 293 F.3d at 302 (6th Cir.); *Weil v. Invest./Indicators, Research and Mgmt.*, 647 F.2d 18, 24 (9th Cir. 1981). *See also* Burden-Meeks v. Welch, 319 F.3d 897, 899 (7th Cir. 2003) (regarding waiver to defendant who happened to be the mayor).

[39] *Permian Corp.*, 665 F.2d at 1221.

[40] *Id.* at 1222 (declining to enjoin the release to the U.S. Department of Energy of privileged documents, which an oil company voluntarily disclosed to the SEC under an agreement that the SEC would not divulge the documents without prior notice, on the basis that "a litigant who wishes to assert confidentiality must maintain genuine confidentiality"); *In re* Sealed Case, 676 F.2d 793, 823, 820 (D.C. Cir. 1982) (holding that disclosure to the SEC of privileged materials did not preclude a grand jury from discovering them, both because "a grand jury's claim to disclosure is stronger than that of a civil litigant" and because the company had failed to secure an agreement, as other companies had done, "to prevent the SEC from disclosing privileged documents to third parties"); *In re* Subpoenas Duces Tecum, 738 F.2d 1367, 1370 (D.C. Cir. 1984) (refusing to find a limited waiver of the attorney-client privilege for documents voluntarily disclosed to the SEC).

[41] *Permian Corp.*, 665 F.2d at 1217-18 (holding that lower court's decision to allow a limited waiver of work-product protection was not clearly erroneous); United States v. Am. Tel. & Tel. Co., 642 F.2d 1285, 1299 (D.C. Cir. 1980) (upholding a claim of work-product protection against a civil defendant's attempt to discover documents given to the government by two other corporations, against whom the defendant was litigating in separate proceedings, on the ground that "a disclosure made in pursuit of such trial preparation, and not inconsistent with maintaining secrecy against opponents, should be allowed without waiver of the privilege"); *Subpoenas Duces Tecum*, 738 F.2d at 1373-74 (holding that the work-product doctrine did not protect materials disclosed to the SEC when the holder of the privilege made no effort to secure a confidentiality agreement from the SEC before disclosing the privileged materials and when litigation was anticipated at the time of the disclosure).

[42] 129 F.3d at 686. *But see* United States v. Buco, 1991 WL 82459 at *2 (D. Mass. May 13, 1991) (finding a limited waiver was appropriate because "the public interest served by encouraging the free flow of information between the banks and their federal regulators is substantial").

[43] 129 F.3d at 686; United States v. Desir, 273 F.3d 39, 45-46 (1st Cir. 2001) (commenting that the First Circuit has not had much opportunity to address implied waiver of privilege and declining to address the issue there). *See* United States v. Billmyer, 57 F.3d 31, 37 (1st Cir. 1995).

[44] 129 F.3d at 687.

[45] *Id.* at 688.

[46] *See*, *e.g.*, *In re* John Doe Corp., 675 F.2d 482, 489 (2d Cir. 1982) (holding that disclosure of a corporate report by counsel for an underwriter waived attorney-client privilege, because "[o]nce a corporate decision is made to disclose [materials] for commercial purposes, no matter what the economic imperatives, the privilege is lost, not because of voluntariness or involuntariness, but because the need for confidentiality served by the privilege is inconsistent with such disclosure").

[47] *See, e.g.*, *In re* Grand Jury Proceedings, 219 F.3d 175, 186–87 (2d Cir. 2000) (declining to find an implied waiver of the attorney-client privilege based solely on the grand jury testimony of a corporate officer); Byrnes v. IDS Realty Trust, 85 F.R.D. 679, 689 (S.D.N.Y. 1980) (holding that disclosure of attorney communications to the SEC for purposes of cooperating with an investigation did not constitute waiver of the attorney-client privilege); IBM Corp. v. United States, 471 F.2d 507, 517 (2d Cir. 1973) (granting a writ of mandamus and vacating a district court order, which had directed the company to disclose to the government certain documents previously disclosed under a protective order to a private litigant in a separate case, on the grounds that (1) the government had already agreed to accept redacted versions of the previously disclosed documents and (2) the order "ignores the real issue, namely, are the documents privileged and was there a knowing and voluntary waiver of the privilege").

[48] *In re* Steinhardt Partners, L.P., 9 F.3d 230, 235, 236 (2d Cir. 1993) (further noting that "the SEC has continued to receive voluntary cooperation from subjects of investigations, notwithstanding the rejection of the selective-waiver doctrine by two circuits"); *accord* Bowne of New York City, Inc. v. AmBase Corp., 150 F.R.D. 465, 480 (S.D.N.Y. 1993) (holding that even an agreement of confidentiality does not prevent disclosure from constituting a waiver of the privilege); Bank of America, N.A. v. Terra Nova Ins. Co., 212 F.R.D. 166, 174 (S.D.N.Y. 2002) (rejecting the limited waiver of the attorney-work-product protection based on an expansive definition of "adversary"). *But see* GAF Corp. v. Eastman Kodak Co., 85 F.R.D. 46, 52 (S.D.N.Y. 1979) (stating that "the mere disclosure of. . .protected attorney work product to the government. . .will not constitute a waiver of. . .[the] work product privilege.").

[49] *Steinhardt*, 9 F.3d at 236 (citations omitted).

[50] 951 F.2d 1414, 1429-30 (3d Cir. 1991). *But see Grand Jury Investigation*, 599 F.2d 1224, 1229 (3d Cir. 1979) ("Prudent parties anticipate litigation, and begin preparation prior to the time suit is formally commenced. Thus the test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.").

[51] 951 F.2d at 1427.

[52] *Id.* at 1429.

[53] *Martin Marietta*, 856 F.2d at 623; *accord In re* Weiss, 596 F.2d 1185, 1186 (4th Cir. 1979) (holding that limited waivers do not apply to a grand jury proceeding, but only private litigation, and that the grand jury was already in possession of the SEC transcript and documents from the prior disclosure.).

[54] *Martin Marietta*, 856 F.2d at 625.

[55] *Id.*; *see also* Black & Decker Corp. v. United States, 219 F.R.D. 87, 91-92 (D. Md. 2003) ("While the waiver of fact attorney work product may extend to all fact work product of the same subject matter, the waiver will not extend to opinion work product except in extreme circumstances.") (citing *Martin Marietta*, 856 F.2d at 627).

[56] This rejection of limited waivers is directly contrary to the Sixth Circuit's prior holding that "a corporation's submissions of portions of a report does not waive the attorney client privilege if the report is not released in 'significant part.'" *In re* Perrigo Co., 128 F.3d 430, 438 (6th Cir. 1997) (citations omitted). Indeed, the court of appeals previously endorsed society's interest in promoting "future communications between the independent directors and attorneys reviewing whether a derivative action is in the corporation's interest." *Id.* at 439.

[57] *Columbia/HCA*, 293 F.3d at 303.

[58] *Id.* (quoting *Steinhardt*, 9 F.3d at 235).

[59] *Id.* at 306.

[60] *Id.* at 307 (quoting *Westinghouse*, 951 F.2d at 1429). The Third and Sixth Circuits also employ this blanket rule. *See Westinghouse*, 951 F.2d at 1429 (3d Cir.); *Columbia/HCA*, 293 F.3d at 307 (6th Cir.) (quoting *Westinghouse*, 951 F.2d at 1429).

[61] Weil v. Inv./Indicators, Research and Mgmt., 647 F.2d 18, 25 (9th Cir. 1981).

[62] *Id.* at 24; *accord* Handgards v. Johnson & Johnson, 413 F. Supp. 926, 929 (N.D. Cal. 1976) ("Voluntary disclosure of a part of a privileged communication is a waiver as to the remainder of the privileged communication about the same subject."); *cf. In re* Worlds of Wonder Sec. Litig., 147 F.R.D. 208, 212 (N.D. Cal. 1992) (holding that disclosure to the SEC of documents protected by the work-product doctrine to the SEC waived the protection because "[d]isclosure as part of an informal investigation is more voluntary, if that is possible, than disclosure in response to subpoena, as in *Westinghouse*"). *But see* Fox v. California Sierra Fin. Serv., 120 F.R.D. 520, 527 (N.D. Cal. 1988) (stating that "without steps to protect the privileged nature of such information, fairness requires a finding that the attorney-client privilege has been waived as to the disclosed information and all information on the same subject").

[63] *Weil*, 647 F.2d at 25.

[64] *See Permian Corp.*, 665 F.2d at 1222; *Massachusetts Inst. of Tech.*, 129 F.3d at 686; *In re* John Doe Corp., 675 F.2d at 489; *Westinghouse*, 951 F.2d at 1429-30; *Martin Marietta*, 856 F.2d at 623; *Columbia/HCA*, 293 F.3d at 303; *Weil*, 647 F.2d 24.

[65] *See Massachusetts Inst. of Tech.*, 129 F.3d at 687; *Westinghouse*, 951 F.2d at 1429-30; *Martin Marietta*, 856 F.2d at 623; *Columbia/HCA*, 293 F.3d at 306. As noted above, the Fourth Circuit has indicated that a subject-matter waiver does not extend to opinion work-product. *Martin Marietta*, 856 F.2d at 625. The First, Third, and Sixth Circuits have not decided the question explicitly.

[66] *Diversified*, 572 F.2d at 611; Pritchard-Keang Nam Corp. v. Jaworski, 751 F.2d 277, 284 (8th Cir. 1984) (following *Diversified*); United States v. Shyres, 898 F.2d 647, 657 (8th Cir. 1990) (same); *see also* St. Paul Reinsurance Co., Ltd. v. Commercial Fin. Corp., 197 F.R.D. 620, 639 (N.D. Iowa 2000) (applying *Diversified*'s analysis to the work-product doctrine); Biben v. Card, 119 F.R.D. 421, 428 (W.D. Mo. 1987) (recognizing a limited waiver to the extent that "the information involved was communicated to independent outside counsel for the purpose of assisting the [holders of the privilege] in investigating their own alleged wrongdoing"). The Eight Circuit is still alone in allowing selective waiver. *See In re* Lupron Marketing and Sales Practices Litig., 383 F. Supp. 2d 8 (D. Mass. 2004) (calling *Diversified* a "celebrated and controversial" twenty-five year old opinion, bringing forth a doctrine which, as the First Circuit observed . . . , has. . .no Circuit siblings. . . .") (citing United States v. Massachusetts Inst. of Tech., 129 F.3d 681 (1st Cir. 1997).

[67] *Diversified*, 572 F.2d at 611.

[68] *See, e.g.*, Byrnes v. IDS Realty Trust, 85 F.R.D. 679, 689 (S.D.N.Y. 1980) (holding that "voluntary submissions to agencies in separate, private proceedings should be a waiver only as to that proceeding"); *In re* Grand Jury Subpoena, 478 F. Supp. 368, 372–73 (D. Wis. 1979) (stating that "voluntary cooperation with the Securities and Exchange Commission or with an Internal Revenue Service or grand jury investigation would be substantially curtailed if such cooperation were deemed to be a waiver of a corporation's attorney-client privilege").

[69] *See Steinhardt*, 9 F.3d at 236 (2d Cir. 1993); United States v. Billmyer, 57 F.3d 31, 37 (1st Cir. 1995). The Seventh Circuit has ruled similarly on the inverse issue—whether disclosure by the government to the target of a criminal investigation waives the law enforcement investigatory privilege as to third party civil plaintiffs—finding that disclosure, even without an express confidentiality agreement, did not waive the privilege. *See* Dellwood Farms, Inc. v. Cargill, Inc., 128 F.3d 1122, 1126, 1127 (7th Cir. 1997).

[70] *See In re* Leslie Fay Companies, Inc. Securities Litig., 161 F.R.D. 274, 284 (S.D.N.Y. 1995); Teachers Ins. & Annuity Ass'n of America v. Shamrock Broad. Co., 521 F. Supp. 638, 644–45 (S.D.N.Y. 1981); *In re* M & L Bus. Mach. Co., 161 B.R. 689, 696 (D. Colo. 1993). *See also In re* Natural Gas Commodity Litig., 2005 WL 145666 at *8 (S.D.N.Y. 2005) (stating that the court is "bound by *Steinhardt* until the Second Circuit (or Supreme Court) reverses or otherwise modifies").

[71] *Teachers*, 521 F. Supp. at 646.

[72] *M & L Bus. Mach.*, 161 B.R. at 696.

[73] *See*, *e.g.*, United States v. Bergonzi, 403 F.3d 1048, 1049-50 (9th Cir. 2005) (plaintiff conceded that defendants could use the disclosed materials, making the issue of privilege waiver moot); United States v. Bergonzi, 216 F.R.D. 487, 497 n.10 (N.D. Cal. 2003) (finding no precedent for such an agreement).

[74] *Columbia/HCA*, 293 F.3d at 307 (Boggs, J., dissenting) (emphasis in original).

[75] *See, e.g.*, Rotella v. Wood, 528 U.S. 549, 558 (2000) ("The object of civil RICO is thus not merely to compensate victims but to turn them into prosecutors, 'private attorneys general,' dedicated to eliminating racketeering activity."); Graham County Soil & Water Conservation Dist. v. United States, 125 S.Ct. 2444, 2447 (2005) (holding that the False Claims Act may be enforced by the Attorney General or by private individuals bringing *qui tam* actions in the government's name).

[76] *Columbia/HCA*, 293 F.3d at 309 (Boggs, J., dissenting).

[77] *See In re* LTV Sec. Litig., 89 F.R.D. 595, 621 (N.D. Tex. 1981).

[78] *Columbia/HCA*, 293 F.3d at 309–10 (Boggs, J., dissenting).

[79] *Id.* at 311 (Boggs, J., dissenting).

[80] *Id.*

[81] *See* Upjohn Co. v. United States, 449 U.S. 383, 390–92 (1981) (resolving a circuit split over whether the "control group test" determines when a corporation is entitled to assert the attorney-client privilege).

[82] Seaboard Report at n.3.

[83] Seaboard Report at n.3. *See* Brief of SEC as Amicus Curiae, McKesson HBOC, Inc., No. 99-C-7980-3 (Ga. Ct. App. Filed May 13, 2001).

[84] Securities Fraud Deterrence and Investor Restitution Act of 2004, H.R. 2179, 108th Cong. § 4 (2d Sess. 2004).

[85] Stephen M. Cutler, "Testimony Concerning the Securities Fraud Deterrence and Investor Restitution Act, H.R. 2179," before the House Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises, Committee on Financial Services, June 5, 2003, *available at* <www.sec.gov/news/testimony/060503tssmc.htm>; *see* S. Rep. No. 108-475, at 24-25 (2004) (echoing Director Cutler's statements).

[86] Legislative history obtained from <http://thomas.loc.gov/home/search.html> (accessed September 24, 2005).

[87] *See* 23 Charles Alan Wright & Kenneth W. Graham, Jr., Fed. Prac. & Pro. § 5421, at 648, 652 (1980) (stating that the version of Rule 501 rejected by Congress "ignited a controversy that continues to smoulder. . .because the Advisory Committee chose to make no provision for the application of state privilege law in diversity cases" and that "the controversy over issues of privilege was to be a major factor in the decision of Congress to intervene for the first time in the rulemaking process").

[88] Congress recently launched a similar foray into the regulation of attorney-client relationships by imposing stiffer reporting requirements on attorneys practicing before the SEC. Section 307 of the Sarbanes-Oxley Act directs the SEC to promulgate rules that have resulted in an "up-the-ladder" reporting requirement in the event of a material breach of the securities laws or a breach of fiduciary duty. *See* 15 U.S.C. § 7245; 17 C.F.R. §§ 205 (2005).

[89] *Diversified*, 572 F.2d at 611.

[90] Amending the Federal Rules of Evidence, of course, would only affect enforcement of limited-waiver agreements in federal courts. It would not bind state courts to enforce limited-waiver agreements, since the Federal Rules apply only to proceedings in federal courts. Fed. R. Evid. 101. Most state rules of evidence, however, mirror the Federal Rules of Evidence: as of 2004, forty-one states had adopted various versions of the federal rules as their own evidentiary rules. Michael E. Solimine, *The Future of Parity*, 46 Wm. & Mary L. Rev. 1457, 1488 (2005); *see* 21 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Prac. & Pro., § 5009. Adopting such a Federal Rule of Evidence would encourage states to incorporate the rule's principle by amending their own rules of evidence. Of course, such a state-by-state reform effort would be lengthy, and the desired result of widespread adoption uncertain.

[91] *See In re* Syncor ERISA Litig., 229 F.R.D. 636, 646 (C.D. Cal 2005) (terms of a confidentiality agreement were inconsistent with cases suggesting that limited-waiver agreements were possible, because the agreement required the SEC to keep documents confidential "except as to the extent that the [SEC] determines that disclosure is otherwise required by law or would be in furtherance of the [SEC's] discharge of its duties and responsibilities"); *United States v. Bergonzi*, 216 F.R.D. 487, 496-97, 497 n.10 (N.D. Cal. 2003) ("Although McKesson entered into what it fashions to be confidentiality agreements with the Government entities involved, the agreement made by the Government to keep the documents was not unconditional.") (citing *Massachusetts Inst. of Tech.*, 129 F.3d at 683); *Billmyer*, 57 F.3d at 37 (suggesting that the court would recognize a limited waiver of the attorney-client privilege, depending on the terms of any agreement with the government); *Steinhardt*, 9 F.3d at 236 (same).

[92] *See* note 91, *supra*.

[93] *See* notes 69-70, *supra*, and accompanying text.

[94] Even circuits that follow the strict waiver rule have recognized that opinion work-product deserves protection when disclosure to the government waives the attorney-client privilege. *See Martin Marietta*, 856 F.2d at 625. With that in mind, it is important to approach the government as soon as practicable, before the government is regarded as an "adversary" for purposes of the attorney-work-product doctrine. *But see* Bank of America, N.A. v. Terra Nova Ins. Co., 212 F.R.D. 166, 170 (S.D.N.Y. 2002) (waiver of work-product doctrine extends to potential adversaries).

[95] *See Diversified*, 572 F.2d at 611; *In re* LTV Sec. Litig., 89 F.R.D. at 616.

[96] The commentary to § 8C2.5 of the Sentencing Guidelines conditions the determination of whether a company has "cooperate[d]" in part on the adequacy of the information provided by the company for prosecutorial purposes: "To be thorough, the cooperation should include the disclosure of all pertinent information known by the organization. A prime test of whether the organization has disclosed all pertinent information is whether the information is sufficient for law enforcement personnel to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct." § 8C2.5 commentary n.12. Short of waiving privilege as to communications or work product, providing the government a roadmap may be an option for companies seeking to satisfy this requirement.

[97] *See Westinghouse*, 951 F.2d at 1429.

Supreme Court Preview: Antitrust Scrutiny of Joint Ventures

*By Louis K. Fisher**

Editor's Note: On February 28, 2006, the Supreme Court issued an opinion authored by Justice Thomas and joined by all Justices who participated in the decision. (Justice Alito had joined the Court after oral argument and did not participate.) The Court held that it is not "per se illegal under §1 of the Sherman Act, 15 U. S. C. §1, for a lawful, economically integrated joint venture to set the prices at which the joint venture sells its products." The Court reasoned that although the joint venture's "pricing policy may be price fixing in a literal sense, it is not price fixing in the antitrust sense," because the policy was "little more than price setting by a single entity—albeit within the context of a joint venture—and not a pricing agreement between competing entities with respect to their competing products." The Court also stated that "for the same reasons that per se liability is unwarranted here, we conclude that petitioners cannot be held liable under the quick look doctrine." The Court did not expressly rule out the possibility that the plaintiffs could have raised a "Rule of Reason" challenge (which they had elected to forego), but it emphasized that "[a]s a single entity, a joint venture, like any other firm, must have the discretion to determine the prices of the products that it sells."

One of the most significant business cases that the Supreme Court will hear this term is *Texaco Inc. v. Dagher*,[1] which presents the question whether it can be concerted action which is *per-se* illegal under Section 1 of the Sherman Act[2] for an economically-integrated joint venture to set the selling price of its own products.[3] Section 1 of the Sherman Act provides in pertinent part that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce. . . is declared to be illegal."[4] The Supreme Court, interpreting this language, has held that an agreement between competitors not to compete on price—that is, "price fixing"—violates Section 1 *per se*.[5] But the Court has also held that "this is not a question simply of determining whether two or more potential competitors have literally 'fixed' a price. . . . When two partners set the price of their goods or services they are literally 'price fixing,' but they are not *per se* in violation of the Sherman Act."[6] Even more fundamentally, two nominally-separate entities, such as a parent corporation and its wholly-owned subsidiary, may in certain circumstances be viewed as acting unilaterally, rather than pursuant to a "contract, combination. . .or conspiracy" subject to Section 1 scrutiny.[7] In the *Dagher* case, the Supreme Court will address how these principles apply to the operations of an economically-integrated joint venture through which two erstwhile competitors have merged certain lines of business, but not their entire corporations.

The joint venture at issue, which was formed by Texaco Inc. and Shell Oil Company, is embodied in an entity, called Equilon, that engages in the refining and marketing of gasoline in the western United States. Upon its formation, Texaco and Shell gave the joint venture trademark licenses and assets that included twelve refineries, twenty-three lubricant plants, two research laboratories, 22,000 branded service stations, over 24,000 miles of pipeline, 107 terminals, and approximately 24,000 employees.[8] Texaco and Shell owned Equilon, and shared its profits and losses, according to a fixed percentage based on the relative value of the assets that each had contributed. Texaco and Shell also agreed not to compete with Equilon in refining and marketing gasoline in the United States. Texaco and Shell continued to operate independently in, for example, their production of crude oil, their refining and marketing of gasoline outside the United States, and their chemical, aviation, and marine fuels businesses. After reviewing the transaction, the Federal Trade Commission and the attorneys general of four western states entered consent agreements with Texaco and Shell providing that, in exchange for certain divestitures designed to alleviate competitive concerns, the regulators would not challenge Equilon's formation under the antitrust laws.

A group of service-station dealers who bought gasoline from Equilon filed suit under Section 1 of the Sherman Act, claiming that it was illegal for Equilon to sell Texaco-branded and Shell-branded gasoline at the *same* price in each geographic marketing area. The dealers alleged that before the venture's formation, Texaco generally sold Texaco-branded gasoline to dealers at a slightly lower price than Shell sold Shell-branded gasoline to dealers, although Texaco's and Shell's geographic pricing areas were not the same. In the months after its formation, Equilon integrated the former Texaco and Shell pricing functions, and established the same geographic marketing areas for Texaco-branded and Shell-branded gasoline. Equilon then began charging the same price for Texaco-branded gasoline and Shell-branded gasoline to dealers in the same geographic area. According to undisputed evidence produced by Equilon, this "unification" of the price for Texaco-branded and Shell-branded gasoline was motivated by a desire to avoid the possibility of being sued under the Robinson-Patman Act, which generally makes it unlawful to sell products "of like grade and quality" to different purchasers and "to discriminate in [the] price" charged to each purchaser.[9]

Significantly, the plaintiffs in *Dagher* expressly disavowed any attempt to engage in a full "rule-of-reason" analysis. Rather, they alleged that the challenged conduct was unlawful either *per se* or under the "quick-look" theory. The *per-se* rule applies to certain categories of restraints that the courts have concluded are "plainly anticompetitive" and likely to have no "redeeming virtue."[10] "Quick-look" analysis also allows the plaintiff to avoid a full market analysis, but only where "an observer with even a rudimentary understanding of economics could conclude

that the arrangements in question have an anticompetitive effect on customers and markets."[11]

By disavowing a full "rule-of-reason" analysis, the plaintiffs effectively waived any challenge to the *existence* of a joint venture between Texaco and Shell to produce and sell branded gasoline. A joint venture, like a merger, is "judged under the rule of reason" because it "hold[s] the promise of increasing a firm's efficiency and enabling it to compete more effectively."[12] In *Dagher*, the plaintiffs conceded that Equilon is a potentially procompetitive joint venture, since Texaco and Shell integrated their entire domestic downstream gasoline businesses, with an expectation of efficiency gains amounting to several hundred million dollars per year.

These same efficiencies, combined with Equilon's lack of obvious market power, also make "quick-look" condemnation of Equilon's existence clearly inappropriate. "Quick-look" condemnation might apply, for example, to "a domestic selling arrangement by which, say, Ford and General Motors distributed their automobiles nationally through a single selling agent" (at least under market conditions in 1981, when this example was offered by antitrust's leading commentator).[13] A quick look might suffice in such circumstances because "the judge will know that these two large firms are major factors in the automobile market, that such joint selling would eliminate important price competition between them, that they are quite substantial enough to distribute their products independently, and that one can hardly imagine a pro-competitive justification actually probable in fact or strong enough in principle to make this particular joint selling arrangement 'reasonable' under Sherman Act § 1."[14] But in the case of Equilon, Texaco and Shell, by fully integrating their downstream domestic gasoline businesses, achieved much more substantial, potentially pro-competitive efficiencies than do Ford and General Motors in Professor Areeda's hypothetical.[15]

The competitive effect of Equilon's formation was akin to a merger, and was analyzed as such by the Federal Trade Commission and state attorneys general when they decided to permit the formation after certain divestitures. Mergers are analyzed under the "rule-of-reason" approach, in which the primary consideration is the market power, if any, that the combined entity will possess. And Equilon as formed did not have such market power. Indeed, while the prior governmental review did not preclude the plaintiffs from challenging the venture's existence,[16] it effectively precluded them from challenging Equilon's existence under "quick-look" analysis. Since federal and state regulators engaged in a full economic analysis of Equilon's formation and determined that (with divestitures) no challenge was appropriate, it plainly cannot be said that "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question have an anticompetitive effect on customers and markets."[17] Thus, the plaintiffs eschewed the only level of analysis (full "rule of reason") under which they could possibly have hoped to challenge Equilon's existence itself.

In the decision under review, the Ninth Circuit accepted the validity of Equilon's existence. But a majority of the panel (in an opinion by Judge Stephen Reinhardt) reversed the district court's grant of summary judgment for the defendants. The panel majority concluded that the plaintiffs might be able to prove that the decision to charge the same price for all Equilon gasoline (both Texaco-branded gasoline and Shell-branded gasoline) was *per-se*-illegal price fixing. The majority reasoned that "the issue with respect to legitimate joint ventures is whether the price fixing is 'naked' (in which case the restraint is illegal) or 'ancillary' (in which case it is not)."[18] Whether a restraint is "naked" or "ancillary," the majority continued, "depends first and foremost on a determination of whether the specific restraint is sufficiently important to attaining the lawful objectives of the joint venture that the anti-competitive effects should be disregarded."[19]

Summary judgment was inappropriate, in the majority's view, because "[t]he defendants have thus far failed to offer any explanation of how their unified pricing of the distinct Texaco and Shell brands of gasoline served to further the ventures' legitimate efforts to produce better products or capitalize on efficiencies."[20] In reaching this conclusion, the majority claimed that it "of course recognize[d] that joint ventures may price their products."[21] By way of illustration, the majority stated that its "analysis would be different if" Equilon had "merge[d]" its Texaco and Shell "product lines into one collective brand."[22] Thus, the majority found "it significant that the defendants did not simply consolidate the pricing decisions within the joint venture[]—they *unified* the pricing of the two brands by designating one individual in [the] joint venture to set a single price for both brands."[23] Absent adequate explanation for *not* having made what the majority saw as "the rational decision to sell the different brands at different prices," the pricing of Equilon's own products was *per-se*-illegal price fixing.[24]

The first thing to be said about the Ninth Circuit's decision is that the distinction between *per-se*-illegal price fixing and a joint venture's legitimate pricing of its own products cannot possibly turn on the particular price charged for the products, or on whether the same or different prices are charged for a venture's different brands. From an antitrust perspective, once the pricing function for Equilon's gasoline was consolidated, it made no competitive difference whether Texaco-branded gasoline and Shell-branded gasoline were sold at the same wholesale price, at wholesale prices that differed by the same amount (*e.g.*, two cents or ten cents per gallon) in each pricing period and geographic market, or at wholesale prices that differed by a varying amount in each pricing period and geographic market. Indeed, it would have made no competitive difference if Equilon, instead of selling both Texaco-branded and Shell-branded gasoline, sold only a single brand—which the Ninth Circuit majority expressly recognized would be valid. The majority seemed to think that maintaining two separate brands yet charging the same

price for them was not "rational" and therefore was less likely to serve the efficiency-enhancing goals of the joint venture, as required by the majority's application of the "ancillary-restraint" test. But, as Texaco pointed out in its petition for certiorari, "[h]ow a court could believe itself competent to engage in such analysis [of the rationality of a particular pricing decision] is hard to fathom."[25]

In all events, regardless of whether a particular pricing decision could ever be examined under the "ancillary-restraint" test, Texaco and Shell are correct in arguing that the test does not apply to the *Dagher* case at all. The pricing decisions for a joint venture's own products, and other decisions about how to operate the business that the joint venture was formed to pursue, are *neither* "ancillary" *nor* "naked" restraints of trade.

A "naked" restraint is one where, for example, "in reliance on the existence of a valid joint venture between Coca Cola and Pepsi designed to research new types of soda flavors, the two companies imposed a price floor on all soda sold nationwide."[26] Such a restraint on the pricing of Coca Cola's and Pepsi's *non*-venture products would not be even arguably necessary to achieve the efficiencies of the research joint venture.

An illustration of an ancillary restraint, on the other hand, is where prospective venturers would not be willing to enter into the venture without a distinct agreement not to compete with each other. For example, two companies might not be willing to jointly construct a building for their two stores, thereby effectively committing to operate the stores out of adjoining space, without an agreement that the two stores will not sell competing products.[27] Another type of ancillary restraint occurs when the venture owners' competition with the venture is limited or forbidden, as may be necessary to prevent "free riding" and a corresponding lack of full incentive to contribute to the venture's success.[28] (In fact, Texaco and Shell entered into agreements not to compete with Equilon, and it has never been suggested that these were not legitimate ancillary restraints.) Ancillary restraints escape the *per-se* rule, but they are subject to "rule-of-reason" analysis and so may be struck down if their anticompetitive effects outweigh their enhancement of procompetitive venture efficiencies.

The Supreme Court's decision in *NCAA v. Board of Regents of the University of Oklahoma*[29] involved the type of restraint that, as in the foregoing examples, limited non-venture operations and thus was either naked or ancillary. The Court recognized that some degree of cooperation was necessary for the product—athletic "contests between competing institutions"—"to be available at all."[30] The type of cooperation that created this product, however, did not result in ownership of the product by the NCAA. Accordingly, by limiting the number and price of games that each school could sell for television broadcast, the NCAA was reducing competition among its members outside the joint venture. This restraint was not so obviously unrelated to the NCAA's legitimate collaboration as to be condemned *per se*, but it nevertheless was struck down without a full market analysis because its strong anticompetitive effects clearly outweighed any procompetitive benefits.

None of these examples exploring the naked/ancillary distinction involves decisions about the operation of the business that the venture was formed to pursue. And it is well-recognized that such operational decisions must be made by the joint venture. For example, in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc. (BMI)*,[31] the essential question was whether copyright owners could jointly sell licenses to their copyrights through an industry association marketing a blanket license. Once the Court held that it was permissible to sell a blanket license, it easily concluded that "a necessary consequence of an aggregate license is that its price must be established."[32] No specific showing of "necessity" or "ancillarity" was required to avoid Sherman-Act liability for this operational decision of an otherwise-valid business activity.

Both the plaintiffs and the Ninth Circuit majority have relied heavily on the Supreme Court's decision in *Citizen Publishing Co. v. United States*[33] as supposed authority for holding that the pricing of a joint venture's own products can be unlawful-*per-se* price fixing. In *Citizen Publishing*, two newspapers integrated their production equipment, distribution equipment, circulation departments, and advertising departments, but not their news or editorial departments.[34] Before discussing at length the "failing-firm" defense,[35] the Court stated cursorily that "[t]he § 1 violations are plain beyond peradventure. Price-fixing is illegal *per se*. Pooling of profits pursuant to an inflexible ratio at least reduces incentives to compete for circulation and advertising revenues and runs afoul of the Sherman Act. The agreement not to engage in any other publishing business in Pima County was a division of fields also banned by the Act."[36]

The Court's conclusion in *Citizen Publishing* that the joint venture's pricing of its products could be held unlawful *per se* is attributable to the fact that the Court found the joint venture itself—that is, the "[p]ooling of profits pursuant to an inflexible ratio"—to be unlawful. The newspapers in *Citizen Publishing* apparently were the *only* two competitors in the market,[37] and their efficiency-enhancing integration appears to have been insubstantial. In *Dagher*, by contrast, federal and state regulators concluded that Equilon would not have sufficient market power (post-divestitures) to warrant an objection to its formation, and Texaco and Shell combined their entire domestic downstream gasoline businesses, with estimated annual efficiencies of several hundred million dollars. For these reasons, *Citizen Publishing* easily can be distinguished.

Furthermore, as the Ninth Circuit recognized, subsequent Supreme Court decisions "suggest that the Court, if confronted with a similar joint venture today, might not find the enterprise as a whole unlawful."[38] In particular, the Court in *BMI*[39] and *NCAA*[40] adopted a much more

nuanced approach to joint ventures and associated restraints. *BMI*, for example, upheld a joint venture to sell a blanket copyright license, as well as the venture's setting of the price for that product. Thus, *Citizen Publishing* must be read in light not only of its specific facts but also of the Court's more recent decisions relating to joint ventures. In that light, *Citizen Publishing* has little or no application to the *Dagher* case.

The conclusion that Section 1 cannot interfere with a joint venture's pricing of its own products, or related operational decisions, can be reached in either or both of two related ways. First, such decisions represent unilateral conduct subject only to Section 2 of the Sherman Act, not concerted activity covered by Section 1. (Of course, an agreement between Equilon (or Texaco and Shell) *and Exxon Mobil* about the pricing of Equilon's gasoline would be subject to—and, indeed, *per se* unlawful under—Section 1.). Second, because the formation of Equilon ended all competition between Texaco and Shell in the domestic downstream gasoline market, the pricing of Equilon's products, even when viewed as concerted activity, cannot have had any anticompetitive effect.

The Sherman Act's "basic distinction between concerted and independent action" was emphasized by the Supreme Court in *Copperweld Corp. v. Independence Tube Corp.*,[41] which held that while a parent corporation and its wholly-owned subsidiary are nominally distinct entities, their decisions are not concerted activity covered by Section 1.[42] Once the parent has acquired the subsidiary, such actions do not represent a "merging of resources" that "increases the economic power moving in one particular direction."[43] The Court similarly recognized in *Arizona v. Maricopa County Medical Society*[44] that an economically-integrated joint venture "is regarded as a single firm competing with other sellers in the market," and that "a price-fixing agreement among the [partners] would be perfectly proper."[45] Applying these principles to *Dagher*, the *formation* of Equilon represented a "merging of resources" and is reviewable under Section 1, but the pricing of Equilon's products does not represent any further merging of resources and thus is not concerted action. In other words, "[o]nce a venture is judged to have been lawful at its inception and currently, decisions that do not affect the behavior of the participants in their nonventure business should generally be regarded as those of a single entity rather than the parents' daily conspiracy."[46]

Moreover, even if subject to Section 1, Equilon's pricing decisions cannot possibly violate the statute, because they have no anticompetitive effect. Texaco-branded gasoline sold by Equilon and Shell-branded gasoline sold by Equilon, just like Buick-branded automobiles sold by General Motors and Chevrolet-branded automobiles sold by General Motors, might "compete" in the sense that consumers choose between them. But any such "competition" is not relevant competition under the antitrust laws. Indeed, the profits and losses of Equilon were shared by Texaco and Shell in proportion to the assets contributed by each at the venture's formation, and not in proportion to the relative sales by Equilon of Texaco-branded gasoline and Shell-branded gasoline. The *formation* of that profit-sharing arrangement ended all competition between Texaco and Shell in domestic sales of downstream gasoline (but was justified by the venture's lack of market power and procompetitive efficiencies). The subsequent pricing decisions cannot have had a further anticompetitive effect.

The plaintiffs and their *amici* argue in response that,unlike the parent and subsidiary in *Copperweld*, Texaco and Shell did not have a *complete* unity of interest, and had not ended *all* actual and potential competition among themselves. They point to the fact that as owners of the brand names that were licensed to Equilon and used both inside and outside the venture, Texaco and Shell each had an interest in having Equilon act so as to increase the value of one brand over the other. At the venture's formation, however, Texaco and Shell had agreed to "Brand Management Protocols" that prohibited Equilon from devaluing either brand. The plaintiffs' *amici* seem to suggest the Brand Management Protocols themselves were anticompetitive restraints because they supposedly limited, however slightly, Equilon's ability to maximize its own profits. But that would be relevant, at most, only in analyzing the extent of procompetitive efficiencies generated by Equilon's *formation*; it would not make the pricing of Equilon's products subject to Section 1 scrutiny.

For similar reasons, it is irrelevant that Texaco and Shell continued to compete in non-venture businesses such as aviation fuels, and potentially could compete again in domestic downstream gasoline sales if the venture were unwound. To the extent, if any, that the pricing of Equilon gasoline had a potential effect on competition in the sale of non-gasoline products or in the future sale of branded gasoline, that effect is considered only in the analysis of whether it was valid for Texaco and Shell to *form* Equilon as a joint venture with authority to set prices for gasoline owned and sold by Equilon.

The plaintiffs' speculation about anticompetitive effects and diminished procompetitive efficiencies do not change the conclusion that Equilon's formation could not possibly be held unlawful under Section 1 based on anything other than a full "rule of reason" analysis, which the plaintiffs have disavowed. And, with Equilon's existence not subject to challenge in this case, the plaintiffs' arguments are insufficient to condemn decisions as to the pricing of Equilon's own products. Far from being subject to either a *per-se* rule or "quick-look" analysis, such decisions are not subject to Section 1 at all.

The Supreme Court should hold in *Dagher* at least that a defendant's particular pricing decisions (such as whether to charge the same or different prices for two brands under common control) are irrelevant, and that a valid joint venture's pricing of its own products is neither *per-se*

unlawful nor invalid on a "quick look." While that would be sufficient to reverse the Ninth Circuit's judgment, the Court also should hold that a valid joint venture's pricing of its own products is not concerted action subject to Section 1. Such a holding would provide important guidance to all businesses that have formed or may form efficiency-enhancing joint ventures, which are an increasingly important element of the national economy.

* Louis Fisher is an associate at Jones Day in Washington, D.C. Jones Day represents the petitioner in *Texaco Inc. v. Dagher*, and the author participated in the drafting of the petitioner's briefs. The views expressed herein are solely those of the author.

Footnotes

[1] No. 04-805 (June 27, 2005), *cert. granted.* The case was consolidated for argument with *Shell Oil Company v. Dagher*, No. 04-814 (June 27, 2005), *cert. granted.*

[2] 15 U.S.C. § 1.

[3] An economically-integrated joint venture is a collaboration "in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit." Arizona v. Maricopa Cty. Med. Soc'y, 457 U.S. 332 (1982).

[4] *Id.*

[5] *See, e.g.*, United States v. Trenton Potteries Co., 273 U.S. 392, 397 (1927).

[6] Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 8-9 (1979) (hereinafter, "BMI").

[7] Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769-71 (1984).

[8] Dagher v. Saudi Refining Co., 369 F.3d 1108, 1111 n.3 (9th Cir. 2004). These include both contributions to Equilon, which operated in the western United States, and contributions to Motiva, a separate joint venture that operated in the eastern United States. Motiva is not at issue in the Supreme Court.

[9] 15 U.S.C. § 13(a).

[10] *BMI*, 441 U.S. at 9.

[11] Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770 (1990).

[12] *Copperweld*, 467 U.S. at 768.

[13] Phillip Areeda, The "Rule of Reason" in Antitrust Analysis: General Issues 37-38 (Federal Judicial Center 1981), *quoted in* NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 109 n.39 (1984).

[14] *Id.*

[15] *Cf.* United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964) (recognizing need for full "rule of reason" analysis of joint venture to construct chemical plant).

[16] *See BMI*, 441 U.S. at 13.

[17] *Cal. Dental*, 526 U.S. at 770.

[18] 369 F.3d at 1118.

[19] *Id.* at 1121.

[20] *Id.* at 1122.

[21] *Id.* at 1124.

[22] *Id.*

[23] *Id.* at 1122 (emphasis in original).

[24] *Id.*

[25] Texaco Inc. v. Dagher, No. 04-805, 2004 WL 2912786, at *26 (Dec. 14, 2004), *petition for cert.*.

[26] 369 F.3d at 1118.

[27] *See, e.g.,* Polk Bros., Inc. v. Forest City Enters., Inc., 776 F.2d 185 (7th Cir. 1985).

[28] *See, e.g.*, Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210 (D.C. Cir. 1986).

[29] 468 U.S. 85 (1984).

[30] *Id.* at 101.

[31] 441 U.S. 1 (1979).

[32] *Id.* at 21; *see also* Augusta News Co. v. Hudson News Co., 269 F.3d 41, 48 (1st Cir. 2001) ("a joint venture often entails setting a single price for the joint offering").

[33] 394 U.S. 131 (1969).

[34] *Id.* at 133-34.

[35] *Id.* at 136-39.

[36] *Id.* at 135 (citations omitted).

[37] *Id.* at 133.

[38] 369 F.3d at 1119.

[39] 468 U.S. 85.

[40] 441 U.S. 1.

[41] 467 U.S. 752 (1984).

[42] *Id.* at 767.

[43] *Id.* at 768-69, 771.

[44] 457 U.S. 332 (1982).

[45] *Id.* at 356, 357.

[46] VII Phillip Areeda & Herbert Hovenkamp, Antitrust Law ¶ 1478, at 325 (2003).

Criminal Law and Procedure

Contempt of Court & Broken Windows: Why Ignoring Contempt of Court Severely Undermines Justice, the Rule of Law, and Republican Self-Government

*By Michael Warren**

I. Introduction

Former Mayor Rudolph Giuliani dramatically reduced serious crime in the city of New York by rigorously enforcing what were until then widely considered insignificant criminal laws and ordinances. Under Mayor Giuliani, New York began to enforce long neglected laws against vandalism, graffiti, loitering, underage drinking, public use of intoxicants, public indecency, subway gate jumping, and similar matters. Although many critics demeaned the enforcement of these laws as trivial and unworthy of the resources of the police, when used in conjunction with complementary strategies, the investment paid off handsomely. Overall crime was cut by more than half; murders plunged by over 70 percent; robbery fell by over 60 percent; total violent crimes dropped by over 50 percent; and total property felonies fell over 60 percent.[1] In implementing this policy, Mayor Giuliani relied heavily on a theory originally posited by Harvard political scientists James Q. Wilson and George L. Kelling. In a 1982 Atlantic Monthly article, "Broken Windows," they posited that the failure to address so called petty crimes encourages criminals to engage in more serious felonies, thereby plunging communities into a spiral of urban decay and crime.[2] Broken windows that are not fixed lead to graffiti, which leads to loitering, which leads to prostitution, which leads to drugs, which lead to gangs and even murder.

Although most courts do not need to replace any broken glass, the administration of justice has the equivalent of broken windows—contempt of court. The shards facing the courts mostly involve two major forms of contempt of court—perjury and violations of court orders. The failure to act in the face of clear perjury and blatant violations of court orders seriously impairs the effective administration of justice, denigrates the rule of law, and undermines our republican form of government. Moreover, when contemnors are not held accountable in the halls of justice, they are encouraged to engage in additional misconduct and commit additional crimes.

II. The Dirty Little Secret of Modern Litigation: Rampant Perjury and Disobedience of Court Orders

That perjury is commonplace is the dirty little secret of modern litigation.[3] Seasoned lawyers and judges more than suspect that many litigants sign improper discovery answers, file misleading or false affidavits, provide baseless deposition testimony, and lie under oath at trial. Although people may hear and see events differently, often trial testimony is so diametrically opposed that the only rational explanation for the contradictions is that at least one witness is simply lying under oath. Indeed, at times, the evidence that a witness is committing perjury becomes overwhelming. Real world examples in my own courtroom include, among others, tape recordings of conversations a witness testified never occurred; certified court records of convictions a witness claimed he never possessed; positive drug and alcohol tests results taken immediately after the witnesses swore under oath that they were not under the influence of alcohol or drugs; handwriting expert testimony confirming forgery of documents that the forger testified that he witnessed signed by the opposing party; a counselor who knowingly misrepresented that a treatment facility was a 24 hour secure, "lock-down" placement when a subsequent hearing revealed that all patients were free to leave of their own free will; criminal defendants who testified alternatively that they did, did not, and did commit the charged crimes; testimony by criminal defendants that they had no meaningful legal representation by counsel belied by stacks of legal files and correspondence from the maligned lawyers; and testimony of neutral eyewitnesses of an assault in the courtroom that occurred just minutes before the perpetrator swore under oath that the assault did not occur. Antidotal evidence strongly suggests that my courtroom is hardly unique.

Similarly, disobedience of duly issued orders and judgments is widespread. Many litigants tend to view court orders as all but advisory opinions from which they may pick and choose with what to comply. Most lawyers are familiar with the problematic area of discovery, but other areas appear to suffer from the same epidemic. Violations of child support, spousal support, parenting time, personal protection (restraining), and probation orders are rampant. Many litigants flagrantly disobey the orders of the court. Examples in my court alone include, among others, a woman who purposefully brought the wrong child to a court ordered paternity test; a juror who refused to serve and left the jury room after being directly ordered to remain until the empanelled jury rendered a verdict; a father who conspired with his daughter to violate parenting time orders; a divorcee who violated a court order to evenly divide the proceeds of a land sale by selling the property at a *de minimis* price and keeping the entire proceeds; and the failure of a counselor to notify the court as required by an order when she became aware that a bond condition was violated by her client. Again, the experiences of my brethren reveal that my courtroom is indicative of the broader justice system.

III. No Minor Matter: Exercise of the Contempt Power is Indispensable to the Administration of Justice, the Rule of Law, and the Republican Form of Government

One might be tempted to suggest that these transgressions, even if open and obvious, are too trivial to be worth any significant expenditure of court resources. In fact, the prevailing perspective of many lawyers and judges appears to be that contempt is a fact of life which is overshadowed by the merits of the underlying cases. After all, the underlying cases involve very serious matters such as murder, rape, armed robbery, wrongful death, civil rights, medical malpractice, trade secrets, contracts, divorce, and custody matters. Many reason that the courts' energies should be dedicated to the substantive law for which cases are initiated and defended—not to procedural niceties and court rules. Thus, the use of criminal contempt to punish perjury or blatant violations of court orders appears to be a rare phenomenon.

Yet, a review of first principles reveals that the prevailing perspective is an affront to justice, the rule of law, and republican self-government. Throughout the States and the federal government, the authority of the government has been divided between the legislative, executive, and judicial branches. With regard to the judiciary, its "primary functions. . .are to declare what the law is and to determine the rights of parties conformably thereto."[4] Thus, "[b]y the judicial power of courts is generally understood the power to hear and determine controversies between adverse parties, and questions in litigation."[5] The primary means by which the courts exercise the judicial power is by entering orders and judgments.

From "time immemorial" the judicial power has included the authority to compel compliance with the court's orders and judgments and to punish misconduct that impairs the preservation of order in proceedings.[6] In fact, this power is an essential and necessary part of the constitutional power vested in the courts under the doctrine of separation of powers, which authority may not be infringed or tampered with by either the executive or legislative branches.[7] Indeed, the power of the courts to find parties and litigants in contempt of court *"is as ancient as the courts, and antedates Magna Charta."*[8]

A. Exercise of the Contempt Power is Essential to the Administration of Justice

As an ancient power intrinsic in the nature of courts, the exercise the power of contempt is no trivial matter or simply meant to assuage the personal feelings of judges—it is an indispensable component of the constitutional authority of the court.[9] Thus, the judiciary should be a jealous guardian of the contempt power, as it is inherently necessary to the administration of justice. As the United States Supreme Court has explained, "[i]f a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls 'the judicial power of the United States' would be a mere mockery."[10]

Justice is seriously impaired when those subject to the authority of the court violate the orders or rules of the court and are not held accountable. Of course, the contempt power is to be used sparingly. Nevertheless, when contempt is let alone, contemnors are rewarded for their misconduct, while those who act properly are severely prejudiced. This is especially troubling when perjury or other contempt is obvious and unaddressed. After all, if one can lie under oath with impunity or simply disregard the orders of the court without consequence, then such wrongdoers and others are certainly encouraged to undertake additional misconduct. Such misconduct includes both obvious disdain for the court as well as the subtle circumvention of the oath and court orders.

In fact, much of the gamesmanship in courts today is plainly encouraged by the courts' reluctance to act to punish obvious contempt. After all, if a court is unwilling to act in the face of brazen perjury or violation of court edicts, then the cost-benefit analysis for more clever misconduct is easy, especially when the stakes of modern litigation are so high. In addition, the impotence of the courts in the face of unashamed disobedience instills a strong sense of disillusionment in those who do not engage in such conduct.

B. Contempt of Court is Critical to the Rule of Law and Protecting our Liberties

In a parallel fashion, the exercise of the contempt power is essential to preserving the rule of law and protection of our liberties. In the end, the rule of law is preserved by the courts. The courts render verdicts enforcing the criminal and civil law. Before such verdicts may be rendered, due process requires that certain rules and orders of the court be adhered to. Apparently mundane matters such as scheduling orders, discovery rules, and subpoenas are critical to ensuring that the machinery of justice works toward the final resolution of cases. If the procedural mechanisms of the law are ignored, then justice is impossible to achieve. Furthermore, the courts protect the rights of the people against government oppression by enforcing constitutional rights such as the free exercise of religion, free speech, free press, the right to associate, the bar against quartering troops, the prohibition of the establishment of a government religion, the prohibition of warrantless or unreasonable searches and seizures, the prohibition against cruel and unusual punishment, and the right to bear arms. The courts also defend the integrity of the constitutional and statutory structure of the government by enforcing the separation of powers, checks and balances, federalism (and home rule, in some states), and ensuring that government agencies act in accordance with the law and their duly authorized powers. Likewise, the courts ensure the rendering of justice in private disputes by enforcing contracts, holding tortfeasors accountable, enforcing property rights, and enforcing civil rights and similar legislation.

The power of contempt is the means by which the

court enforces its fundamental authority. Courts have no armies to command and no taxes to raise and spend. In a very fundamental sense, the judicial power *is* the contempt power; and the failure to exercise it becomes a failure of the judiciary.

As the New York Supreme Court has explained, when the courts neglect to invoke the contempt power and allow litigants to lie under oath or violate court orders without consequence, our system of justice and liberties are at grave risk:

> Whenever we subject the established courts of the land to degradation of private prosecution, we subdue their importance and destroy their authority. Instead of being venerable before the public, they become contemptible; and we thereby embolden the licentious to trample upon everything sacred in society, and to overthrow those institutions which have hither-to been deemed the best guardians of civil liberty.[11]

Stated another way, the failure to pursue blatant perjury and clear disobedience of court orders rapidly leads to a wholesale disrespect for the law.[12] After all, if courts are perceived as unwilling to protect the integrity of the legal process in the very courtrooms in which the law is enforced, wrongdoers would seem to have full license to disregard the law on the streets. Why keep your word in a business deal if you face no sanction for lying to a court? Why not forge a signature on a check if a court is unwilling to act on a forged document offered in a case? Why tell the truth to your patients if the court is ambivalent about your lying under oath about your practice in discovery responses? If the very palladium of the law does not concern itself with truth telling and misconduct before it, then we are fools to expect that those inclined to engage in illegal activities would not be encouraged by such infirmity.

C. Contempt of Court is Critical to Maintaining our Republican Form of Self-Government

Another essential, but often overlooked, vital characteristic of the contempt power is the maintaining the republican form of self-government. In America, the people are sovereign. The people have delegated their authority to the three branches of government. Lawmaking is delegated to the State legislatures and Congress. Enforcement and execution of the law is delegated to the governors and President. Ascertaining the law, resolution of legal controversies, and the administration of justice is delegated directly (in States in which judges are entirely elected) or indirectly (such as in the federal system or appointed state systems) to the courts. Hence, the failure to obey the duly executed orders and judgments of the courts, or acts or omissions that impair the orderly administration of justice in those courts, is a direct affront to the republican government. The Colorado Supreme Court has eloquently elaborated:

> It was said in argument by counsel for respondents "that by the common law every judge was regarded as the direct representative of the sovereign, and upon this fiction the power to punish for contempt was based." With us the people have been substituted for the crown. The courts are created by the people, and are dependent upon the popular will for a continuation of the powers granted. They are the people's courts, and contemptuous conduct toward the judges in the discharge of their official duties tending to defeat the administration of justice, is more than an offense against the person of the judge; it is an offense against the people's court, the dignity of which the judge should protect, however willing he may be to forego the private injury.[13]

Put another way, the failure to invoke the power of contempt when appropriate not only undermines the administration of justice and the rule of law, it strikes at the heart of our republican form of government. Judges have been given a sacred trust to ensure that the law established by the duly appointed representatives of the people is appropriately ascertained, applied, and administered. When courts shirk their duty to exercise the power of contempt, they also abandon their sacred trust to ensure that law, not the lawbreakers, prevail. When the law can be flaunted in the people's courts without sanction, then the people's law is no more. Only by appropriately exercising the power of contempt can the judiciary ensure that the law of the people governs.

IV. A Modest Self-Study in the Exercise of the Contempt Power

Those seasoned attorneys well acquainted with the difficulties of invoking the power of contempt might be skeptical as to whether exercising that power is practical and whether its benefits outweigh its costs. Although the procedural and substantive aspects of contempt proceedings are not within the scope of this article, there is no doubt that it is a sophisticated and complicated field of law jam-packed with technical and procedural hurdles ready to trip the inexperienced. Even those well grounded in such matters must exercise special care to successfully avoid the pitfalls.[14] Nevertheless, my short tenure on the bench reveals that thoughtfully attended to contempt proceedings may be undertaken without significant docket disruption and with considerable benefits. Although obviously not encompassing all of the various difficulties, aspects, or approaches regarding contempt proceedings, my experience may be illuminating.

As crimes against the public welfare, whether to pursue criminal contempt is generally a matter for the court.[15] In these instances, the court must consider whether criminal proceedings are a necessary and appropriate means by which to punish potential contemptuous behavior and vindicate the authority of the court.[16] When significant evidence of

criminal contempt is alleged or apparently occurred in my court, I have issued orders to show cause potential contemnors for criminal contempt. Some of these proceedings have been handled by the prosecutor's office. When the prosecutor's office has demurred to prosecute criminal contempt matters, I have invoked the court's inherent constitutional authority to proceed with contempt matters and appointed special prosecutors to handle the matters.[17] These prosecutors are often independent, but on occasion are the counsel for an opposing party in a civil matter.[18] In any event, each of these proceedings has successfully resulted in a guilty verdict—through pleas, pleas taken under advisement, and bench trials.

Furthermore, the actual prosecution of the criminal contempt proceedings generally has taken little time and energy. Like most criminal cases, most of the defendants plead guilty or have pleas taken under advisement. In fact, unlike most other criminal proceedings, the majority of the defendants appear to be genuinely remorseful and embarrassed that their behavior has been uncovered and taken seriously by the court. The few cases that have proceeded to trial are generally no more burdensome than any other misdemeanor criminal trial.

Unlike criminal contempt, civil contempt serves to vindicate the interests of a private party by compelling an opposing party to comply with an order of the court.[19] Thus, such proceedings are generally driven by the actions of the aggrieved party. When parties have satisfied the necessary procedural and substantive requirements, I have issued orders to show cause to potential contemnors for civil contempt and, where appropriate, I have rendered suitable sanctions to compel adherence to the orders of the court. Again, simply the initiation of these proceedings is often sufficient to obtain compliance with the court's orders. Those matters that require more significant proceedings are usually no more troublesome than most other evidentiary hearings the court routinely holds, and often result in the righting of wrongs committed by parties on the court's watch.

One could reasonably ask whether the effort has been worthwhile. While invoking the power of contempt is not a daily experience, it has been important to protecting the integrity of the administration of justice in my court. Apparently word has spread. I have been told by a number of prominent litigators (including the current president of the county bar association) that they are well aware of the criminal contempt prosecutions that have occurred in my court, and that they support the revivification of the oath and the importance of orders. If one believes what they say, the behavior of at least some of the parties before my court has been modified to remove any possible contempt entanglements with the court. In fact, there has been a drop in the number of contempt proceedings in my court over the last few months.

V. Conclusion

The exercise of the power of contempt is indispensable to the administration of justice, maintaining the rule of law, and preserving our republican form of government. As the Michigan Supreme Court has explained, "[i]t is the right and duty of a conscientious court" to exercise the power of contempt when its authority is challenged in an open manner.[20] Indeed, the United States Supreme Court has declared that "there is no more important duty than to render such a decree as would serve to vindicate the jurisdiction and authority of courts to enforce orders and to punish acts of disobedience."[21] Thus, a court should fulfill this duty regardless of how forgiving or reluctant the judge might otherwise be to pursue the matter.

During his confirmation hearings, Chief Justice John Roberts noted that the role of the judge is to call balls and strikes. However, the judge's role is also to ensure that the game is played by the rules—corked bats and greased balls are prohibited in baseball, and civil and criminal contempt of court are barred in legal proceedings. Enforcing the oath and court orders is the only manner in which the rules of the judicial proceedings are appropriately enforced and maintained and the basic underpinnings of our system of justice are preserved.

If the oath means nothing, it should not be given. If court orders are to be ignored, they should not be issued. On the other hand, if the rule of law is to prevail, the oath and orders should be vigorously enforced, and those who breach the same should be held accountable for their misconduct. If litigants understand that they can blatantly lie under oath (even when extrinsic evidence clearly proves the falsity of the statements) and violate court orders without consequence, we only degrade the rule of law. After all, perjury is generally a felony,[22] and in some jurisdictions and circumstances perjury can be a life offense.[23] Indeed, historically taking an oath was a solemn responsibility fundamental to justice and living a just life.[24]

Lies under oath lead to violating court orders; broken court orders lead to more serious crimes. Contemnors are simply emboldened to lie with impunity and to violate the orders of the court without consequence. If the truth does not matter in our courts of law, how can it matter elsewhere? If we will not enforce the law in our own courts, how can we expect that it will be adhered to outside of them? In the end, the courts must stand against contempt of court or stand for nothing at all.

* Michael Warren is a judge on the Oakland County Circuit Court in Michigan.

Footnotes

[1] *See, e.g.*, George L. Kelling and William H. Sousa, Jr., Center for Civic Innovation at the Manhattan Institute, Do Police Matter? An Analysis of the Impact of New York City's Police

Reforms, Civic Report No. 22, p. 1 (December 2001). (In fact, one study concluded that "Over 60,000 violent crimes were prevented from 1989 to 1998 because of 'broken windows' policing." *Id*., Executive Summary. Another authority summarized the prevailing sentiment:

> Under his leadership, a city that had long been regarded as out of control and ungovernable made the most dramatic recovery in the history of urban America. Innovative crime-fighting strategies, soon to become a model for cities around the world, cut crime by more than half, until the FBI recognized New York as the safest large city in America. Times Square itself, long considered a symbol of the city's deterioration, experienced a dramatic rebirth. (Profile: Rudolph Giuliani, Academy of Achievement, http://www.achievement.org/autodoc/page/giu0pro-1).

Even the skeptics acknowledge that crime was reduced significantly. *See, e.g*., D. Francis, National Bureau of Economic Research What Reduced Crime in New York City, ("[b]etween 1990 and 1999, homicide dropped 73 percent, burglary 66 percent, assault 40 percent, robbery 67 percent, and vehicle hoists 73 percent")).

[2] The theory was extensively studied and confirmed in Catherine M. Coles and George L. Kelling, Fixing Broken Windows: Restoring Order and Reducing Crime in our Communities (1996).

[3] Even a cursory review of the local media supports this proposition. *See, e.g*., Cynthia Hubert, *The Truth about Lying*, The Detroit News, November 3, 2005, p E-1, E-5 ("John Mayoue, an Atlanta divorce lawyer who has represented famous clients, including Jane Fonda in her breakup with Ted Turner, says lying is rampant in his business. 'In the courtroom, there is no end to lying, particularly if money is at stake.' Moyoue says, 'The more money, the bigger the lies'); Jeff Plungis, *Honda Witness Destroyed Proof*, The Detroit News, November 4, 2005, p C-1 ("A leading expert witness who has testified on behalf of automakers in vehicle rollover trials destroyed evidence in a high-profile case involving Honda Motor Co. according to a California court ruling unsealed this week"); David Shepardson, *Informant Who Misled FBI, Court Faces Prison,* The Detroit News October 28, 2005, p 5B ("Strong also fabricated evidence which resulted in the arrest and jailing of two individuals for drug trafficking crimes which they did not commit; he fabricated evidence resulting in judges of this court issuing wiretap orders and search warrants," Joseph Allen, a special assistant U.S. attorney, said in a court filing.).

[4] Johnson v. Kramer Bros. Freight Lines, Inc., 357 Mich. 254, 258; (1959), quoting 16 CJS, Constitutional Law § 144, p 687.

[5] Daniels v. People, 6 Mich 381, 388 (1859). Although the citations throughout this article are based on federal and Michigan law (the author's home State), such law appears to prevail throughout the States. *See, e.g*., 17 Am Jur 2d Contempt § 1; 17 C J S Contempt.

[6] *See, e.g*., *In re* Chadwick, 109 Mich. 588, 601; (1896), quoting *Ex Parte Robinson,* 86 U.S. 505, 510 (1973)(the power of contempt is "'essential to the preservation of order in judicial proceedings and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice'"); Nichols v. Judge of Superior Court of Grand Rapids, 130 Mich. 187, 195; (1902).

[7] *See, e.g*., *Ex Parte Robinson, supra* at 510 ("The power to punish for contempts is inherent in all courts"); Langdon v. Judges of Wayne Circuit Courts, 76 Mich. 358, 367 (1889)("Courts of record in this state have inherent power to hear and determine all contempts of court which the superior courts of England had at the common law"); *In re* Dingley, 182 Mich. 44, 50 (1914) ("The right of the court to punish as for a criminal contempt an offender is no longer an open question in this state. . . . The courts possess the power independent of the statute"); People v. Doe, 226 Mich. 19 (1924) (Fellows, J.) ("The power to punish for contempt is inherent in the court. It is a part of the judicial power. It is as firmly vested in the constitutional courts by the Constitution as is the exercise of any other judicial power. That the exercise of the judicial power and all of it cannot be taken away from constitutional courts by the Legislature is settled." [opinion of four justices, affirming by evenly split decision the trial court's exercise of the contempt power]); *In Re* Huff, 352 Mich. 415 (1958)("There is inherent power in the courts, to the full extent that it existed in the courts of England at the common law, independent of, as well as by reason of statute." [citations omitted]); *In re* Contempt of Dougherty, 429 Mich. 81, 92 n14 (1987)("Michigan courts have, as an inherent power, the power at common law to punish all contempts of court."). "Such power, being inherent and a part of the judicial power of constitutional courts, cannot be limited or taken away by act of the legislature nor is it dependent on legislative provision for its validity or procedures to effectuate it." *Huff, supra* at 415-416. Hence, the Legislature, although codifying the processes, procedures, and sanctions applicable for contempt of court, is without authority to prohibit, regulate, or curtail the court's authority to exercise such power. *See, e.g*., *Langdon, supra* at 358 ("Courts of record in this state have inherent power to hear and determine all contempts of court which the superior courts of England had at the common law; and the statute has not undertaken to limit or prohibit their jurisdiction in the matter of contempts. The statutes are in affirmation of the common-law power of courts to punish for contempts, and, while not attempting to curtail the power, they have regulated the mode of proceeding and prescribed what punishment may be inflicted."); *Huff, supra* at 415 ("There is inherent power in the courts, to the full extent that it existed in the courts of England at the common law, independent of, as well as by reason of statute [C.L.1948, § 605.1 *et seq*. (Stat Ann § 27.511 *et seq*.)] which is merely declaratory and in affirmation thereof, to adjudge and punish for contempt, and determination of the issue is not for a jury but the court. Such inherent power extends not only to contempt committed in the presence of the court, but also to constructive contempt arising from refusal of defendant to comply with an order of the court. Such power, being inherent and a part of the judicial power of constitutional courts, cannot be limited or taken away by act of the legislature nor is it dependent on legislative provision for its validity or procedures to effectuate it." [citations omitted]).

The Arkansas and Michigan Supreme Courts have elaborated:

> The legislature may regulate the exercise of, but cannot abridge the express or necessarily implied powers granted to, this court by the constitution. If it could, it might encroach upon both the judicial and executive departments, and draw to itself all the powers of government, and thereby destroy that admirable system of checks and balances to be found in the gigantic framework of both the federal and state institutions, and a favorite theory in the governments of the American people. As far as the act in question goes, in sanctioning the power of the courts to punish as contempts the 'acts' therein enumerated, it is merely declaratory of what the law was before its passage. The prohibitory feature of the act can be regarded as nothing more than the expression of a judicial opinion by the legislature that the courts may exercise and enforce all their constitutional powers, and answer all the useful purposes of their creation, without the necessity of

> punishing as a contempt any matter not enumerated in the act. As such, it is entitled to great respect, but to say that it is absolutely binding upon the courts would be to concede that the courts have no constitutional and inherent power to punish any class of contempts, but that the whole subject is under the control of the legislative department; because, if the general assembly may deprive courts of power to punish one class of contempts, it may go the whole length, and divest them of power to punish any contempt.
>
> (*In re* Chadwick, *supra* at 599-600, quoting State v. Morrill, 16 Ark. 384 (1855)).

[8] *Nichols, supra* at 196.

[9] *See, e.g.*, *Id.* at 193-195.

[10] Gompers v. Bucks Stove & Range Co, 221 U.S. 418, 450 (1911). *See also* Young v. United States *ex rel* Vuitton et Fils S.A., 481 U.S. 787, 796 (1987), quoting *Gompers, supra* at 450.

[11] Yates v. Lansing, 5 Johns. 282 (N.Y. 1810). *See also Ex Parte Gilliand*, 284 Mich. 604, 611 (1939), quoting *Yates, supra*.

[12] *See, e.g.*, *In re* Chadwick, *supra* at 596 ("The power to punish for contempt is inherent in, and as ancient as, courts themselves. It is essential to the proper administration of the law, to enable courts to enforce their orders, judgments, and decrees, and to preserve the confidence and respect of the people, without which the rights of the people cannot be maintained and enforced.").

[13] Cooper v. People, 13 Colo. 373 (1889).

[14] *See, e.g.*, Hon. Michael Warren, Institute for Continuing Legal Education, How-to Kit: How to Obtain an Order for Contempt of Court (2005).

[15] People v. Joseph, 179 N.W.2d 383 (Mich. 1970)("Criminal contempt is a crime and public wrong.").

[16] Criminal contempt proceedings are intended to vindicate the authority of the court by imposing criminal sanctions upon those who violate a court's order or judgment. Like other crimes, criminal contempt proceedings punish past misdeeds that cannot be rectified. *See, e.g.*, *In re* Contempt of Doughtery, *supra* at 93-94.

[17] In the event a prosecutor refuses to prosecute criminal contempt, the court issuing the order to show cause possesses the inherent constitutional authority to appoint a private prosecutor to proceed with the case. *See, e.g.*, *Young, supra* at 796 n 22.

[18] Although federal courts have ruled that under federal law an interested party may not be appointed as the special prosecutor and that a private attorney shall be appointed only after the federal prosecutor has declined to proceed, Michigan law holds to the contrary. *See, e.g.*, *In re* Contempt of Mitan, unpublished opinion of the Court of Appeals, decided September 17, 2002 (Docket Nos. 222230 and 222231), 2002 WL 31082190 at 10.

[19] People v. Goodman, 17 Mich. Ct. App. 175, 177-178 (1969). ("Civil contempt addresses disobedience of a court order by remedying the violation. Civil contempt proceedings are coercive in nature—they attempt to compel the contemnor to obey a prior order or judgment of the court.").

[20] *Ex Parte Gilliland*, 284 Mich. 604, 611 (1938), *cert. den.* 306 U.S. 643 (1939), *reh den* 306 U.S. 643 (1939). *See also Chadwick, supra* at 603, quoting *Yates, supra*; Mundy v. McDonald, 185 N.W. 877 (Mich. 1921) ("The chancellor, in the case of the plaintiff, was bound in duty to imprison and reimprison him, if he considered his conduct as amounting to a contempt of his court. The obligations of his office left him no volition. He was as much bound to punish a contempt committed in his court, as he was bound in any other case to exercise his power.").

[21] *Gompers, supra* at 450.

[22] *See e.g.*, 18 USC 1621 (five year felony); Mich Comp Law 750.422 and 750.423 (fifteen year felony).

[23] *See, e.g.*, Mich Comp Law 750.422 (life offense in the event the perjury is "committed on the trial of an indictment for a capital crime").

[24] At one time the oath was so solemn that St. Thomas More literally became a martyr rather than take an oath he knew would be false. Indeed, the Ten Commandments forbid a person from giving false testimony. *Exodus 20:16.* ("You shall not bear false witness against your neighbor," New American Bible (Catholic); "You shall not give false testimony against your neighbor," The Bible, New International Version; "You shall not bear false witness against your neighbor," The Bible, New American Standard Version; "Thou shalt not bear false witness against thy neighbour," King James Bible). Similar commandments to speak truthfully and not bear false testimony are set forth in the Islamic Qur'an 6.151-53 ("And if you give your word, do it justice, even if a near relative is concerned; and fulfill your obligations before God. Thus does He command you, that you may remember"); the Buddhist Nagrajuna, Precious Garland 8-9 ("Not killing, no longer stealing, forsaking the wives of others, refraining completely from false, divisive, harsh and senseless speech, forsaking covetousness, harmful intent and the views of Nihilists—these are the ten white paths of action, their opposites are black.") and Majjhima Nikaya iii. 251-52 ("What is right speech? Refraining from lying speech, refraining from slanderous speech, refraining from harsh speech, refraining from gossip—this is called right speech."); the Jainist Acarangasutra 2.15 ("The second great vow, Sir, runs thus, I renounce all vices of lying speech arising from anger or greed or fear or mirth. I shall neither myself speak lies, nor cause others to speak lies, nor consent to the speaking of lies by others. I confess."); and the Hindu Laws of Manu 10.63 ("Nonviolence, truthfulness, not stealing, purity, control of the senses—this, in brief, says Manu, is the Dharma for all the four castes."). For concise and informative surveys of such religious principles, *see* Andrew Wilson, World Scripture, The Decalogue, http://www.unification.org/ucbooks/WorldScr/WS-02-03.htm and *Ten Commandments,* From Wikipedia, http://en.wikipedia.org/wiki/Ten_Commandments#Texts_of_the_commandments.

Anticipatory Search Warrants: Constitutional Tools for Fighting Crime

*By Tom Gede and Ronald J. Rychlak**

Judging from the chatter in that portion of the Blogosphere dedicated to law topics, there is general surprise and concern about anticipatory search warrants in general and an expectation that the U.S. Supreme Court will invalidate their viability in the forthcoming decision in *U.S. v. Grubbs*, No. 04-1414. Whether the Court goes so far as to disallow the use of anticipatory search warrants altogether is beyond the predictive capability of the authors, but as the *Grubbs* case is currently positioned, it does not present the question of the general viability of these important tools which have been used to fight crime since the late 1970s.

An anticipatory search warrant is "a warrant based upon an affidavit showing probable cause that at some future time (but not presently) certain evidence of crime will be located at a specified place."[1] Its issuance requires a supporting affidavit alleging facts sufficient to provide a magistrate with probable cause to believe that the contraband will be at the place to be searched at the time of the search.[2] Typically, an anticipatory search warrant is issued in a narcotics or child pornography case involving an anticipated delivery to a certain address of a package known or reasonably believed to contain contraband.[3] The affidavit describes the contents of the package as well as the anticipated delivery time and place ("the triggering event"). Where the crime is either receipt or possession of contraband, the delivery (usually carried out by postal inspectors or agents), as the triggering event, provides sufficient probable cause to justify the execution of the warrant. Such warrants, in the view of many courts, "better serve the objective of the Fourth Amendment by allowing law enforcement agents to obtain a warrant in advance of delivery, rather than forcing them to go to the scene without a warrant and decide for themselves, subject to second-guessing by judicial authorities, whether the facts justify a search."[4] As such, anticipatory search warrants have been approved by many state and federal courts, and they have been written into some state codes.[5]

One of the major practical difficulties that confronts law enforcement officials is the time required to obtain a search warrant. As the Second Circuit has noted: "In many instances, the speed with which government agents are required to act, 'especially when dealing with the furtive and transitory activities of persons who traffic in narcotics,' W. LaFave, Search and Seizure 700 (1978) (citation omitted), demands that they proceed without a warrant or risk losing both criminal and contraband."[6]

Supreme Court Justice Stephen J. Breyer, writing as Chief Judge of the First Circuit, noted that "[i]n principle, the use of a 'triggering event' can help assure that the search takes place *only* when justified by 'probable cause'; and anticipatory warrants may thereby offer greater, not lesser, protection against unreasonable invasion of a citizen's privacy."[7] By this, then-Judge Breyer meant that an anticipatory search warrant may obviate the need for a warrantless search based on "exigent circumstances."[8] As he noted, the "simple fact that a warrant is 'anticipatory'—*i.e.*, that it takes effect, not upon issuance, but at a specified future time— does not invalidate a warrant or make it somehow suspect or legally disfavored."[9] The Constitution only requires that a search must not be "unreasonable," and that warrants must be supported by "probable cause."[10] There is nothing unreasonable, Breyer said, about authorizing "a search for tomorrow, not today, when reliable information indicates that, say, the marijuana will reach the house, not now, but then. Nor does it seem automatically unreasonable to tie the warrant's search authority to the future event that brings with it the probable cause (*e.g.*, the time of 'delivery of a large brown package addressed to X with return address Y')."[11]

The inclusion of a "triggering event" can help assure that the search takes place only when justified by "probable cause," as the magistrate has already determined that *if* and *when* such a triggering event were to occur, probable cause inexorably exists. Thus, it is not surprising that no circuit has invalidated anticipatory search warrants as a tool for police and postal inspectors to effectively enforce the law, though the courts have varied somewhat in the precise requirements for such warrants. The First Circuit rule is that anticipatory search warrants must set forth the conditions to be met and that those conditions must be "explicit, clear, and narrowly drawn."[12] Accordingly, the First Circuit requires that an anticipatory search warrant must, on its face, specifically identify the triggering event in such a way as to leave "as little as possible to the discretion of the agent executing the warrant."[13]

The Second Circuit has held that an anticipatory warrant is valid even though it does not state on its face the conditions precedent for its execution when 1) clear, explicit, and narrowly drawn conditions for the execution of the warrant are contained in the affidavit that is filed along with the warrant application, and 2) those conditions are actually satisfied before the warrant is executed.[14] The Sixth, Seventh, Eighth, and Tenth Circuits have also addressed this issue and adopted identical or similar views.[15] Although some of these circuits have suggested that it would be more "efficient" or preferable for an anticipatory warrant to state on its face the conditions necessary for its execution,[16] none has found the failure to do so to constitute a Fourth Amendment violation.

It is this different approach to the inclusion of the triggering event in the warrant itself that lies at the heart of the *Grubbs* decision. In that case, the defendant/respondent ordered illegal child pornography from a web page that was operated by an undercover United States Postal Inspector. Prior to delivery, federal officials sought an anticipatory search warrant with the triggering event being delivery to Grubbs' home. The triggering event was specified in the affidavit, but it was not included in the warrant.

The district court, relying on earlier circuit precedent,[17] held that the warrant and ensuing search were valid. The error of failing to specify the triggering event in the warrant was cured, held the district court, because it was in the affidavit. The district court concluded that since "the triggering event was specified in the affidavit," "the warrant incorporated the affidavit," and "the warrant and affidavit were. . .in the immediate possession of the officers" while they searched Grubbs' residence, the search was reasonable

and the evidence would be admissible. Grubbs entered a guilty plea, reserving the right to appeal the holding on the warrant.

The Ninth Circuit reversed. It held that that the Fourth Amendment requires that warrants "particularly describe the place to be searched[ ] and the persons or things to be seized." It went on to say that when a warrant that violates this "particularity requirement," and is therefore "facially defective," it can be "cured" by an affidavit that (a) is "sufficiently incorporated" into the warrant and (b) "accompanies" the warrant. A defect in the warrant "is not cured," however, if the affidavit "is not shown to the persons being subjected to the search." As such, the Ninth Circuit held that the particularity requirement of the Fourth Amendment requires the warrant or the accompanying affidavits to specify the triggering event for the search and, contrary to all other circuits, it must be shown to the person whose effects are being searched.[18] Since the officers executing the warrant did not show the affidavit to Grubbs, the defect was not cured, the search was not reasonable, and the evidence should have been suppressed. The rationale for the rule, the court said, is that "a warrant conditioned on a future event presents a potential for abuse above and beyond that which exists in more traditional settings," because, "inevitably, the executing agents are called upon to determine when and where the triggering event specified in the warrant has actually occurred."[19]

As should be obvious, the *Grubbs* case, as it is currently situated before the Supreme Court, does not directly present the general question of the constitutionality of anticipatory search warrants. The petition filed with the Supreme Court by the Solicitor General asks only whether the Fourth Amendment requires suppression of evidence when officers conduct a search under an anticipatory warrant after the warrant's triggering condition is satisfied, but the triggering condition is not set forth either in the warrant itself or in an affidavit that is both incorporated into the warrant and shown to the person whose property is being searched.

The key constitutional argument relates to the particularity requirement of the Fourth Amendment. As the Solicitor General notes, this requirement relates only to the "the place to be searched" and "the persons or things to be seized."[20] Accordingly, the Solicitor General argues that: "while the Fourth Amendment requires that the triggering condition be described in the supporting affidavit, which is made under 'oath' and submitted to the magistrate to establish 'probable cause,' it does not require that the triggering condition be described in the warrant, which must 'particularly describ(e)' only the 'place to be searched' and the 'things to be seized.'"[21]

Analyzing the issues on appeal, it seems that the government has the better case. The triggering condition does not relate to the place to be searched or the object of the search, but only describes the future event that triggers the search. In that way, it is more an aspect of probable cause than a part of the search, to which the particularly requirement actually relates. That the text of the Fourth Amendment does not require warrants to describe particularly matters of timing or conditions.[22] Insofar as any aspect of the Warrant Clause addresses the triggering condition, it is only that the warrant's issuance must be "upon probable cause" and "supported by Oath or affirmation." For that reason, all other circuits to have addressed the issue have held that the Warrant Clause requires only that the triggering condition be described in the supporting affidavit.

In *Grubbs,* the Ninth Circuit held that describing the triggering event in the warrant is the only effective way to safeguard against unreasonable searches and that, if residents were not made aware of the triggering condition at the time of the search, they would stand little chance of policing the officers' conduct. In most cases, of course, those who are subject to a search are in no real position to police the officers' conduct, nor is there any constitutional or legal requirement that those being searched somehow be enabled to police the officers' conduct. In fact, there is no general requirement that the warrant be served at the outset of the search.[23] Accordingly, including the triggering event in the warrant will rarely assist the property owner in policing the search. The best safeguard against unreasonable searches is a motion to suppress (in a criminal case) or a claim for damages (in a civil case), not confronting officers who are poised to execute a warrant.

The Ninth Circuit sought to justify its rule on the ground that anticipatory warrants present a greater potential for abuse than traditional warrants, because the determination of whether the triggering event has occurred will be made by the executing officers. But as then-Judge Breyer wrote, the use of a "triggering event" can help assure that the search takes place only when justified by "probable cause," and anticipatory warrants may thereby offer greater, not lesser, protection against unreasonable invasion of a citizen's privacy.[24]

There are, of course, certain issues that need to be resolved when it comes to the use of anticipatory search warrants. These issues include the situation where an electronic tracking device is placed in the item for delivery,[25] delivery to a P.O. Box rather than a physical location,[26] when and how they go stale,[27] and the application of *Leon's* "good faith" exception in the case of anticipatory search warrants.[28] As a general matter, however, anticipatory search warrants have proven themselves to be effective tools for police investigation, and they protect citizens from unreasonable searches. There is no reason to suppose that the Supreme Court will hold otherwise.

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Footnotes

[1] 2 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 3.7(c), at 398 (4th ed. 2004).

[2] United States v. Ricciardelli, 998 F.2d 8, 11 (1st Cir. 1998).

[3] *See, e.g.*, People v. Kaslowski, 608 N.W.2d 539 (Mich. App. 2000) (marijuana); Rios v. State, 762 N.E.2d 153 (Ind. Ct. App. 2002)

(cocaine); United States v. Hotal, 143 F.3d 1223, 1227 (9th Cir. 1998) (child pornography).

[4] United States v. Santa, 236 F.3d 662, 673 (11th Cir. 2000); *see* United States v. Garcia, 882 F.2d 699, 702-703 (2d Cir. 1989). *See generally* James A. Adams, *Anticipatory Search Warrants: Constitutionality, Requirements, and Scope*, 79 Ky L.J. 681 (1991); John Magee, Case note, Kostelec v. State: *Present Tense Language of Search Warrant Statute Does Not Permit Issuance of Anticipatory Search Warrant Based on Future Evidence of a Criminal Act*, 28 U Balt L.F. 31 (1998); Joshua D. Poyer, Note & Comment, United States v. Miggins: *A Survey of Anticipatory Search Warrants and the Need for Uniformity Among the Circuits*, 58 U Miami L Rev. 701 (2004); Norma Rotunno, Annotation, Validity of Anticipatory Search Warrants-State Cases, 67 A.L.R. 5th 361 (1999).

[5] *See, e.g.*, Pennsylvania Rule of Criminal Procedure 203 (F) ("A search warrant may be issued in anticipation of a prospective event so long as the warrant is based upon an affidavit showing probable case that at some future time, but not presently, certain evidence of a crime will be located as a specified place.").

[6] United States v. Garcia, *supra*, 882 F.2d at 703.

[7] United States v. Gendron, 18 F.3d 955, 965 (1st Cir. 1994).

[8] *Id*., citing Vale v. Louisiana, 399 U.S. 30, 34-35 (1970) and 2 LaFave, *supra*, § 6.5 (2d ed. 1987). Breyer wrote:

> In general, the simple fact that a warrant is "anticipatory"—*i.e*., that it takes effect, not upon issuance, but at a specified future time—does not invalidate a warrant or make it somehow suspect or legally disfavored. Warrants often do specify that they will take effect upon issuance. But the Constitution imposes no such requirement. Rather, it says that a search must not be "unreasonable," and that warrants must be supported by "probable cause." U.S. Const. amend. IV. There is nothing unreasonable about authorizing a search for tomorrow, not today, when reliable information indicates that, say, the marijuana will reach the house, not now, but then. Nor does it seem automatically unreasonable to tie the warrant's search authority to the future event that brings with it the probable cause (*e.g*., the time of "delivery of a large brown package addressed to X with return address Y").

[9] *Id.*

[10] U.S. Const. amend. IV.

[11] *Id*., citing United States v. Ricciardelli, 998 F.2d 8, 10-11 (1st Cir. 1993).

[12] *See* United States v. Gendron, 18 F.3d 955, 965 (1st Cir. 1994) (quoting United States v. Ricciardelli, 998 F.2d 8, 12 (1st Cir. 1993)).

[13] *Ricciardelli*, 998 F.2d at 13.

[14] *See* United States v. Moetamedi, 46 F.3d 225, 229 (2nd Cir.1995).

[15] *See* United States v. Rey, 923 F.2d 1217, 1221 (6th Cir.1991); United States v. Dennis, 115 F.3d 524, 529 (7th Cir.1997) (following *Moetamedi*); United States v. Tagbering, 985 F.2d 946, 950 (8th Cir. 1993); United States v. Hugoboom, 112 F.3d 1081, 1086-87 (10th Cir. 1997) (following *Moetamedi*). As the 10th Circuit wrote in the unpublished *United States v. Vance*, 1999 U.S. App. LEXIS 17788; 1999 Colo. J. C.A.R. 4512 (10th Cir. 1999), a search warrant issued in anticipation of a near-future event is not unconstitutional so long as two general requirements are met: "(1) that it be supported by probable cause and (2) that the warrant or supporting affidavit clearly set out conditions precedent to the warrant's execution." *Id.,* quoting United States v. Rawlings, 145 F.3d 1194, 1201 (10th Cir. 1998); *see also Hugoboom*, 112 F.3d at 1085 (affirming district court's denial of motion to suppress evidence obtained pursuant to anticipatory search warrant issued for controlled delivery of box containing drugs to package's addressee).

[16] *See, e.g., Hugoboom*, 112 F.3d at 1086; *Moetemadi*, 46 F.3d at 229; *Rey*, 923 F.2d at 1221.

[17] United States v. Hotal, 143 F.3d 1223 (9th Cir. 1998).

[18] United States v. Grubbs, 377 F.3d 1072, 1078 (9th Cir. 2004), Reinhardt, J., *cert. granted* 126 S.Ct. 34 (2005) ("we hold that, in order to comply with the Fourth Amendment, an anticipatory search warrant must either on its face or on the face of the accompanying affidavit, clearly, expressly, and narrowly specify the triggering event. The warrant used to search *Hotal's* residence failed to do so—in fact, it failed even to identify that it was an anticipatory search warrant. Accordingly, the evidence seized pursuant to the warrant must be suppressed.")

[19] *Id*. (quoting *Hotal*, 143 F.3d at 1226, in turn quoting *Ricciardelli*, 998 F.2d at 12).

[20] Brief of Solicitor General, *United States v. Grubbs*, No. 04-1414, at 14.

[21] *Id*.

[22] U.S. Const. amend. IV.

[23] Groh v. Ramirez, 540 U.S. 551, 562 n.5 (2004).

[24] United States v. Gendron, 18 F.3d 955, 965 (1st Cir.) (Breyer, C.J.), cert. denied, 513 U.S. 1051 (1994).

[25] *See, e.g.,* United States v. Bender, 265 F.3d 464 (6th Cir. 2001).

[26] *See, e.g., Ricciardelli*, 998 F.2d at 13; United States v. Loy, 191 F3d 360 (3d Cir. 1999).

[27] United States v. Jackson, 55 F3d. 1219 (6th Cir. 1995).

[28] United States v. Loy, 191 F3d at 371. *See* United States v. Leon, 468 U.S. 897, 920-24 (1984).

Environmental Law and Property Rights

The Threatened and Endangered Species Recovery Act of 2005

*By James S. Burling**

I. The Problems with the Endangered Species Act

In its 32 years of existence, the Endangered Species Act (ESA) has not lived up to its billing as America's "premier environmental law."[1] It has had little success at achieving its potential of conserving and recovering species. Unfortunately, it has been more successful at creating deep divisions between landowners and federal regulators. Of the 1,264 species listed under the act as of early 2005, only 10 domestic species have been recovered and delisted.[2] The relationship between the ESA and those recoveries is doubtful, at best.[3] Although there are those who claim great success for the ESA because fewer than 1% of listed species have actually gone extinct,[4] that seems to be a rather defeatist benchmark. Considering the costs the ESA has imposed, one would hope for a more robust measure of success.

And the costs have been enormous.[5] In the period from 1989 to 2000, the United States Fish and Wildlife Service has estimated the costs of the ESA to be $3.5 billion.[6] Others have suggested that these costs are vastly underestimated because the United States Fish and Wildlife Service has ignored costs of administration, costs to other federal agencies, costs backed out when money is spent on both endangered and nonendangered species, and underestimation of actual monies spent.[7] Indeed, in the year 2000 alone, the Property and Economy Research Center estimates total costs to be closer to $2.4 billion than the estimated $610 million.[8] Moreover, in 2001 the Bonneville Power Administration estimated that lost power generation caused by ESA compliance to be $1.7 billion.[9]

In addition, these cost estimates ignore costs to state and local governments such as the costs of Habitat Conservation Plans. Three such plans in California and Texas cost $650 million (San Diego), $45 million (Riverside County for Stephens Kangaroo Rat), and $160 million (Balcones Canyonlands, Texas).[10] Finally, the cost to private landowners in mitigation, unuseable land, and lost opportunity costs are staggering.[11] PERC estimates the annual costs from the listing of one animal: the California gnatcatcher to be $300 million per year,[12] the costs to farmers in the Klamath basin for salmon and other endangered fish to be $54 million in 2001,[13] and the costs of the spotted owl listing in the Pacific Northwest to be 130,000 jobs.[14]

Approximately 75% of all listed species have habitat on private property.[15] But rather than being a fortuitous event, the discovery of an endangered plant or animal on private property is a cause for concern and consternation. "Taking" that species—which could mean anything from killing it to damaging its habitat[16]—may result in substantial fines or incarceration.[17] This has led to the infamous maxim that landowners in pursuit of their own survival will "shoot, shovel, and shut up." More often, landowners will take less drastic, but equally effective means of reducing populations. An example is the red-cockaded woodpecker (RCW), an endangered species that prefers to nest in cavities of mature pine trees. It is at full maturity when the trees are most valuable for harvesting and when these nest-suitable cavities are most likely to form. Not surprisingly, in a study of RCW habitat, it was found that "the closer a landowner is to known populations of RCWs, the more likely the landowner will take action to destroy the habitat for RCWs, primarily by 'prematurely' cutting their pine forest."[18] The authors of this study also cited to the documentation of preemptive habitat destruction, or a "scorched-earth policy," for the golden-cheeked warbler in Texas, the black-capped vireo also in Texas, and the northern spotted owl in the Pacific Northwest.[19]

The problems caused by the ESA for property owners are exacerbated for smaller property owners of modest means. Their problems include the disproportionate costs of obtaining an Incidental Take Permit (ITP) and Habitat Conservation Plan (HCP) and the inability of obtaining a "final" agency decision regarding what can and what cannot be done on a parcel without running afoul of the ESA. This has put landowners to a very uncomfortable choice: they can either attempt to use their property—and run the risk of violating the ESA with its attendant penalties—or expend substantial resources to participate in an HCP or, if appropriate, an ITP. Unfortunately, for the small property owner seeking only a modest use of his property, the costs of such an HCP or ITP may exceed the value of the project or even the property.

For example, Robert Morris sought to cut five trees on his property near Philipsville, California—where removal of the five trees was a permitted use under state law and the only economic value of the property.[20] When the National Marine Fisheries Service indicated that the cutting of these trees *might* violate the ESA by removing shade from the aquatic habitat for endangered salmon, his only option was to seek an HCP—at an estimated cost that exceeded the value of the trees. He filed a claim against the United States for a regulatory taking, but lost on ripeness grounds because he had not applied for permits that he alleged cost more than the underlying property.[21]

Another failing of the ESA is with the designation of critical habitat. "Concurrently" with the listing of a species as threatened or endangered, the Fish and Wildlife Service is required "to the maximum extent prudent and determinable" to designate "critical habitat."[22] For a number of years, the agency was reluctant to do this, both because of costs and limited efficacy. However, in recent years groups such as

the Center for Biological Diversity (CBD) began a litigation campaign to force the designation of critical habitat.[23] In an exercise more akin to spearing fish in a barrel than engaging in cutting-edge litigation, an exercise not coincidentally for which the ESA allows for substantial attorneys fees, CBD has sued repeatedly to force the agency to designate critical habitat, whether or not such habitat is needed.[24] At present, Fish and Wildlife Service's entire management of the ESA is being driven by litigation. To make matters more difficult, in response to lawsuits, the Fish and Wildlife Service began to designate wholesale vast stretches of real estate without adequately determining whether the land was indeed habitat and without doing the prerequisite economic analysis. As a result, property rights oriented industry associations such as ranch and homebuilding entities together with nonprofits such as Pacific Legal Foundation have embarked on a campaign to sue the Fish and Wildlife Service over its hasty and allegedly unlawful critical habitat designations.[25]

For example, when the Fish and Wildlife Service designated over 400,000 acres of critical habitat for the Alameda whipsnake in four California counties, in response to a court challenge, the Agency openly acknowledged it included areas that were not essential to the conservation of the species:

> We recognize that not all parcels within the proposed critical habitat designation will contain the primary constituent elements needed by the whipsnake. Given the short period of time in which we were required to complete this proposed rule, and the lack of fine scale mapping data, we were unable to map critical habitat in sufficient detail to exclude such areas.[26]

The deficiencies did not stop there, however. The Agency also failed to adequately consider the economic impacts of the critical habitat designation. Although the critical habitat included highly populated areas of the State of California in the midst of a housing shortage, and costs associated with critical habitat were estimated at $100 million for the University of California, and a like amount for the mining industry, and state and local agencies identified severe limits that would flow from critical habitat affecting fire and flood protection activities, the Service concluded the designation of critical habitat for the Alameda whipsnake would have no significant economic effect.[27]

Recently, Pacific Legal Foundation attorneys filed suits in federal court challenging the critical habitat designations of 42 species in 42 counties of the State of California, covering almost 1.5 million acres.[28] Each of these designations was promulgated as a result of a court action and suffers from the same deficiencies as the critical habitat for the Alameda whipsnake—the designations are over broad and the economic analyses are inadequate.

Thus, the ESA critical habitat requirement is, at best, inefficient, and, at worst, wasteful, on two fronts. First, according to the very agency tasked with the responsibility for protecting listed species, the designation of critical habitat provides no meaningful protection to the species beyond the protections already provided by other provisions of the Act, such as the Section 9 take provision which prohibits anyone from harming a listed species. This was also the conclusion of the district court in *Home Builders*.[29] And, second, the critical habitat requirement breeds endless litigation that diverts limited resources from true conservation efforts.

The Fish and Wildlife Service agrees. In a Federal Register document related to the designation of critical habitat for the Bull Trout, the Fish and Wildlife Service expressed its frustration:

> In 30 years of implementing the Act (16 U.S.C. 1531 *et seq*.), we have found that the designation of statutory critical habitat provides little additional protection to most listed species, while consuming significant amounts of available conservation resources. Our present system for designating critical habitat has evolved since its original statutory prescription into a process that provides little real conservation benefit, is driven by litigation and the courts rather than biology, limits our ability to fully evaluate the science involved, consumes enormous agency resources, and imposes huge social and economic costs. We believe that additional agency discretion would allow our focus to return to those actions that provide the greatest benefit to the species most in need of protection.
>
> . . . .
>
> We have been inundated with lawsuits regarding critical habitat designation, and we face a growing number of lawsuits challenging critical habitat determinations once they are made. These lawsuits have subjected us to an ever-increasing series of court orders and court-approved settlement agreements, compliance with which now consumes nearly the entire listing program budget. This leaves us with little ability to prioritize our activities to direct scarce listing resources to the listing program actions with the most biologically urgent species conservation needs.[30]

This is no way to run a recovery effort.

The ESA requires that "best available" data be employed in reaching listing and critical habitat decisions.[31] At present, however, both the implementing agencies and the courts have interpreted "best available" to mean any evidence whatsoever. This has resulted in unnecessary listings and overly broad "critical habitat" designations. For example, in a July 15, 1998, study entitled *Babbitt's Big Mistake*, the National Wilderness Institute documented the

following:

> Historically data error has been the most common actual reason for a species to be removed from the endangered species list. Species officially removed because of data error include: the Mexican duck, Santa Barbara song sparrow, Pine Barrens tree frog, Indian flap-shelled turtle, Bahama swallowtail butterfly, purple-spined hedgehog cactus, Tumamock globeberry, spineless hedgehog cactus, McKittrick pennyroyal and cuneate bidens. While officially termed "recovered", the Rydberg milk-vetch and three birds species from Palau owe their delisting to data error (*see* Delisted Species Wrongly Termed Recovered by FWS, p. 16). Many other currently listed species have been determined to be substantially more numerous and to occupy a much larger habitat than believed at the time of listing (*see* Environment International, Conservation Under the Endangered Species Act, 1997).[32]

"Best available" data is often not peer reviewed. Currently, the agencies use peer review on an informal, ad hoc basis. This has proven inadequate as events in the Klamath area have shown. In 2001, the Biological Opinion for the Klamath Project concluded that any water diversions for irrigation purposes would jeopardize listed salmon and sucker fish, although numerous claims were made that the Biological Opinion ignored more reliable data that showed that water diversions would not jeopardize the fish. Based on this conclusion, the Bureau of Reclamation prohibited all water diversions from the Klamath Project to Klamath area farmers who depend on irrigation water from the project. A firestorm of protests followed calling on the Administration to take a closer look at the data for 2002. In response, the Administration subjected the data to "peer review" by the National Academy of Sciences. An expert scientific committee of that body subsequently determined that the 2001 Biological Opinion was faulty because the "best scientific and commercial data" showed that water diversions for irrigation would not jeopardize the listed fish.[33]

This is not the end of the flaws with the implementation of the ESA. From listings based on inadequate, faulty, or biased science[34] to policy driven absurdities[35] the ESA has mutated from America's "premier" environmental statute to the paradigm of what happens when good intentions go bad. It is not illogical to suggest that a regulatory scheme that has been only marginally successful in the recovery of species might have its effectiveness improved if perverse incentives were replaced with positive incentives whereby landowners would have an economic justification for increasing and improving endangered species habitat, where litigation driven "critical habitat" considerations are replaced with efforts at actual recovery.

II. The Threatened and Endangered Species Recovery Act of 2005

The Threatened and Endangered Species Recovery Act of 2005, H.R. 3824 (TESRA), passed by the House of Representatives on September 29, 2005, seeks to change the dynamics of the ESA. In a nutshell, it seeks to refocus the resources of the federal government from a litigation-driven agenda that focuses on critical habitat and other actions of questionable benefit to one where resources are more directly applied to recovery efforts. Moreover, it is designed to enlist the support of property owners by transforming the present adversarial relationship into one of cooperation.

The remainder of this article will focus on the major substantive changes to the ESA found in TESRA, primarily portions of Section 9 (Species Recovery Agreements), Section 12(d) (Written Determination of Compliance), and Section 13 (Private Property Conservation fund).

A. Section 9(c): Species Recovery Agreements and Species Conservation Contracts

Section 9(c) amends Section 5 (16 U.S.C. § 1534) and provides for voluntary species recovery agreements and species conservation agreements. These species recovery agreements of not less than five years will allow property owners to voluntarily work to protect and restore habitat, contribute to the conservation of listed species, and implement a management plan.[36] In exchange for these agreements, the Secretary will make annual payments or provide other compensation. This section will, therefore, enlist the support and cooperation of property owners by making them active partners in the recovery of listed species.

In addition to species recovery agreements, Section 9 also provides for species conservation contracts.[37] This will promote property owners' use of conservation practices for the conservation of species and their habitat. Property owners who enter into long-term contracts of 30 years will be entitled to contract payments equal to the actual costs of the conservation practices; property owners who enter into shorter contracts of 20 or 10 years will be entitled to 80% and 60% of the costs, respectively. This provision will encourage property owners to enter into long-term agreements for the long-term conservation of listed species, but it may discourage shorter-term agreements even if they will help conserve the species and it may, therefore, discourage some property owners altogether from entering into agreements.

It is important to stress that these contracts and agreements will be *voluntary*. New Subsection 5(l)(2)(A) provides, in part, that the Secretary "may not require a person to enter into an agreement under this subsection as a term or condition of any right, privilege, or benefit." By making these agreements strictly voluntary, property owners are much more likely to be enthusiastic and willing partners of the recovery and conservation efforts promoted by this Act.

B. Section 5: Critical Habitat

Section 5 repeals existing provisions providing for the designation of critical habitat. Despite inflated claims of certain professional critical habitat litigation mills, there is no evidence that the designation of any critical habitat has contributed to the recovery of any threatened or endangered species. As in Section I, *supra*, what critical habitat designations have done is make the use of millions of acres of nonfederal land especially difficult, with property owners facing severe risks if they move forward with projects or even if they merely continue a traditional use of their land.

C. Section 12(d): Written Determination of Compliance

Property owners need a meaningful way to determine whether a particular activity on their property *will* or *will not* violate the ESA before they are required to go through the time and expense of seeking an HCP or ITP. Section 12(d) provides such a mechanism. It adds a new subsection 10(k) to 16 U.S.C. § 1539.

Under this section, property owners have the option of applying to the Secretary for a written determination as to whether a particular activity will be in compliance with the ESA. To obtain a determination, property owners must submit a written description of the activity that is lawful under state and local law (including the nature, specific location, lawfulness, and duration), a description of any adverse impact to a listed species that the requestor reasonably expects to occur as a result of the proposed action, and any other information the requestor chooses to include.[38] Upon receipt of a submission with the required information, the Secretary shall, within 180 days, provide the requestor with a written determination of whether the proposed use will comply with Section 9(a) of the ESA.[39] The Secretary may extend this time period by an additional 180 days if seasonal or biological considerations make a determination impossible during the initial 180 days.[40] If the Secretary fails to provide a timely written determination, "the Secretary is deemed to have determined that the proposed use complies with Section (9)(a) [regulating ESA takes.]"[41]

A written determination of compliance will remain effective for 10 years, a default determination of compliance (caused by Secretarial inaction) is effective for 5 years.[42] Requiring the Secretary to adhere to a timetable is especially important so that property owners will not face endless delay—delay that otherwise could last for years. Finally, the Secretary may withdraw a determination if there are changed circumstances.[43]

Under this provision, it is anticipated that the following scenarios may occur:

> 1. A property owner who seeks to cut trees on a certain portion of his property during a certain period of time may request a determination as to whether the activity will violate Section 9(a). By examining the information submitted by the requestor, and any other available information, the Secretary will be able to inform the property owner whether the proposed activity will comply with Section 9(a).
>
> 2. A property owner seeking to develop land that is the potential habitat of a threatened or endangered species will know within six months to a year whether he may proceed without fear of prosecution under the ESA. A written determination of compliance will provide the property owner with a "safe harbor" within which he may proceed, so long as he is in compliance with state and local law.

With this provision, property owners will no longer be kept in eternal limbo, afraid to act and unable to afford a way of determining whether their activities will, in fact, violate the ESA.

D. Section 13: Private Property Conservation

The next most significant provision of the proposal is Section 13, Private Property Conservation. This section, through grants and aid, will foster collaborative efforts between property owners and the federal government.

Section 13 of TESRA amends Section 13(a) of the ESA and establishes that the Secretary may provide conservation grants to promote the "voluntary conservation of endangered and threatened species by the owners of private property."[44] Amended Section 13(b) requires that grants, among other things, "must be designed to directly contribute to the conservation of an endangered species or threatened species by increasing the species numbers and distribution."[45] In addition, amended Subsection 13(c)(i) gives the highest priority to grants that "promote the conservation of endangered species or threatened species while making economically beneficial and productive use of the nonfederal property on which the conservation activities are conducted."[46] This is especially important, because if property owners are able to make economically beneficial use of their property *while at the same time* conserving a threatened or endangered species, the antagonism that currently exists between some property owners and the federal government may be ameliorated. Through the HCP process and other cooperative ventures, property owners have demonstrated their ability and willingness to manage their land uses for species conservation and recovery, especially where compensation and regulatory certainty are provided. This reform may further encourage property owners. For example:

> 1. Grants may be used to develop forestry techniques that preserve habitat while allowing economically productive timber management activities.
>
> 2. Grants may help develop farming techniques that better allow a coexistence between

threatened and endangered species and farming.

3. Grants may help provide ways of addressing mining activities in areas that are the habitat for threatened and endangered species so that mining activities will enhance species habitat through innovative mining and reclamation techniques.

The most critical and, not surprisingly, most controversial element of TESRA is amended Subsection 13(d). That section provides relief to property owners who have been unable to receive a determination under Section 12(d) (amended Subsection 10(k)) that a proposed activity will not violate Section 9(a). Through financial incentives, TESRA converts those property owners into partners for conservation and recovery. If a property owner agrees to forego the use of his property that would result in a violation of Section 9(a), the property owner will be entitled to aid equivalent to the fair market value of the foregone use.[47] In this way, property owners will no longer be forced to bear the entire cost of the preservation of a threatened or endangered species when the conditions that have led to the precarious state of the species are not the result of activities of the property owner. To receive aid, a property owner must first request aid within 180 days of the issuance of a written determination that a proposed use will not comply with Section 9(a) and, second, agree to forego the proposed use.[48] The proposed use must be lawful under state and local law and the property owner must demonstrate that he has the means to undertake the proposed use.[49]

TESRA establishes a procedure for the Secretary and property owner to reach an agreement as to how to document the agreement to forego a proposed use. Such an agreement may be in the form of a contract, lease, deed restrictions, easement, or transfer of title, with a preference for the documentation that has the least impact on private title.[50]

It is important to note that amended Subsection 13(d)(3) makes it clear that if the Secretary can determine that the proposed use would constitute a nuisance under a state's long-standing law of property, then the property owner will not be eligible for aid. Thus,

1. If a property owner proposes to destroy riparian habitat in a manner that is prohibited by a state's law of nuisance and public-trust doctrine, then the property owner will not be entitled to aid;

2. If a property owner seeks to develop property on a steep hillside in a manner that constitutes a nuisance under state law, the property owner will not be entitled to aid;

3. But if a property owner seeks to put his property to a traditional lawful use, such as placing a home on a lot in a residential subdivision, or engaging in normal farming activities, the property owner will be entitled to aid if the owner decides to forego the use.

TESRA also provides a mechanism for determining the value of the foregone use. In an effort to keep the government's liability to a minimum, and the impact on the ownership interests of property owners, TESRA is designed to compensate only for the lost use, not the entire fee of the property owner. In amended Section 13(g), TESRA provides a mechanism for determining the fair market value of the foregone use, as documented per Section 13(f), through the use of licensed appraisers.[51] TESRA follows well-established federal precedents which hold that fair market value is defined as "what a willing buyer would pay in cash to a willing seller." *See, e.g.*, United States v. 564.54 Acres of Land, 441 U.S. 506 (1979). This means what knowledgeable buyers will pay voluntarily for property based on its existing uses and those uses that are reasonably foreseeable in the future. This will not include purely speculative uses that have no basis under current market conditions. Likewise, the existence of state and local regulations is relevant to a determination of fair market value. Thus,

1. A property owner who proposes to engage in a timber harvest in accordance with state and local law will be able to claim reasonably that the fair market value of the use is the reasonably anticipated profit from the harvest after all expenses are accounted for;

2. If a property owner seeks to develop land in a manner that is prohibited by the zoning laws of a local municipality, then that prohibition will affect the determination of fair market value (and may preclude any consideration of aid in the first place). The same considerations would apply if a property owner seeks to harvest timber in a manner prohibited by a State's forestry laws, or seeks to fill tidal wetlands that are protected by a State's public trust doctrine;

3. A property owner who proposes to build a single-family home in accordance with state and local law will be able to claim that the fair market value of that use is the value attributed to a lot by virtue of the ability to build that single-family home. The property owner may not claim that the value of the foregone use includes uses not allowed by state or local law, such as housing that exceeds local density requirements when there is no reasonable chance of obtaining a variance;

4. A property owner who proposes to build a skyscraper in a corn field (assuming such were allowed by local law) will not be able to claim that fair market value of the use includes such an unrealistic and speculative project—and one

that he cannot demonstrate an ability under TESRA's Section 12(d) to undertake in the first place;

5. A property owner who has already agreed to set aside land under an HCP will not be eligible for aid for foregoing a use on the land previously set aside, because any enforceable agreement to set the subject land aside will be accounted for in the fair market value;

6. A property owner seeking aid for foregoing a frivolous use will not gain by this provision as the time and costs of proceeding with administrative process and then gathering adequate evidence of fair market value will likely exceed any aid available for the frivolous use;

7. A property owner who deliberately falsifies data or an estimation of fair market value would be engaging in fraud, actionable under federal law.

E. Other Provisions

Other technical, but potentially quite important, reforms include changes to the way data are collected and used, and the manner in which species are listed.

1. Best Scientific Data

Section 3(a) defines "best available scientific data" to be the data the Secretary deems most accurate, reliable, and relevant. Moreover, this data will be made public for review by affected members of the public. As noted in Part I, *supra*, there have been too many instances where data relied upon by the agency has proven to be unreliable and, remarkably, unavailable to the public for review. For example, in the listing of the California gnatcatcher, the determination that the California gnatcatcher was a separate species from the common Mexican gnatcatcher was a scientifically controversial decision—and one for which the underlying data was unavailable for public review.

The proposed reform requires that the Secretary promulgate regulations that will "establish criteria that must be met to determine which data constitute the best available scientific data."[52] This should help establish minimal standards of reliability for scientific data relied upon by the agencies.

2. Better Supported Listing Decisions

Section 4 requires that the "best available scientific data" be used in listing decisions. Factors to be considered include the inadequacy of existing regulatory mechanisms. This should include private conservation efforts. This provision also refers to "other natural or manmade factors." This would allow the existence of hatcheries and similar programs will be taken into account in a listing decision. One of the problems with some of the salmon listings in the Pacific Northwest is that they failed to include the populations of hatchery salmon.[53] This provision does require that the use of "distinct population segments" be used "only sparingly."

This section also requires that the Secretary conduct, at least once every five years, a review of listed species "based on the information collected for the biennial reports to Congress." The data in these reports, however, can be weak and subjective. It may be more efficacious not to limit the reviews to this data.

3. Posting of Data

Section 6 requires that data supporting a petition to list a species must be provided to the Secretary and must be posted for public review on the Internet. This will avoid the perception that some listing decisions have been based on a paucity of reliable evidence. Advocates of listing a particular species should welcome the opportunity for a full public review and discussion of the data upon which listing petitions are based.

III. Conclusion

Meaningful reform of the ESA has been a long time coming. TESRA stands as a vital first step to reform. While the Senate is presently considering TESRA and similar reform measures, it is doubtful that any reform will be successful unless it enlists the voluntary cooperation of landowners. By making landowners partners in conservation, meaning that property owners have a financial incentive to promote species conservation on their land, the long-term prospects of species recovery will remain clouded.

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Footnotes

[1] This is the de facto appellation given to the Act. *See, e.g.*, Brad Knickerbocker, *A Growing Regional Divide Over Species Act*, Christian Sci. Mon., Oct. 5, 2005, *available at* http://www.csmonitor.com/2005/1005/p02s02-uspo.html.

[2] *Implementation of the Endangered Species Act of 1973*, Report to the Committee on Resources, May 2005, at 7, *reprinted in* Threatened and Endangered Species Recovery Act of 2005, House Report 109-237, at 129 (2005).

[3] *Id.* at 9-16.

[4] *See Regional Divide*, *supra* note 1.

[5] *See Implementation*, *supra* note 2, at 41-57, House Report 109-237, at 163-79 (discussing ESA expenditures).

[6] Randy T. Simons & Kimberly Frost, Property and Economy Research Center (PERC), Accounting for Species: The True Cost of the Endangered Species Act 3 (2004), *available at* http://www.perc.org/perc.php?subsection=10&id=600.

[7] *Id.* at 3-7. *See also Implementation*, *supra* note 2, at 51-53, House Report 109-237, at 173-75.

[8] *Id.* at 7.

[9] *Implementation*, *supra* note 2, at 41, House Report 109-237, at 163.

[10] *Id.* at 9.

[11] *Id.* at 10-11.

[12] *Id.* at 11.

[13] *Id.* at 13.

[14] *Id.* at 14 (citing Press Release, House Committee on Resources, Forest Subcommittee Examines Job Loss in Forest Industry (Feb. 2004)).

[15] *Id.* at 10 (citing Environmental Conservation Online System (ECOS), Threatened and Endangered Species System (TESS): Delisted Species Report, (2004), *available at* http://ecos.fws.gov/tess_public/TESSWebpageDelisted?listings=0).

[16] Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687 (1995) (direct and indirect takes covered by ESA); Palila v. Hawaii Department of Land and Natural Resources, 639 F.2d 495 (9th Cir. 1981) (habitat modification is unlawful take).

[17] 16 U.S.C. § 1540.

[18] Dean Lueck & Jeffrey A. Michael, *Preemptive Habitat Destruction Under the Endangered Species Act* (Apr. 2000), *available at* http://ssrn.com/abstract=223871.

[19] *Id.* at 4.

[20] Morris v. United States, 392 F.3d 1372, 1374 (Fed. Cir. 2004). Mr. Morris was represented by attorneys for Pacific Legal Foundation.

[21] *Id.* at 1376-77.

[22] 16 U.S.C. § 1533.

[23] Peter Aleshire, *A bare-knuckled trio goes after the Forest Service*, High Country News, Mar. 30, 1998, *available at* http://www.hcn.org/servlets/hcn.Article?article_id=4040.

[24] *Id.*

[25] *See, e.g.*, New Mexico Cattle Growers Ass'n v. U.S. Fish & Wildlife Service, 248 F.3d 1277 (10th Cir. 2001) (critical habitat for Southwestern Willow Flycatcher rejected because of failure to adequately consider economic impacts); Home Builders Ass'n of Northern California v. U.S. Fish and Wildlife Service, 268 F. Supp. 2d 1197 (E.D. Cal. 2003) (same for the Alameda whipsnake critical habitat).

[26] 65 Fed. Reg. 58,933, 58,944 (Oct. 3, 2000).

[27] *See* 268 F. Supp. 2d 1197.

[28] Details available on Pacific Legal Foundation's website: www.pacificlegal.org.

[29] *See* 268 F. Supp. 2d 1197.

[30] United States Fish and Wildlife Service, Critical Habitat Listing for the Bull Trout, 69 Fed. Reg. 59,996 (2004).

[31] 16 U.S.C. § 1533(b).

[32] Publications, Studies, Reports, Legislative Briefs *at* http://www.nwi.org.

[33] *See* Press Release, National Academies, Broader Approach Needed for Protection And Recovery of Fish in Klamath River Basin (October 22, 2003)(located at http://www4.nationalacademies.org/news.nsf/isbn/0309090970?OpenDocument).

[34] *See, e.g.*, Endangered Species Committee of Bldg. Industry Ass'n of Southern California v. Babbitt, 852 F. Supp. 32 (D.D.C. 1994)(Secretary of Interior required to make available, as part of rule-making process in which California gnatcatcher designated as threatened species, raw data underlying taxonomist's report on which Secretary's decision was based, where taxonomist reached two different conclusions from same underlying data). *See also* House Resources Committee, Field or Empirical Data Often Proves Original Data Inaccurate (Taken from Recovery Plans), *available as pdf link titled* "Data Errors in the Endangered Species Act", *at* http://resourcescommittee.house.gov/ issues/more/esa/esa.htm.

[35] Alsea Valley Alliance v. Evans, 161 F. Supp. 2d 1154, 1163 (D. Or. 2001), *appeal dismissed*, *sub nom.* Alsea Valley Alliance v. Department of Commerce, 358 F.3d 1181 (9th Cir. 2004) (In a challenge to the listing of a "wild" salmon when there was a huge population of hatchery salmon, the court wrote, "the NMFS listing decision creates the unusual circumstance of two genetically identical coho salmon swimming side-by-side in the same stream, but only one receives ESA protection while the other does not. The distinction is arbitrary.").

[36] H.R. 3824, § 9, amending ESA Section 5.

[37] H.R. 3824, § 9, adding ESA Section 5(m).

[38] H.R. 3824, § 12(d) adding new Section 10(k)(1)-(k)(3).

[39] H.R. 3824, § 12(d) adding new Section 10(k)(5).

[40] H.R. 3824, § 12(d) adding new Section 10(k)(11).

[41] H.R. 3824, § 12(d) adding new Section 10(k)(6).

[42] H.R. 3824, § 12(d) adding new Section 10(k)(9).

[43] H.R. 3824, § 12(d) adding new Section 10(k)(10).

[44] H.R. 3824, § 13, amending ESA Section 13(a).

[45] H.R. 3824, § 13, amending ESA Section 13(b).

[46] *Id.*

[47] H.R. 3824, § 13, amending ESA Section 13(d).

[48] H.R. 3824, § 13, amending ESA Section 13(d)(2)(A)-(B).

[49] H.R. 3824, § 13, amending ESA Section 13(d)(2)(C).

[50] H.R. 3824, § 13, amending ESA Section 13(f).

[51] H.R. 3824, § 13, amending ESA Section 13(g).

[52] H.R. 3824, § 3.

[53] In December, 2005, Pacific Legal Foundation filed suit in Salem, Oregon, over the listing of 14 salmon species that did not account for hatchery populations. *See* www.pacificlegal.org.

New Regulation of Ocean Dumping: Discharged Ballast Water Must Be Clean

*By Joel C. Mandelman**

I. The Invasive Species Problem

Every oil tanker, freighter and cruise ship carries ballast water. A typical oil tanker will carry as much as 20 million gallons of ballast water and a freighter, depending on its size, from 6 to 10 million gallons. As cargo is taken on board an equivalent weight in ballast water must be discharged, so that the vessel remains stable. When cargo is unloaded, the process is reversed. Without ballast water, a ship will become dangerously unstable, unable to operate efficiently and it may even capsize and sink. The preferred place to discharge ballast water is while the vessel is in port.[1] But most nations no longer allow ships to do that. They now require that the ballast water be exchanged, typically 200 miles off shore, before the vessel enters a port. The theory underlying this practice is that the exchanged ballast water is cleaner.[2] Unfortunately, it is usually not appreciably cleaner than the sea-water for which it is exchanged. Such ballast water will probably contain almost as many invasive species by the time the ship reaches port as a ship that never conducted a deep ocean exchange.[3]

All ballast water contains aquatic nuisance species. These species are nature's invisible threat to the environment. They range in size from a single micron *invibrio cholera* or *e. coli bacteria* to visible creatures such as Chinese mitten crab and zebra mussel larvae.[4] Invasive species cause billions of dollars in damage to wetlands, water supplies and to local power plants and waste water treatment systems. The problem is not limited to the United States. Star fish invaded ports in Australia and have caused similar environmental and economic damage. Other invasive species threaten virtually every port, river and lake on which ships sail worldwide.[5] The estimated cost of the damage caused by these species in the United States runs into the billions of dollars annually.[6]

II. Pending Legislation and the IMO Treaty

Both the United States Congress and the United Nations, acting through the International Maritime Organization (IMO), have recognized the magnitude of this problem and are attempting to devise statutory and regulatory abatement remedies.

The regulation of invasive species is one of the few environmental issues where there is little disagreement as to the reality of the problem. Unlike global warming or automobile mileage standards, affected interest groups agree that there is a problem. The shipping industry, the government and environmental groups agree that action must be taken. The disagreement is focused almost exclusively on defining "how clean is clean" and when to mandate the use of ballast water treatment technology.[7] Currently, there is no requirement that ballast water be treated prior to discharge. There is only a Coast Guard "rule" requesting that ballast water be exchanged more than 200 miles off-shore. If the ship's captain is unable to do so, he is supposed to notify the Coast Guard prior to entering the port in which the water will be discharged.[8]

There is wide spread dissatisfaction with the absence of meaningful Coast Guard regulation of the treatment of ballast water prior to its discharge. As a result, several bills are pending in Congress to deal with the problem. The first is the Inouye Stevens Ballast Water Management Act. The Senate Commerce Committee held hearings on that bill, on June 15, 2005. The bill was revised and unanimously approved and reported on July 15, 2005. The Senate Environment & Public Works Committee is also considering the Levin-Collins National Aquatic Invasive Species Act[9] and the House is considering the parallel Gilchrest-Ehlers bill,[10] but hearings have not been scheduled in either chamber. The House Transportation & Infrastructure Committee is now redrafting its own version of a ballast water management bill.[11]

Also under consideration is the International Maritime Organization's International Convention for the Control & Management of Ships' Ballast Water and Sediments, February 16, 2004 (hereafter "the IMO Treaty"), which was ratified by the IMO in February 2004. The Bush Administration is considering whether to submit the Treaty to the Senate for ratification but a decision on that is not expected before 2006. That Treaty is now being analyzed by an inter-agency task force which includes the State, Commerce and Interior Departments in addition to the Navy, the Coast Guard and the Justice Department. The State Department is awaiting receipt of numerous additional enforcement regulations that will implement the IMO Treaty. Until those draft regulations are reviewed it is unlikely that any recommendation will be sent to the President. After those recommendations are reviewed, the President will decide whether to submit the Treaty to the Senate. Of course, passage of any ballast water legislation by Congress would make ratification of the Treaty a moot issue.

A. Federal Litigation

In April 2005, the U.S. District Court in San Francisco ruled that the Environmental Protection Agency (EPA) had violated the National Pollution Discharge Elimination System (NPDES) Permit requirements of the Clean Water Act by failing to regulate ballast water discharges as point source discharges.[12] It has been EPA's position, for more than 30 years, that it had discretion under the Clean Water Act to exempt ships from the NPDES requirements. The Court ruled that such regulation was mandatory. Had the Court's decision been implemented, EPA would have been forced to immediately adopt ballast water treatment regulations, determine the appropriate discharge and treatment requirements and begin testing and certifying ballast water treatment technology. EPA has no funds, no overall policy, no personnel and no testing facilities to carry out a regulatory program that would involve issuing permits, and closely regulating the activities of tens of thousands of ships that enter United States ports annually. As a result, the District Court delayed issuing a final order until November 2005. By that time, one of the pending ballast water bills may have been signed into law, thus making the lawsuit moot.

III. The Treatment Standard: How Clean is Clean Enough?

The first unresolved substantive issue is the mandatory treatment standard. Both bills and the IMO Treaty require that ballast water be cleaned up before being discharged, whether in-port or at-sea, but the question "how clean is clean enough?" remains unanswered.

Many members of the Senate and House, of both parties, have expressed dissatisfaction with he IMO Treaty's performance requirements on the grounds that they are not sufficiently stringent. Many members of Congress have criticized the IMO standards as being too lax and urged adoption of the standards used in the Ballast Water Management Act.[13] The bill's standards are 100 times more stringent than those contained in the IMO Treaty.[14]

If Congress fails to act, by the end of 2006, it is likely that the Coast Guard will issue draft treatment regulations sometime in 2006. It is assumed that the Coast Guard will lean towards adopting the treatment standards at least at the level contained in Regulation D-2 of the pending International Maritime Organization (IMO) Treaty.

Regardless of the treatment standards that are finally adopted, the Coast Guard will still control the certification of equipment as meeting those standards and the Coast Guard will enforce compliance with them. However, the EPA will also have a role in determining "how clean is clean enough."

The essential difference between the version of Levin Collins' NAIS bill (S. 770), the IMO Treaty's Regulation D-2 and the Inouye Stevens bill (S. 363) are clear cut. Both the IMO Treaty and the Inouye Stevens bill require that no more than a specified number of invasive species be allowed in treated ballast water. The IMO standard is that, in most instances, no more than 1 microbe (of any kind) may be contained in 1 cubic meter of treated ballast water. The Inouye Stevens standard is that no more than 0.1 microbes may be found in 10 cubic meters of treated ballast water, a standard 100 times more stringent than the Treaty. Neither the Treaty nor the bill differentiates between types of microbes so 1 bacteria that is only 1 micron in size is not distinguished from a zebra mussel larvae that might be a half inch in size or larger. Differing quantitative standards are used for specified types of colony forming bacteria such as *e. coli* and *invibrio cholera*.

The 2005 NAIS bill uses an entirely different approach. That draft of the NAIS bill contemplates using a Best Available Control Technology standard.[15] This means that the treatment standard could become more stringent every few years. The shipping industry is opposed to this approach because it lacks a specific treatment requirement.

Prior versions of the NAIS bill, introduced in 2000, 2001 and 2003, mandated that 95 percent of the ballast water be exchanged for "clean" ballast water or that 95 percent of the invasive species contained in the original supply of ballast water be killed by whatever treatment technology was used. That approach has now generally been abandoned because deep ocean exchanges frequently remove only 50 percent of the unwanted invasive species and that many of these re-grow prior to the ship reaching port.

Beyond that defect, it would have been exceptionally difficult to enforce. Any percentage reduction standard would require that microbe counts be conducted both before and after each ballast water discharge. This is an expensive and time consuming process that must be done in a well equipped laboratory, not on-board a ship. Second, the underlying theory is absurd and fundamentally flawed. A 95 percent reduction for a vessel carrying ballast water containing 10,000 microbes per cubic meter of water would leave only 500 microbes and result in fairly clean water. But a 95 percent reduction for a vessel carrying ballast water with 1 million microbes per cubic meter would leave 500,000 invasive microbes in each cubic meter of treated water and result in a dangerous quantity that, although "clean" under the NAIS standard, is hardly desirable. For these reasons, the percentage reduction approach has been abandoned.

It is probable that any legislatively mandated treatment standard will initially be the IMO standard which will be ratcheted up to the Inouye Stevens standard after the treatment requirement has been in effect for several years and environmental protection agencies have had the opportunity to analyze its impact on water quality.

IV. Other Unresolved Issues

A. When Should Treatment be Required?

To date, at least 25 companies have registered technology with the International Maritime Organization for future evaluation. Thus, there will likely be effective and affordable treatment on the market in 2006. Therefore, it has been recommended to Congress that the deadline for treating ballast water be moved up. Under that proposal, affected ship owners would have no more than 18 months after the date on which the Coast Guard certified the availability of an effective treatment technology to install it on their ships.

B. Retrofitting Will Save Ship Owners Money

The related issue of retrofitting must also be dealt with. There are now at least 25,000 ships in service world-wide that transport and discharge ballast water. If the requirement that ballast water be treated is limited to ships built after 2009 (and in many cases built after 2016) then there will be 30,000, or more, ships discharging untreated ballast water for another 25 or 30 years all over the world. If affordable technology is available in 2006, that can be installed at a reasonable cost, and with no appreciable down time for the vessel involved, then there is every logical reason to require that all ships—except those that will be scrapped within 5 years—to be retrofitted with treatment equipment.

C. Federal Preemption of State Ballast Water Treatment Laws

Finally, there is the politically sensitive issue of federal preemption. The Chamber of Shipping of America has urged the adoption of an amendment that would make it explicitly clear that the Ballast Water Management Act provided the sole legislative authority for mandating the treatment, and regulating the discharge, of ballast water. This proposal would prevent conflicting regulation of such discharges under the Clean Water Act. That amendment was approved when the Senate Commerce Committee reported the bill on July 15, 2005.

There is substantial support for the proposal among governors of states bordering the Great Lakes. In November 2004, Governor Robert Taft (R-Ohio) wrote to Senator George Voinovich (R-Ohio). Governor Taft sent this letter in his capacity as Chairman of the Council of Great Lakes Governor's. He told Senator Voinovich that, "I encourage Congress to act on the [invasive species issue] because we recognize that a consistent nationwide strategy is more effective than individual state government strategies [in dealing with invasive species]." Governors of other Great Lakes states have expressed similar views.

D. Proving That the Ballast Water Has been Treated

In terms of enforcing the bill's treatment requirements, it is essential that a ship captain's ability to prove to the Coast Guard that the ship has complied with those requirements be temporally and economically feasible. This is especially critical if proof of treatment must be presented each time a ship enters a port and discharges ballast water or has done so inside the Exclusive Economic Zone.

It has been suggested that after the Coast Guard certified that a given technology meets the established treatment standard, that the ship's captain certifying that the approved equipment was in operation for the required time period be accepted as proof of compliance.

Testing for the required level of a TRO is easily performed. Nutech, for example, can provide customers with off-the-shelf, automated equipment that will measure TRO levels as the System is in use. This is less difficult and less time consuming than testing a swimming pool's water for the proper level of chlorine. Use of this testing procedure is not limited to ozone injection treatment technology. This technique should work as well with other biocides producing bio-chemical residuals. *Thus, requiring that the Coast Guard (and EPA) accept TRO levels as proof of compliance would not give Nutech a competitive advantage over other biocide-based technologies*.

Conducting microbe counts, on the other hand, is not a practical or economical means of proving that compliance especially on a multiple trip, or multiple port entry basis. Such counts are very expensive. They require trained, scientific personnel. Expensive laboratory equipment is required. It can take several days to transport ballast water samples from a ship to a laboratory. The microbe count could rapidly increase (or decrease) during shipping, thus providing inaccurate results to an enforcement agency. For all of these reasons, such counts cannot routinely be conducted on board a ship.

Moreover, it is doubtful that taking a few ballast water samples, even from widely dispersed areas of a ballast tank is a statistically accurate method for proving that the ballast water has been treated to a specific microbe per cubic meter of water standard. A typical oil tanker carries 12 to 18 million gallons of ballast water in a ship that has ballast water compartments running the entire length, width and height of a ship that may be 1,000 or more feet long, 125 feet wide and 100 or more feet high. It is highly improbable that a few gallons of water taken randomly from those ballast tanks will be representative of the content of the ship's ballast water. This is especially true since it is practically impossible to take samples from tanks immediately above the bottom of the ship's hull.

While it may be desirable to such sampling annually, or on some other periodic basis, to establish another reference point for gauging the effectiveness of a treatment system, it is not practical to do so during every port entry. Testing has proven that the presence of a Total Residual Oxidant (TRO) is an effective and scientifically accepted methodology for proving that ballast water has been properly treated. This identical methodology has been in use, for decades, to prove that drinking water has been properly chlorinated (or ozonated) pursuant to the Safe Drinking Water Act's Surface Water Treatment Regulations.

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Footnotes

[1] *Id*.

[2] *Id.* and U.S. Coast Guard Advanced Notice of Proposed Rule Making, March 2003.

[3] Jake C. Perrins et al., School of Aquatic & Fishery Sciences, University of Washington, Ozone for Treatment of Marine Ballast Water: Formation & Decay of Total Residual Oxidant; and Adam Jones et al., Dep't of Chemistry & Biochemistry and Center for Marine Science, University of North Carolina-Wilmington Toxicity of Ozonated Seawatrer to Marine Organisms.

[4] *Id*. Pps. 1-10 and Hearings before the Senate Committee on Commerce, Science & Transportation, Subcommittee on National Ocean Policy Study, June 15, 2004, on S. 363, Ballast Water Management Act.

[5] *Id*.

[6] *Id*.

[7] Hearings on S. 363, Ballast Water Management Act, before the Subcommittee on National Ocean Policy Study, Senate Committee on Commerce, Science & Transportation, June 15, 2004.

[8] *See* 33 C.F.R. Part 151, Sub-part C.

[9] S. 770, Introduced on April 13, 2005.

[10] H.R. 1591.

[11] As of August 1, 2005, no other bill has been introduced in the House.

[12] Northwest Ocean Protectors v. Environmental Protection Agency, ___ F. Supp. 2d ___ (N.D. Cal. 2005).

[13] Hearings before House Committee on Transportation & Infrastructure, March 24, 2004 and before the Senate Committee on Commerce, Science & Transportation, June 15, 2005.

[14] *See* S. 363, Ballast Water Management Act, § 1101(f) and Annex 2, Regulation D-2 to the IMO Treaty.

[15] *See* S. 770, National Aquatic Invasive Species Act, §§1101(a)(4) and (b)(3)(A).

Federalism and Separation of Powers

A Court United: A Statement of a Number of Ninth Circuit Judges*

Editor's Note: This article is the second installment of a series entitled "Ninth Circuit Split: Point/Counterpoint." This article is the counterpoint to Judge Diarmuid F. O'Scannlain's previous article in this series that was featured in the October 2005 issue of Engage. Judge O'Scannlain will author a final rebuttal to this article which will be published in the next issue of Engage, scheduled to be released in early Fall of 2006.

Last issue, in this space, our colleague, Judge Diarmuid O'Scannlain, wrote a lengthy article, heavily footnoted and adorned with numerous graphs, arguing that the Ninth Circuit should be split. To those of us who went to college in the early 70s, Judge O'Scannlain's article is reminiscent of a then widely read book titled, appropriately enough, *The Limits to Growth*. The book's authors, writing on behalf of an organization calling itself The Club of Rome, purported to demonstrate that, by the year 2000, the world would run out of land, food and clean drinking water to satisfy the needs of an out-of-control global population. Like Judge O'Scannlain's article, *The Limits to Growth* tried to make its point by the use of graphs, charts and opinions of so-called experts—all leading to the "inevitable" conclusions favored by the book's authors.

The year 2000 has come and gone and we find ourselves in a world much different from that predicted by The Club of Rome and its experts. The book's tone of urgency and inevitability—like that of Judge O'Scannlain's article—was based on false assumptions and selective use of statistics; it painted a distorted picture that ignored the ability of people and institutions to adapt to inevitable changes in a complex world.

Any discussion of splitting the Ninth Circuit must take into account two very important and immutable facts: First, any circuit that includes California will always be the largest circuit in the country, and the one with the greatest caseload. California is our most populous state, boasts the world's fifth largest economy and has the busiest Mexican border crossing point in the country. Appeals from California now number something like eleven thousand a year, accounting for seventy percent of our caseload. Unless California is split between two circuits, the circuit containing it will always dwarf all the others and require a very large number of appellate judges.

All split proposals now on the table, for example, would leave California in the Ninth Circuit, which would be comprised of between twenty-one and twenty-six judges, not many fewer than the twenty-eight now authorized. Even then, the circuit will be under-staffed, so that in a few short years we'll be back up to twenty-eight judges or more. At the same time, the eleven Ninth Circuit judges, like Judge O'Scannlain, who would wind up in the new circuit will see their work cut to a bit more than half. In other words, a substantial number of new judges will have to be added to our circuit so that judges in the new circuit(s) will have the luxury of a reduced caseload.

The second immutable fact that any split proposal must take into account is that the territory of the western states is huge and will always require substantial travel time by both lawyers and judges—whether or not the circuit is split. Any circuit that includes Alaska will, of necessity, have the largest territory. The current split proposal, as approved by the House and endorsed by some Senators, would create a sparsely-populated Twelfth Circuit spanning more than four thousand miles, from the Mexican border in Arizona to the Bering Strait in Alaska. No split will eliminate the need for judges and lawyers to travel across the Pacific for hearings on cases from Hawaii, Guam and Saipan. Rather than traveling to Los Angeles and San Francisco—large hubs, with frequent flights and relatively cheap airfares, where most of our cases are now heard—judges and lawyers from the southern part of the new circuit would have to travel to Seattle, Missoula or Portland for some hearings, while those in the north would sometimes have to travel to Phoenix or Las Vegas. What is now an easy one-hop trip would turn into a travel nightmare for many judges and lawyers. Thus, many of the problems Judge O'Scannlain points out—to the extent they are problems at all—will not be eliminated, and may in fact be exacerbated, by splitting the Ninth Circuit.

The remaining issues do not remotely justify a split. Judge O'Scannlain, for example, points to the number of opinions—about seven hundred—published by the Ninth Circuit each year, and complains about the "daunting task" of keeping track of such a colossal body of caselaw. However, the Eighth Circuit issued even more opinions, and the Seventh Circuit issued only about one hundred fewer, during the same twelve-month period, yet we hear no complaints from the lawyers and judges in those circuits.

* By Chief Judge Mary M. Schroeder and Judges James R. Browning, Alfred T. Goodwin, J. Clifford Wallace, Procter Hug, Jr., Otto R. Skopil, Betty B. Fletcher, Jerome Farris, Harry Pregerson, Warren J. Ferguson, Dorothy W. Nelson, William C. Canby, Jr., Robert Boochever, Stephen Reinhardt, Melvin Brunetti, Alex Kozinski, John T. Noonan, Jr., David R. Thompson, Michael D. Hawkins, A. Wallace Tashima, Sidney R. Thomas, Barry G. Silverman, Susan P. Graber, M. Margaret McKeown, Kim M. Wardlaw, William A. Fletcher, Raymond C. Fisher, Richard A. Paez, Marsha S. Berzon, Johnnie B. Rawlinson, Richard R. Clifton, Consuelo M. Callahan & Carlos T. Bea, all of the Ninth Circuit Court of Appeals.

In reality, this is no more than a debater's point. Lawyers practice in discrete areas of the law and are generally unconcerned with caselaw in other areas; criminal lawyers care not a whit about our antitrust cases, and trademark lawyers seldom read our immigration opinions. The number of opinions any lawyer need worry about is thus far fewer than the seven hundred we issue every year. When it comes to caselaw in their area of expertise, lawyers generally complain that there are too few opinions. Judges, of course, rely on lawyers to bring relevant caselaw to their attention, and have law clerks to help them. We are surprised to learn that Judge O'Scannlain considers this to be a problem, as he always displays a firm command of our circuit's caselaw during case sittings and our internal *en banc* debates.

Then there is the shopworn argument that we are too big to maintain consistency in our caselaw. This supposed problem has been much mooted, and we have spent considerable time and resources trying to track it down. We have invited lawyers to bring inconsistencies to our attention, even if they have no case raising the issue pending before us, and have provided electronic and conventional access points for them to do so. For several years, we maintained a panel of judges and staff charged with identifying caselaw-inconsistencies. We are, each of us, mindful of the need to maintain consistency, and take very seriously any suggestion in a brief or petition for rehearing that our cases on a particular point are in conflict. After many years of devoting time and attention to the issue, we have concluded that conflicts in our caselaw do occur, but they are very rare. And when they are brought to our attention, even on relatively trivial points, we immediately take steps to correct them. The charge that our caselaw is riddled with hidden inconsistencies is simply not true—as demonstrated by the fact that Judge O'Scannlain, who meticulously documents many other propositions in his article, offers not a single example.

Judge O'Scannlain also expresses concern about the fact that we are one of the slowest among the circuits in disposing of our cases. But size bears no relation to the speed with which a court decides cases, as is borne out by the fact that the First Circuit, though the smallest, with only six judges, is not nearly the fastest circuit. The mix of cases and the number of judicial vacancies are what make a difference; they bear directly on how many cases the court can decide in a given period.

At this time and for some years past, the Ninth Circuit has had four vacancies, accounting for some fourteen percent of its authorized positions; within the recent past we had as many as ten vacancies, more than a third of our positions. The delay in filling vacancies has, not surprisingly, caused delay in getting cases to the judges, pushing our average case disposition time approximately four months above the national average. However, what Judge O'Scannlain fails to mention is that, once the cases are submitted to the judges, we are the second-fastest among the circuits in disposing of them. If size were the dispositive factor, one would expect our court to be dead last. In fact, quite the opposite is the case; once our judges receive the cases, we are unusually fast in deciding them. When our court is fully staffed, the delay in deciding cases will be eliminated; size has nothing to do with it.

Then there is the bugaboo about collegiality, and the supposed absence of it on a large court. Collegiality is an elusive concept and few judges or lay people agree about what it means. One common meaning concerns the ability of judges to get along with each other on friendly terms—enjoying an atmosphere of bonhomie and mutual respect. In that sense, we consider ourselves as collegial as any other court, far more than many. Though we often disagree, we seldom engage in the kind of ad hominem attacks that some other courts are known for. And, whatever our differences, we have not resorted to publicly impugning each other's integrity, or filing charges of misconduct, as has happened in other circuits and state supreme courts, all of them much smaller than ours. Though we have very different views on a variety of matters, including whether our court should be divided, our disagreements are highly professional, never mean-spirited or personal. Indeed, among the reasons we oppose the split is the sad prospect of losing our excellent working relationship with some of our colleagues, like Judge O'Scannlain.

Judge O'Scannlain also seems to say that we lack collegiality in the sense that we can't gain insight into each other's thinking processes, and this prevents us from reaching consensus in difficult cases. The quaint notion that judges on a small court engage in a Vulcan mind meld where they come to assimilate each other's points of view is easily disproved. One need only consider the Rehnquist Court, where the same nine justices worked together for eleven years straight. Were Judge O'Scannlain's theory correct, one would expect that, by the end of that period, disagreements among the justices would have been rare and unanimous opinions the rule. As we know, the opposite is true; differences that existed at the beginning of that period remained—and often grew more pronounced—by the end.

The simple reality of modern appellate judging is that we do not spend endless hours in face-to-face debate trying to hammer out a mutually acceptable solution. Rather, conferences tend to be short; few minds get changed there. The real debate on hard cases takes the form of inter-office memos, and in majority and separate opinions, where judges articulate their views precisely and at length. We all read these memos and opinions, and gain a fairly accurate insight into each other's thinking; sometimes we reach consensus, sometimes we don't. But there is absolutely no evidence that judges who spend more quality time together end up agreeing more often. Indeed, experience teaches that on smaller courts, where judges are forced to deal with each other constantly, acrimony and disagreement may be more common.

Nor is our use of visiting judges remarkably high, as Judge O'Scannlain suggests. During the past year, only 3.4 percent of our cases included the use of such judges, below the national average of 5.1 percent and well below the 11

percent in the Second Circuit and 22.5 percent in the Sixth Circuit. Again there is no relationship between a circuit's size and its use of visiting judges.

Our colleague also disparages our limited *en banc* process, which calls for a panel of fifteen judges (formerly eleven) to decide cases taken *en banc* by vote of the full court. He overlooks the fact that splitting the circuit will not resolve this problem, for the same reason it will not resolve many of the other issues he raises. Under any of the pending split proposals, the remaining Ninth Circuit would have at least twenty-one authorized positions, far too large for a viable all-hands *en banc* panel; this is just two short of the number of judges we had when we first adopted the limited *en banc* process in 1980. Whether or not the circuit is split, the great majority of the circuit's cases will continue to be decided by a court where a limited *en banc* is the only workable procedure. Moreover, as other circuits are now approaching twenty judges, it is only a matter of time before they too will have to adopt this procedure.

There is nothing sinister or illegitimate about a limited *en banc* court. Traditionally, *en banc* meant hearing by the full court, but this practice arose in an era when circuits were small and a full-court *en banc* was not a problem. Nothing about *en banc* consideration requires the participation of the full court. Having circuit law made by a limited *en banc* court, which consists entirely of the court's active judges, is certainly no less legitimate than the widespread practice of making circuit law by three-judge panels consisting of a single active judge, a senior judge and a judge visiting from another court.

Cases are taken *en banc* largely for two reasons: First, there is a conflict in the law of the circuit which cannot be resolved by a three-judge panel because such panels have no authority to overrule circuit precedent. And, second, because the case is one of exceptional importance, it merits consideration by more than three judges. Neither of these functions requires the participation of every single judge of the court of appeals. A limited *en banc* court, consisting of a representative portion of the full complement of judges, ensures that all competing views will be considered and reflected in majority, concurring and dissenting opinions. And, because the judges are drawn randomly for *en banc* panels, the results will be the same as would be reached by the full court in the overwhelming number of cases. Since eighty-five percent of our *en banc* cases have been decided by seven-to-four or greater majorities, it is the rare case that would have been decided differently by a full-court *en banc*.

Finally, Judge O'Scannlain relies on history, but history cuts largely against him. To begin with, the redrawing of circuit lines—at least as to modern circuits—has occurred very rarely, and never over the opposition of the affected judges. Judge O'Scannlain's reference to the frequent redrawing of circuit borders prior to the Civil War era is entirely beside the point. While circuits existed from the early days of the Republic, they meant something very different from what they do today because there were no circuit judges and no permanent courts of appeals. Rather, until late in the 19th century, Supreme Court justices rode circuit, and heard appeals on panels consisting of themselves and local district judges. Thus, a change in circuit boundaries affected only what geographic area a particular justice would be required to patrol.

The circuits as we know them were first created in 1891 when Congress established the courts of appeals. Since that time, Congress has been chary about re-drawing circuit lines, and has done so only twice—when it split off the Tenth Circuit from the Eighth in 1929, and then, again, in 1981, when it divided the Fifth Circuit to create the Eleventh Circuit. In both instances, the split enjoyed the support of the affected courts, because the circuits could be divided into units of roughly equal size in terms of territory and caseload. For reasons already explained, this is impossible to do in the Ninth Circuit.

By contrast, the overwhelming number of Ninth Circuit judges have repeatedly and consistently opposed a split; only three active judges support it. Split opponents include judges appointed by Republican and Democratic presidents; judges appointed as early as 1961 and as late as 2003; judges from California, Arizona, Nevada, Oregon, Washington, Hawaii and Montana; active and senior judges; men and women. Neither ideology nor personal convenience animates this opposition; indeed, personal convenience for many of us points the other way. Our opposition, rather, stems from a firm conviction, based on our collective experience, that splitting the Ninth Circuit is a very bad idea for the public we serve.

Aside from the weakness of the arguments supporting the split, we see some very potent arguments militating against it. Because of our size, we have been both required and enabled to work smarter and become more productive. To ensure consistency in our caselaw, we have implemented a case monitoring and issue-spotting system that alerts panels to other pending cases raising the same legal issues. We have a pre-publication report that digests upcoming cases and alerts our judges before opinions are actually published; on numerous occasions, this has resulted in halting publication of opinions because of a previously-unidentified conflict. We were the first circuit to institute a Bankruptcy Appellate Panel, which now hears five hundred appeals a year, easing caseload pressure for our district judges. We have an active appellate mediation program that resolves one thousand cases a year. We are the only circuit with an appellate commissioner, who resolves over eleven hundred fee applications and four thousand motions a year; the appellate commissioner has helped resolve these matters more quickly and consistently than before, gaining the unanimous acclaim of our bar. Long before anyone had heard of the Internet, we pioneered the use of e-mail for the conduct of court business. We have also made active use of tele-conferencing for motions, screening and administrative work. These procedures have saved our judges many days of travel every year. The White Commission, which studied the operations of the circuit courts, noted in its 1998 report that the Ninth Circuit was well run and remarked on the

court's many innovative procedures. It concluded that "[s]plitting the Ninth Circuit itself would be impractical and is unnecessary. As an administrative entity, the circuit should be preserved without statutory change."

Only forty years ago, every circuit had fewer than ten judges; today, only one circuit, the First, does. Every other circuit now has more judges than the Ninth Circuit had in 1965. It will be no more than a generation or two until other circuits are as large as we are today. The idea of splitting circuits in order to keep the number of appellate judges small is a pipe dream. How, for example, could one profitably split the Fifth Circuit—which now has seventeen judges—without splitting Texas? Or the Second Circuit without splitting New York? And what will the repeated splitting do to the burden on the Supreme Court in resolving inter-circuit conflicts? Soon, probably very soon, other circuits will find themselves in the situation in which the Ninth Circuit finds itself today, and they will have no choice but to adapt, as we have. Our innovations will provide valuable experience about how to deal with the inevitable problem of size.

In addition, by aggregating its resources, a large circuit can provide to districts with smaller caseloads significant assistance that would not otherwise be available, such as courthouse design and maintenance, human resource consulting and technology support. Through close communication among the district courts, the Ninth Circuit has been able to supply visiting district judges when a region experiences unexpected vacancies or a surge in case filings. These reasons, among many others, are why numerous bar associations including those of Arizona, Washington, Montana and Hawaii oppose a split of the Ninth Circuit.

We also believe that splitting the Ninth Circuit will have another important, though subtle, deleterious effect. While district courts have traditionally been considered local in character, circuits have been national or at least regional. It has been a strength of the federal appellate courts that their judges hail from several states, thus bringing to bear a wider perspective than their district court colleagues. Having several states in the same circuit also ensures that a multitude of senators are involved in vetting judicial appointments to the courts of appeals. Thus, no circuit today—save the D.C. Circuit, which is sui generis—comprises fewer than three states. Splitting the Ninth Circuit will break with this important tradition; under the legislation that is currently under consideration, the new Ninth Circuit would consist of only two states—California and Hawaii. Because of California's hugely disproportionate size, the overwhelming number of the new Ninth Circuit's judges will be appointed from California. This will change the regional and national character of our court and turn it, in effect, into a California Federal Court of Appeals. Once the three-state precedent is cast aside, it will not be too long before we have a Texas Federal Court of Appeals, a New York Federal Court of Appeals and perhaps a Florida or Illinois court as well. We believe this course is neither wise nor prudent, as we have found that a diversity of experiences and viewpoints, brought to us by judges from a multitude of states and geographic regions, has had a positive and invigorating influence on our decision-making process. The principle of the regional federal circuits is important and should not be lightly discarded.

We do not dispute that the increase in the federal caseload, and the appellate caseload in particular, presents a serious challenge to the orderly administration of justice. We do disagree, however, with those who would answer this challenge by breaking up what we consider to be an effective, well-organized and efficiently-run organization. Splitting the Ninth Circuit would be a costly enterprise, estimated by the Administrative Office of the United States Courts at some $96 million, plus additional costs of $16 million a year for operating two circuits rather than one. At a time of budget austerity, it seems wasteful and counterproductive to spend that kind of money for a net loss in efficiency.

There are, indeed, measures Congress might consider to deal with our caseload problem. In addition to adequately staffing our court by filling vacancies, Congress might look to the reasons for the increase in appellate caseloads. For example, we and the Second Circuit have suffered a huge number of filings (some six thousand cases in our court) in immigration cases. This has come as a direct result of what is known as "streamlining" on the part of the Board of Immigration Appeals, which has recently released thousands of cases from its docket after giving them only cursory review. These cases have found their way into the federal courts of appeals, and our court and the Second Circuit are the ones most directly affected by this practice. While this problem may be only temporary, Congress may well want to consider providing a more effective administrative appeal process.

Finally, we oppose the proposed split of the Ninth Circuit to the extent it is motivated by partisan political considerations or unhappiness with some of our decisions. In this regard, we are confident that we speak not just for ourselves, but also for those judges who favor a split. Whatever our other disagreements, we are united in our view that whether to split the Ninth Circuit should be governed by the kind of administrative and efficiency issues we have discussed in these pages, and not by a desire to punish our court for its decisions.

In sum, we believe the case for splitting the circuit has not been made. Yes, we are big and our territory is wide, but we have shown that we can function effectively and efficiently despite—indeed because of—our size. Large organizations, whether they be corporations or courts, profit from economies of scale. We have made size our friend rather than our enemy; other courts of appeals will have no choice but to follow suit, because in one generation, two at the most, they will be where we are today. Which is why the overwhelming number of judges of the Ninth Circuit, and the lawyers who practice before us—the people who know the most about the court's operation—strongly oppose the split. The time has come to put this bad idea behind us and get on with the business of administering justice.

The Structural Constitution and the Rehnquist Court

*By Eric R. Claeys**

Most retrospectives about the Rehnquist Court frame its legacy in terms of a debate between "the living Constitution" and the "original Constitution." This contrast captures an important and rich debate on the Rehnquist Court. Chief Justice William Rehnquist, after all, created a name for himself by railing early in his judicial career against "the notion of a living Constitution."[1] Thus, some retrospectives aggressively criticize the Rehnquist Court for straying from the living Constitution and mistakenly trying to return to the dead, original Constitution.[2] Others portray the Rehnquist Court as a seesaw struggle between the living and original Constitutions, in which some of the Court's more conservative members surprise all by embracing moderation and preserving the living Constitution.[3]

Although all of these portraits are accurate to an extent, they obscure many important details that provide an ultimately more satisfying explication of the Rehnquist Court's work. In this essay, I mean to focus on the differences among the members of the Rehnquist Court's 5-vote moderate-to-conservative majority. One gap relates to Justices O'Connor and Kennedy. Previous retrospectives have (correctly) identified them as conservative and (again correctly) somewhat less conservative than the Chief Justice and Justices Scalia and Thomas. However, these retrospectives have not satisfactorily explained how closely Justices O'Connor and Kennedy have followed the conventional wisdom emanating from Supreme Court precedent and the legal academy over the last half-century. The other difference is between Justices Thomas and Scalia. In most retrospectives, Justices Scalia and Thomas are lumped together as the Rehnquist Court's two most extreme conservatives; in a few, Justice Thomas is blithely dismissed as a second-rate imitator of Justice Scalia. In reality, each represents in fairly pure form one important tendency of "judicial conservatism" as it has been understood since the Warren Court. These tendencies and their differences need to be explored in greater detail—especially because the Roberts Court seems to be slightly more conservative than the Rehnquist Court.

To demonstrate these suggestions, I will focus in particular on case examples from the non-delegation doctrine and Commerce Clause federalism. I will give a brief survey of the main highlights of twentieth-century constitutional development, accentuating especially the emergence of modern judicial conservatism, and then situate each of the Rehnquist Court's conservatives within that course of development. I will conclude with some brief observations about the Roberts Court.

Many of the deepest transformations in American constitutionalism—including in federalism and separation of powers—started in the academy between roughly 1880 and 1920. Although this period is not understood nearly as well as it deserves to be,[4] a few broad themes suffice for our purposes here. Leading academics in political and social sciences developed a new and (in their view, at least) more rigorous understanding of the scientific study of human behavior. In this understanding, political reality was understood not to be organized around higher-law principles, as previous generations had assumed, but rather around forces like "progress," "evolution," "society," or "the will of the American people." These background assumptions encouraged theorists to speak for the first time of a "living Constitution;" Woodrow Wilson, for one, frequently described the Constitution as a social entity, the "the charter of a living government" and "the vehicle of a nation's life."[5]

Theorists who subscribed to the new "living Constitution" political science also tended to conclude that the American constitutional order needed to be revised substantially to accommodate more interventionist regulation. In structural constitutionalism, they concluded that Congress's powers needed to reach deeper into local affairs, and they also concluded that Congress needed to assign broader regulatory powers to apolitical agencies similar to the civil services in European bureaucracies.[6] In part, these prescriptions were influenced by academics' "living Constitution" political theory. In federalism, some academics believed that the American people's will was more representative and less parochial than the wills of the peoples of the several states. In separation of powers, they believed that bureaucratic government would help specialize both politics—the process of identifying the popular will—and administration—the rational implementation of that will. Separately, however, some academics insisted that these changes would have desirable policy consequences, on the ground that larger and more centralized national government would more efficiently satisfy the desires of American voters.

That general architecture took hold in American law and political practice during the New Deal, as these theorists' students took positions of prominence in the Roosevelt Administration. In seminal federalism and separation of powers cases, the New Deal Court upheld many New Deal agencies from Commerce Clause and separation of powers challenges. At the same time, the Court used legal logic slightly different from Progressive political-theory arguments. To be sure, in many cases, the Court used Progressive efficiency-based policy arguments to uphold new schemes from challenge. But the New Deal Court downplayed heavily talk of a "living Constitution." Indeed, some Justices claimed that the original meaning of the Constitution *encourages* Congress to construe its powers vigorously, and that federal courts had engaged in improper judicial activism by suggesting otherwise; Robert Jackson even wrote a book demonstrating this thesis.[7] No case illustrates both sides of the trend better than the 1942 case of *Wickard v. Filburn*, which cemented the New Deal transformation of the Commerce Clause into place.[8] Justice Jackson started his analysis of the Commerce Clause with an appeal to originalist authority: "At the beginning Chief Justice Marshall described the Federal commerce power with a breadth never yet exceeded."[9] He ended it with an appeal to political-science comparative institutional analysis: "The conflicts of economic interest between the regulated and those who advantage by it are wisely left under our system to resolution by the Congress under its more flexible and responsible legislative process. Such conflicts rarely lend themselves to judicial determination. And with the wisdom,

workability, or fairness, of the plan of regulation we have nothing to do."[10]

During the Warren Court, the Court lost interest in structural constitutional law and property cases and focused instead on racial equality, the rights of criminal defendants, free speech, and individual privacy. That shift forced the New Deal's constitutional settlement to fracture. The "conservative" wing of the Warren Court consisted of New Deal liberals who, mindful of the crisis of 1937, never again wanted to see courts substituting their policy expertise for that of legislators. The "progressive" wing of the Warren Court, by contrast, assumed that the Court could intervene to do good in individual-rights law as long as it left alone the New Deal settlement of structural constitutional law and property rights. That wing, led by Chief Justice Warren and Justice Brennan, made the notion of a "living Constitution" respectable in legal argument and used it as a standard around which federal courts could rally to rectify violations of privacy and equality.

But also during the Warren Court, political conservatives began to develop their own brand of judicial conservatism, substantially different from the conservatism of "go slow" New Deal liberals like Justice Frankfurter. Substantial segments of the American populace objected to the Warren Court's forays into school busing, criminal law-enforcement, and state and local morals legislation. Richard Nixon and subsequent Republican presidential nominees used these issues to distinguish the Republican Party from the cultural liberalism of the Democratic Party. Nixon and subsequent nominees used the term "strict construction" as a signal that they would nominate judges who would not engage in the kinds of interpretive and enforcement practices associated with the Warren Court.[11]

However, it is one thing to bash "living Constitutionalism" and tout "strict construction" in a set campaign speech, and quite another to develop coherent theories of constitutional interpretation and judicial behavior around those themes. In many important respects, this effort has been a work in progress among judicial conservatives for more than 40 years. Nixon's appointees to the Burger Court highlighted a few early problems. For one thing, many Republican lawyers were then (and still are now) culturally more liberal than the religious voters and grass-roots activists who favor strict constructionism. For another, Nixon tended to favor sitting judges and practitioners. Whatever their virtues, judges and practitioners tend not to be theoretical, as one would need to be to develop a program of constitutional interpretation outside the mainstream of two generations of legal development. But other problems have surfaced even among more theoretically oriented lawyers. Some prominent judicial conservatives understand "judicial conservatism" to require judges to follow the original meaning of the Constitution; others understand the project to require judges to develop rules that maximize the policy-making power of the political branches and minimize the policy-making power of judges. (Gary Lawson has explained this tension in a clear and mercifully short essay.[12]).

This quick survey helps situate the different conservatives on the Rehnquist Court. Consider first Justices O'Connor and Kennedy. They are best understood as holdovers from the Burger Court. Both were successful and accomplished lawyers. Both were loyal and politically active Republicans. Neither had time or inclination during their professional careers to test out different theories of constitutional interpretation to a degree that would satisfy serious intellectuals or constitutional scholars. As Mark Tushnet has perceptively noted, in the culture wars associated with the Warren Court, both sympathized more with "establishment" Republicans (who tended to support some measure of federal-court intervention) and not "grass-roots" and "movement" Republicans (who opposed federal courts more vigorously).[13] Both were politically conservative enough to break from the accumulated wisdom of the New Deal and Warren Courts to reflect the new conservative leanings the American populace started to reflect in the late 1970s. At the same time, both bought into most of the substantive and interpretive commitments locked into the Court's precedent, and both therefore wanted to preserve the old while making space for the new.

Justices O'Connor and Kennedy illustrate these tendencies in the Rehnquist Court's separation of powers and federalism cases. As I have explained elsewhere, separation of powers may be the biggest *non*-event during the Rehnquist Court. The Burger Court left the Rehnquist Court with several excellent originalist precedents to use in separation of powers, and the Rehnquist Court limited most of them substantially.[14] Justices O'Connor and Kennedy's substantive commitments go a long way in explaining why. For all intents and purposes, they subscribed to the same theory of bureaucratic government as leading Progressives and New Dealers. To take one of many examples, in one routine non-delegation case, Justice O'Connor reaffirmed for a unanimous Rehnquist Court "our longstanding principle that so long as Congress provides an administrative agency with standards guiding its actions such that a court could ascertain whether the will of Congress has been obeyed, no delegation of legislative authority trenching on the principle of separation of powers has occurred."[15] Here, Justice O'Connor accepted as conventional wisdom the view that modern political life would descend into anarchy unless federal courts enforced the non-delegation doctrine extremely permissively.

The same tendencies also limited the scope of the Rehnquist Court's New Federalism, as I am explaining in scholarship to be published shortly.[16] Even in *United States v. López*, the case that launched the New Federalism and resuscitated the Commerce Clause, Justice Kennedy wrote a separate opinion (joined by Justice O'Connor), warning that *López*'s holding, while "necessary," was "limited."[17] He assumed that Congress may "regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy."[18] Here, Justice Kennedy assumed as conventional wisdom that modern political life would descend into anarchy unless Congress can regulate manufacturing and agriculture on the same terms as interstate trade; he also casually assumed that the views of "we" the American people *must* take priority over the voices of 50 parochial state "we's." Kennedy's substantive attachments help explain why he switched votes from *López* to *Gonzales v. Raich*, the June 2005 decision in which he sided with the Rehnquist Court's liberals to reject a *López* challenge to a federal prosecution of two Californians who were home-growing marijuana.[19]

More intriguing, in the last five years of the Rehnquist Court, Justices Thomas and Scalia have parted in subtle but

unmistakable and important ways. Justices Thomas and Scalia are staking out differences about how post-1960 "judicial conservatism" should be understood. Justice Scalia stands for the "minimalists," the conservatives who believe that the Warren Court's main sin was to usurp control over legislative policy-making. Justice Thomas, by contrast, stands for the "originalists," the conservatives who believe that the Warren Court's main sin was to disregard the original meaning of the Constitution.

Even if Justice Scalia's and Justice Thomas's preferences dovetail in most cases, they do not always dovetail, especially not in the most revealing cases. The non-delegation doctrine highlights the difference. For a minimalist like Justice Scalia, the constitutional language "legislative powers" is too open-ended a phrase to generate a manageable, bright-line rule. Thus, in the 1989 non-delegation case of *Mistretta v. United States*, Justice Scalia agreed not to enforce the non-delegation doctrine—even though he conceded that the Constitution requires it—because he regarded the doctrine as "not. . .readily enforceable by the courts."[20] By contrast, the originalist Justice Thomas wondered, in the 2001 non-delegation case *Whitman v. American Trucking Ass'ns*, whether a century's worth of "delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers."[21]

The same tension explains why Justices Scalia and Thomas split in the 2005 Commerce Clause decision of *Gonzales v. Raich.* As fellow judicial conservatives, they agree that if the federal government has constitutional power to prosecute the growing of marijuana, that power comes from the Necessary and Proper Clause, "which the founding generation called the Sweeping Clause,"[22] and not the Commerce Clause. Both agree that "commerce among the several states" refers to interstate trade and therefore excludes the growing of a crop in a state. But they disagree whether the federal government may limit the growing of marijuana as a "necessary and proper" adjunct to its power to control interstate trade in marijuana. As I have explained elsewhere,[23] in *Raich,* Justice Scalia preferred, for good minimalist reasons, to leave Congress to decide what was "proper;"[24] Justice Thomas, for good originalist reasons, insisted that the term "proper" requires federal courts to review whether acts of Congress remain faithful to the "'letter and spirit' of, the Constitution," including Article I's broad substantive divisions between enumerated federal and reserved state powers.[25]

And what about Chief Justice Rehnquist himself? Surprisingly, he was more enigmatic as Chief Justice of the Rehnquist Court than he was as an Associate Justice on the Burger Court. On the Burger Court, he developed a reputation as a "Lone Ranger" who broke from two generations of accumulated conventional legal wisdom. As Chief Justice, however, Rehnquist often submerged his own individual views for the corporate views of the Court or the faction of the Court he led.

These tendencies come out in Rehnquist's cases on non-delegation and the Commerce Clause. As for the Commerce Clause, in the 1981 case *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, then-Justice Rehnquist caustically observed that "one could easily get the sense from this Court's [Commerce Clause] opinions that the federal system exists only at the sufferance of Congress."[26] Here, Rehnquist found some traction when he took over as Chief Justice. In *Lopez*, he found four willing contributors to a project to resuscitate the Commerce Clause, and he relied substantially on the argument he had developed in *Hodel* to read the Commerce Clause more narrowly than at any time since 1937.[27] By contrast, Rehnquist never tried as Chief Justice to resuscitate the non-delegation doctrine. This comes as a surprise after the 1980 *The Benzene Cases*, in which Rehnquist cited John Locke's *Second Treatise* to argue for resuscitating the non-delegation doctrine.[28] As Chief Justice, Rehnquist never renewed this argument; he instead joined many lopsided and unanimous or near-unanimous opinions brusquely rejecting non-delegation challenges.

Not only are these portraits important for understanding the Rehnquist Court, but they also help to highlight important features and trends leading into the Roberts Court. For one thing, they help explain how far the center of gravity has shifted within the Republican Party and within the ranks of lawyers and politicians who help Republican Presidents pick Supreme Court nominees. Judged by the standards of 1970, Justices O'Connor and Kennedy were par for the course—if anything, they had stronger paper credentials and seemed more conservative than most of President Nixon's nominees. Both, however, would attract considerable criticism if nominated in today's climate. The best confirmation of this shift, of course, is President Bush's abortive attempt to nominate Harriet Miers to replace Justice O'Connor. Miers' nomination collapsed for a variety of reasons. Her paper credentials were unusually thin, she did not impress Senators in face-to-face meetings, and (probably the clincher) she had given speeches in 1993 suggesting that she was pro-choice. All the same, her nomination would not have seemed nearly as surprising or disappointing in the climate of Republican conservatism in 1970 as it did in the climate of 2005. Social conservatives and "movement" legal conservatives have developed a considerably more sophisticated and focused understanding of their commitments and priorities in 35 years.

Two of those conservatives, of course, are new Chief Justice John Roberts and Associate Justice Samuel Alito. As of now, most Rehnquist Court retrospectives—indeed, most constitutional scholarship—lack the tools needed to appreciate the subtle differences between a Roberts or an Alito and the conservatives on the Rehnquist Court. The portrait presented here, however, highlights some of the questions to ask: How do Roberts and Alito understand precedent? What is the first instinct of each when presented with an open-ended constitutional clause, like the Legislative Vesting Clause or the Sweeping Clause? Around 1960, when New Deal judicial liberalism fractured, Court watchers needed to develop a new tool kit to appreciate the differences between different species of judicial liberals. Today, Court watchers may need to develop a similar set of questions to ask of modern-day judicial conservatives.

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Footnotes

[1] William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

[2] *See, e.g.*, Cass R. Sunstein, Radicals in Robes: Why Extreme Right-Wing Courts Are Wrong for America (Basic Books, 2005); The Rehnquist Court: Judicial Activism on the Right (Herman Schwartz ed., 2002).

[3] *See, e.g.*, Thomas M. Keck, The Most Activist Supreme Court in History: The Road to Modern Judicial Conservatism (University Of Chicago Press 2004); Tinsley E. Yarbrough, The Rehnquist Court and the Constitution, (Oxford University Press 2000); James F. Simon, The Center Holds: The Power Struggle Inside the Rehnquist Court (1995).

[4] For helpful studies, consider G. Edward White, The Constitution and the New Deal (2000); Dennis J. Mahoney, Politics and Progress: The Emergence of American Political Science (2004); David M. Ricci, The Tragedy of Political Science: Politics, Scholarship, and Democracy (1984); Edward A. Purcell, Jr., The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value (1973).

[5] Woodrow Wilson, Constitutional Government in the United States 167 (1908).

[6] I develop these themes at greater length in Eric R. Claeys, *The National Regulatory State in Progressive Political Theory and Twentieth-Century Constitutional Law*, *in* Modern America and the Legacy of the Founding (Ronald J. Pestritto & Thomas G. West eds., forthcoming 2006) (manuscript on file with author).

[7] *See* Robert H. Jackson, The Struggle for Judicial Supremacy: A Study of a Crisis in American Power Politics (1941).

[8] Wickard v. Filburn, 317 U.S. 111 (1942).

[9] *Id.* at 120.

[10] *Id.* at 129 (footnote omitted).

[11] *See, e.g.*, *Vice President Gore and Governor Bush Participate in Presidential Debate* (Oct. 3, 2000), http://www.cnn.com/ELECTION/2000/debates/transcripts/u221003.html.

[12] Gary Lawson, *Conservative or Constitutionalist?*, 1 Geo. J.L. & Pub. Pol'y 81 (2002).

[13] *See* Mark Tushnet, A Court Divided: The Rehnquist Court and the Future of Constitutional Law 49–70 (W.W. Norton & Company 2005).

[14] *See* Eric R. Claeys, *Progressive Political Theory and Separation of Powers on the Burger and Rehnquist Courts*, 21 Const. Comment. 405 (2004).

[15] Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 218 (1989) (citation and internal quotation marks omitted).

[16] Eric R. Claeys, Sabri, Lane, *and* Raich: *The Progressive Limits on the Rehnquist Court's Federalism Revival* (forthcoming 2006) (unpublished manuscript, on file with author).

[17] United States v. López, 514 U.S. 549, 568 (1995) (Kennedy, J., concurring).

[18] *Id.* at 574.

[19] Gonzales v. Raich, 125 S. Ct. 2195 (2005).

[20] Mistretta v. United States, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting).

[21] Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 487 (2001) (Thomas, J., concurring).

[22] Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, 1234 (1994).

[23] *See* Eric R. Claeys, Raich *and Judicial Conservatism at the Close of the Rehnquist Court*, 9 Lewis & Clark L. Rev. 791, 812–15 (2005).

[24] *Raich*, 125 S. Ct. at 2219–20 (Scalia, J., concurring in the judgment).

[25] *Id.* at 2233 (Thomas, J., dissenting) (quoting McCulloch v. Maryland, 31 U.S. (4 Wheat.) 316, 421 (1819)).

[26] Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 308 (1981) (Rehnquist, J., concurring in the judgment).

[27] *Compare id.* at 309 (citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)), *with López*, 514 U.S. at 556–57 (same).

[28] *See* Industrial Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 672–73 (1980) (Rehnquist, J., concurring in the judgment) (quoting John Locke, Second Treatise of Civil Government ¶ 141, at 244 (M. Mayer ed., 1957)).

FINANCIAL SERVICES AND E-COMMERCE

BASEL II IMPLEMENTATION: RUSHING TO A FALSE START

*BY CHARLES M. MILLER**

For the past decade, a conference of banking supervisors from nations around the world that meets regularly in Basel, Switzerland (and thus has been informally referred to as the Basel Committee) has been formulating an extensive system drastically altering how national supervisors will evaluate banks. Because it follows an earlier system devised by the same group, the new system is called Basel II. Basel II is coming to the forefront as regulators begin the domestic rulemaking processes needed to implement the accord. As this process moves forward, the shape and identity of Basel II changes. Indeed, there are serious questions whether Basel II will be implemented at all. Because Basel II developments and changes occur rapidly and on many fronts, this paper has been updated several times during the drafting process to reflect recent developments. This paper is as current as possible at the time of publication and regardless of Basel II's status, this document serves as an excellent outline of the utter complexity that is Basel II.

Historically, one method of regulating banking and other depository institutions has been to mandate certain levels of capital they are to maintain. Capital is generally a measure of an organization's net worth, its assets minus its liabilities and is a measure of a bank's ability to absorb losses, protecting senior lenders, including depositors and the insurer of those deposits. By mandating higher levels of capital, regulators theoretically increase the size of the cushion available to absorb losses before a bank fails.

The 2004 Basel II Capital Accord will drastically alter all aspects of banking worldwide. Under Basel II, the nature of banking supervision will shift from general standards applicable to all banks, to a system that evaluates the soundness of each bank based upon its particular size, structure, portfolio, and risk exposure. The current plan to implement fully Basel II by 2008 is overly ambitious and risks sending tremors through the financial system, especially now that the U.S. rulemaking process has been significantly delayed. The systematic changes that are Basel II should occur gradually, if at all.

Then-Comptroller John D. Hawke, Jr. stated, "U.S. agencies should not foreclose consideration of alternative proposals that address the acknowledged deficiencies of the 1988 Accord but that do not constitute such a radical departure from our existing regulatory capital framework." We agree and propose that Basel II should be implemented sequentially. A bank that intends to adopt the most advanced approaches of the accord should first implement and transition through the more basic approaches. This ramping-up period would allow time for the implementing bank, its supervisor, Congress, and the financial markets to evaluate each step of the process. It will also ensure that problems that will inevitably arise will be smaller and more easily correctable. The banking system prides itself on soundness and stability. Basel II implementation is a sea change. It need not be a tsunami. The change should occur gradually in order to maintain a regulatory capital scheme that is workable and affordable for banks and regulators.

I. The Basel I Era (1988—Present)

Since 1988, banks in industrialized countries have been subject to an 8% risk-based regulatory capital floor.[1] These laws are rooted in the "International Convergence of Capital Measurement and Capital Standards" finalized by the Basel Committee on Banking Supervision (BCBS) at the Bank of International Settlement in Basel, Switzerland in 1988.[2] Under the original accord, a bank was required to maintain capital equivalent to 8% of its at-risk assets. The formula was simple and easy to apply. The principle was also sound, as evident by its near universal adoption by banking regulators worldwide and the very low rate of bank failures in countries that implemented Basel I.

Some observers have concluded that the Basel I framework is overly simplistic. Large banks complain that the 8% threshold is too high for very large, well-diversified banks. As the mutual fund industry frequently reminds us, diversification lowers risk. Large banks posit that the flat 8% capital floor does not account for the benefits of banking diversification. These banks conclude that their regulatory capital floors should be lowered significantly to reflect the benefits of diversification.

Banking supervisors, on the other hand, fault the Basel I Accord for not reflecting the risk- increasing effect of securitization. Securitization is, in effect, the bundling and selling of similar loans. Fannie Mae and Freddie Mac have created a very large market for securitized mortgages. Because mortgages are low-risk, a bank that divests itself of mortgages while retaining high-risk facilities, will have increased its risk exposure without a corresponding increase in the amount of capital it is required to keep on hand under Basel I.

These and similar concerns led the Basel Committee on Banking Supervision to frame a new accord: *The International Convergence of Capital Measurement and Capital Standards: A Revised Framework*, known as Basel II, which was adopted in June 2004.[3]

The original Basel Accord is not viewed as fatally flawed. Indeed, the original accord serves as the foundation for Basel II. Moreover, the stated intent of Basel II is to maintain the overall level of regulatory capital collectively

held by banks under Basel I. Even after the implementation of Basel II, the original accord will not be dead. Some countries are not in a position to implement the new accord. The U.S., as a prime example, intends to apply Basel II to only a handful of banks. The vast majority of U.S. banks will continue to be regulated under a yet-to-be-determined modified version of the original accord.

II. A Basic Overview of Basel II

Basel II seeks to tweak each bank's capital requirement to more accurately reflect that bank's individual risk exposure. The concept is simple. Unfortunately, collecting and interpreting the data necessary to practice the concept is anything but simple. For the approximately ten to twenty U.S. banks that will initially fall under Basel II, the changes will be great and costly. "Some institutions estimate that implementation will cost approximately $70 million to $100 million to startup."[4]

The new accord consists of three pillars. Pillar One is designed to make the minimum capital requirements risk sensitive. Pillar Two outlines how supervisors should review capital adequacy. Pillar Three details the public disclosure of risk profile and regulatory capital information that should occur in a market economy. Pillar One bears the greatest weight. This is especially true in the United States, where supervisor scrutiny and public disclosure are already the norm. Pillar One will be the focus of this paper.

Pillar One is the foremost aspect of the new accord because it requires that a bank establish its own regulatory capital requirements based upon internal risk assessments. Through Pillar One, Basel II addresses three types of risk—credit, market, and operational.[5] Credit risk is the loss potential for a particular transaction or category of transactions. Market risk is the risk associated with changing economic conditions. Operational risk is the general loss potential associated with a banking enterprise. Whereas Basel I has a static capital requirement designed to collectively address all risk, the new accord treats each type of risk separately. Unfortunately, Basel II does not explicitly address interest-rate risk, which is much more a phenomenon of the U.S. banking system than is true in other countries where borrowers and bondholders shoulder most of the interest-rate risk.

A. Credit Risk

As approved by the BCBS, Basel II allows for a bank and its supervisor to select from between three methods of ascertaining the credit risk confronting the bank, the Standardized Approach, the Foundational Internal Ratings Based Approach, and the Advanced Internal Ratings Based Approach. The United States, for its part, has chosen to partially implement the new accord. It will require the 10 largest banks to adopt the Advanced Approach.[6] The remaining 7,840 banks and 1,365 savings institutions may choose to adopt the Advanced Approach or remain under a modified Basel I.[7] Neither the Standardized Approach nor the Foundational Internal Ratings Based Approach will be implemented in the United States. This paper will nevertheless discuss all available approaches under Basel II because a full understanding of the new accord is helpful in understanding what is occurring in the United States.

The Standardized Approach is similar to Basel I in that the Accord (or the supervisor) assigns a weight to the risk faced by a bank. The Standardized Approach adjusts Basel I by assigning more detailed risk weight for exposures by category. It also assigns a higher risk weight to past-due loans. Thus, the Standardized Approach intends to make regulatory capital more risk sensitive, and thereby more effective and less burdensome. The U.S. does not intend to permit banks to implement the Standardized Approach because it views Basel I sufficient to protect banks without large international exposures.

The Foundational Internal Ratings Based Approach (F-IRB) differs substantially from the Standardized Approach and the current accord. F-IRB utilizes a bank's internal risk assessments as key drivers for establishing the bank's capital requirement. For loans to a corporation or government, a bank will enter its own assessment of the probability of default for each particular exposure into a formula designed by the supervisor to ascertain regulatory capital requirements for that type of exposure. Additionally, the F-IRB allows for a partial offset of the capital required against these exposures for risk mitigation, *e.g.*, collateral and insurance. However, the F-IRB approach will not be available for retail exposures. U.S. banking supervisors do not intend to permit banks to implement F-IRB.

Banks with thorough internal rating systems can choose to operate under the Advanced Internal Ratings Based Approach (Advanced Approach). The Advanced Approach is more intricate than F-IRB. In addition to assessing the probability of default (PD), a bank operating under the Advanced Approach will supply estimates of the duration of the exposure, the amount that will be outstanding at the likely time of default, and the percentage of the outstanding exposure that will be lost. The Advanced Approach can be used for corporate, governmental, and retail exposures. Corporate and governmental loans will be assessed individually.[8] Retail exposures will be assessed in pools. Straying from the accord, the U.S. will also permit some corporate probabilities of default to be assessed in pools.

Under these three new approaches to credit risk, a bank will have a greater role in assessing its credit risk exposure, and thus in determining its regulatory capital requirement. This is especially true under the Advanced Approach, which will likely be adopted by the largest and most active international banks.[9] A bank operating under the Advanced Approach will be its own primary regulator. The bank will, within certain parameters, determine the risk associated with a particular loan and be expected to allocate capital reserves in accordance with its internal assessments. The role of the bank supervisor will be to review the bank's

internal rating system to ensure that the bank honestly assesses the risk it faces.

The Advanced Approach is dynamic. It allows a bank's capital requirement to fluctuate depending upon the bank's view of the risk underlying its portfolio. The Advanced Approach is essentially a requirement that a bank continually evolve its credit risk assessment to reflect the current best practices. "Basel II, at least in its more advanced form, is as much a proposal for strengthening risk management as it is a proposal for improving capital standards; these considerations are, as they should be, inseparable."[10] Along with the latitude for self-assessment also come the risks of self-delusion and manipulation.

Theoretically, the more risk acceptant a bank is, the higher its regulatory capital requirement will be. The goal of Basel II is to ensure that a bank with a large concentration of low risk exposures will have an appropriately low regulatory capital requirement. Ideally, regulatory capital and economic capital will be aligned.[11] To take advantage of this benefit, a bank must be able to maintain a complicated internal rating system and to continually evolve that system to reflect best practices.

B. Market Risk

Market risk was not explicitly accounted for in the original 1988 Basel I accord. In 1996, Basel I was amended to include an explicit measure of market risk. This treatment will not be substantially modified under Basel II.

C. Operational Risk

Operational risk is the risk of loss resulting from inadequate or failed internal processes, people and systems, or external events. Unlike credit risk, banks have not developed complicated models to quantify operational risk. Basel II encourages banks to accurately quantify operational risk.

It does so by offering a bank three means of rating its operational risk. The simplest is the Basic Indicator Approach. A bank that chooses this approach will have an operational risk assessment of 15% of its average gross income over the previous three years. The second approach is the Standardized Approach, which also uses gross income as a proxy for operational risk. However, the Standardized Approach assigns a different risk factor for each business line. Thus, the capital requirement is more tailored to a bank's operational risk under the Standardized Approach than under the Basic Indicator Approach. Neither of these approaches will be available in the United States.

The final approach to operational risk is the Advanced Measurement Approach (AMA). A bank operating under the AMA may utilize any means to evaluate its operational risk, so long as the system is comprehensive and systematic. The AMA arbitrarily permits a bank only to offset up to 20% of its operational risk capital requirement with insurance. A bank will be able to adopt partially the AMA for only those business lines that the bank has adopted a sufficiently comprehensive analysis. The United States will require its ten largest banks to adopt the AMA.

The AMA is rather amorphous at this point because banks are just beginning to develop means of accurately measuring operational risk. BCBS wishes to encourage this development. "[O]ver time the regulatory capital functions we have hard-wired into Basel II, along with their embedded correlation assumptions, will give way to individual bank-developed models that are verifiable by supervisors," says Ferguson.[12] Thus, regulators promise that banks will be given the widest possible latitude to develop an effective measure of operational risk. However, one must question whether the safety and soundness of the banking industry is advanced by requiring banks to comply with a standard that has yet to be created.

Measuring operational risk is one of Basel II's highly questionable elements. Operational risk, the risk that a bank's operational activities might bankrupt it, is very much dependent on the diversity of the bank's activities and the absolute size of its capital base. The probability that a single operation risk, or even a set of operational risks, will render Citibank insolvent, given its pre-tax earnings of $3.3 billion and book equity capital of $55.2 billion to close the first-quarter of 2005, has to be less than the probability that operational shortcomings will render, say, Comerica insolvent. As big as Comerica is, its first-quarter 2005 pre-tax earnings of $316 million and its equity capital of $5.5 billion on 3-31-05, was just 10% of Citibank's capacity to absorb losses of any kind.

III. Analysis

Basel II promises much change and great uncertainty with a goal to modify only slightly regulatory capital. The regulatory capital requirement for most Basel II banks is supposedly expected to remain relatively unchanged. Basel II's benefits occur at the fringes of the banking industry with the banks that face either extremely high or extremely low risk. The burdens associated with adopting Basel II include 1) the system stress caused by adopting a complicated unknown regulatory structure; 2) the high economic costs of Basel II compliance; and most important to Congress, 3) the danger of unbalancing the competitive markets between the Basel I and Basel II banks and amongst Basel II banks themselves. These concepts and other concerns are discussed in this section.

A. Basel II, Leverage Ratios, & Well-Capitalized Banks

A distinctively American problem with Basel II is that it conflicts with other important regulatory standards. First, the U.S. has gone beyond Basel I by implementing the notion of "well-capitalized," which requires 6% Tier-1 capital and 10% total risk-based capital. Second, the U.S. has a unique-to-the-U.S. leverage capital requirement of 5% for a well-capitalized bank. A bank has to meet all three capital requirements—leverage ratio, Tier 1, and total risk-based

capital in order to be well-capitalized. This powerfully overrides much of the impact of Basel I.

If the leverage ratio and "well capitalized" standards remain intact, many of the Basel II changes are meaningless. Thus, Basel II supporters advocate for either lowering or eliminating leverage ratios for Basel II banks. The FDIC, whose deposit Insurance Funds are indirectly protected by levels of bank capital as a practical matter, feverishly defends leverage ratios. On April 8, 2005, FDIC Chairman Don Powell stated that leverage ratios will remain in effect and will limit the downward impact of the Basel II.[13] It is increasingly recognized, though, that the leverage ratio requirement will have to be adjusted somewhat if there is a serious move to implement Basel II or to modify Basel I. This is particularly important for banks who have invested a substantial portion of their assets in home mortgages which are expected to be assigned a particularly low risk weighting. The battle over whether the leverage ratio or Basel II will reign supreme will be at the very heart of the U.S. implementation process.

B. Divided American Supervisors

The U.S. regulators' opinions on Basel II vary broadly. While they all see the Basel process as productive, they disagree over many details of the accord. The Federal Reserve is the most eager to implement Basel II. "The Federal Deposit Insurance Corp. and the Office of Thrift Supervision have argued for more than a year that banks that do not adopt Basel II could be at a competitive disadvantage if Basel II caused capital levels to drop."[14] The Federal Reserve, having two offices involved in the process, may have lead to its position being overstated. The absence of a unified position certainly weakened the stature of the U.S. in the negotiations, and might have resulted in an accord that does not adequately reflect the interests of American banks and banking customers.

Adding to the uncertainty is the changing composition of senior decision-makers at some of the banking agencies. Membership on the board of the Federal Deposit insurance Corporation has recently changed as has the identity of the Comptroller of the Currency. The views of new decision-makers at the agencies on Basel II are not entirely clear at this time.

C. Too much, too soon

The most ringing criticism of Basel II is that the target implementation dates are too ambitious. The target date for implementation of the Advanced Approaches is January 2008. However, U.S. regulators expect Basel II banks to run the Basel II approach internally for the year preceding implementation, making the effective implementation deadline January 2007. This timeframe is too short for the rulemaking process to occur in time to allow banks to create and implement Basel II compliant systems, especially now that QIS-5[15] will be conducted in late 2005. Discussion of the timeframe banks need to implement Basel II compliant programs presupposes a swift rulemaking process. However, QIS-5 and the concerns about the very detailed regulations undermine U.S. regulators' goal to finalize rules in 2005. On April 29, 2005, the U.S. Regulators provided additional evidence that the timeframe is unachievable when they announced that the NPR will not be released on schedule.[16] As of this publication, the NPR has not been unveiled. One must wonder with QIS-5 to be conducted from October until December, whether even the NPR will be published by year's end. The regulators' solution: shorten the parallel run time by 6 months.[17] This unnecessary rush to implementation leads to an ironic observation: it is strange to see the Federal Reserve, whose open market committee carefully measures every word in statements released in conjunction with federal funds rate announcement, be so eager to quickly initiate an unnecessarily drastic systematic overhaul.

The Advanced Approach requires five years of information for both credit risk evaluations and operational risk determinations. While some banks have been gathering credit risk information for sufficient time to theoretically implement Basel II by year end 2007, the information is not necessarily of the quality or type that will be required by the final rule. For example, the ANPR includes a broader definition of default than currently utilized. Thus, the information banks maintain on defaults is likely insufficient to meet the Basel II standards. Moreover, even the Federal Reserve admits that banks "do not yet have the systems for producing Basel II inputs that meet the standards set forth in the Basel II proposal."[18] Data collection and warehouse systems are just now being developed that enable the comprehensive risk assessment required under Basel II.[19] The first generation of these systems should be evaluated to ascertain the level of benefit they provide and any limitations they may have. It might be that the information generated from the systems is not as predictive as hoped. Moreover, the case has not been made that the banking supervisors can adequately supervise a full-blown Basel II calculation system.

The concept of collecting operational risk data is even newer. Only a very few banks collect this information in any form. The study of operational risk is so new that there is no consensus on how this aspect of Basel II should be implemented. The ANPR does not even try to choose an approach. It merely recognizes that the concept is in its infancy, while still requiring compliance with the standards that have not been created.

D. Level Playing Field / Bifurcated system

Under the current regulatory capital framework, banks of all sizes and risk exposures are required to keep the same level of regulatory capital. The playing field is unquestionably level, some would argue that it is also unjust. Once Basel II is implemented, the playing field will become infinitely granulated for Basel II banks, in an effort to cause each bank's risk capital to mirror its risk exposure. This system, while not level, has the potential to more accurately reflect economic realities. On the other hand, if calibrated improperly, Basel II could potentially wreak havoc on the financial markets.

There are several concerns unique to the United States because of its chosen manner of implementation. Basel II recommends abandoning Basel I in favor of a three-tiered system of advancing complexity. Under the full blown Basel II system, a bank can be required to operate at a level of regulatory sophistication that best reflects that bank's activities. Significant to full implementation of Basel II, is that, even under the Standardized Approach, a bank's regulatory capital will be based on the quality of risk it faces. A bank's capital adequacy level under the Standardized Approach may be determined more crudely than a bank operating under the F-IRB or Advanced Approach, but regulatory capital fluctuates with risk under all three. Thus, under Basel II, a bank is faced with the option of investing more into compliance systems to obtain a more accurate risk assessment. A bank will generally have the incentive to obtain a more accurate risk assessment because doing so will generally free up more capital because the more basic approaches have higher built-in capital buffers. This effect will be mitigated in the U.S. to the extent the leverage ratio and well-capitalized standard remain in effect. U.S. banks will be incented to game the system by adjusting the riskiness of asset mixes so that all three capital measures have approximately the same proportional amount of cushion above the minimum percentages to be considered to be well-capitalized.

Because of the unique way the U.S. has decided to implement Basel II, U.S. banks are faced with different incentives. Banks large enough to consider opting into Basel II compliance, but not large enough to be required to do so, might face market pressure to opt into Basel II. If the bank chooses not to opt in, it potentially faces negative market ratings and depressed share prices. If, however, the bank on the bubble succumbs to the market forces and opts in, it might face decreased performance due to the costs associated with Basel II implementation. Following QIS-4, one of the bubble banks, Capital One, opted to remain under Basel I after forecasting large regulatory capital increases under Basel II.

Small banks and other institutions that will not adopt Basel II believe Basel II will unfairly place them at a competitive disadvantage.[20] Basel II will permit implementing banks to decrease their regulatory capital for low-risk weighted assets. For small banks, implementing Basel II is cost prohibitive. Small banks will be forced to remain under Basel I, with its higher capital requirements. Thus, small banks will be forced to carry as much as 50% more regulatory capital than Basel II banks for identical facilities.[21] This will give Basel II banks more leverage and the option of issuing the facility at a lower rate. For their part, Basel II banks will demand lower regulatory capital levels than Basel I banks to recoup the tremendous expense of implementing and maintaining the Basel II systems. This could result in a market realignment as low risk banking migrates to Basel II banks, and high risk activities concentrate in Basel I banks where the regulatory capital will not increase as much relative to risk. If the leverage ratio remains intact, Basel II banks will supplement their very low-risk exposures with high-risk ones, in an effort to align regulatory capital with the leverage ratio. This would leave midlevel-risk exposures for small banks.

Unraveling the impact of Basel II is not easy. Then-Comptroller Hawke noted, "Realistically, we are not yet in a position to assess definitively the full range of consequences from the implementation of Basel II, including its effect on competitive equality in the global financial marketplace. There are risks that Basel II may create or exacerbate relative advantages between domestic banks and foreign banks; between banks and non-banks; and between large domestic banks and mid-size/small domestic banks."[22] Even though the Fed., the leading U.S. cheerleader for Basel II, denies that Basel II will impact mortgage rates, it admits that "adopters might have increased profits from some mortgages relative to nonadopters because they will capture some of the deadweight losses that occur under the current regulatory capital frameworks imposed on depositories and on securitizers. . . ."[23] Whether a competitive advantage results in lower market rates, profit disparities, or both, doesn't matter. The point is that Basel II banks will have a competitive advantage. Federal Reserve Chairman Alan Greenspan recently acknowledged that Basel II with result in competitive disadvantages for Basel I banks, "Where concerns appear valid, we and the other federal banking agencies will this summer propose some options for simple revisions to the current capital rules that would mitigate any unintended and undesired competitive distortions engendered by the new Accord."[24] Because of Congressional pressure, in addition to adopting the Advanced Approaches of Basel II, the Fed now intends to modify the existing Basel I rules in an effort to maintain a level playing field.

The unanswered question is whether the regulators will be able to fully anticipate the impact of bifurcated capital rules prior to roll out of Basel II. If not, there is risk that banks operating under one system will have significant and unfair competitive advantages over those under the other. QIS-4 is a wake-up call. Basel II should be rolled out only after these questions have been answered. The soundness of the banking system should be paramount.

E. Proper Weighting

Basel II demands an implementing bank pay close attention to the risk associated with its clients (probability of default) and its facilities (loss given default). The new accord establishes capital adequacy ranges for each class of facility and client. Commentators have suggested that many of these are misaligned.

For example, before being corrected recently, Basel II assigned a higher risk rate to home equity loans than it did to credit cards. It is certainly an oddity that a secured loan would have a higher risk weight than an unsecured loan. It appears this resulted from the low rate of use of home equity products outside the United States. This in turn may reflect weakness on the part of the U.S. regulators in Basel II's formation. Such misalignments show that the new Accord

reflects the priorities of foreign financial markets over our own,[25] demonstrating the need for Congress to ensure that U.S. regulators carefully assess the impact Basel II upon all areas of our capital market.

A second example of weighting problems is co-signed or insured loans. Basel II does not account for the risk lowering affect of a guarantor on a loan, thus it over anticipates the risk of "double default." The Basel Committee may be in the process of rectifying this omission.[26]

Capital requirements for mortgages will fall significantly under Basel II to somewhere near 1% or below. "The irony, of course, is that the GSE capital levels will be required to be increased at the same time that Basel II banks' capital for the same mortgage assets will be allowed to decline to levels *below* what is currently held by Fannie Mae and Freddie Mac. Someone is not connecting the dots."[27]

U.S. regulators intend to require implementing banks to make their risk assessments based upon five (5) years of data that includes at least one stress period.[28] Core banks are required to implement the Advanced Approaches by 2007.[29] This means that they are required to have data on customers and facilities dating back until at least 2002. However, if there has not been a time of stress in that period (the last serious commercial real estate downturn in the U.S. occurred in the early 1990s), then even more historical data will be necessary. For example, while some areas of the economy have hit a rough patch, retail lending has not been recently stressed. Therefore, banks will need to look further back to a five-year period that included a stress when establishing retail credit risk. Banks will need to mine data from the recession of the early 1990s to find a sufficiently stressful period for the purpose of making this risk assessment. Of course, in many, if not most, cases, credit-loss data from that period is simply not available.

The quantitative impact studies that accompanied early drafts of Basel II were not sufficiently detailed to ascertain the precise impacts of the new accord.[30] "In many cases, existing bank systems were not able to produce the data requirements necessary for inputs required by the new Accord. In some areas, the QIS-3 instructions were not sufficiently clear or were misinterpreted, and in other cases, the proposals were still in flux as banks were completing the survey."[31] The United States and a handful of other countries independently conducted a fourth quantitative impact study (QIS-4). The U.S. survey was distributed in late 2004. Banks returned the survey by mid-January 2005. In addition to QIS-4, the U.S. conducted a case study focusing on Citigroup. The U.S. regulators will recalibrate the framework based upon the results of QIS-4 and the Citigroup case study.[32] QIS-4 results were not reassuring. Then-Acting Comptroller Williams recently told a House Subcommittee,

> [T]he dispersion in results—both across institutions and across portfolios—was much wider than we anticipated or than we can readily explain. Changes in effective minimum required capital for individual institutions ranged from a decrease of 47 percent to an increase of 56 percent. While some dispersion of results in a truly more risk-sensitive framework would be expected, we are not convinced that the wide ranges indicated by QIS-4 can be fully explained by relative differences in risk among institutions; it appears that comparability of QIS-4 results among different institutions may be severely lacking.[33]

Further highlighting the uncertainty inherent to Basel II, the BCBS recently reversed course and decided that an additional QIS is necessary for proper calibration. QIS-5 will be conducted in late 2005. Whether the recalibration will resolve some of the above concerns without creating more, is yet to be seen.

F. Operational risk

Assessing operational risk is original to Basel II. As with credit risk, the ANPR requires operational risk be assessed from data obtained over a five-year period that includes a time of stress. This means tracking data on internal and external fraud, employment practices and workplace safety, physical asset values, business disruptions, and internal and external system failures.[34] This task is more complicated than in the credit risk area because there is virtually no history of collecting this information. Unfortunately, the ANPR does little to frame how operational risk data should be obtained or how it should be used. Operational risk standards are virtually nonexistent.

There is a heated dispute over the 20 percent offset to operational risk for risk mitigation techniques. Large banks label the 20% cap arbitrary and call for the AMA to allow for banks to offset the actual percentage of operational risk that is insured against. Banks that will not adopt the AMA warn that competitive inequities will result if AMA banks are permitted to offset for insurance, while non-AMA banks are not.

Concern has also been expressed regarding the simpler operational risk approaches. Because both the Basic Indicator Approach and the Standardized Approach utilize percentage of gross income as a proxy for operational risk, a bank's credit risk is being double counted to the extent that profit margins increase with credit risk.

The new operational risk assessment tools create calibration problems of their own. Operational risk, the inherent risk of doing business, is today implicitly built into the current 8% capital floor. Thus, if operational risk is to be assessed separately from market risk, it is important that market risk capital be reduced to reflect the independent operational risk capital requirement.

G. Home/Host Supervisor Conflicts

The most important aspect of Basel I was its uniform application in every implementing country. The complexity of Basel II makes uniform implementation impossible. "[E]ach jurisdiction may offer several methodologies for the calculation of capital requirement."[35] A bank that operates under F-IRB in one country might be required to operate under the Advanced Approach in another country and remain under Basel I in a third. These differences render Basel II more costly, and less optimal than it is intended to be. For example, when a host country determines that a bank needs to maintain more capital for its operations in that country than the home country supervisor would require, the excess capital retained in the host country often is not allowed to offset capital shortfalls at home.[36] Even where a bank operates under the same approach in its home and host countries, banks could be "forced to implement conflicting risk calculations by different regulators, making compliance a difficult 'Catch-22.'"[37]

A seemingly unavoidable consequence of Basel II is that each implementing country will modify the accord to reflect the particular needs and biases of its domestic market. This results in the disintegration of a unified global capital standard, the lodestone of Basel I. It must be emphasized that Basel II in its current form dismantles Basel I more than it modifies it. The inconsistencies in international adaptation of Basel II combine with its complexity to make the international money markets inefficient and less integrated. While the U.S. implementation of Basel II will be undertaken to match capital and risk, it must be assumed that in some countries Basel II will be treated as deregulation. These countries can expect a greater risk of bank failure. U.S. regulators must work diligently in both the host and home supervisor roles to ensure that the U.S. financial markets are insulated from unsound foreign practices.

H. Increases Arbitrage

The choice for banks in the United States is stark. With the exception of the approximately 10 banks that are required to opt-in, every bank is faced with the decision of whether to implement the Basel II advanced approaches or remain in Basel I. Under Basel I, risk taking is rewarded in a sense because a bank is not required to increase its regulatory capital to reflect risk. Under Basel II, banks operating under a low risk environment are rewarded. The banks that are the most likely to opt in are those with the lowest risk exposure because these banks have the most incentive to opt in. Of course, a bank that specializes in high-risk activities will most likely elect to remain under Basel I, in order avoid tailoring its regulatory capital position to its above- average risk exposure. This, in turn, has the potential to lead to systematic under-capitalization, as banks will choose to operate under the regulatory structure that most benefits them. Regulatory arbitrage will be increased as capital moves to follow the path of least resistance. High-risk banking activities can be expected to migrate toward Basel I banks because, all else being equal, Basel I banks will have lower regulatory costs associated with high-risk lending. In turn, U.S. banks operating under the Advanced Approaches will attract low risk clients and facilities because those banks can more economically finance low-risk clients and facilities.

I. Procyclicality

Federal Reserve Board Chairman Greenspan made the concept of procyclicality in the equities markets famous when he warned of "irrational exuberance" at the close of the booming '90s. Basel II attempts to limit the procyclical effects of its ratings systems by basing risk assessments on extended periods of data including a time of stress. Nevertheless, if not carefully monitored, there is a chance that the subjective elements of risk weighting will cause risk assessments to be lightened during boom times and steepened during downturns, thereby amplifying current market trends, increasing volatility, and accentuating economic cycles. Basel II's requirement that defaults be weighted at 150% certainly could increase procyclicality.

Unfortunately, Basel II leaves it up to each country to decide whether to have a capital adequacy standard that shifts with market conditions. In a recently released working paper, the Basel Committee asked and answered, "What properties should obligor-specific PDs possess? . . . The revised Framework does not explicitly discuss the characteristics that obligor-specific PDs should posses, so the answer to the. . .question listed above may well differ from country to country depending on national supervisors' assessments of the tradeoffs between the benefits of credit-risk capital requirements that are sensitive to changing economic conditions versus the benefits of capital requirements that are relatively stable over the business cycle."[38] Any system that allows regulatory capital to decrease with a market boom risks unnecessary financial calamity when a downturn occurs.

According to BCBS, "banks tend to focus more narrowly on current conditions in setting ratings than do public rating agencies. This suggests that many bank rating systems may conform more closely to a PIT philosophy."[39] "PIT" stands for Point-in-Time and is "Basel Talk" for a system that bases an obligor's PD on current economic conditions rather than a stress period. "[O]ne can think of a PIT rating system as a system designed to ensure that all obligors within a grade share roughly the same unstressed PD."[40] BCBS claims that a PIT rating system that utilizes unstressed PDs is stable. This assertion is based upon assigning obligors to pools—"risk buckets" in "Basel Talk." The average PD of a bucket will remain constant because when an individual obligor's PD moves up or down, the obligor will be reassigned to a different bucket. However, a rating system should focus upon the stability of capital ratios, not a bucket's risk weight. Under PIT, even a bucket that has been emptied is considered stable because it is still assigned a constant PD. Regulatory capital will fluctuate with market conditions as obligors migrate into low-risk buckets during economic highs and into high-risk buckets during downturns. Calling PIT stable is akin to measuring

the temperature of a watering bucket when the focus should be on the amount of water in the bucket. Basel II should not be used to adopt a regulatory capital regime that parallels market conditions. If a PIT approach is used, adequate capital will not be available to balance the obligors being dumped into high PD buckets when a downturn occurs.

J. Statistical Models

Because there is not much reliable data available to perform the calculations required under Basel II, the New Accord encourages banks to utilize statistical models to predict PD, Exposure at Default (EAD), and Loss Given Default (LGD). A problem with using statistical models is that the models are based on guesses and predictions.[41] It is very difficult to see how switching from a stable uniform 8% capital floor to a dynamic system based upon predictions advances the safety and soundness of the banking system. Advocates for statistical models claim that the models perform better than analyzing past data. "The reason is that the unstressed pooled PD will tend to be lower than the long-run average default frequency during cyclical peaks and higher than the long-run average default frequency during cyclical troughs. The statistical models approach is potentially more flexible. . . ."[42] A cyclically flexible capital floor is unsafe and unsound and is a surefire procyclical roller coaster. While adjusting a bank's capital requirement based upon its risk exposure relative to other banks is a legitimate goal of Basel II, permitting capital to mirror market conditions is not.

K. QIS-4

Preliminary results from QIS-4 were released in May 2005. Of the 26 participating institutions, two projected significant regulatory capital increases; two remained nearly unchanged; and 22 saw significant reductions. The median change was a decrease of 26%, which equates to maintaining just under 6% liquidity. Approximately five institutions saw a 40% decrease, equating to a 4.8% capital requirement. Upon reviewing these results, FDIC Director Thomas Curry sounded the alarm:

> This is without fully factoring in the benefits of credit risk hedging and guarantees that are likely to reduce capital requirements significantly more. For individual loan types at individual banks, over one third of the reductions in capital requirements were in the range of 50 to almost 100 percent. Numbers like this do [sic] not provide comfort that the Basel framework will require capital adequate for the risks of individual activities.[43]

The two institutions that saw a significant capital increase will face difficulty competing with Basel I banks. These institutions will likely either not opt into Basel II (if they have the option), modify their risk assessment techniques to produce a lower capital requirement, or sell the high risk lines to Basel I banks. The identities of the banks remains confidential. However, the ever useful anonymous sources have indicated that the banks with significant increases were Capital One and MBNA.[44] This is no surprise since each carries heavy loads of revolving accounts. Capital One recently announced that it will opt-out of Basel II. MBNA would have had to dump half of its foreign exposures if it wished to also opt out. If MBNA implemented Basel II, it would have been be forced to significantly modify its portfolio or structure to avoid crushing regulatory capital requirements. Thus, with MBNA as the possible lone exception, the sole effect of U.S. Basel II implementation would have been a significant decrease of regulatory capital for large banks. The Bank of America organization now plans to acquire MBNA, and it is conceivable that there will be no exception. It is also believed by some that Capital One's recent announcement to buy Hibernia was in some way related to Basel II pressures.

The QIS-4 results make clear that the above-mentioned risks of Basel II are very real. Non-adopting banks will find it difficult to compete with adopters for low risk business and will be forced to focus on the high-risk businesses where they will face lower capital requirements than adopters.

Basel II's complexity and lack of clear channel markers led to extremely disparate results for participating banks. As mentioned above, then-Acting Comptroller Williams cautioned, "it appears that comparability of QIS-4 results among different institutions may be severely lacking."[45] Director Curry echoed, "Achieving consistency in Basel II depends on the idea that best practices, and best data, will lead to convergence in the capital treatment of similar loan portfolios across banks. At present, however, at least as indicated by QIS-4, there is little commonality in the approaches the various banks used to estimate their risk inputs."[46] These results are unfortunate, but unsurprising. Each bank has been told to develop its own system for determining PD, EAD, and LGD. Different systems will produce different results. Moreover, the advanced approaches rely heavily upon a bank's judgment of its risk. Judgment is another term for discretion. When each institution is given broad leeway to assess its risk, we can only expect widely divergent results. Predictability and equal treatment are sacrificed.

The QIS-4 weighting of home equity loans is particularly notable, dropping 74%. The OTS is particularly concerned about this decrease because, "the imbedded potential risks of home equity lending exceed what the results from the last few years have shown." FDIC Director Curry agreed, "The example of home equity lending suggests to us that Basel II has not solved the problem of finding the 'right' level of capital for such emerging activities, and that further thought is needed about the appropriate prudential approaches in this area."[47] QIS-4's treatment of home equity loans is important because the home equity market is both new and potentially susceptible to interest rate increases. The reason for developing Basel II was Basel I's failure to adequately address new banking practices. Now it appears Basel II might have the same problem.

QIS-4 should serve as an eye-opening exercise. Its results show that our banking system is not prepared to leap into the Advanced Approaches. We must slow down and smoothly transition into a risk sensitive regulatory capital system.

IV. Recommendation

The future of banking under Basel II is uncertain. The soundness of banking under Basel I is clear. Banks have operated under Basel I for the past 17 years. While there is general criticism that Basel I has not kept up with banking innovations, such as securitization, Basel I has not lead to any crisis in the banking industry. Nor is there an impending crisis that calls for immediate action. In fact, the merits of Basel I are demonstrated by the U.S. regulators' decision to retain Basel I for all but a handful of banks.

U.S. banks uniformly maintain capital greatly in excess of the current capital adequacy requirements. Thus, even if the current regulatory capital levels are too low, the high levels of economic capital offset any shortfalls in the regulatory scheme. Furthermore, the uniform maintenance of high levels of economic capital undercuts any argument that banks are being forced by regulators to hold too much cash. If this really were the case, I would expect economic capital to parallel the regulatory minimums.[48] Basel II brings chaos and high costs and undercuts the integration of international capital markets, but it might not change the economic capital banks keep on hand. There is no reason that the regulatory changes being thrust upon that handful of banks should be drastic and abrupt.

I wish to reiterate that the goals behind Basel II are worthwhile. Any change that causes regulatory capital to better reflect economic capital must be seen as a positive. However, implementing any change too swiftly carries great risk. As the Basel Committee and U.S. regulators admit, the Advanced Approaches are untested and complex. There is great uncertainty regarding the precise effects Basel II will have upon individual banks and the banking system as a whole.

This uncertainty manifests itself in the eagerness of both regulators and some large banks to implement Basel II. Regulators argue that Basel II is needed because regulatory capital is lower than the risk faced by large banks. The large banks, for their part, believe that implementing the advanced approaches will permit them to *lower* their regulatory capital. Both of these contentions cannot be true. There is too much uncertainty involved in Basel II. The differences between the Advanced Approaches and Basel I are simply too great for all of the kinks to be worked out in theory.

As recently as May, 2005, then-Acting Comptroller Williams hinted that Basel II might need a major overhaul: "If we [U.S. Regulators] believe that changes in the Basel II framework are necessary, we will seek to have those changes made by the Basel Committee. While some might argue that the Committee is too far down the path of 'finalizing' Basel II to accept any changes at this stage, I do not believe that most Basel Committee members would find their interests best served if the U.S. agencies were compelled to deviate significantly from Basel II in order to fulfill our supervisory responsibilities."[49] If significant deviation from or revision to Basel II is necessary, why are we rushing toward implementation?

The Advanced Approaches are dramatically different than Basel I. The very foundational principles conflict. Basel I was designed to provide a safe, sound, and level playing field for all banks. The Advanced Approaches create a unique playing field for each institution. Doing so requires a detailed understanding of the risk faced by a particular bank. This means assessing each facility and customer to document the risk level of every transaction at any given point in time. This assessment must be dynamic. The credit risk of each customer fluctuates regularly. The Advanced Approaches also require a bank to monitor the value of collateral to assess the loss given default of a transaction. The bank must also monitor the economic cycles to prepare for unexpected downturns, system wide or for particular sectors, and predict the impact such changes on its portfolio. A bank must also assess risks to its continued operation and assess its mitigation programs to determine how much risk it has distributed to others. In short, the Advanced Approach calls for total risk awareness. Total risk awareness is not achievable overnight.

For its part, a supervisor will be required to become familiar with the operational and risk assessment programs of each of its client banks. Achieving the level of oversight necessary to ensure that a bank is properly risk weighting its banking activities and operations will be difficult. The Basel Committee acknowledges,

> In addition to an evaluation of the rating system, validation comprises an evaluation of the rating process. This involves important issues like data quality, the internal reporting, how problems are handled and how the rating system is used by the credit officers. It also entails the training of credit officers and a uniform application of the rating system across different branches. Although quantitative techniques are useful, especially for the assessment of data quality, *the validation of the rating process is mainly qualitative in nature and should rely on the skills and experience of typical banking supervisors*.[50]

Banking supervisors will be required to exercise a great deal of judgment to determine, essentially, if a bank's internal models "feel right." The supervisor will be required to assess many of a bank's loans individually to verify that each was properly weighted. This process is complicated by the subjective nature of risk weighting. The supervisor must distinguish a legitimate risk assignment with which it disagrees from one that is unacceptable or is indicative of

systematic bias within the bank's assessment program. Even when operating smoothly, the Advanced Approaches will be onerous and expensive for banks, supervisors, and in turn, banking customers.

Unfortunately, there is no guarantee that the Advanced Approaches will operate smoothly. The regulators have yet to articulate how operational risk will be calculated. There are significant disagreements over the treatment of loss mitigation techniques. The definitions of certain terms under Basel II, such as "default," are distinct enough from the current definitions to diminish the usefulness of current credit risk assessment programs in predicting capital requirements under Basel II. Former Acting OTS Director Richard M. Riccobono admits, "Significant uncertainty is inherent in the most advanced approaches of Basel II, as well as with the uneven state of readiness at our largest banking organizations—and the regulatory and supervisory framework we have developed for them."[51]

A significant allure of the Advanced Approaches is the perceived benefit to a bank's operations and profitability. If a bank is able to accurately assess the risk of each potential transaction, it will be able to price its products appropriately to minimize or avoid loss. This benefit seems great enough to make adaptation of the Advanced Approaches beneficial to a bank regardless of whether the programs are used to set regulatory capital. Thus we should expect to see similar programs in use at banks already. A survey indicates that banks are beginning to transform their internal credit assessment programs in directions consistent with Basel II. However, these programs are in their infancy. Herein lies the Achilles heel of Basel II: the accord seeks to set compliance with leading edge developments as the floor for acceptable banking standards. The ambitious standards articulated as Basel II's Advanced Approaches are so early in their development that they are too new to constitute best practices. Yet, Basel II seeks to make them the standard for minimum compliance. The time has not yet arrived for banks to be held to the Advanced Approaches. Nevertheless under the ANPR, core banks will be expected to have an advanced approach-compliant system fully operational by January 2007, even though much of the regulatory details have not been proposed.

Rather than rushing to implement the Advanced Approaches of Basel II as quickly as possible, *the U.S. should implement Basel II incrementally.* This would allow an extended period for the transition from the general 8% capital standard to individual determinations. The best use of Basel II is to treat it as a journey in which each bank that intends to adopt the Advanced Approaches must first pass through the basic approaches. Treating the Basel II framework as a roadmap for achieving a more risk sensitive regulatory regime will quell most of the concerns that have been expressed regarding Basel II.

The time banks spend in the Standardized Approach to credit risk and Basic Indicator Approach to operational risk will inform the banks and supervisors on the steps necessary to properly calibrate and implement the F-IRB and Standardized Approach to operational risk, which in turn will inform the Advanced Approaches. Incrementally moving towards the Advanced Approaches is the only means by which to allow the necessary internal systems to develop for banks to comply with the regulations. It would be important to pause at each phase of implementation to assess whether risk is sufficiently assessed and whether the added costs of a more complex supervisory structure are justified by the benefits of the more advanced approaches.

A long transition into the Advanced Approaches will best resolve the concerns over proper risk weighting, operational risk, arbitrage between Basel I and II, procyclicality, cross-boarder implementation, and a level playing field. In fact, many of these issues are only resolvable over time. Time is necessary to capture the data necessary to properly weight risk and to determine the best means of assessing operational risk. There is no question that, if the Advanced Approaches are to be achieved within the ambitious timeframe outlined in the ANPR, there will be little time for many serious issues to be resolved.

I am cognizant of the U.S. regulators' stated intent to implement only the Advanced Approaches and not utilize the more basic approaches because they believe Basel I is sufficient for the majority of U.S. banks. This decision is baffling. At first blush, it would appear that if all three Basel II approaches were needed in any country, it would be the United States. It would be naïve to suggest that there are only two groups of banks in the U.S., the 10 or 20 largest banks, operating on an ultra-complex level, and seven thousand other banks with only basic operations. Certainly there are hundreds of banks in the middle. If it is worth adopting A-IRB for 20 banks, it ought to be worth adopting F-IRB for 1000 banks. I am pleased to see our sentiments reflected on Capitol Hill and are happy that the regulators admitted that the current system needs to be modified so that implementing banks will not have an unfair advantage over Basel II banks.

I am not alone in my criticism that Basel II should not be fully rolled out in 2008. The House Financial Services Committee expressed suspicion of the timeframe.[52] Former Comptroller Hawke stated, "[B]asic principles of safety and soundness demand that the banking agencies have a more complete understanding of the consequences of this proposal on the overall capital levels of affected institutions, the competitive effects on our financial system, and associated compliance costs and burdens before moving forward to finalize this proposal."[53] Basel II can improve the financial system. However, it is dangerously unrealistic to expect the transition to Basel II to occur in a short period of time.

Other commentors have expressed the view that Basel II implementation should occur incrementally. The World Bank, for example, proposed that Basel II should be rolled

out for international banking activities before domestic ones, and for commercial activities before retail ones. This idea, while different than mine, is a good one and parallels my concern that Basel II is too complex to be fully implemented at its startup. A gradual, sound transition is necessary for Basel II to be successful.

V. Conclusion

I agree with the premise of Basel II: "[S]upervisors, to the extent possible, should shift their emphasis towards the quality of a bank's risk management process and ability to assess risk exposures properly."[54] However, as then Comptroller Hawke said, "We need to reach an appropriate accommodation where we try to make our basic system of regulatory capital rules more risk-sensitive, but we shouldn't do that at the price of dismantling or significantly impairing the basis for our supervision of U.S. banks."[55]

Basel II is ambitious and should be treated with caution.[56] The nature of the banking industry is conservative. Changes to the banking regulatory framework should be conservative and sound. Mandatory compliance with the advanced approaches should be targeted for a date near 2015. This extended implementation timeframe would allow for testing and revising the many assumptions Basel II's most advanced approaches rely upon *prior to implementation*. There is no need to expedite this process. All affected banks maintain capital in excess of regulatory minimums, calling into question the benefits of any adjustment, either raised or lowered, to regulatory capital.

Jumping headlong into the Advanced Approaches demands too much of all involved. Banks are commanded, with limited guidance, to suddenly produce methods to accurately predict each loan's PD, EAD, and LGD. Meanwhile, Banking Supervisors are told, basically, to sit back and watch unless there is a truly egregious violation.[57] This is a recipe for disaster.

Basel II's Advanced Approaches may not be achievable. They are certainly not instantaneously achievable. Banks should be required to transition through the Standardized Approach and the F-IRB before regulators decide to adopt the A-IRB. On the operational side, banks should transition through the Basic Indicator Approach and the Standardized Approach before regulators decide to adopt the Advanced Measurement Approach. This conservative step-by-step process will prevent the chaos of instant implementation of the Advanced Approaches. This will lessen the jeopardy to the banking system and the credibility of its regulators. The current Basel I regulatory environment is not cataclysmic. It is better to slowly transition to Basel II than to risk unforeseen setbacks in an abrupt transition.

I am pleased to see that the OTS apparently agrees with our recommendation. Then-Acting Director Riccobono testified,

> Among the issues for consideration are whether Basel II should be modified to allow for other available options, including the creation of transitional steps before proceeding to full Basel II implementation. This includes preserving flexibility to change existing timeframes to allow for supervisory qualification and validation, and to permit institutions more time to operate under parallel standards as well as to implement Basel II at their own pace.[58]

Even if my main recommendation is ignored, it is clear that the date of Basel II implementation should be postponed. It will be well into 2005 before QIS-4 is fully digested and the results internalized into a NPR. QIS-5 surveys were released on July 13, 2005. QIS-5 delays final calibration until 2006. The means of operational risk assessment remain unknown. Additional time is needed to evaluate the market realignments that will result from competitive advantages caused by Basel II. Proper implementation of Basel II requires extensive cooperation between U.S. regulators, implementing banks, non-implementing banks, Congress, host country supervisors, and rating agencies. More time is needed for all of these institutions to prepare for Basel II. A rush to implementation is unwarranted and will cause much greater stress to the financial system than quick implementation would alleviate.

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Footnotes

[1] The U.S. has gone beyond these requirements by requiring a 10% total risk-based capital requirement for "well-capitalized" status which is highly desirable for a number of regulatory reasons, including, among others, the authority to engage in a broader range of activities and the availability of expedited procedures. The U.S. also has a one-of-a-kind "leverage capital" requirement., which, regardless of the level of risk in a bank's assets, sets a minimum level of capital as a percentage of total assets.

[2] The Basel Committee was established at the end of 1974 and is comprised of members from Belgium, Canada, France, Germany, Italy, Japan, Luxembourg, the Netherlands, Spain, Sweden, Switzerland, United Kingdom and United States.

[3] http://www.bis.org/publ/bcbs107.htm.

[4] House Financial Services Committee Letter to U.S. Banking Regulators, at 8 (November 3, 2003) *at* http://financialservices.house.gov/media/pdf/ANPR%20Comment_001.pdf.

[5] When Basel II was first proposed, interest rate risk was a fourth focus of concern. Basel II treats interest rate risk as a part of operational risk for those institutions positioned to be harmed by interest rate swings.

[6] U.S. banks with assets greater than $250 billion or foreign exposures greater than $10 billion are required to adopt Basel II's advanced approaches and are referred to as "core banks." OCC BULLETIN 2003-32 (August 4, 2003).

[7] The number of banks comes from the FDIC QUARTERLY BANKING PROFILE, STATISTICS AT A GLANCE, THIRD QUARTER, 2004. http://www.fdic.gov/bank/statistical/stats/2004sep/industry.pdf.

[8] Five categories of specialized lending are treated separately under both IRB approaches. These specialized lending exposures include equity exposures, highly volatile commercial real estate, and other exposures where a bank's return is based on income generated by the loan recipient.

[9] The United States will require its 10 largest banks to utilize the A-IRB approach. Additionally, many large non-American banks have indicated their intent to adopt the A-IRB approach.

[10] Vice Chairman Roger W. Ferguson, Jr., Concerns and Considerations for the Practical Implementation of the New Basel Accord, Address at the ICBI Risk Management 2003 Conference, Geneva, Switzerland (December 2, 2003) *at* http://www.federalreserve.gov/BoardDocs/Speeches/2003/20031202/default.htm.

[11] "[I]ncreased alignment between regulatory and economic capital measures can create real incentives for all banks to improve their internal risk management systems while contributing to the development of more resilient financial systems. The combination of more risk-sensitive quantitative capital requirements (Pillar One), more robust supervisory approaches tailored to focus on risk characteristics within individual institutions (Pillar Two), and increased transparency (Pillar Three) can accomplish these goals if the new framework is adequately designed and implemented in a pragmatic and commercially sensible manner." Response from the Institute of International Finance to the Third Consultative Paper of BCBS, pg 21. *Available at* http://www.bis.org/bcbs/cp3/inofinfi.pdf.

[12] Ferguson, Concerns and Considerations for the Practical Implementation of the New Basel Accord, Address at the ICBI Risk Management 2003 Conference, Geneva, Switzerland (December 2, 2003) *at* http://www.federalreserve.gov/BoardDocs/Speeches/2003/20031202/default.htm.

[13] "U.S. law and regulation require FDIC-insured banks to meet certain leverage ratio requirements. . . . [A] leverage ratio is, and should remain, an integral part of our overall system of capital regulation. . . . [T]here should be limits on regulators' discretion about the level of capital at which banks are permitted to operate. The FDIC continues to support that position. Any risk-based capital framework that addresses the risks and uncertainties of the real world must include a straightforward capital floor." Press Release, FDIC, FDIC Chairman Powell Discusses Minimum Capital Requirements for U.S. Banks, *available at* http://www.fdic.gov/news/news/press/2005/pr3305.html.

[14] Paletta, Damian, *A Tale of Two Fed Staffers and a Paper on Basel II*, AMERICAN BANKER, Jan. 14, 2005.

[15] In order to gain a more certain understanding of the effects of adoption of Basel II, bank regulators in the U.S. have undertaken, with the help of individual banks, so-called Quantitative Impact Studies. QIS-5 would be the fifth such study. The U.S. bank regulators have expressed surprise at the results of QIS-4 and, therefore, postponed the schedule for implementation of Basel II in the U.S..

[16] "Based on the preliminary assessment of QIS-4 results, however, we concluded that a delay was the only responsible course of action available to us." Testimony of Julie L. Williams, Action Comptroller of the Currency before the Subcommittee on Financial Institutions and Consumer Credit and the Subcommittee on Domestic and International Monetary Policy, Trade and Technology of the Committee on Financial Services of the U.S. House of Representatives, at 9 (May 11, 2005).

[17] David Keefe, *U.S. Could Shorten Parallel Running to Save Basel II Timetable, Say Regulators*, GLOBAL RISK REGULATOR (June 24, 2005) *at* http://www.globalriskregulator.com/grrnews9.htm.

[18] Statement of Susan S. Bies Member Board of Governors of the Federal Reserve System before the Subcommittee on Financial Institutions and Consumer Credit and the Subcommittee on Domestic and International Monetary Policy, Trade, and Technology of the Committee on Financial Services U.S. House of Representatives, at 3 (May 11, 2005).

[19] *IBM Rolls Out System For Basel II Compliance*, YAHOO NEWS (Apr 8, 2005) *at* http://news.yahoo.com/news?tmpl=story&u=/cmp/20050409/tc_cmp/160503416.

[20] Benton E. Gup, Testimony before the U.S. House of Representatives, Committee on Financial Services, Subcommittee on Financial Institutions and Consumer Credit (June 19, 2003).

[21] Paletta, Damian., *supra* n. 24.

[22] Testimony of Comptroller Hawke before the Subcommittee on Financial Institutions and Consumer Credit of the Committee on Financial Services of the U.S. House of Representatives at 11 (June 19, 2003).

[23] FED. RES. BD., AN ANALYSIS OF THE POTENTIAL COMPETITIVE IMPACTS OF BASEL II CAPITAL STANDARDS ON U.S. MORTGAGE RATES AND MORTGAGE SECURITIZATION, at 1 (Apr., 2005) http://www.federalreserve.gov/../generalinfo/basel2/docs2005/potentialimpact.pdf.

[24] Chairman Alan Greenspan, remarks before the Independent Community Bankers of America National Convention, San Antonio, Texas (March 11, 2005), *at* http://www.federalreserve.gov/boarddocs/speeches/2005/20050311/default.htm.

[25] Nowhere is the priority Basel II gives to foreign financial markets more graphically illustrated than in its treatment of small business credit, which receives a particularly favorably low risk weighting. It is said that it is the strong policy of the German government to promote small business growth and that, without such a favorable low risk weighting for small business credit, German bank regulators would have declined to participate in Basel II. Thus, as currently contemplated, Basel II will encourage small business lending worldwide in order to placate the policy preferences of a single foreign government.

[26] BSBE, THE APPLICATION OF BASEL II TO TRADING ACTIVITIES AND THE TREATMENT OF DOUBLE DEFAULT EFFECTS (July 2005) http://www.bis.org/publ/bcbs116.pdf.

[27] World Savings comment letter to U.S. regulators (January 25, 2005).

[28] 68 Fed. Reg. 45960.

[29] NR 2004-52.

[30] "Unfortunately, the QIS-3 data do not provide a reliable estimate of the likely regulatory capital requirements for banks subject to Basel II. Banks encountered several practical impediments to providing accurate estimate of the effect of the proposals on their measured ratios: thus, the estimated risk-based capital ratios were subject to a substantial margin of error." House Testimony of Comptroller Hawke at 14.

[31] *Id.*

[32] We trust that the agencies will take appropriate action to ensure that lessons learned from the Citigroup case study will not be biased in favor of Citigroup and against other core banks.

[33] Williams, May 11, 2005 Testimony at 9-10.

[34] Bleier, Michael E., *Operational Risk in Basel II*, 8 N.C. Banking Inst. 101, 109 (Apr. 2004).

[35] BCBS, Implementation of Basel II: Practical Considerations, at 7.

[36] "Host countries charged with ensuring the strength of the legal entities operating in the host countries charged with ensuring the strength of the legal entities operating in their jurisdictions will not be inclined to recognize an allocation of group-wide diversification benefits, given that capital among legal entities is simply not freely transferable, especially in times of stress." Bernanke, Ben S., Remarks given at the Institute of International Bankers' Annual Breakfast Dialogue (Oct. 4, 2004). *available at* http://www.federalreserve.gov/boarddocs/speeches/2004/20041004/.

[37] D.Wilson Envin, Credit Suisse First Boston.

[38] *Studies on the Validation of Internal Rating Systems,* BSCS Working Paper No. 14, at 11 (Feb. 2005) http://www.bis.org/publ/bcbs_wp14.pdf.

[39] BSCS Working Paper No. 14, at 16 (internal citation omitted).

[40] *Id.*

[41] Statisticians' "talents are unlikely to include an appreciation of the practical risks of running a bank. These modelers will not speak the same language as those charged with oversight of risk management . . . ." World Savings comment letter to U.S. regulators.

[42] BSCS Working Paper No. 14, at 2.

[43] Thomas J. Curry, Remarks before the Subcommittee on Financial Institutions and Consumer Credit and the Subcommittee on Domestic and International Monetary Policy, Trade and Technology of the House Financial Services Committee, at 4 (May 11, 2005).

[44] Damian Paletta, *In Focus: Card Banks' Divergent Conclusions on Basel II*, American Banker, June 27, 2005, *available at* http://www.americanbanker.com/article.html?id=200506241UQVMP3L&from=home&e=y. Ironically, both organizations are at this writing in the midst of acquisitions of or by other banking organizations. It is conceivable that the very prospect of Basel II is encouraging consolidation in the banking industry.

[45] Williams, May 11, 2005 Testimony at 10.

[46] Curry, May 11, 2005 Testimony at 4.

[47] Curry at 11.

[48] Keep in mind that a regulatory capital requirement is the *minimum* level of capital a bank must maintain in order to be sound. There are many reasons for a bank to elect to maintain economic capital greatly in excess of the regulatory floor. There are unquestionable benefits of being well capitalized.

[49] Williams May 11, 2005 Testimony, at 12.

[50] BSCS, Working Paper No. 14, at 9 (emphasis added).

[51] Testimony of Richard M. Riccobono Acting Director, Office of Thrift Supervision before the Subcommittee on Financial Institutions and Consumer Credit and the Subcommittee on Domestic and International Monetary Policy, Trade and Technology of the House Financial Services Committee, at 12 (May 11, 2005).

[52] Letter from House Financial Services Committee to U.S. Banking Regulators (November 3, 2003).

[53] House Testimony of Comptroller Hawke.

[54] BCBS, Implementation of Basel II: Practical Considerations, at 4.

[55] Testimony before the Senate Banking Committee (April 20, 2004).

[56] "We believe that, as a matter of good public policy, the Basel II timeframes should be viewed as guidelines, not hard targets." Riccobono Testimony, at 12 (May 11, 2005).

[57] BSCS Working Paper No. 14, at 10. "Although this flexibility allows banks to make maximum use of their own internal rating and credit data systems in quantifying PDs, it also raises important challenges for PD validation. Supervisors and bank risk managers will not be able to apply a single formulaic approach to PD validation because dynamic properties of pooled PDs depend on each bank's particular approach to rating obligors. Supervisors and risk managers will have to exercise considerable skill to verify that a bank's approach to PD quantification is consistent with its rating philosophy."

[58] Riccobono Testimony, at 15 (May 11, 2005).

Free Speech and Election Law

Chief Justice Rehnquist and the Freedom of Speech

*By Richard W. Garnett**

With time or overuse, even the most spot-on insight can degrade to a tired cliché or shopworn truism. Still, Tocqueville was right: In the United States, sooner or later, almost every interesting or controversial question becomes a legal one. What's more, a present-day Tocqueville might add, by way of friendly amendment to his predecessor's original report, it seems that all of the *really* interesting or controversial problems are eventually packaged, often quite creatively, in freedom-of-speech terms. As a result, the First Amendment's Free Speech Clause now occupies much of the field when it comes to our simmering (and sometimes boiling) public debates on matters of law, policy, and morality. Indeed, this "free-speech takeover" of public (and private) discourse was one of the more striking and significant developments during Chief Justice William Rehnquist's long tenure on the Supreme Court.

Now, the point here is not merely to re-hash the observation, or the complaint, that certain forms of once-outcast, low-value expression have come to enjoy First Amendment status and protection. The free-speech takeover has been more dramatic, and more interesting, than just that. Today, in the courts of both law and public opinion, arguments about a huge range of human activities are constructed using First Amendment premises, precedents, and jargon. The Supreme Court's First Amendment doctrines have invited and also, in turn, been shaped by this general tendency to transpose conversations that matter into a free-speech key.

It is fair to say that, by and large, Chief Justice Rehnquist resisted, or at least regretted, this development. In 1976, for example, when the Justices switched course and extended the First Amendment's protections to commercial advertising, he chided his colleagues for second-guessing duly enacted economic regulations, insisting that "in a democracy, the economic is subordinate to the political."[1] Just a few years later, Rehnquist dissented from the Court's ruling striking down certain restrictions on election-related speech and spending by corporations, insisting that "a corporation is an artificial being, invisible, intangible, and existing only in contemplation of law" and, therefore, does not necessarily enjoy "the right of political expression." And in *Texas v. Johnson*, the flag-burning case, he insisted—again in dissent—that, for purposes of the First Amendment, flag burning should be regarded as "the equivalent of an inarticulate grunt or roar" rather than an "essential part of any exposition of ideas."[2]

But it would be a mistake—or, at least, it would be an incomplete explanation—to chalk up Rehnquist's views in these and similar free-speech cases simply to an unyielding deference to the Constitution's original meaning, a law-and-order disposition, or lingering midwestern babbitry. Nor is it clear that, as Professor Geoffrey R. Stone has charged, Rehnquist's record cannot be explained or justified in terms of any "plausible" or "coherent theory of the First Amendment."[3] Actually, his work in this area reveals a careful and instructive appreciation for the fact that the expansion of constitutionalized free-speech rights and the accompanying translation, or reduction, of so many policy questions to free-speech problems have come at a cost.

To be sure, it is almost *always* costly to recognize and protect constitutional and human rights. These rights are guaranteed and celebrated in our law and traditions not because they are painless, but because we think they are *worth* the price to signify and advance our commitments to human dignity, civil liberties, and democratic government. It might seem a bit "chintzy", then, for Rehnquist, citing the costs of expansion, to have dragged his feet and lagged behind while the Court and the culture steadily pushed back the boundaries of free-speech rights. After all, what could be wrong with more expression, more rights, more freedom?

Just this, he might have said: "Sometimes, more is less." That is, the more that "free speech" purports to mean, the less meaningful the protections from government action that free-speech rights can provide. The more work we ask the freedom of speech to do, the less energetically and successfully it will be able to do it. Remember, as our notion of free speech expands, government actions will more often bump up against, burden, constrain, or even punish purportedly protected expression. If everything becomes speech, and if, as a result, nearly all state actions are governed by, and nearly all pursuits protected by, the First Amendment, then it should come as no surprise when the courts become unable or unwilling to enforce free-speech protections in a rigorous or demanding way.

In his First Amendment opinions, Chief Justice Rehnquist often highlighted a variation on this "more is less" concern: as the civic, social, and political territory controlled by the Free Speech Clause grows, the amount shrinks that is governed democratically and experimentally by the people and their representatives, or that is left under the direction of private persons, groups, and institutions. One implication of the free-speech takeover, Rehnquist warned us, is that difficult policy and other decisions depend increasingly—and, in his view, excessively—on judges' evaluation of the abstract weight or worthiness of the government's interests, and on their application of one or another First Amendment balancing "tests," rather than on deliberation, compromise, and trial-and-error by and among citizens and politically accountable public officials.[4]

It is true, then—but it should be neither surprising nor troubling—that one does not detect in Rehnquist's free-speech opinions any burning enthusiasm for increasing the scope of the First Amendment, either by expanding the notion of what counts as speech or by increased judicial sensitivity to possible burdens on that speech. The late Chief Justice consistently tried to avoid increasing the range of policy questions and political decisions that are subject to judicial review for compliance with the First Amendment. And, Rehnquist's reasonably consistent aversion to this result was of a piece with a theory of the First Amendment specifically, and of the Constitution generally, that is coherent, plausible, and normatively attractive.

In an insightful essay commenting on the Court's then-recent *Krishna Consciousness* decision[5]—in which the Justices concluded, among other things, that a public airport is, for free-speech purposes, a non-public forum—Professor Lillian BeVier suggested that the Court's public-forum doctrine was in "disarray" and noted the "deep division among the Justices about the underlying purpose of public forum doctrine."[6] She suggested that two models—an "Enhancement" and a "Distortion" model—were competing "to supply the underlying premise of the public forum right." The Enhancement Model, she wrote, "is concerned with how much speech takes place in society and with the overall quality of public debate. . . . It presupposes that the core mission of the First Amendment is to promote an idealized vision of the democratic process by promoting speech about public and, in particular, political issues." The less ambitious Distortion Model, on the other hand, "portrays the First Amendment as embodying nothing more than a set of constraints upon government actors. . . . According to the Distortion model, the essential task of First Amendment rules is to restrain government from deliberately manipulating the content or outcome of public debate."

Rehnquist's "relatively modest set of assumptions about the appropriate boundaries of the judicial task," put him squarely in the Distortion Model camp. For the Chief Justice, Professor Bevier might have said, the aim is not to interpret, expand, and deploy the First Amendment in order to achieve the quality and quantity of constitutionally protected speech that is regarded as optimal by the Court's Justices. Or, as Rehnquist himself put it nearly thirty years ago: "It should not be easy for any one individual or group of individuals to impose by law their value judgments upon fellow citizens who may disagree with those judgments. Indeed, it should not be any easier just because the individual in question is a judge."[7] The goal, instead, should be to police vigorously government attempts to misuse its regulatory and managerial powers to stack the deck against disapproved viewpoints, while at the same time minimizing the debate-skewing dangers associated with judicial review and preserving as much room as possible for politics, experimentation, and compromise. After all, he might have added, "however socially desirable the goals sought to be advanced. . . , advancing them through a freewheeling, non-elected judiciary is quite unacceptable in a democratic society."[8]

Professor Bevier's thesis explains a lot—at least, it does at first. At the same time, it must be conceded that some of Chief Justice Rehnquist's later votes and opinions in First Amendment cases might seem inconsistent with Bevier's claim that Rehnquist is working from a model that is skeptical of judicial review and deferential to politics. For example, Justice Rehnquist substantially retreated from—if not abandoned entirely—his strong position against First Amendment protection for commercial advertising. His vote and dissenting opinion in *McConnell v. Federal Election Comm'n*—involving the so-called Bipartisan Campaign Reform Act of 2002, indicate a marked move away from his previous view that regulations of political speech by corporations are not the First Amendment's concern.[9] And his majority opinion in *Boy Scouts of America v. Dale*,[10] which concluded that the Boy Scouts' First Amendment right of "expressive association" entitled it to fire an openly gay scoutmaster notwithstanding a state law prohibition on such discrimination, seems to embrace a notion of association-as-speech that is broader than Rehnquist might have been expected to believe. What's going on?

One explanation, of course, is that Rehnquist's relatively narrow understanding of the Free Speech Clause's content and reach always had more to do with bringing about his preferred policy outcomes than with a principled commitment to democratic government or a deep-seated concern about the distorting effects on civil society of judicial review. But this explanation is both uncharitable and unsatisfactory. Fortunately, a better one is available.

I suggested above that Rehnquist's free-speech decisions reflected his concern that as the civic, social, and political territory controlled by the Free Speech Clause grows, the amount shrinks that is governed democratically and experimentally by the people and their representatives, or that is left under the direction of private persons, groups, and institutions. In keeping with this concern, Rehnquist tended to resist constitutionalizing in free-speech terms disputes about economic policy or the management of public property and resources, a resistance that indicates a desire to protect the workings and structure of civil society from intrusive, and possibly distorting, First Amendment review.

In his ambitious "retrospective on the Rehnquist Court," Professor John McGinnis contended that, in a number of areas, the Chief Justice has developed a jurisprudence that "invigorates decentralization and the private ordering of social norms," in part by protecting the autonomy of mediating associations and institutions—like corporations, political parties, local governments, and the Boy Scouts—"from the encroachments of more centralized power."[11] If this is right, then Rehnquist's later decisions and votes in favor of Free Speech claimants can and perhaps should be seen not so much as a departure from his earlier rulings, but instead as an application of the same, overriding belief that

the First Amendment should be understood and applied in a way that protects and values localism, pluralism, and politics, and that "permits. . .debate to continue, as it should in a democratic society."[12]

We have all heard, read, and (probably) argued a good deal lately about the "judicial philosophy" of nominees to and Justices of the Supreme Court of the United States. Senate staffers, pundits, "big media" journalists, and bloggers have scoured the sources, including college research papers, job applications, appellate briefs, and opinions—even thank-you notes—looking for clues (or smoking guns). To understand William H. Rehnquist's understanding of the Free Speech Clause—and, more generally, his "judicial philosophy"—it is essential to understand his consistent goal was to insist and, to the extent possible, ensure that the people—"We the People," the "ultimate source of authority in this Nation"[13]—acting through their politically accountable representatives, retain the right to serve (or not) as the agents of and vehicles for that change. What animated Rehnquist's work and career on the Court was a clear-eyed appreciation for tension that can exist between the "antidemocratic and antimajoritarian facets" of judicial review—facets that, he reminded us, "require some justification in this Nation, which prides itself on being a self-governing representative democracy"—and the "political theory basic to democratic society."[14]

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Footnotes

[1] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (Rehnquist, J., dissenting).

[2] Texas v. Johnson, 491 U.S. 397 (1989) (Rehnquist, J., dissenting).

[3] Geoffrey R. Stone, *Justice Rehnquist and "The Freedom of Speech, or of the Press," in* Bradley, *supra*.

[4] Early in his career, then-Justice Rehnquist pressed this argument in the context of a general discussion of constitutional interpretation. *See* William H. Rehnquist, *The Notion of a Living Constitution,* 54 Tex. L. Rev. 693 (1976).

[5] Int'l Society for Krishna Consciousness v. Lee, 505 U.S. 672 (1992).

[6] Lillian R. BeVier, *Rehabilitating Public Forum Doctrine: In Defense of Categories,* 1992 Sup. Ct. Rev. 79.

[7] Rehnquist, *supra.*

[8] *Id.*

[9] 540 U.S. 93 (2003).

[10] 530 U.S. 640 (2000).

[11] John O. McGinnis, *Reviving Tocqueville's America: The Supreme Court's New Jurisprudence of Social Discovery,* 90 Cal. L. Rev. 485 (2002).

[12] *Washington v. Glucksberg,* 521 U.S. 702 (1997).

[13] Rehnquist, *supra.*

[14] *Id.*

Intellectual Property

Intellectual Property and Human Rights

*By Ronald A. Cass**

Human rights embody the set of principles that properly apply to all people at all times. They are rights that are not bound by specific demographic, geographic, temporal, or technological circumstances. Although there may be debate about the particular definition of rights, human rights properly understood command respect not because they are universally embraced but because they should be—as the rights that allow individuals to flourish and societies to prosper, that support progress and liberty. These rights are in service to humanity, not to any temporary political agenda.

Basics and origins of human rights

Although a growing body of treaties and international accords has taken up the banner of human rights, the notion of universal human rights is not new. In 1776, Thomas Jefferson, in the American Declaration of Independence, wrote, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain unalienable rights, that among these are Life, Liberty, and the pursuit of Happiness." Jefferson's phrasing, while one of the most memorable aphorisms, tapped into an already established vein of discourse about human rights. Jefferson stood most directly on the shoulders of John Locke, whose design of government for the protection and promotion of "life, liberty, and property" was a foundation stone of the American constitutional system. Locke, in turn, built on far older religious and philosophical antecedents.

The older writings on human rights, from ancient times through the founding of the United States, consistently included among the listed rights the rights to marry, to raise a family, to safeguard one's property, and to pursue a calling. Property often was closely linked to marriage, family, and related institutions.[1] Rights to property were conceived in many societies as part of the constellation of rights properly guaranteed to assure familial success. Over time, property rights were assimilated into individual rights, as the individual came to have identity, and to enjoy rights, independent of family.

Over time, as well, property rights developed several distinct but related strands. One strand encompasses the right to own property and to control its use and disposition. Another strand focuses on the right to work, to retain the fruits of one's labor—in essence, to translate labor into property. A third strand addresses the rights associated with enjoyment of the benefits from contributions to scientific and intellectual advancement. All of these strands are intertwined and share common roots. All of these strands also play important roles in modern economies.

Human rights and property rights—modern charters

The identity of property rights with basic human rights continued in modern times. The original modern charter of human rights is the Universal Declaration of Human Rights, adopted by the United Nations in 1948. This remains the core of what we understand as human rights today and was expressly reaffirmed in the Millennium Declaration of the United Nations. The Universal Declaration of Human Rights specifically protects rights of property, of work, and of artistic and scientific creativity.

Article 17 of the Universal Declaration, which immediately follows the provision guaranteeing rights of marriage and family, declares: "Everyone has the right to own property alone as well as in association with others." The second clause in Article 17 states: "No one shall arbitrarily be deprived of his property."

Article 23 provides that "everyone has the right to work." Article 27 guarantees the right "to enjoy the arts and to share in scientific advancement and its benefits" and also asserts that "everyone has the right to the protection of the moral and material interests resulting from any scientific, literary, or artistic production of which he is the author."

The next major treaty concerning human rights, the International Covenant on Economic, Social and Cultural Rights, adopted by the United Nations General Assembly in 1966, continues the linkage of economic advancement and human rights. Article 6 of the Covenant provides the undertaking of each signatory nation to "recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses," and also commits nations to pursue "policies and techniques to achieve steady economic, social and cultural development and full and productive employment."

Article 15 of the Covenant repeats the guarantee of Article 27 of the Universal Declaration, committing signatory states to recognize rights "to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author." Additionally, Article 15 of the Covenant provides the states will take steps "necessary for the conservation, the development and the diffusion of science and culture" and will also "respect the freedom indispensable for scientific research and creative activity."

Property rights' fundamental importance

These rights to property, to the fruits of one's own labor, and to the benefits from contributions to scientific advancement are part of the basic constellation of human rights in large measure because they provide the predicate

for so much of what allows us to enjoy other rights. They are, of course, important on their own.

At the most fundamental level, basic property rights are an extension of the self and of the prohibition on slavery. Ownership of one's own body implies ownership of one's own labor. (That point has been made repeatedly, starting with Thomas Aquinas, and then elaborated by Locke.) All of the other property rights protected as core human rights flow from that ground.

Together, these rights allow individuals to exercise a measure of control over their surroundings. They allow us to plan our lives with some security, not that we have full control, but that we can decide for ourselves how best to invest our energies, based on our own values and expectations.

The importance of property rights to individual self-development is related to, though different from, their contribution to societal wealth and, derivative of that, to society's capacity to promote a wide variety of other rights and interests. This relationship was first noted by Aristotle, who observed that property tended to be most productive when it was owned individually rather than collectively.[2]

The twentieth century offers something as close as one gets in real life to a controlled experiment on the virtues of collective versus individual ownership. The unambiguous lesson of the century is that greater individual ownership has a marked advantage over greater collective ownership in producing wealth for society.

Although that lesson appears in many forms, one need only look at the stark divergence between the communist German Democratic Republic (commonly referred to as East Germany) and the market-oriented Federal Republic of Germany (West Germany). The two Germanys were a single nation at the end of World War II, with the same population, education, and attributes on both sides. During the 40 years that they were divided, however, the two Germanys followed radically different paths. Just prior to reunification, per capita GDP in East Germany, with an economy based on Soviet-style collective ownership, was estimated at roughly one-third that of West Germany, with its western-style market economy based on private ownership.[3] The difference between an economy based on private property and one based on collective ownership—that is, on the state abrogating rights to private property—was sufficient to produce three times the personal wealth in one half of Germany as in the other.

The advantage of private property over collective property traces only in part to the point Aristotle made. Aristotle's emphasis was on incentives, noting that the wider the ownership, the more one counted on the investment of others' efforts to secure the property's productive outputs; individual ownership naturally tended to induce individual investment in making the most of a property's productivity.

Another advantage of private property and of economies based on markets for private transactions is that these institutions give greater play to individual judgments about value and to individual knowledge (and, hence, expectations) about circumstances. Collective ownership and command-and-control organization of economies substitute centralized estimations of value and of the steps that will best increase value for individual decisions. The interplay of knowledge and information from many sources is a better guide to directing resources to their best uses than is the top-down direction from even the most sophisticated and beneficent planner.

In any economy in which there are numerous goods and numerous choices to be made respecting the best way to increase value for them, reliance on many individuals who can make specific decisions is likely to produce far better outcomes, better congruence between what is made and what is desired. Think of just an infinitesimal subset of the issues that arise in a modern economy: how much corn should be planted on a given parcel of land in Iowa? how many shirts should be produced in a particular factory, using what inputs, to be shipped where? should more small cars or large cars be made, with what features, and by what processes, using which suppliers? The larger and more complex an economy is, the greater the advantage of decentralized decision making. Centrally controlled decision making can never replicate the full information set that moves decisions in a decentralized economy. Further, the centralized economy inevitably will lack most of the "feedback loops" that help minimize and correct mistakes in decentralized economies based on individual ownership. Incentives and information flows work in tandem to produce greater efficiency and greater wealth in economies with strong protections of property rights.[4]

The contribution of strong property rights to economic success does not make optimal organization of the national economy a human right. The Universal Declaration of Human Rights and other treaties that can be looked to in defining human rights do not forbid socialism of any particular variety, although they do forbid arbitrary infringements on property rights that might be associated with a move toward greater socialism.

If a particular form of economic organization is not mandated, however, the relation of strong property rights to economic success does underscore another reason—beyond their contribution to individual self-fulfillment—that property rights have been seen as fundamental human rights. Although human rights are not conditioned on societal wealth, most human rights are facilitated by increased societal wealth. This is true, for example, with declared rights to remuneration consistent with "an existence worthy of human dignity" (Article 23 of the Universal Declaration), to rest and leisure (Article 24), to an adequate standard of living (Article 25), or to education (Article 26). It is true as well for rights related to health. Indeed, the basic assertion of such a right was expressly predicated on a connection to wealth:

the right was not directly to health but to "a standard of living adequate for the health and well-being of himself and of his family, including. . .medical care" (Article 25).

The connection of societal wealth to health, for example, is not simply a matter of common sense. Any number of examples or statistics can be marshaled to demonstrate the connection. Look, for instance, at the correlation of health indicators, such as life expectancy, with per capita GDP from a 209-nation sample based on World Bank data.[5] The correlation is extremely robust and dominates other correlations, such as employment/unemployment, health expenditures per capita, number of physicians per 1,000 of population, or number of hospital beds per 1,000 of population. The fact that wealth correlates even more strongly with increased life expectancy than the various individual, identifiable factors suggests that societal wealth helps promote health in many different ways, including both the obvious ways (such as increased availability of traditional medical services) and less obvious ways that do not show up in the discrete factors that are looked to as those most likely to explain health and longevity.

Intellectual property rights as human rights

The three different strands of property rights noted above included, in addition to rights to ownership and control of property and to the fruits of one's own labor, a right to enjoyment of the benefits from contributions to scientific and intellectual advancement. This third strand of property rights would seem to be encompassed within the first two. A right to the fruits of one's own labor certainly implies that those who invest their energies and efforts in developing inventions or new creative works should control and profit from their innovations. And a right to ownership and control of property implies that those who contract with innovators —who purchase the rights to their innovations—should enjoy the rights associated with property ownership. That would include broadly the rights to determine how the property is used, on what terms others have access to it, and how the property is disposed of (including not only royalty terms but also decisions on when and how to license or sell rights associated with the innovation).

While rights to intellectual property (the term generally applied to the class of properties associated with innovation and creativity) are implicit in the other property rights recognized as human rights, the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights both expressly grant protection to intellectual property rights. Intellectual property rights have a complex legal background with roots in tort law (misappropriation, unlawful competition), in consumer protection law (misrepresentation, fraud), and in property law. Some intellectual property rights also have coloration from the guild systems, limiting who could engage in certain activities (such as printing). The dominant legal origins for intellectual property rights, however, are property rights more generally, and the basic claims for protection of property rights as human rights also extend to protection of intellectual property rights.

In both cases, of course, the exact contours of the rights are not definite. A right to property ownership and control does not prohibit all forms of regulation. My right to control the disposition and use of my property does not give me unlimited rights to use my home as a stockyard in the middle of a residential neighborhood or to blast loud music into the neighborhood during the night.

At the same time, there must be *some* substantive content to the protection of property rights; certain types of interference with the use and control of property must be forbidden by the safeguards given to property rights. So, for instance, a declaration that property rights are protected would be incompatible with a system that permits redefinition at the ruler's whim of what property could be used for, who could own it, or how it could be disposed of.[6] If the state attempted to justify these restrictions on property ownership and control as part of the baseline definition of the rights to property that one could enjoy—a definition that could be claimed to be separate from the question of how a state protected the property rights it recognized—any meaningful concept of human rights, or of substantive legal rights more generally, would reject that claim.

The contours of intellectual property rights

The optimal contours of intellectual property rights are matters of debate. Some commentators stress that intellectual property is intangible and, so, can be used by many people at once. You and I can both use the idea of making Coca-Cola by mixing certain ingredients, in contrast to us both trying to wear the same shirt simultaneously or to use a particular property for a picnic and a ballgame at the same time. In this sense, intellectual property is, to use the economists' terminology, "non-rivalrous." Because it is non-rivalrous, some scholars and pundits suggest that the scope of rights to intellectual property should be severely limited.[7] After all, why do you need protection against others' use of your property if it doesn't diminish your ability to use it yourself?

No one disputes that there are differences between property that is non-rivalrous and more traditional types of property, but the point with respect to intellectual property is frequently overstated. For example, while many people could simultaneously use the formula for Coca-Cola to manufacture that drink, having many makers of the drink has obvious consequences for the value of the formula. For one thing, allowing unlimited numbers of Coca-Cola producers—allowing production without approval of the owner of the formula—would have an obvious impact on the ability of those who came up with the formula to profit from its success. For another thing, production unconstrained by approval from the formula's owners would remove an important incentive to maintain its quality, consistency, and purity. While the formula's owners have a

strong interest in maintaining its long-term value, those who are but one among many producers lack that incentive.

Both the ability to profit from an innovation and the incentive to maintain its value over the longer term are important. Let's turn first to the incentive to create and its relation to profit potential from innovation.

No one should doubt that the profit-motive is a central incentive to invest in innovation. Popular images often connect technological progress with some solitary genius' "Eureka" moment. But most major innovations are the result of enormous investment in research and development over extended periods of time.

Look, for instance, at spending by pharmaceutical companies on the development of new drugs to help prevent and combat disease. A study of American pharmaceutical companies states that these firms spent $26 billion on research and development in 2000, an amount that equates to over $960 million for each new drug approved for use.[8] This figure is approximately one-third of world-wide spending on pharmaceutical research and development. Another study found that for every 5,000 drugs that appeared promising enough to pursue research in animal studies, only five would be approved for human clinical trials and only one would prove suitable for human use.[9] Obviously, without the prospect of recouping this investment, progress on pharmaceutical innovation would grind to a halt.

Given the critical contributions of pharmaceuticals to improved health, that would be terribly unfortunate. Advances in pharmaceuticals, biologics, vaccines, and hygiene, together with improvements in transportation, communication, and agriculture, helped propel a dramatic increase in life expectancy in the twentieth century along with a remarkable decrease in infant and childhood mortality. American life expectancy rose more than fifty percent over the century, and childhood mortality in America at the end of the century was one-fifteenth its level at the century's outset.[10] These changes are signal accomplishments of a society that values and rewards innovation.

Similarly, the last century saw a revolution in other fields driven by entrepreneurs' ability to reap the rewards of investment in creation of intellectual property. Personal computing, cellular telephony, and a host of other IP-intensive technologies boosted productivity and improved both safety and access of many communities—including the disabled and the geographically remote—to a host of goods and services formerly unavailable. According to the U.S. Bureau of Economic Analysis, the information-communication-technology sector (one of the heavily IP-dependent sectors) accounted for fifteen percent of U.S. economic growth in 2004, triple its share of the economy.

Certainly, the incentive to continue investing in innovation is central to economic progress. Although no one with confidence can assert that a particular set of IP rights definitively provides the right trade-off between investment in innovation and maximum diffusion of the innovation—maximum use of the innovation—no one should doubt the importance of strong IP right protections to the initial creative successes that are essential to any vision of social advancement.

This is also true of the need to protect IP following the initial innovation. Just as the right to profit from an innovation is an indispensable spur to the investments that produce innovations, the right to control IP to protect its long-term value is indispensable as well. The lesson of the Soviet-collective system in part was that, as Aristotle saw in his own day, collective ownership diminishes incentives to maintain property and to support its productivity. That is no less true of intellectual property than of other property. Indeed, the very intangibility that advocates of greater limits on IP rights rely on for their arguments makes those rights especially fragile and makes protection of those rights especially important. That in large measure explains the special protections afforded intellectual property, in addition to those afforded the larger class of property that encompasses them, in the basic documents defining human rights.

Threats to intellectual property rights

Recently, some commentators have advocated limitations on intellectual property rights in order to protect other interests, such as economic development in less affluent nations or health in poorer populations. Those efforts should be viewed with an extraordinary degree of skepticism.

The claim that property rights should be restricted in order to promote some other interest, such as economic development, is neither new nor limited to intellectual property rights. In Zimbabwe, for example, President Robert Mugabe has blatantly violated property owners' rights, justifying his conduct by declaring it necessary to advance economic development and justice in this former colonial nation.[11] Yet, as discussed above, economic development is enhanced, not restrained, by recognition of property rights.

The same is true of intellectual property rights. Access to intellectual property and to goods and services embodying intellectual property facilitates economic development. Respecting intellectual property rights encourages owners of the rights and producers of goods that incorporate those rights to provide greater access to the products built on them.

The connection to health also should be seen in this light. Health, as already noted, is strongly correlated with increased societal wealth. Steps that encourage economic advancement will serve interests in health more securely for a longer time than short-run efforts to expropriate intellectual property.

Of course, there is always an opportunity to advance some other interest temporarily at the expense of property rights. Commandeering my home can lower the cost of putting up a hotel. Conscripting doctors—or even kidnapping doctors from other nations (as some nations used to impress sailors from other nations on the high seas)—to provide free services can lower the cost of medical care. Both acts would violate core protections of human rights. And both acts would undermine longer-term interests in development—and with that, undermine the advantages for societal wealth, for housing, and for health that come with protection of property rights.

Frequently, policy advocates are tempted to try and find a short-cut to some end. So, for example, unable to persuade a government to invest in adequate medical care, some people who are concerned with health issues wish to conscript pharmaceutical companies to serve poor communities without the remuneration that they otherwise would receive. It is beyond the scope of this paper to explore the full implications of such efforts, but it is clear that these are a direct assault on the human rights protected by the United Nations Declaration and International Convention. They stand in the same position as taking private property without compensation or depriving individuals of their right to the fruits of their own labor. These violations of basic human rights might seem useful to some immediate policy goal, but they contravene established law and have consequences for future behavior that no one should want.

Conclusion

Declaring basic human rights and concluding international treaties in support of such rights help frame the understood set of universally applicable freedoms to which all governments at all times should adhere. Property rights, including rights to ownership and control of property, to the fruits of one's own labor, and to enjoyment of the benefits from contributions to scientific and intellectual advancement, are included within the core set of rights protected as human rights by international law. Recent suggestions that nations are free to derogate from protection of intellectual property rights in order to secure short-term gains along policy margins of importance to some advocates run directly contrary to the understanding of human rights included in the charter documents on human rights. They are at odds with historic notions of property rights and freedom dating back to Aristotle and beyond. Those who are concerned with human rights should reject calls to impinge on them, no matter how heartfelt the plea or how attractive the cause. The causes of human advancement, of personal security, and of the rule of law that under gird the historic definition of human rights ultimately should prove more compelling than quick fixes for today's problems.

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Footnotes

[1] *See, e.g.*, Leonard P. Liggio & Alejandro A. Chafuen, *Cultural and Religious Foundations of Private Property*, *in* The Elgar Companion to the Economics of Property Rights (Enrico Colombatto ed., Edward Elgar Pub. 2004).

[2] The Politics of Aristotle 44 [1261b] (Ernest Barker ed., Oxford Univ. Press 1969).

[3] Charles Wolf, Jr., *Commentary: One Korea?*, Wall St. J., June 30, 2005 (republished: <http://www.rand.org/commentary/063005WSJ.html>).

[4] The correlation of strong property rights with economic success is shown, among other places, in the statistics gathered in Gerald P. O'Driscoll et al., Index of Economic Freedom (Heritage Found. 2002).

[5] Cynthia Ramsay, Beyond the Public-Private Debate: An Examination of Quality, Access and Cost in the Health-Care Systems of Eight Countries (Marigold Found. 2001).

[6] *See, e.g.*, Ronald A. Cass, *Property Rights Systems and the Rule of Law, in* The Elgar Companion to the Economics of Property Rights (Enrico Colombatto ed., Edward Elgar Pub. 2004).

[7] *See, e.g.*, Lawrence Lessig, The Future of Ideas: The Fate of the Commons in a Connected World (Vintage Books 2002).

[8] Merrill Matthews, Jr., Inst. for Policy Innovation, From Inception to Ingestion: The Cost of Creating New Drugs (Sep. 9, 2002).

[9] Report of Joseph DiMasi, Tufts University, described in Matthews, *supra*.

[10] *See* Bernard Guyer, et al., *Annual Summary of Vital Statistics: Trends in the Health of Americans During the 20th Century*, 106 Pediatrics 1307-1317 (2000).

[11] *See* Cass, *supra*.

Some Thoughts on the Right to Health in International Law: An American Perspective

*By John S. Gardner**

"Property is surely a right of mankind as real as liberty."[1]

Classic and Modern Conceptions of International Law

At least three of the Millennium Development Goals adopted in 2000 by the United Nations General Assembly[2] are related to health: Goal 4 ("Reduce child mortality"), Goal 5 ("Improve maternal health"), and Goal 6 ("Combat HIV/AIDS, malaria and other diseases").[3] Many would argue that Goal 7 ("Ensure environmental sustainability") has a health component as well, as poor environmental conditions often lead to deleterious effects on human health and a safe environment is a precondition to good health.

Yet, while this shows the deep concern of the international community to improve health worldwide, a discussion of whether there is a "right to health" in international law, and, if so, the contours of that right, the definition of to whom the right appertains and against whom it may be enforced, and the implementation of the right, is far more complex. To answer this question, one must first examine the classic and modern conceptions of international law.

In the classic conception of international law, the subject concerns the rights and obligations of sovereigns rather than private actors. "[I]nternational law is regarded as [a] set of objectively valid norms that regulate the mutual behavior of *states*."[4] Similarly, the Restatement (Revised) of International Law §102(1), affirms that "[a] rule of international law is one that has been accepted as such by the international community of states (a) in the form of customary law, (b) by international agreement, or (c) by derivation from general principles common to the major legal systems of the world."[5]

The crucial idea here is the acceptance by the community of *states*, rather than private actors or even international organizations, that a particular doctrine is part of international law. States may themselves decide to incorporate private actors into a scheme of international law, but this requires the affirmative action of States.[6]

This conception of international law is equally applicable to international human rights law. Human rights law has traditionally concerned obligations of and rights against governments, not private actors. Consequently, "human rights" were thought to include basic civil and political rights—for instance, guarantees against slavery, torture, arbitrary detention, extrajudicial killing, and governments acting with impunity against their citizens. Whether governments could be subject as a matter of international law to any kind of enforcement of these principles was, however, a very different question. The traditional answer is that they could not be, except through a treaty which bound the subject government and, for many States, including the United States, which also either was executable by its own terms under domestic law or had been incorporated by express enactment into domestic law. Certainly if governments took actions against the citizens of *another* country, international law principles could be invoked and the government of the affected country could seek to take action, but international law as such had no real enforcement mechanisms against governments for violations of their own citizens' rights, save war.

After the Second World War, the adoption of the United Nations Charter, the Universal Declaration of Human Rights,[7] and other documents as discussed below opened the way to a new dimension of human rights as a subject of international law. Increasingly, on the basis of these documents, the proposition has been advanced and accepted by many states that international law, particularly in the form of international human rights law, broadly encompasses socioeconomic rights such as the right to work, the right to housing, the right to education, and the right to health care.[8]

So far, this is relatively uncontroversial. Yet recently some in the international legal community have been pressing for even further expansions of international law in the area of socioeconomic rights. In one notable recent exposition of this view, Louise Arbour, the United Nations High Commissioner for Human Rights, declared at the opening of the 61st session of the UN Commission on Human Rights this past Spring that: "Socioeconomic rights have the status of binding law. . .bringing them from the realm of charity to the realm of justice, and developing a body of ever growing jurisprudence by which we can be guided in bringing these vital rights to the reality of people's lives."[9]

Recognizing the evident difficulty of domestic enforcement of socioeconomic rights, however, Commissioner Arbour further hoped that "agreement can soon be reached to allow the entry into force of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights giving rise to a legal process that would allow individuals to bring their claims before an international forum in those situations where national recourse has been found wanting."[10]

While it would surely be some time before any such Optional Protocol could come into force and in any event would apply only to those states which ratified it, this statement is as audacious as it is open-ended. How could an appropriate level of socioeconomic rights justifying intervention by an international legal forum be defined? Moreover, how could these rights, or even the decisions of such a tribunal, be enforced? Are national officials to come to trial, as indicted war criminals do to the Hague or Arusha?

Would such an indictment or a conviction end the national officials' responsibility for conduct of their own government? More basically, when states seek to assure a high standard of living for their own people, is that merely "charity," or is it rather the working of representative government and market-oriented economics—systems designed to ensure that governments keep the welfare of their citizens as the highest priority? And what does the implicit criticism of "charity" here mean for private industry, which has responded generously by providing programs to bring humanitarian goods, including pharmaceuticals, to needy people in their own countries and around the world?

States may of course establish whatever rights they wish for their own citizens and enforce those rights through appropriate domestic mechanisms. Indeed, legal scholar Paul Hunt of the Human Rights Centre at Essex University in the United Kingdom has noted that over 60 countries have enshrined a "right to health care" in their own constitutions.[11] But that in no way proves that the "right to health" is of itself a proper subject of *international* law, strictly considered under the traditional definition. Rather, the right derives from the affirmative acceptance by States that certain rules are binding on them, either as rules of general law or from their accession to treaties and conventions to which they have become parties. It is from this process that the right to health in international law exists.

Indeed, an analysis of special situations proves the point that the traditional standard of international law, such rights as the right to health care are strictly limited: States have an obligation to provide a certain level of health care for prisoners of war under the relevant Geneva Convention,[12] for instance, but this merely shows that the obligation runs to States rather than being simply a specific socioeconomic right pertaining to all individuals.

In any event, if a right to health is violated, other, more basic political and civil rights have likely been violated. If (for example) Tibetans, Darfurians, or Karen Christians are denied equal access to health care by virtue of government action, it is probably not their right to health as such that is being violated—though that is a result—but their clear right to equal treatment and non-discrimination based on their race, religion, or ethnicity. Furthermore, it is a fair bet that the discrimination does not stop at health care but most likely includes other concerns such as equal access to employment and housing and the rights of freedom of religion and freedom of speech, and, in extreme cases such as Darfur, even the right to life.

Sources of the "Right to Health" in International Law

The World Health Organization (WHO) was founded in 1948, and its Constitution came into force at that time.[13] Its establishment, however, was prefigured in the United Nations (UN) Charter, which evidences an interest in human health as among the goals of the organization. For instance, Article I.3 of the Charter speaks of the need "[t]o achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character" (Article 13.1(b) gives this power to the General Assembly).

Similarly, Article 55 states that the United Nations shall promote "solutions of international economic, social, health, and related problems [.]" Under Article 56, Members "pledge themselves to take joint and separate action in co-operation with [the UN]" to achieve the purposes of Article 55. However, compliance with this provision is surely achieved by a UN member state's membership of and active involvement in the WHO. The provision is not self-executing; WHO cannot simply order a member state to take specific actions such as approving or banning pharmaceutical products. There is an elaborate governance system in the WHO, but the organization's actions and effectiveness in practice depend on the cooperation and affirmative decisions taken by the member states.

Finally, Article 62 of the United Nations Charter grants to the Economic and Social Council (ECOSOC) powers to prepare reports on the subject of health, prepare draft conventions, and call international conferences. Again, it is worth remembering that all of these are statements of positive law, or derived from the treaties themselves. There is no requirement that States must attend these conferences or ratify the conventions as a part of their membership of the United Nations, ECOSOC, or the WHO.

Next, the Universal Declaration of Human Rights,[14] adopted in 1948, while not stating a "right to health" as such, provided that:

> Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.[15]
>
> Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.[16]

Also in that year, the Constitution of the World Health Organization was adopted. The Preamble to the Constitution declares that "Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity. . . . The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic, or social condition." In Article 1 of the

Constitution, the achievement of "the highest attainable standard of health" is called the objective of the WHO.[17]

Similarly, Article 12 of the International Covenant on Economic, Social, and Cultural Rights sets forth the principle of the "highest attainable standard of physical and mental health."[18] Among more modern treaties comprising what is commonly referred to as international human rights law, the right to health is addressed in Article 24 of the Convention on the Rights of the Child (CRC),[19] in Article 12 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),[20] and in Article 5 (e)(iv) of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).[21]

Perhaps the most comprehensive and direct example of a right to health is in the proposed Constitution for Europe, which states in Article II-95 that "[e]veryone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities."[22]

With the exception of the Constitution for Europe (which would in any event be limited in application to the Member States of the European Union), the covenants discussed above were signed and ratified by (among the major industrialized nations) Italy, France, Germany, Canada, Switzerland, and Japan, and none of these states entered reservations to the conventions with respect to the application of the right to health of all the peoples under their jurisdiction. The states' parties to the conventions are also obliged to make periodic reports to the Committees that oversee these covenants and justify their approach or inaction before a panel. On the other hand, the United States, which is a signatory to all the aforementioned covenants, has chosen to ratify only the CERD but has entered a reservation on the relevant article concerning the right to health (among other reservations to the Convention).[23] In so doing, it has extricated itself from this obligation. With respect to the other conventions, the United States' signature does not complete the ratification process and is of political significance only. The conventions would come into force for the United States only upon ratification by the Senate,[24] subject to any reservations the Senate adopts.

Whereas the United States and the United Kingdom have "pledged" to cooperate with the UN in order to achieve the "observance of human rights" contained in the Universal Declaration of Human Rights, the latter is not legally binding but was rather intended for launching the pivotal International Convention on Economic, Social, and Cultural Rights and the International Covenant on Civil and Political Rights. Notwithstanding this, the other covenants of relevance to this synopsis, the ICESCR, CRC, CEDAW and CERD, are legally binding on States Parties to those conventions.

A fundamental principle of international law is that States that bring treaties and conventions into force for their jurisdictions are bound by their provisions—the crucial doctrine, formed by Grotius, of *pacta sunt servanda*. As the various reservations adopted by the United States to the CERD indicate, the different nature of the U.S. legal system, including its federal system, is one important reason why the United States has declined to ratify the Convention on the Rights of the Child,[25] the Convention to End Discrimination Against Women,[26] and other proposals that have served to dramatically expand the reach of international human rights law. In brief, the United States' position seems to be that international human rights law—indeed, international law more generally—should be well-defined rather than a fluid document, and treaty-based rather than flexible and evolving.

Scholars such as Paul Hunt, who is the UN Rapporteur on the right to health, and activists in many non-governmental organizations have, however, sought to read these texts expansively to establish socioeconomic rights more broadly in international law. This is in despite of the evident lack of consensus that they in fact form customary law (as discussed below) and the numerous difficulties that would in any event accompany actual enforcement of these provisions, either against states parties to the conventions or, even more broadly, to private actors who are not subject to the conventions.

Based on the various provisions of international human rights law that address the right to health,[27] Hunt has summarized his definition of the right to health as follows:

> The right to health includes the right to health care—but it goes beyond health care to encompass adequate sanitation, healthy conditions at work, and access to health-related information, including on sexual and reproductive health. It includes freedoms, such as the right to be free from forced sterilization and discrimination, as well as entitlements such as the right to a system of health protection. The right to health has numerous elements, sort of sub-rights, including maternal, child, and reproductive health. Like other human rights, the right to health has a particular preoccupation with the disadvantaged, vulnerable, and those living in poverty. Although subject to progressive realization, the right imposes some obligations of immediate effect, such as the obligations of equal treatment and non-discrimination. It demands indicators and benchmarks to monitor the progressive realization of the right. . . . [D]eveloped states have some responsibilities towards the realization of the right to health in poor countries —we learn this from the Millennium Declaration, including MDG 8, as well as the provisions of

> international human rights law on international assistance and cooperation.[28]

One wonders whether many delegates to the UN Commission on Human Rights would as enthusiastically agree that developed countries have a responsibility towards the realization of the right to life in Sudan or Baathist Iraq, the right to peaceable assembly in Uzbekistan, the right to religious freedom in Saudi Arabia, or the right to freedom of the press in any number of countries around the world. Still, the quotation shows that at least with respect to the area of socioeconomic rights, the burden falls on developed countries to assist in ensuring implementation—though not enforcement as such—of these rights.

One example of a broad reading of socioeconomic rights in practice appears in paragraph 13 of the General Comment to Article 12 of CEDAW, which notes, "The duty of States parties to ensure, on a basis of equality of men and women, access to health-care services, information and education implies an obligation to respect, protect and fulfill women's rights to health care. States' parties have the responsibility to ensure that legislation and executive action and policy comply with these three obligations. They must also put in place a system that ensures effective judicial action. Failure to do so will constitute a violation of article 12." While the principle here is one of equal *access* to health care, rather than equality of delivery or still less equality of results (which in any event is surely impossible), nevertheless the General Comment shows that the scope of the article is broad and expansive. No one questions the goals; ensuring the health of women is crucial for development. But, as discussed below, unless it is clear that the obligations established by these treaties fall only on states, this can raise particular dangers in implementation and practice, not least for the private sector.

Hunt himself admits that

> General Comments are not binding documents. But, based on the Committee's long experience, they are intended to shed light on the contours and contexts of the right in question. Many economic, social, and cultural rights are worded vaguely. How can one reasonably expect a state to honor its obligations in relation to economic, social and cultural rights when the rights are so imprecise that it is not clear what they mean? So the Committee's General Comments are designed to help states, *and other actors*, by clarifying the Committee's understanding of what the rights means [sic].[29]

Americans should understand that much of international human rights law derives from a framework far more similar to civil law principles than to the Anglo-American common law tradition. While it is clear and uncontested that *travaux préparatoires* form an integral part of the interpretation of international treaties, the different principles underlying the UN system helps one to understand the higher position that documents such as General Comments and continuing actions of Committees established by various treaties compromising international human rights law have in the UN system in interpreting the treaties themselves and show how the interpretation of the treaties can change over time.

In short, some scholars and activists working in this area have sought to distort and not so subtly broaden the nature of the right to health agreed to by states which have ratified the various conventions comprising international human rights law. In the classic conception, the issue is not about the entitlement to health care per se but rather to equal *access* to health care. Fortunately, some references in the treaties comprising international human rights law themselves speak of equal access. However, with the new conception of international law, there is a clear danger that the subject could be beginning to encompass not only the question of citizens' rights relating to their own sovereign but also supposed obligations towards the international community.[30]

There is as well a danger that international human rights law could be moving in the direction of attempts to elevate multinational companies to the rank only held by states in international law and to usurp the role to the state[31] by, for instance, using a committee to review the policies and practices of pharmaceutical companies under the rubric of enforcement of the right to health. This is a radical departure from the traditional understanding of international law and is unwarranted by the texts of international human rights treaties themselves.

The Obligation to Provide the Right to Health Rests with Sovereigns

Let us be clear: the right to health in international law exists for those States which have chosen to ratify these pacts but does not, indeed cannot exist, for those States which have not, still less for private actors such as the pharmaceutical industry. It is ironic indeed that some States which focus on socioeconomic rights to the exclusion of political rights are also those which might prove singularly unwilling to permit challenges to their authority based on the conventions themselves.

The right to health, as with other socioeconomic rights, is based on treaties. In no way are these rights part of customary international law, both because important nations such as the United States have declined to ratify many of the conventions concerned and because state practice among many of the states which have ratified the conventions shows that they are in far too many instances practically unenforced.

One common UN definition of human rights also states that the obligations established by international human rights treaties belong to governments:

> Human Rights are universal legal guarantees protecting individuals and groups against actions which interfere with fundamental freedoms and human dignity. Some of the most important characteristics of human rights are that they are:
>
> · guaranteed by international standards;
> · legally protected;
> · focus on the dignity of the human being;
> · oblige *states and state actors*;
> · cannot be waived or taken away;
> · interdependent and interrelated; and
> · universal.[32]

Obviously one crucial question concerns the achievement of the right in everyday life. Who, then, is responsible for providing the right to health? As the definition given above indicates, the answer is simple: sovereign governments. This is reaffirmed by the Preamble of the WHO Constitution: "Governments have a responsibility for the health of their peoples which can be fulfilled only by the provision of adequate health and social measures."[33]

General Comment No. 14 (2000) to the ICESCR on "The right to the highest attainable standard of health" is useful for defining the role of states and the obligations of actors other than the state. This interpretive guidance rightly takes the view that apart from the state, the "other actors" mentioned in Articles 22 and 23 of the ICESCR refer to the other UN agencies and organizations[34] and not to the private sector. The obligations here pertain solely to sovereigns.

Countries also *enforce* the right to the degree they are willing or able to do so. Private sector actors such as the pharmaceutical industry can and certainly do undertake measures to help governments and other parties attain the aims of the right to health, as discussed below, but the responsibility for attaining this goal (and thus compliance with the treaties) rests with governments. Still less do the treaties require any particular form or method of attaining the goal; governments remain free to act in the way they choose.

Consequences of the Focus on Socioeconomic Rights

From the traditional perspective of international law, the new focus on socioeconomic rights, as well as the interpretation of these rights as encompassing obligations towards the international community, has several important consequences: First, in the international context, it (perhaps conveniently) can deflect attention away from gross human rights abuses in the traditional areas of focus, political and civil rights, including the right to life and to security of the person. Second, it can weaken the structure of international law by proposing to elevate to the structure of binding law rights which by their very nature are not readily susceptible of enforcement. Third, particularly with respect to the right to health, there is a danger that the new focus on socioeconomic rights can permits states asserting this right on behalf of their own citizens or the international community to criticize private actors, such as pharmaceutical manufacturers, for supposedly violating this right by not giving up their proprietary research, information, and products—even though doing so would have the deeply ironic and deleterious effect of retarding innovation and thus weakening the ability of the private sector to advance the health of millions of people around the world.

Fourth, the corollary of this last point is an increasing belief that private actors, no less than states, are proper subjects of international law. As noted above, states are free to make this shift through international agreement. They have not yet done so. It is a much further and more intrusive step, however, to seek to enforce socioeconomic rights on other states which have not signed these treaties and still more intrusive to extend their reach to encompass enforcement against private actors.

Specifically with regard to the pharmaceutical industry and similarly affected industries, a broad reading of the right to health may have additional consequences. First is the increasingly common view that the pharmaceutical industry has an obligation to ensure the availability and accessibility of, at a minimum, essential medicines[35] as defined by national governments or (from another perspective) some portion of the international community. Second, there is a view, following from this, that patent protection itself is impinging on the right to health in the developing world (or even the developed world). Hence the position that intellectual property rights should be limited and perhaps eliminated in certain cases and that companies do not have an absolute right to price their products at a cost which recoups their investment and permits a reasonable profit, some of which is reinvested in additional research and development activities. Third, if one accepts that the right to health is held by the public (or, more usually, by national governments in trust for the public), transnational companies have a wide variety of disclosure and self-reporting obligations respecting R&D, their expenditures, and their clinical trial practices. The right to privacy of their scientific research can thus be severely circumscribed. In this regard, at the 2005 session of the UNCHR, there was a sharp debate over whether a resolution on transnational corporations should even acknowledge their positive contributions at all.

A few examples will illustrate the dangers:

To end litigation in Thailand, the U.S. company Bristol-Myers Squibb surrendered its right to produce the drug didanosine (sold as Videx®), making a decision to "dedicate the product to the people and government of Thailand." This had been the case even though the Thai government had already refused a request for compulsory licensing. Director of the Foundation for Consumers Saree Ongsomwang, stated that "[t]his case can be an example for other consumer organizations in other parts of the world—if people cannot access pharmaceutical products, they can

use their rights to basic needs as a consumer."[36] While the litigation specifically concerned the scope of the patent, it is easy to see how activists and other parties could attempt to use the new international treaties granting a right to health to argue for compulsory licensing and other remedies on the grounds of the "rights to basic needs as a consumer." For the countries concerned, however, the danger, of course, is that foreign companies could decide to exit the market. But, a government could respond to this rational step by escalating the stakes: actually breaking the internationally valid patent held by the pharmaceutical company.

Worse, there could easily be specific consequences for human health with regard to use of generic drugs which have not gone through typical testing by a stringent regulatory authority such as the United States Food and Drug Administration, the European Medicines Evaluation Agency, the Swiss Federal Office of Public Health, or the Japanese Ministry of Health. For instance, there is a danger that use of unapproved drugs could lead to under dosage of patients, possibly resulting in mutations of a virus—an exceptionally serious consequences for a virus like HIV, possibly jeopardizing the remarkable progress made to date in the fight against HIV.[37]

Responding to concerns that a new type of drug combining three drugs had not undergone separate testing and evaluation, one physician noted,

> Many health experts are rightly skeptical of a one-size-fits-all approach to a complex disease that doctors in the West routinely treat with a flexible armament of drugs, adjusted to each patient according to that individual's needs. . . . In rural Africa, where sophisticated medical care is lacking, a calculable percentage of patients will become very sick or even die from the nevirapine component of this three-in-one drug. Thus the dilemma: the need to balance drug-related deaths and illness from using Triomene against the numbers of people who would go untreated altogether if aid agencies adopted a flexible but more expensive strategy."[38]

No one expects clinical practice in the developing world to have the same standard as in the developed world; regrettably, the resources in many cases are simply not present. However, one can and should expect that Western governments at least recognize the medical dilemmas here before adopting a particular policy.

While efforts to use the new human rights treaties as grounds for action against transnational companies have heretofore focused primarily on suggestions that pharmaceutical companies either make their products available at low or no cost (thus denying them the ability even to recoup the costs of developing the products), the views of some are considerably more extreme. Referring to the unavailability of antiretroviral therapy for all HIV sufferers who need it, Stephen Lewis, the special representative for AIDS for UN Secretary General Kofi Annan, stated on January 8, 2003 that "There may yet come a day when we have peacetime tribunals with this particular version of crimes against humanity."[39] Commissioner Arbour's view of simple enforcement through international tribunals, radical enough itself, is taken to another level by the implication of invoking criminal proceedings.

On the positive side, however, some governments have shown a willingness to address this issue in the international context. in spite of the numerous international treaties between states and other voluntary codes of conduct drawn by corporations, 38 states, including the United Kingdom, Germany, France, Italy, and Switzerland (all of whose pharmaceutical companies are well represented in the global market) have successfully lobbied for the appointment of a special UN representative on the issue of human rights and transnational corporations who will not only identify and clarify corporate responsibility and accountability but also monitor sphere of influence and complicity in human rights violations.[40] These states, however, are already states parties to the ICESCR and thus already have obligations to monitor companies that violate those provisions. Further, a number of governments have previously opposed the adoption of the optional protocol to the ICESCR discussed above because they did not want reports from individuals on state abuses of human rights to come under scrutiny of the committee.

Using the New Treaties: An Alternative Strategy

How can those who favor a more traditional interpretation of international law, including international human rights law, respond to the attempt to read international human rights treaties more broadly than their plain terms would allow?

Given that international law works to a large degree on consensus, a radical shift is not inevitable, so long as some states resist its transformation. An alternative strategy is simply to shift the terms of debate. Accepting the treaties discussed above as binding on the states which signed them, there is nothing to indicate what, if anything, in those treaties privileges *certain* socioeconomic rights above others. Rather, a strategy of using the new treaties to reaffirm the fundamental principles of free inquiry into and free ownership of the results of scientific research would focus upon and accentuate different provisions of human rights instruments which should be given equal weight with other provisions in the same treaties. This approach has the virtue of viewing the treaties concerned as unified documents and treating socioeconomic rights as a whole, not privileging some over others.

For instance, the Universal Declaration of Human Rights states that "[e]veryone has the right to own property" and "no one shall be arbitrarily deprived of his property."[41] With respect to intellectual property, such as research into pharmaceutical products, Article 27 declares that "[e]veryone

has the right to the protection of the moral and material interests resulting from any scientific, literary, or artistic production of which he is the author."[42] It follows naturally that the author or inventor of such writings or discoveries has the right, through freedom of contract, to alienate these interests to another person, a corporation, or an organization such as a non-governmental organization.

Similarly, the Convention on Economic, Social, and Cultural Rights recognizes "the right to work" and says that states should adopt policies and techniques to achieve steady economic. . .development. . .under conditions safeguarding fundamental economic freedoms to the individual."[43] States Parties to the Convention also "undertake to respect the freedom indispensable for scientific research and creative activity."[44] This freedom is limited indeed if states are able to take away the fruits of that research at will.

In a remarkable parallel which may almost be read as a corrective commentary on the clause in the Preamble of the WHO Constitution that "[u]nequal development in different countries in the promotion of health and control of disease, especially communicable disease, is a common danger,"[45] the Vienna Declaration and Programme of Action of the World Conference on Human Rights stated in contrast that "[w]hile development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognized human rights."[46] This clearly encompasses the rights of intellectual freedom and of ownership of property, including intellectual property. Under the scheme of the Universal Declaration and the ICESCR which grew from it, States cannot arbitrarily deprive researchers or owners of their intellectual property. One can perhaps even take this a step further to argue that if particular provisions of a treaty are to be interpreted by reference to the treaty as a whole, then provisions relating to health and private property would interact to support the proposition that there is an international principle favoring the use of market-oriented mechanisms to develop and distribute new drugs.

In short, international human rights law both recognizes property interests—which clearly includes property interests held by corporations as well as private individuals—and protects against their unreasonable alienation to or expropriation by governments. Moving beyond the strictly legal sphere, one may also easily make the argument that market-oriented economic policies focusing on economic growth and protection for internationally recognized intellectual property rights actually promote economic and social development, thus achieving the goals of the treaties themselves and, more practically, making more national resources available which may be used by both governments and the private sector to provide better access to health care and a better quality health care.

Industry Responses

Despite the real toll in human suffering and the tragedy of diseases such as AIDS, the situation is not as gloomy as Stephen Lewis' comment quoted above would suggest. As noted earlier, the right to health in international law gives obligations and responsibilities to governments. However, progress in achieving more comprehensive health care is best advanced when governments work cooperatively with the domestic private sector, all types of civil society organizations, and international companies.

There are, fortunately, numerous examples of industry working with governments to assist in improving health care for their people. Of the many possible examples from which to choose, this paper will highlight a few early interventions in response to the AIDS crisis, to show that the response of transnational corporations is not simply a reaction to WHO Director General J.W. Lee's declaration of AIDS as a "global emergency" in 2003 or to the discussions of intellectual property rights in the context of the Doha Round of the World Trade Organization.

To take but a few examples:

In December 2000, the U.S. company Pfizer, Inc. and South Africa agreed on Pfizer's donation of US $50,000,000 of its drug Diflucan® for two-types of AIDS-related concomitant infections affecting about 40% of AIDS patients.[47] Crucially, the donation is targeted to those who cannot afford to pay for the drug. The company can still market it to private patients approximately four times above the rate for government purchases. Thus, under the scheme there are effectively three levels of price in South Africa: the private rate, a sharply lower rate for government purchases (which surely reflects not only compassion and targeted marketing to a lower-income group but also economies of scale and the strong, near monophony power of many national health ministries), and the donated drugs.

In April 2003, Gilead Sciences, Inc. announced that it would sell tenofovir disoproxil fumarate (Viread®), its HIV/AIDS drug, to 68 developing countries at cost. The company has also worked with the AIDS Healthcare Foundation to support a clinic's expansion to 1,000 patients on ARV therapy through donations of its proprietary drugs, including the then-recently approved emtricitabine (Emtriva®).[48]

Private foundations have also played a role. The William J. Clinton Foundation, founded by the former U.S President, negotiated an agreement with Indian and South African makers of generic drugs "to sell the drugs for $140 per patient per year if large orders were guaranteed, payment was in cash and the drug maker did not have to pay the legal and lobbying costs of getting each drug licensed in country."[49] Yet this did not mean an endorsement of compulsory licensing or an abandonment of international intellectual property rights. Rather, a joint announcement on April 6, 2004 of the William J. Clinton Foundation, the Global Fund to Fight AIDS, Tuberculosis and Malaria,

UNICEF, and the World Bank noted that "[a]ll four organizations support strong protection of intellectual property" and further noted that "[s]ome compounds can be purchased most cheaply through procurements from patent-holding manufacturers."[50]

The overall environment with respect to AIDS drugs has been one of declining prices generally, including from use of generics that do meet international standards.[51] As of 2003, GlaxoSmithKline had agreements to make Combivir® antiretroviral therapy able to non-profit organizations for as little as 65 US cents per day. In that year, the company shipped 10,000,000 tablets of preferentially-priced ARV medication, including 165 agreements in 56 countries, of which 17 agreements were with private companies who provide treatment to their uninsured employees.[52]

Perhaps the best known industry initiative is the Accelerating Access Initiative (AAI). The AAI brings together states, international organizations, and pharmaceutical companies with the aim of increasing access to medication for HIV/AIDS in developing countries by making the drugs more affordable. Forty-nine countries have already reached an agreement on reduced prices for HIV treatment with the companies concerned. AAI has increased the number of people taking triple ARV therapy ten-fold in Africa since May 2000.[53]

Quite simply, the pharmaceutical market today is global. As GlaxoSmithKline PLC executive Jean Stephenne stated in commenting on the test of a vaccine against rotavirus, "Our business model is to supply vaccines to the world, not just the U.S. and Europe."[54] The company also responded to an urgent WHO request for a vaccine against a new strain of meningitis and sold 6,000,000 doses for just US $1.00 per dose. However, in this instance, donors had to help cover the costs.[55]

These examples all help to show that "[i]n combined donations, the pharmaceutical companies are giving more money to AIDS charity in Africa than many European/OECD *governments* are giving in annual aid for AIDS to Africa!"[56]

Yet the opposition to these efforts by some has been equally strong. One prominent U.S. activist organization greeted Boehringer-Ingleheim GmbH's early announcement of donations of Viramune® for HIV-infected pregnant women with the view that it was "completely unethical" to provide these drugs; instead, "[t]he only acceptable program must provide a clear plan for treatment to women and other infected family members, as well as assurance of medical follow up and treatment for mothers and babies." The release further stated that donations "must not be allowed to obscure efforts to increase access through means such as compulsory licensing and parallel importing. Any country doing generic production or importation of nevirapine must not be excluded from this offer.[57]

In other words, only if a pharmaceutical company agreed to essentially underwrite the health care system of a family or village for a lifetime and also agreed to eliminate its market share even among patients who can afford the drugs through compulsory licensing and parallel importation is the donation acceptable. Not only would there be no donors under such a system, but even if sound could be found, they would have little to donate in the future. As British Prime Minister Tony Blair reminded the World Economic Forum in Davos in February 2005, the first responsibility of business is to "make a profit."[58] Without that, there would be no corporation and hence no ability even to discuss the idea of corporate social responsibility.

Further, within the implementation of the right to health itself, what grounds are there to privilege one part of that right—the alleged need to invoke compulsory licensing of pharmaceutical products with the implicit or explicit threat of breaking patents—over the failure of domestic governments to strengthen their own health delivery systems[59] or to pursue policies that lead to economic growth and increasing national wealth which could lead to greater resources, both public and private, available for health care ?[60] An expropriated (or donated) vaccine can do nothing to help a child if proper refrigeration is not maintained in the delivery system. Taxes,[61] tariffs, and other government policies can also weaken the ability of ordinary citizens to purchase health care for themselves or to have access to health care products paid for by private, bilateral, or multilateral donors.

Rather than simply criticizing industry, a better approach to the right to health would be to reaffirm the original intent of the various international human rights treaties and focus instead on national governments' own actions with respect to their own health care priorities. As WHO Director General J. W. Lee said on September 23, 2003, "Today, we have medicines to treat AIDS patients for a dollar a day or less but these medicines are not getting to the people who need them. . .Investing in treatment for AIDS also means strengthening health systems. This will benefit all those who require health care, for AIDS, for TB and for any other health needs."[62] As the obligation to fulfill the right to health pertains in the final analysis solely to governments, ensuring that the responsibilities remain there as well would also be more consistent with a traditional approach to international law readily accepted by all in the international community.

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Footnotes

[1] John Adams, Dissertation on the Canon and the Feudal Law (1765).

[2] G.A. Res. 55/2, UN Doc. A/RES/55/2 (Sept. 18, 2000).

[3] The Millennium Declaration may be found at http://www.un.org/millennium/declaration/ares552e.pdf (last visited Sept. 9, 2005).

[4] Hans Kelsen, Pure Theory of Law, 215 (Knight trans. 1967) (emphasis added).

[5] Restatement (Second) of International Law, § 102; *see also* (Restatement (Third) of Foreign Relations Law of the United States). *See also* Article 38 of the Statute of the International Court of Justice: 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations;
>
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

[6] Perhaps the best example of this is the International Federation of Red Cross and Red Crescent Societies, which has international personality even though the most of the national societies are not themselves state actors. The Global Fund to Fight AIDS, Tuberculosis and Malaria has also signed a headquarters agreement with the Swiss Confederation which confers similar rights on it.

[7] *Universal Declaration of Human Rights*, G.A. Res. 217A (III) at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948). (The Universal Declaration was actually adopted by the General Assembly on December 10, 1948.).

[8] *Charter of Economic Rights and Duties of States*, G.A. Res. 3281, U.N. GAOR, 29th Sess. (Dec. 12, 1974).

[9] The speech may be found at http://www.unhchr.ch/huricane/huricane.nsf/view01/527ED2F6E7DD06ADC1256FC400406C8D?opendocument?.

[10] *Id*.

[11] As have several states in the United States, *see, e.g.* N.Y. const. art. XVII, § 3: "The protection and promotion of the health of the inhabitants of the state are matters of public concern and provision therefore shall be made by the state and by such of its subdivisions and in such manner, and by such means as the legislature shall from time to time determine." This provision was adopted in 1938.

[12] Geneva Convention relative to the Treatment of Prisoners of War, (Aug. 12, 1949, entry into force Oct. 21, 1950) arts 2, 13, and 15. Article 15 states the principle most directly: "The Power detaining prisoners of war shall be bound to provide free of charge for their maintenance and for the medical attention required by their state of health." *See also* the (earlier) Third Geneva Convention of 1925, arts. 30 ("Each camp must have an adequate infirmary and, if additional treatment is necessary, prisoners of war must be admitted to any military or civilian hospital where that treatment can be given, even if they are soon to be repatriated") and 109-110 providing that seriously wounded and sick prisoners must be sent back to their own countries as soon as they are fit to travel.

[13] According to the official statement of the WHO, "[t]he Constitution was adopted by the International Health Conference held in New York from 19 June to 22 July 1946, signed on 22 July 1946 by the representatives of 61 States (*Off. Rec. Wld Hlth Org*., 2, 100), and entered into force on 7 April 1948."

[14] *Universal Declaration of Human Rights*, G.A. Res. 217A (III) at 71, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810 (Dec. 12, 1948). (The Universal Declaration was actually adopted by the General Assembly on December 10, 1948.).

[15] *Id*., art. 22.

[16] *Id*., art. 25(1).

[17] WHO Const., art. 1.

[18] The complete text of the article states:

> 1. State Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
>
> 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
> a. The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
> b. The improvement of all aspects of environmental and industrial hygiene;
> c. The prevention, treatment and control of epidemic, endemic, occupational and other diseases,
> d. The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

[19] *Convention on the Rights of the Child*, GA Res 44/25 (Nov. 20, 1989).

[20] *Convention on the Elimination of All Forms of Discrimination Against Women*, GA Res. 34/180 (1979). Article 12 reads: "1. States Parties shall take all appropriate measures to eliminate discrimination against. women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning. 2. Notwithstanding the provisions of paragraph I of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation."

[21] *International Convention on the Elimination of All Forms of Racial Discrimination*, GA Res. 20/2106 (Dec. 21, 1965).

[22] Eur. Const., art. II-95.

[23] The reservation may be found at http://www.unhchr.ch/html/menu3/b/treaty2_asp.htm.

[24] U.S. Const., art. II, § 2.

[25] *Convention on the Rights of the Child*, GA Res 44/25 (Nov. 20, 1989).

[26] *Convention on the Elimination of All Forms of Discrimination Against Women*, GA Res 34/280 (Dec. 18, 1979).

[27] Right to health care (Art. 12.2.d ICESCR); sanitation (Art. 24.2.e); healthy conditions at work (Art. 7.b and 12.2.b ICESCR); access to health-related information, including sexual and reproductive health (Articles 10.h., 14.2.b. and 16.e. CEDAW, Art. 24.2.f CRC);maternal health (Art. 10.2 ICESCR and Art. 12 CEDAW); child health (Art.12.2.a ICESCR and Art.24 CRC); sterilisation (Art. 16.e. CEDAW) ; non-discrimination (Art. 2.2 ICESCR); responsibility of developed states vis-à-vis developing states (only in Art. 24.4 CRC); disadvantaged, vulnerable and poor (Preamble ICESCR).

[28] Paul Hunt, Presentation at the panel discussion on the Rights to Sexual and Reproductive Health, 10th Canadian Conference on International Health (Oct. 28, 2003) *available at* http://www.acpd.ca/acpd.cfm/en/section/csih/articleid/223.

[29] Paul Hunt, The Right to Health: New Opportunities and Challenges, Speech at the Plenary Session, 10th Canadian Conference on International Health, (Oct. 28, 2003), *available at* http://www.acpd.ca/acpd.cfm/en/section/csih/articleid/221 (last visited Aug. 9, 2005) (emphasis added). To American ears, Hunt's phrase "contours and contexts" has a remarkably similar sound to the Warren Court's discovery of "penumbras, formed by emendations" of enumerated Constitutional rights. *See* Griswold v. Connecticut, 381 U.S. 479, at 484 (Douglas, J).

[30] It is notable how much discussion of the right to health has focused on issues regarding sexual and reproductive rights. *See, e.g.,* Paul Hunt, Presentation at the panel discussion on the Rights to Sexual and Reproductive Health, 10th Canadian Conference on International Health (Oct. 28, 2003) *at* http://www.acpd.ca/acpd.cfm/en/section/csih/articleid/223 (last visited Aug. 9, 2005)("as [UN] Special Rapporteur on the right to health I have to submit a report to the UN General Assembly and also one to the UN Commission on Human Rights. Next month I submit by [*sic*] report to the Commission and I have decided that a significant section of this report—perhaps some three to four pages—will be on the rights to sexual and reproductive health."). Later in the same presentation, Hunt noted that "It is a source of regret that the [Millennium Development Goals] do not refer to sexual and reproductive health." *Id.*

[31] See General Comment No. 14 (2000) to the ICESCR, "The right to the highest attainable standard of health." General Comment 14 clearly defines the role of the states parties to the Convention in the implementation of the right to health in their own jurisdictions and in monitoring that third parties do not violate this right.

[32] Consultative Committee on Programme and Operational Questions, Administrative Committee on Coordination, The United Nations System and Human Rights Guidelines and Information for the Resident Coordinator System, 16th Sess. (2000) (emphasis added).

[33] WHO Const., preamble.

[34] *See also* the Vienna Convention on the Law of Treaties, Articles 2.1.i and 5.

[35] For the WHO's definition of "essential medicines," *see* http://www.who.int/topics/essential_medicines/en/: "Essential medicines are those that satisfy the priority health care needs of the population. They are selected with due regard to public health relevance, evidence on efficacy and safety, and comparative cost-effectiveness. Essential medicines are intended to be available within the context of functioning health systems at all times in adequate amounts, in the appropriate dosage forms, with assured quality and adequate information, and at a price the individual and the community can afford. The implementation of the concept of essential medicines is intended to be flexible and adaptable to many different situations; *exactly which medicines are regarded as essential remains a national responsibility*" (emphasis added).

[36] Amy Kazmin, *Thai Victory on Aids drug patent paves way*, Fin. Times, Feb. 20, 2004.

[37] In any event, the use of generic pharmaceuticals, some of which have not been subject to approval by a "stringent regulatory authority" (as defined by the WHO) or to continual review of Good Manufacturing Practices (GMP), can raise concerns over safety, as the withdrawal in 2004 of three Indian-made drugs from the WHO's approved list shows. *See* Dagi Kimani, *Key Aids Drugs Dropped from WHO List*, The East African, Aug. 9, 2004, *available at* http://www.nationmedia.com/eastafrican/09082004/Regional/RegionalMain09082004.html. Of course, the company concerned should be commended for its prompt action in withdrawing its drugs from the international market once it discovered the quality concerns. Similarly, "[U.S. State Department Official Mark Dybul] added that if anything bad happened because the Bush program [the President's Emergency Plan for AIDS Relief, *see* 39 Wkly. Comp. Pres. Doc . No. 5, at 112 (Feb. 3, 2003)] used substandard drugs, 'you would crucify us for not have the due diligence of looking at the data ourselves – and rightly so.'" David Brown, *AIDS Program Balks at Foreign Generics*, Wash. Post, Mar. 27, 2004, at A3. *See also* Roger Bate & Richard Tren, *The Cost of a Cure*, National Review Online, Jun. 15, 2004, found at http://www.nationalreview.com/comment/bate_tren200406150851.asp, reporting on a visit to Zambia: "At one of the best pharmacies we visited. . .the pharmacist said she encourages people to buy the patented version of GSK's [GlaxoSmithKline's] drug first, and then perhaps the generic alternative. Why? Because GSK drugs are better and of more reliable quality, and it is more likely that the GSK drugs are genuine, rather than the increasingly prevalent counterfeit copies. If a patient starts on the GSK drug and then switches to a generic, the pharmacist can note whether the generic is effective. If it's not, the patient can switch back to GSK's drug." The two researchers also noted that wholesalers sell generic drugs "at a significant premium to the announced price," *id.*, thus reducing the price differential between generic and patented drugs.

[38] Sally Satel, *WHO's Dubious Bag of HIV Medicines*, LA Times, Jul. 1, 2004.

[39] Notes for Press Briefing, Jan. 8, 2003, *available at*: http://stephenlewisfoundation.org/docs/20030108-UNPressBriefing.html.

[40] E/CN.4/2005/L.87.

[41] Universal Declaration of Human Rights, art. 17.

[42] *Id*., art. 27.

[43] ICESCR, art. 6.

[44] *Id*., art. 15. *See also* Universal Declaration on Human Genome, 29th Gen Conf. of UNESCO, art. 14 (Nov. 11, 1997): "States should take appropriate measures to foster intellectual conditions favourable to freedom in the conduct of research."

[45] WHO Const., pmbl.

[46] World Conference on Human Rights, Vienna Declaration and Programme of Action, (June 14-25, 1993) ¶ 10, U.N. Doc. A/CONF.157/23 (July 12, 1993).

[47] Michael Waldholz, *Pfizer, South Africa Agree on Plan for Donations of AIDS Medicine*, Wall St. J., Dec. 4, 2000.

[48] *Available at* http://www.aidshealth.org/newsroom/press/press_archive/PR070203a.htm.

[49] Donald McNeil, *Plan to Fight AIDS Overseas is Foundering*, N.Y. Times, Mar. 27, 2004.

[50] *See* "Global Fund, World Bank, UNICEF Agreement" *available at* http://www.clintonfoundation.org/040604-nr-cf-hs-ai-pr-coalition-aims-to-provide-low-cost-aids-drugs.htm.

[51] "Q. And what is the average price for a year of treatment? A. Now less than $25 per month, but it's come down. It used to be $1,000 per month." John Zarocastas, "Uganda leads in fight against AIDS," Wash. Times, Jun. 3, 2004, at A17. The response to the question was given by Brigadier General Jim K Muhwezi, Minister of Health of Uganda. *See also* comments of Richard G.A. Feachem, Executive Director of the Global Fund to Fight AIDS, TB, and Malaria, *in id*., *Global Fund optimistic about AIDS Battle*, Wash. Times, May 17, 2004, at A15:

> A few years ago, antiretroviral therapy cost something on the order of $25,000 a year in the [United States] and might have involved taking 20 to 30 tablets per day. Today, antiretroviral therapy can cost as little as $150 per year as a result of agreements between the Global Fund and the Clinton Foundation. It involves taking only two pills per day, and they are the same pills. You take one pill twice a day. Now, that is a revolution in cost and practicality of a kind that we have not seen in medical history. It's a most remarkable change in only three or four years.

[52] Press Release, GSK (Jan. 19, 2004).

[53] *See* material on the AAI at http://www.ifpma.org/Health/hiv/health_aai_hiv.aspx.

[54] [Anon.], *Vaccinating the World's Poor*, Business Week, Apr. 26, 2004.

[55] *Id*.

[56] Dave Kopel, Carlo Stagnaro, Alberto Mingardi, *Articles of Faith*, TechCentralStation, Jul. 23, 2004, found at http://www.techcentralstation.com/072304D.html.

[57] Press Release, ACT UP, found at http://www.actupny.org/reports/durban-Boehringer.html (last visited Sept. 5, 2005).

[58] Alan Murray, *When CEOs Have Tea With Tony Blair*, Wall St. J., Feb. 2, 2005, found at http://online.wsj.com/article/0,,SB110729674209542849,00.html.

[59] Governments' own priorities in health care are sometimes shocking, as outside evaluations have shown. For instance, one group of studies on neonatal health reached the conclusion that "Each year four million babies around the world die in the first month of life. More than half the deaths could be avoided with simple measures such as cutting umbilical cords with sterile blades, prescribing antibiotics for pneumonia and keeping newborns warm." David Brown, *Many Newborns Could Easily Be Saved, Researchers say*, Wash. Post, Mar. 4, 2005, at A16. *See also* [Anon.], *Women and children first*, The Economist, Apr. 9, 2005, at 68:

> While a complex set of factors, from AIDS to poor educational and economic opportunities for women, contribute to the problem [of newborn deaths], the technical solutions are well-known and relatively cheap —for example, immunisation to protect infants, and simple drugs such as magnesium sulphate for pre-eclampsia to deal with some of the complications of childbirth. But the key to solving the problem is not so much technology as organisation. The biggest challenge. . .is to find the political will—and the resources—to create primary-health care systems that bring together the public, private and informal sectors [.]

[60] "Africans are ill, unable to receive medical treatment and short of food because most African governments have kept people poor, frustrated trade and interfered with markets. By increasing economic freedom and enabling the private sector to thrive, Africa will be able to create the wealth that can build health infrastructure." Richard Tren, quoted in Kopel, et. al.; *supra* note 55.

[61] *See* Kopel, et. al; *supra* note 55.

[62] "Press Conference on AIDS treatment global health emergency, Sept. 22, 2003, found at: http://www.who.int/dg/lee/speeches/2003/AIDS_treatment_pressconference/en/_committee/en/index.html.

DUE PROCESS AND WAR: A CRITIQUE OF *RASUL V. BUSH* AND RELATED ACADEMIC COMMENTARY

*BY PETER NICHOLS**

I. Introduction: The Present Conflict and the Courts

After the fourth anniversary of September 11, American forces remain in Afghanistan and Iraq. The conflicts there and in the larger War on Terror have produced a growing number of prisoners, confined, in part, at Guantanamo Bay, Cuba. There is great concern, nationally and internationally, about the conditions and legal rights of the detainees. The concern was, of course, exacerbated by the scandal at Abu Ghraib prison. Recently, there have been calls by some American politicians for the closing of the Guantanamo facility.

The issue of detention in connection with the War on Terror found its way to the nation's high court. On June 28, 2004, the Supreme Court rendered three decisions bearing on this matter. One of them, *Rumsfeld v. Padilla*,[1] was a habeas petition that the Court dismissed on procedural grounds. Padilla, an American citizen alleged to be an al-Qaeda operative, brought his petition in the Southern District of New York after he had been transferred (as an "enemy combatant") to a Navy brig in Charleston. The Court ruled that he had filed in the wrong federal district. A second opinion, *Hamdi v. Rumsfeld*,[2] also involved an American classified as an "enemy combatant." The decision said that American citizens detained as enemy combatants are entitled to notice of the reasons for detention and a hearing, though not necessarily to an ordinary judicial proceeding with the government bearing the burden of proof. The third decision handed down on that date was *Rasul v. Bush*.[3]

The *Rasul* opinion appears to be the most significant and far-reaching of the trilogy. It is the one dealing with alien detainees. *Rasul* upholds the right of alien detainees at Guantanamo Bay to bring habeas petitions in federal court challenging the basis of their confinement. The decision is more predicated upon the habeas corpus statute[4] than the Constitution. Some language in the opinion seems to suggest that so long as the custodian holding a prisoner (the custodian here being the U.S. government) is within the jurisdiction of a district court, the prisoner may sue for his freedom. If this is what the Court means, then anyone, alien or citizen, held by American forces anywhere in the world may avail himself of the federal bench. The matter is rendered ambiguous by the majority's determined argument that the lease with Cuba makes Guantanamo Bay and its inmates subject to American jurisdiction. In either case, the *Rasul* decision has the potential to affect the prosecution of the War on Terror, including the conflicts in Iraq and Afghanistan.[5] Since Abu Ghraib, there has been a drumbeat of criticism directed at the military's treatment of detainees. The pressure to abandon not only torture but all coercive techniques of interrogation has been great.[6] The decisions of the Court on detention were cited by Senator Lindsey Graham as necessitating a legislated code of prisoner rights and procedures, before such matters were further determined by judicial decree.[7] This, of course, gave way to the recent resolution against torture and all inhumane methods of interrogation, passed in Congress with the leadership of Senator John McCain.

One issue presented by the *Rasul* and other detention cases is the extent to which judicially imposed due process is consistent with the Executive's prosecution of a war. More precisely, the question is what is the role of due process in so irregular a war as the one now being waged, a conflict against a clandestine terrorist enemy who maintains no fixed military formations that can be observed by ordinary reconnaissance? Certainly, *Rasul* has been praised as a blow for civil liberties by those opposed to the Iraq War itself, except that they doubt whether it went far enough.[8] But is it possible to conduct any military conflict, while allowing the courts to control the detention of battlefield prisoners.

II. *Rasul*: the Majority Opinion

The majority opinion in *Rasul* contains several distinct lines of reasoning. Justice Stevens must first distinguish the 1950 case of *Eisentrager v. Johnson*,[9] upon which the government relies. *Eisentrager* dealt with the petitions of German prisoners held at Landsberg Prison after World War II. They had been convicted of continuing belligerent activities in China despite the German surrender. The *Eisentrager* Court rendered its decision easy to distinguish by listing a number of specific factors that mandated its decision, without making clear whether each of these factors was crucial to the result. The factors mentioned in *Eisentrager* were the petitioners' identities as enemy aliens who had never resided in the United States, the fact that they were captured outside American territory and held in military custody as prisoners of war, that they had been tried and convicted by a military commission outside of the United States for offenses under the laws of war, also committed outside of the United States, and that they had been at all relevant times imprisoned abroad.[10]

The Court in *Rasul* notes:

> Petitioners in these cases differ from the *Eisentrager* detainees in important respects: They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less

> charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.[11]

Justice Stevens also observes that the *Eisentrager* decision was based primarily upon the constitutional issue of habeas relief for military prisoners. The *Rasul* decision, by contrast, seems to be based more upon the interpretation of the statute. This, of course, makes the result in *Rasul* subject to congressional amendment. It is an interpretation of the applicable U.S. Code section rather than of the Article I Suspension or Fifth Amendment Due Process Clauses.

The distinctions between the facts of *Eisentrager* and *Rasul* are perhaps even more extensive than the majority suggests. The present War on Terror is being waged against a non-governmental network of illegal combatants, hailing from a number of countries. Of these countries, only Taliban Afghanistan and Saddam Hussein's Iraq (both defunct) were wartime antagonists. Furthermore, at the time of *Eisentrager*, the war was over. The petitioners were not incarcerated as part of the war effort, but had been prosecuted and convicted as war criminals. *Rasul* was decided with the conflict still raging and the petitioners being held as enemy combatants (though not as lawful prisoners of war). No nation is likely to subject to indictment and trial every prisoner it takes on the battlefield. The obligations that nations have with regard to the treatment of prisoners are, of course, a different matter.

The Court predicates its decision upon a review of the statutory history of habeas corpus in the United States and its role in the common law, going back to Magna Carta. Lest anyone suppose that the Court is simply applying a peacetime procedural device indiscriminately to a wartime situation, it recalls the writ's use in *Ex Parte Milligan*,[12] *Ex Parte Quirin*,[13] and *In Re Yamashita.*[14] *Milligan*, of course, was the case of a southern sympathizer sentenced to death for seditious activities on behalf of the Confederacy during the Civil War. It was again a decision rendered after the conclusion of hostilities. *Quirin* was indeed decided during the Second World War, but involved spies, sentenced to death and awaiting execution, not battlefield combatants held for the war's duration. *Yamashita*, finally, was another war crimes trial held after the enemy's surrender.[15]

The *Rasul* opinion also asserts that *Eisentrager* was based upon an earlier decision requiring the petitioner's presence in the federal judicial district where he sued. According to Justice Stevens, this earlier decision, *Ahrens v. Clark*,[16] and *Eisentrager* were effectively overruled by a later case: *Braden v. 30th Judicial Circuit District of KY.*[17] *Ahrens* involved a habeas petition by a number of Germans being detained at Ellis Island, New York for deportation. The Court there interpreted the habeas statute to require that the petition be brought in the judicial district of the petitioner's confinement.[18] It accordingly dismissed the petition brought in the District of Columbia by petitioners detained in the state of New York. The *Eisentrager* Court relied upon *Ahrens*. The *Rasul* majority concludes that the decision in *Ahrens*, and therefore that in *Eisentrager*, was overturned in *Braden*. *Braden* did not concern foreign nationals held outside of the United States, but an American being prosecuted by Kentucky who found himself locked up in Alabama. The Court held that since it was really Kentucky's detainer that was holding him, and Alabama was acting as Kentucky's agent, he could bring his petition in Kentucky. Justice Stevens, nonetheless, cites the language from the *Braden* opinion, stating that "the prisoner's presence within the territorial jurisdictions of the district court is not 'an invariable prerequisite' to the exercise of district court jurisdiction under the federal habeas statute."[19] The new doctrine which the *Rasul* Court finds to have been handed down in *Braden* is that any district has habeas jurisdiction in favor of any petitioner provided that "'the custodian can be reached by service of process.'"[20] The *Rasul* majority summarizes its holding as follows:

> In the end, the answer to the question presented is clear. Petitioners contend that they are being held in federal custody in violation of the laws of the United States. No party questions the District Court's jurisdiction over petitioners' custodians. . .Section 2241, by its terms, requires no more.[21]

Although the aspects of the *Rasul* holding discussed thus far would seem to render the territorial status of Guantanamo Bay irrelevant, the Court in the final portion of its majority opinion takes the trouble to argue that Guantanamo is for all practical purposes part of the United States. The Court addresses the issue of "extraterritoriality," observing:

> Whatever traction the presumption against extraterritoriality might have in other contexts, it certainly has no application to the operation of the habeas statute with respect to persons detained in "the territorial jurisdiction" of the United States. . . . By the express terms of its agreements with Cuba, the United States exercises "complete jurisdiction and control" over the Guantanamo Bay naval base, and may continue to exercise such control permanently if it so chooses. . . . Respondents themselves concede that the habeas statute would create federal court jurisdiction over the claims of an American citizen held at the base. . . . Considering that the statute draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship. Aliens held at the base, no less than American citizens, are entitled to invoke the federal court's authority under Section 2241.[22]

The Court is certainly correct that aliens on U.S. soil are entitled to the benefit of the habeas statute and the rest of due process.[23] Even an illegal alien, confined in the United States upon conviction of murder and robbery, can obtain review of his conviction and sentence. But does *Rasul* say that aliens held by the United States on foreign territory may bring habeas petitions in U.S District Court or not?

There is a growing body of academic literature suggesting that "territoriality" should not be a limit on legal jurisdiction.[24] As expressed by one author, "If we do cherish constitutional freedoms, if we do think that constitutional rights are in some normative sense *right*, it is surprising that the accident of geography should control the ability to invoke them." For, "[w]hy should governmental action repugnant to our deepest values become anodyne merely because it occurs outside our borders?"[25] It is further argued that the activities of nations outside of their borders should not occur in a legal "black hole." Human rights standards, in other words, should apply to anything a nation does overseas, no matter to whom it does it.[26] But surely a distinction needs to be made between human rights standards imposed by international conventions and treaties, and the strictures of American statutory law.[27] No one doubted that the Geneva Convention applied to Axis prisoners captured in World War II (despite the utter indifference to its provisions on the part of the Japanese), but that didn't mean that they could bring habeas petitions in American courts. American law, in general, only extends over America, or over Americans. No one denies that American citizens abroad retain their constitutional rights against the United States—that much was conceded by the Government in *Rasul* and by Justice Scalia in dissent. But extending the protection of the U.S. Constitution to alien enemy combatants would appear to be something else. That is where *Rasul* takes us.

The *Rasul* majority completely rejects the idea that the status of habeas petitioners as aliens in military custody should pose any barrier to their seeking relief in American courts. They observe, "nothing in *Eisentrager* or in any of our other cases categorically excludes aliens detained in military custody outside the United States from the 'privilege of litigation' in U.S. courts."[28] The Court cites in support of this proposition a case dealing with the right of alien citizens in time of peace to bring law suits in American courts,[29] as well as the U.S. Code section allowing actions for torts "committed in violation of the law of nations or a Treaty of the United States."[30] Justice Stevens concludes by stating, "the fact that the petitioners in these cases are being held in military custody is immaterial to the question of the district court's jurisdiction of their nonhabeas statutory claims."[31] The implication seems to be that their status is not material to their habeas statutory claims. If this is truly the holding in *Rasul*, then any prisoner held by American soldiers in a makeshift stockade anywhere abroad may, subject to the mechanical details of obtaining counsel and serving a writ, sue for his freedom in an American federal court.

III. Justice Kennedy's Concurrence

Justice Kennedy agrees with the dissent and disagrees with the majority about *Braden* having overruled *Eisentrager* and *Ahrens*. He believes that *Eisentrager* indeed governs this case and has not been modified by subsequent decisions. He distinguishes *Eisentrager* from *Rasul* in much the same way as does the majority, however. Guantanamo Bay, unlike Landsberg Prison, is American territory. Furthermore, the petitioners in *Eisentrager* had been tried, convicted, and sentenced to a fixed term of years, while the *Rasul* petitioners were being held "indefinitely." Kennedy attaches particular importance to the circumstance of detention without trial:

> Indefinite detention without trial or other proceeding presents altogether different considerations. It allows friends and foes alike to remain in detention. It suggests a weaker case of military necessity and a much greater alignment with the traditional function of habeas corpus. Perhaps where detainees are taken from a zone of hostilities, detention without proceedings or trial would be justified by military necessity for a matter of weeks; but as the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker.[32]

Justice Kennedy seems to regard the length of time of confinement as critical, no matter what the progress of the conflict in which the prisoners were taken. Doesn't "the case for continued detention to meet military exigencies" depend to some extent on how things are going on the battlefield? The possibility that prisoners captured in war will return to being enemy combatants and will have to be captured again or killed generally means that they are held throughout the duration of the conflict. Certainly, there was no limitation upon the time for which American prisoners of war were held in North Vietnam. Justice Kennedy almost seems to have in mind the example of 1941-45. Under this historical model you go through a brief initial period of danger, win some crucial victories, see the tide turn, and emerge triumphant in less than four years. But the outcome of the Second World War was not a foregone conclusion in 1941, and there was no thought of releasing German, Japanese, and Italian prisoners of war until peace was concluded. Thousands of them were, in fact, held in prisoner of war camps within the continental United States, without the slightest possibility of suing for their release. To repeat, they were not like the petitioners in *Eisentrager*, who were tried as criminals after the War. The detainees at Guantanamo Bay, whether they are viewed as prisoners of war, subject to the protections of the Geneva Convention, or as illegal combatants, not subject to those protections, were captured as participants in the battlefield conflict. That conflict is still very much active and the significance of affording them judicial means to achieve release is obviously far greater than it would be if the conflict were over. This is, in large measure, the substance of Justice Scalia's dissent.

IV. The Dissent

Justice Scalia notes that the Constitution does not confer jurisdiction in this case and that the supposed basis for the majority ruling is the habeas statute itself. Scalia cites the applicable language from it,[33] pointing out that it seems to require the petitioner's detention within the territorial jurisdiction of some district court. Scalia notes:

> No matter to whom the writ is directed, custodian or detainee, the statute could not be clearer that a necessary requirement for issuing the writ is that some federal court have territorial jurisdiction over the detainee. Here, as the Court allows. . .the Guantanamo Bay detainees are not located within the territorial jurisdiction of any federal district court. One would think that is the end of this case.[34]

Scalia traces the jurisprudence on this matter from *Ahrens* to *Eisentrager* to *Braden*. In short, Scalia points out that *Ahrens* involved detainees held within one jurisdiction (Ellis Island, New York), who decided to bring their petition in another jurisdiction (the District of Columbia). They were unsuccessful, but the *Ahrens* Court reserved the question of what rights a petitioner would have who was not confined within the jurisdiction of any federal court. Then came *Eisentrager*, which Scalia contends settled that question once and for all. The Court of Appeals in *Eisentrager* held that the habeas statute should be interpreted as conferring a right upon the absent petitioners, in order to preserve the statute's constitutionality. The Supreme Court, reversing the Court of Appeals, ruled on the federal statute as much as on the Constitution, Scalia argues:

> A conclusion of no constitutionally conferred right would obviously not support reversal of a judgment that rested upon a statutorily conferred right. An absence of a right to a writ under the clear wording of the habeas statute is what the *Eisentrager* opinion held: "nothing in the text of the Constitution extends such a right, nor does anything in our statutes." 339 U.S. at 768 (emphasis added). "[T]hese prisoners at no relevant time were within any territory over which the United States is sovereign and the scenes of their offense, their capture, their trial, and their punishment were all beyond the territorial jurisdiction of any court of the United States . . . .(original emphasis).[35]

Scalia rejects the argument that *Braden* overruled *Ahrens* and thereby *Eisentrager*. His essential point is that *Braden* involved a petitioner confined within the jurisdiction of a federal district court within the United States. The petitioner in *Braden* was being prosecuted in Kentucky and had been captured in Alabama. The Court held that the custodial state, Alabama, was effectively acting as an agent for Kentucky and that the habeas petition could be brought properly in Kentucky, the state with which Braden really had his dispute. This, Scalia argues, hardly justifies allowing petitioners confined within the jurisdiction of no federal district court, petitioners who never were in such a jurisdiction, simply to choose at will any federal district in the United States and bring a habeas petition challenging their confinement. The *Braden* decision, which (Scalia maintains) overruled neither *Ahrens* nor *Eisentrager*, is predicated upon the inconvenience of transporting all of the court records and witnesses from the state in which the petitioner is being prosecuted to the state in which he is actually confined. The most that *Braden* and the litigants in *Rasul* acknowledge is the right to habeas relief extending to United States citizens abroad. This, Scalia says, is not justified by the habeas statute but is perhaps justified as a matter of constitutional right.[36]

The majority holding, according to Scalia, represents the most inconvenient and indeed reckless impairment of the war effort. Scalia observes that "in abandoning the venerable statutory line drawn in *Eisentrager*, the Court boldly extends the scope of the habeas statute to the four corners of the earth." He bases this upon the majority's assertion, made more than once, that the critical factor in determining the availability of habeas relief is the presence of the *custodian* within a federal district court's jurisdiction. Since the custodian in the case of any military detention is the government of the United States of America, habeas relief presumably would be available to any military prisoner held by American forces anywhere in the world. Scalia contrasts the attitude of "today's carefree Court" with the "dire warning of a more circumspect Court in *Eisentrager*." He quotes a salient paragraph from the *Eisentrager* opinion in which the Court notes the grave threat to the Executive's prosecution of a war that the availability of habeas relief to military prisoners would pose.[37]

Scalia's reply to the majority's point that Guantanamo Bay is part of the United States is, first of all, to observe that the issue is irrelevant. That is, it is irrelevant assuming the majority means what it says when it finds the presence of the petitioners' custodian within the jurisdiction of a federal court to be the controlling factor. Scalia, in any case, argues that the Court's view of Guantanamo Bay makes no sense. To say that Guantanamo Bay is part of the United States for all legal purposes would be to say that the inmates could sue their captors for damages caused by illegal search and seizure pursuant to the celebrated Supreme Court decision conferring such a right.[38] Scalia also points out that the lease agreement with Cuba preserved that country's "ultimate sovereignty" over Guantanamo. Consequently, the United States retains "complete jurisdiction and control," but not sovereignty, and therefore Guantanamo is no different in jurisdictional status from areas of Iraq and Afghanistan occupied by American forces or than Landsburg Prison in Germany.[39] Scalia then goes through the other authorities cited by the majority, many of them predicated upon English decisions, to show that, in reality, they involved the application of the writ in areas over which the monarch was

deemed to be sovereign and in which the petitioners were subjects (*i.e.*, citizens).[40] Where the Court lacks territorial jurisdiction over the detained petitioners, citizenship, Scalia contends, is the indispensable substitute.

V. The Progeny of *Rasul* thus Far

Rasul has had an immediate and dramatic impact on the course of litigation by detainees.[41] There have been, first of all, a number of cases in which Guantanamo detainees seek to enjoin the government from moving them out of Guantanamo to other countries.[42] It seems that *Rasul* encouraged, though it certainly did not begin, the government's removal of prisoners to other countries (the practice known as "rendition"). There was also the decision of one D.C. District Court Judge holding not only that the Guantanamo detainees were entitled to due process but that the existing Combatant Status Review Tribunal, specifically set up to address judicial concerns about detention procedures, violates their rights.[43]

Rasul, together with the uproar over the treatment of prisoners at Abu Ghraib in Iraq, predictably will affect the scope of interrogation methods used in such detention facilities as Guantanamo Bay. To the extent that prisoners have access to U.S. district courts in order to challenge the very basis of their confinement, they presumably will also be able to challenge the methods of interrogation used against them. What impact this will have upon the prosecution of the War on Terror, in which intelligence obviously is at a premium, one can only imagine.

VI. Due Process and War

Political philosophy distinguishes the state of war from that of civil society, in which law applies. It wrestles with the question of how law can apply in a time of war when contending parties (sovereignties) are not governed by any common authority.[44]

> One commentator observes:
>
> In the Western tradition, the State has a duty to protect individual rights by virtue of a contract that the members of its community have entered . . . . One traditional basis on which the community has been understood is in terms of nationality. Contractual theories, by definition, do not address requirements of justice arising in the context of the interaction between the community (and its officials) and individuals who do not belong to it. When "belonging" is defined according to nationality, foreigners are left outside the frame. Thus Locke excludes foreigners from the social contract and the protection of citizenship rights: "foreigners, by living all their lives under another government, and enjoying the privileges and protection of it, though they are bound, even in conscience, to submit to its administration, as far forth as any denison; yet do not thereby come to be subjects or members of that common-wealth."[45]

This analysis, of course, portrays Lockean social contract theory as an exercise in xenophobia and chauvinism. In fact, Locke says merely that the alien, not having entered into the social contract, is not bound by its terms (the nation's laws) and may be punished or destroyed only by the Law of Nature which gives everyone the right to preserve himself against attackers.[46] The civil law, in this light, does not apply to wartime antagonists, but the right of self-preservation against attackers does.

The *Rasul* issue is, as stated above, also one of citizenship—its meaning and significance. The majority, in effect, says that in the context of military detention and habeas corpus, the alien detainee has as much right as the citizen. But Scalia argues that such authorities as Blackstone make citizenship (or the status of royal subject) a prerequisite to such relief. And Blackstone does maintain that alien enemies have no rights in time of war:

> When I mention these rights of an alien, I must be understood of alien friends only, or such whose countries are in peace with ours; for alien enemies have no rights, no privileges unless by the King's special favor, during the time of war.[47]

The Ciceronian maxim, "inter arma silent leges" (in time of war the laws are silent)[48] reflects the foregoing. That phrase, obviously, is nothing that an American court can or should adopt (although it is adduced by Churchill in justifying an Anglo-Soviet operation to eliminate a pro-fascist regime in Iran in 1941).[49] It does form the beginning of Kant's analysis of war, though he goes on to lay down standards for its civilized prosecution. It is indeed stipulated that in a just war, all that is necessary to prevail is allowed.[50]

The international norms of war, devised in the modern world undoubtedly in part as a result of Kant's influence, are intended to avoid recourse to Cicero's principle. Nations agree to limit their belligerent acts and to act humanely towards prisoners. They may even adhere to those agreements without reciprocity—clearly no antagonist of the United States in the present conflict will ever comply with the rules of war.[51] But that is altogether different from supposing that the standards and methodology of jurisprudence are the same as those of war. In simplest terms, criminal justice is backward looking—it seeks to determine what happened, and accordingly to condemn or to vindicate. War-making, including the taking of prisoners is of necessity forward looking—it seeks to bring about a result: victory.[52] Adjudicating the individual cases of battlefield prisoners is obstructive of that result, if prisoners are to be taken at all.

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Footnotes

[1] 542 U.S. 426 (2004).

[2] 542 U.S. 507 (2004).

[3] 542 U.S. 466 (2004). Since the published U.S. Reports have not reached this volume, page citations will be given from the Supreme Court Reporter.

[4] 28 U.S.C. 2241. It reads, in part,

> Writs of Habeas Corpus may be granted by the Supreme Court, any justice thereof, the district courts, and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of a district court of a district wherein the restraint complained of is had.

[5] As argued in Christopher M. Schumann, *Bring it On: the Supreme Court Opens the Floodgates with* Rasul v. Bush, 55 A. F. L. Rev. 349 (2004). *See also* Thomas M. Franck, *Editorial Comment: Criminals, Combatants, or What?*, 98 Am. J. Int'l. L. 686 (2004), in which the author supports the decision, but acknowledges the problem of applying law to terrorism.

Opponents of the Iraq War in the United States and Europe, of course, dispute that it is any part of the War on Terror. Perhaps they would concede, at least, that the enemy there includes terrorists.

[6] *See e.g.*, Torture, A Collection, 111, 145, 270 (Sanford Levenson, ed., Oxford University Press, 2004). *See also*, Diane Marie Amann, *Symposium: Current debates in the Conflict of Laws: Application of the Constitution to Guantanamo Bay: Abu Ghraib*, 153 U. Pa L. Rev. 2085 (2005), in which the questions of habeas review and torture are linked; *Torture and Liberal Democracy*, by the present author in 30 Rev. Jour. Phil.& Soc. Science 79 (2005).

[7] In his press release of July 25, 2005, Senator Graham announced his intention to offer an amendment to the Defense Authorization Bill "strengthening the legal hand of the Bush Administration and future administrations to hold enemy combatants at Guantanamo Bay, Cuba (Gitmo)." Graham's amendment would have enacted as a statute the military's Combatant Status Review Tribunal (CSRT) and Annual Review Board (ARB). These tribunals, established by the President, respectively determine whether a prisoner is an unlawful enemy combatant and review that determination, as well as the detainee's intelligence value and the danger he presents. The amendment also would have afforded each detainee a military attorney to represent him before the ARB, instead of the present military representative. The Senator said that this legislation was necessary to forestall the removal of the President's authority over Guantanamo by the courts. He did not mention *Rasul* specifically in the press release, although he has verbally during hearings. Why, precisely, Senator Graham was confident that the courts would not find his legislation unconstitutional is unclear. Of course, one other form of legislation that might strengthen the President's hand would be a bill restricting the courts' jurisdiction to review the detention of aliens held prisoner by the U.S. military, pursuant to Article III, sec. 2.

[8] *E.g.*, Ronald Dworkin, *What the Court Really Said*, New York Review of Books, 51:13:Aug. 12, 2004. *See also* David A. Martin, *Immigration Law and Human Rights*, 25 B.C. Third World L.J. 125, 135-36 (2005). Martin considers the *Rasul, Hamdi, Padilla* trilogy "an important blow for civil liberties and human rights," but worries about the matters left unresolved in *Rasul*. He notes that *Rasul* does not specify the "substantive standards" that courts must use "when they review overseas military detentions."

[9] 339 U.S. 763 (1950).

[10] 124 S.Ct. at 2693, citing 339 U.S. at 777.

[11] 124 S.Ct. at 2686.

[12] 4 Wall 2 (1866).

[13] 317 U.S. 1 (1942).

[14] 327 U.S. 1 (1946).

[15] In support of due process for Guantanamo detainees, Senator McCain recently observed that even Adolph Eichmann got a trial. Eichmann also was hardly a wartime prisoner when he was tried.

[16] 335 U.S. 188 (1948).

[17] 410 U.S. 484 (1973).

[18] *See* n. 4, *supra*.

[19] 124 S.Ct. at 2695, citing 410 U.S. at 494-95.

[20] *Id*.

[21] 124 S.Ct. at 2698.

[22] *Id*. at 2696. Kal Raustiala, in *The Geography of Justice*, 73 Fordham L. Rev. 2501, 2538-42, analyzes the Court's interpretation of the U.S.-Cuba lease and suggests that the "ultimate sovereignty," retained by Cuba under the lease, merely refers to Cuba's reversionary interest in the land, to be enjoyed if the United States ever leaves. Raustiala concludes that since the detainees have no legal recourse under Cuban law, they must be governed by American law, just like the inhabitants of Puerto Rico.

[23] *See, e.g.*, Johnson v. Ascroft, 378 F.3rd 164 (2nd Cir. 2004); Kelly v. Farquharson, 256 F.Supp.2d 93 (D.Mass. 2003).

[24] Raustiala, *supra*; Ralph Wilde, *Legal 'Black Hole'? Extraterritorial State Action and International Treaty Law on Civil and Political Rights*, 26 Mich. J. Int'l L. 739 (2005); Gerald L. Neuman, *Extraterritorial Rights and Constitutional Methodology after* Rasul v. Bush, 153 U. Pa L. Rev. 2073 (2005); Kermit Roosevelt, *Application of the Constitution to Guantanamo Bay*, 153 U. Pa L. Rev. 2017 (2005).

[25] Roosevelt, *supra*, at 2029-30.

[26] Wilde, *supra, passim*.

[27] A distinction discussed in Note: *A "Full and Fair Trial,"* 15 Duke J. Comp. & Int'l L. 387 (2005).

[28] 124 S.Ct. at 2698.

[29] Disconto Gesellschaft v. Umbreit, 208 U.S. 570 (1908).

[30] 28 U.S.C. 1350.

[31] 124 S.Ct. at 2699.

[32] *Id*. at 2700.

[33] *See* note 4, *supra*.

[34] 124 S.Ct. at 2701.

[35] 124 S.Ct. at 2703.

[36] In dueling notes, Justice Stevens cites then-Justice Rehnquist's dissent and other authorities to show that *Braden* did overrule *Ahrens* (124 S.Ct. at 2686, n. 4) and Justice Scalia replies that it did not, in any case, overrule it with regard to the point relevant to *Eisentrager* (124 S.Ct. at 2686, n. 4). In the exchange, Scalia seems forced to backtrack from the confident statement that *Braden* merely distinguished *Ahrens*. He, however, reiterates that *Braden* was the case of an American petitioner held in one state and charged in another. It hardly applies to an alien detainee held outside any federal court's jurisdiction. The *Braden* exception to the statute, in other words, is not applicable to *Eisentrager* or *Rasul*.

[37] "To grant the writ to these prisoners might mean that our army must transport them across the seas for hearing. This would require allocation for shipping space, guarding personnel, billeting and rations. It might also require transportation for whatever witnesses the prisoners desired to call as well as transportation for those necessary to defend the legality of the sentence. The writ, since it is held to be a matter of right, would be equally available to enemies during active hostilities as in the present twilight between war and peace. Such trials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise a more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be conflict between judicial and military opinion highly comforting to enemies of the United States." 124 S.Ct. at 2707, quoting 339 U.S. at 778-79.

[38] Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971).

[39] This is the point with which Raustiala takes issue (n. 22, *supra)*.

[40] Justices Scalia and Stevens lock horns over the significance of various English authorities, applying the writ outside the kingdom. Stevens emphasizes Lord Mansfield's opinion in *King v. Cowls*, 2 Burr. 834, 854-55, 97 Eng. Rep. 587, 598-99 (KB), in which the Lord Justice extends the writ to "'territories under the subjection of the Crown.'" 124 S.Ct. at 2697. Scalia rejoins that in this and all the English authorities offered by the majority, the petitioners were confined in "sovereign territory of the Crown; colonies, acquisitions and conquest, and so on," not on "installations merely leased for a particular use from another nation that still retained ultimate sovereignty." 124 S.Ct. at 2709. The second issue that Stevens and Scalia argue, involving especially *Ex Parte Mwenya*, 1 QB 241 (C.A. 1960) and *In Re* Ning Yi-Ching, 56 T.L.R. 3 (Vacation Ct. 1939), is the relevance of the petitioners' alien status. None of these decisions, Scalia points out, extend the writ to aliens on foreign soil. Scalia cites Blackstone (III, 31, 78-79 and I, 93-106), in particular, to demonstrate that all areas to which the writ was extended were "'dominions of the crown of Britain'" if not "'part of the Kingdom of England'" and that the persons affected were always subjects.

[41] *See*, Bradford A. Berenson, *The Uncertain Legacy of* Rasul v. Bush, 12 Tulsa J. Comp. & Int'l Law, 39 (2004), in which the potential battlefield costs of *Rasul* are examined; Note, n. 27, *supra*, at 398-99.

[42] *E.g.* Al-Anazi v. Bush, 370 F.Supp.2d 188 (D.D.C. 2005); Almurbati v. Bush, 366 F.Supp.2d 72 (D.D.C. 2005); Khalid v Bush, 355 F.Supp. 2d 311 (D.D.C. 2005); Al-Marri v. Bush, ___F.Supp.2d____, 2005 U.S. Dist. Lexis 6259 (D.D.C. 2005); Al-Joudi v. Bush, ___F.Supp.2d____, 2005 U.S. Dist. Lexis 6265 (D.D.C. 2005); Abdah v. Bush, ___F.Supp.2d___, 2005 U.S. Dist. Lexis 4942 (D.D.C. 2005); John Doe 1-52 v. Bush, _____F.Supp.2d_____, 2005 U.S. Dist. Lexis 6417 (D.D.C. 2005); Abu Ali v. Ashcroft, 350 F.Supp.2d 28 (D.D.C. 2004).

[43] *In Re* Guantanamo Detainee Cases, 355 F.Supp.2d 443 (D.D.C. 2005).

[44] *See, e.g*., Kant, Metaphysics of Morals, 56-58 (1785); Locke, Second Treatise, Chapters III, XVI (1690).

[45] Wilde, *supra*, at 6.

[46] Second Treatise, sec. 9.

> I desire [doubters of the Law of Nature] to resolve me, by what Right any Prince or State can put to death, or punish an Alien, for any Crime he commits in their Country. . .And therefore if by the Law of Nature, every Man hath not a Power to punish Offences against it, as he soberly judges the Case to require, I see not how the Magistrates of any Community, can punish an Alien of another Country, since in reference to him, they can have no more power, than what every Man naturally may have over another. (original emphasis).

[47] Commentaries, I, 10, sec. 504.

[48] Marcus Tullius, Cicero Pro Milone, IV, 10 (n.d.).

[49] Winston Churchhill, The Grand Alliance 428 (Cassell, 1950).

[50] Hugo Grotius, The Rights of War and Peace, III, 1-3 (Liberty Fund 2005).

[51] The international treaties and conventions establishing rules for the treatment of prisoners are summarized by Andrew C. McCarthy in *Torture: Thinking About the Unthinkable*, Commentary, July-August 2004 at 17-24. These include the 1907 Hague Convention IV and the 1949 Geneva Conventions, the third of which concerns "Treatment of Prisoners of War." To these foundational documents was added the 1977 "Protocol I Additional," relating to the "Protection of Victims of International Armed Conflicts." The United States, while a signatory of the Hague and Geneva Conventions, declined to sign Protocol I. It did sign the 1984 "United Nations Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment," ratifying it in 1994. The Senate, however, in its act of ratification excluded capital punishment from the prohibited category of treatment and provided that the Convention would only exclude "inhumane" practices ("inhumane" but not constituting "torture") violative of the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution. But these amendments have been held to apply only to judicial proceedings,

and to punishment after conviction. *See* Ruth Wedgwood and R. James Woolsey, *Law and Torture*, WALL ST. J., June 28, 2004, in Op/Ed for a somewhat broader interpretation of this treaty. The detainees at Guantanamo Bay are not "lawful" or "privileged" combatants, entitling them to protection as P.O.W.s under the Hague and Geneva Conventions. As summarized by McCarthy (pp. 19-20): "[T]hey are not part of a nation state, they are not signatories of the Geneva Conventions, they do not wear uniforms, they do not as a rule carry their weapons openly, they hide among (and thus gravely imperil) civilian population and infrastructure, and they intentionally target civilians for indiscriminate mass homicide in order to extort concessions from governments they oppose."

Although they do not enjoy the protection of P.O.W. status, and thus can be interrogated and induced to talk, they cannot be tortured. This is so both because of the U.N. Convention and in light of a U.S. statute prohibiting torture, 28 U.S.C. secs. 2340 and 2340A-B. So long as it could be argued that Guantanamo lay outside of the jurisdiction of the United States (an argument foreclosed by *Rasul*), it might be supposed that the federal statute did not apply. But the U.N. Convention, with the Senate's reservations and qualifications, applies everywhere. The official U.S. position, stated by the President, is to abjure torture, even though the adversary feels free to use it and any other violent treatment of captives.

[52] CF., ARISTOTLE, RHETORIC, I, iii, 4-6, Deliberative rhetoric, that of all public policy and legislation (including war policy) looks to the future, and discusses what is expedient or harmful. Forensic rhetoric, that of the courtroom, looks to the past and discusses the just and the unjust.

Understanding the Newly-Refined Role of Customary International Law in U.S. Courts

*By Vincent J. Vitkowsky**

I. Introduction

There is much controversy concerning the role of international and foreign legal sources in U.S. courts. Although in some contexts this subject can seem abstract, it becomes very concrete when the international source involves "customary international law," which is considered to be part of the Law of Nations. Customary international law can provide the basis for a federal cause of action where Congress has not created one. Understanding why and how this occurs requires analysis of the U.S. Constitution, federal statutes, and a series of key decisions, most notably the 2004 U.S. Supreme Court decision in *Sosa v. Alvarez-Machain*.[1] This article will present the essential framework of analysis and identify the key open issues.

II. What is Customary International Law?

The Law of Nations consists of (1) certain treaties and (2) customary international law. Customary international law is defined as (a) a widespread and uniform practice among nations that has ripened into a customary norm, (b) that nations follow out of a sense of legal obligation ("*opino juris siv necessitatis*").

To become a custom, a practice must have the widespread, but not necessarily universal support of nations concerned with the issue, and must usually have continued long enough to give rise to at least an inference of recognition and acquiescence. Interim rules become customary international law once a large enough number of nations having an interest in them act in accordance with the rules.[2] The assent of a nation is inferred by silence, except as to "consistent objectors."

There is a special category of customary international law, *jus congens* or "compelling law," which is considered to consist of peremptory norms. The argument is that no nation is permitted to act contrary to those norms, whether or not it has acquiesced. This category can have real effect in U.S. courts.

III. Constitutional and Statutory Background

Article I, § 8 contains the only express reference to the Law of Nations in the Constitution. It gives Congress the power to "define and punish Piracies and Felonies committed on the high seas, and Offences against the Law of Nations."

Article VI, cl 2, the "Supremacy Clause," explicitly mentions Treaties, but it does not mention any other aspects of the Law of Nations:

> The Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding.

Article III, § 2, cl 1, dealing with Original Jurisdiction, also mentions Treaties, but not other aspects of the Law of Nations:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Questions have arisen concerning the extent to which the phrase "the Laws of the United States which shall be made in pursuance [of the Constitution]," as used in the Supremacy Clause, and the phrase "the Laws of the United States," as used in the Original Jurisdiction Clause, include aspects of the Law of Nations.

The judicial power is given effect in two statutes that have been argued to implicate customary international law. First, the Federal Question statute[3] provides as follows:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

A critical testing ground for customary international law in the U.S. courts has been the Alien Tort Statute[4] (ATS), which provides as follows:

> Alien's action for tort
>
> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

IV. The Status of Customary International Law in U.S. Courts

Historically, the Law of Nations was regarded to a part of "federal common law," which consists of federal rules of decision applied by courts in the absence of express constitutional or statutory direction. The scope of federal common law was famously reduced by *Erie Railroad Co. v. Tompkins*, which held "there is no federal general common law."[5] Despite the sweep of this statement, *Erie* in fact left some categories of federal common law permissible "on issues of national concern."

This gave rise to questions concerning the status of customary international law in the post-*Erie* order. Under one interpretation, following *Erie*, a federal court could not apply customary international law in the absence of express statutory authorization to do so. As discussed below, *Sosa* rejected this interpretation.

Under another interpretation, customary international law became part of the new federal common law. This interpretation would support the conclusion that customary international law is incorporated into "Laws of the United States" as used in Article III, cl 1. If it is, this could support the view that it falls within federal court's subject matter jurisdiction, so that the presence of a customary international law issue gives rise to (1) federal question "arising under" jurisdiction, and (2) Supreme Court jurisdiction on review of state court decisions. This is the position taken by the Restatement (Third) of Foreign Relations Law (1987) (Restatement), § 111.

Moreover, under Article VI, the Supremacy Clause, customary international law would preempt inconsistent state law. This, too, is the view taken by the Restatement, and it reflects a cognitive disconnect between international academic theoreticians and the practicing bar and bench. Consider whether a claim that state death penalty statutes were superceded by contrary customary international law would pass the proverbial "red-face test" of effective advocacy.

V. Key Case Law Before *Sosa*

Customary international law has especially important implications in suits brought in U.S. courts under the ATS. The ATS was largely unused between its enactment in 1789 and 1980, but took on dramatic new life in the Second Circuit decision in *Filartiga v. Pena-Irala*.[6] This was an action between two citizens of Paraguay alleging that defendant, acting under color of state authority, caused the death of plaintiff's son by the use of torture. The Second Circuit allowed the case to proceed, concluding that it had subject matter jurisdiction because a suit for violation of customary international law "arises under" federal law for purposes of Article III. The Court reasoned that "The constitutional basis for [the ATS] is the law of nations, which has always been part of the federal common law."[7] The Court recognized that its reasoning might also sustain jurisdiction under the general Federal Question statute, but expressly rested its decision on the ATS.[8]

The Second Circuit also held that customary international law prohibited state-sponsored torture. This conclusion was not based on state practice, because the Court recognized that many nations engage in torture. Rather, the Court referred to various "soft" sources including (1) the U.N. Charter, (2) the U.N. General Assembly Universal Declaration of Human Rights, (3) the U.N. General Assembly Torture Declaration, (4) several human rights treaties, (5) the writings of jurists, and (6) a survey showing that torture was prohibited, expressly or implicitly, by the constitutions of over fifty-five nations. As addressed below, the weight accorded such soft sources has been significantly reduced by *Sosa*.

But *Filartiga* missed a far more fundamental point. The Federal Question statute and the ATS are each Congressional grants of jurisdiction to the federal courts. But they do not in themselves establish private causes of action. That is, they only confer jurisdiction to adjudicate causes of action that arise from other sources. Unless another statute establishes such a cause of action, the courts must infer one from another source, such as customary international law.

This important distinction was addressed by the D.C. Circuit in *Tel Oren v. Libyan Arab Republic*.[9] Plaintiffs were survivors and representatives of persons murdered in an armed terrorist attack on a civilian bus in Israel. Plaintiffs alleged multiple tortious acts in violation of the law of nations, treaties, the criminal law of the U.S., and common law. Both Federal Question statute and the ATS were alleged to give rise to jurisdiction. The D.C. Circuit concluded that there was no subject matter jurisdiction under either statute. The unanimous decision was derived from three separate opinions, and Judge Bork's was notable for its intellectual rigor and coherence. He wrote that "the Second Circuit in *Filartiga* assumed that Congress' grant of jurisdiction also created a cause of action. That seems fundamentally wrong and certain to produce pernicious results."[10] Judge Bork concluded that no body of law expressly granted a cause of action, and he declined to infer one. He noted that to do so "would present grave separation of powers problems,"[11] but based his conclusion on the grounds that there was insufficient international consensus to establish that customary principles of international law had been violated.

VI. *Sosa v. Alvarez-Machain*

The scope of principles that might constitute customary international law affording a private cause of action under the ATS was narrowed and refined by *Sosa v. Alvarez-Machain.*[12] There, the U.S. Supreme Court left open the possibility that new principles of customary international law might emerge. But the Court took pains to urge judicial restraint, and gave strong indications that courts should limit rather than increase the emergence of such new principles.

The claim in *Sosa* was brought by a Mexican doctor, Alvarez, who was believed to be implicated in the torture and murder of an agent of the Drug Enforcement Administration. Alvarez was abducted in Mexico by Mexicans who brought him to Texas, where he was turned over to federal officers. He was ultimately acquitted, and then brought an action against, *inter alia*, one of his abductors under the ATS, alleging a violation of the Law of Nations.

The Supreme Court dismissed. Its precise holding was that a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violated no norm of customary international law so well defined as to support the creation of a federal remedy.[13]

The Court confirmed the view that the ATS was only jurisdictional, *i.e*. it did not in itself create a new cause of action for torts in violation of the Law of Nations. But the Court rejected the argument that a cause of action could only arise by a further statute expressly creating it. Rather, it wrote that: "We think that at the time of enactment, the jurisdiction enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized as common law."[14] After reviewing that category, the Court concluded as follows: "The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time."[15]

The Court expressly assumed that because Congress has not precluded federal courts from recognizing a claim under the customary international law of nations as an element of common law, the federal courts had that authority.[16] For the purposes of the ATS, the Court set the following standard for any new principles which would provide a cause of action:

> [W]e think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.[17]

The Court identified the "18th-century paradigms" as offenses against diplomats, violations of safe conduct, and piracy.

Thus, as the Court put it, "the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today."[18]

The Court then examined the current state of customary international law and concluded that it includes no "general prohibition against 'arbitrary' detention defined as officially sanctioned action exceeding positive authorization to detain under the domestic law of some government, regardless of the circumstances."[19]

Several aspects of the opinion provided guidance on other open questions, and generally direct courts toward a restricted approach. First, the Court expressed a measure of deference to the Executive Branch, stating that "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy."[20]

Further, the Court found that two widely-cited sources of soft authority did not meet the standard set in the opinion for identifying controlling customary international law. First, the Court concluded that the U.N. Universal Declaration of Human Rights does not of its own force impose obligations as a matter of international law. Next, the Court concluded that the U.N. International Covenant of Civil and Political Rights did not establish a rule of law, because the U.S. ratified it "on the express understanding that it was not self-executing and thus did not itself create obligations binding in the federal courts."[21] This approach should discourage lower courts from relying on other soft sources of customary international law.

Finally, the Court strongly suggested that the presence of customary international law issues would not provide an independent basis for federal question jurisdiction. It wrote that "Our position does not. . .imply. . .that the grant of federal question jurisdiction [in 28 U.S.C. § 1331] would be equally good for our purposes as [the ATS]."[22]

VII. Issues After *Sosa*

The chief consequence of *Sosa* is that unless Congress prohibits the courts from utilizing customary international law as a form of the Law of Nations, giving substantive rights to litigants in U.S. courts, the practice will continue. The opinion leaves scope for further litigation on many issues. Notably, it remains to be seen which additional principles of customary international law, if any, will meet the test established by *Sosa* for the purpose of the ATS.

Future cases will present issues concerning the use of customary international law under statutes other than the ATS, and perhaps under the Constitution. Other cases will present issues concerning which branch of government has the authority to issue binding interpretations of customary international law. In the absence of Congressional action, what weight is to be given to interpretations by the Executive Branch?

Finally, it is widely accepted that a new federal statute would take precedence over a principle of customary international law. But issues may arise concerning the precedence of a federal statute that pre-dated the emergence of a new custom.

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Footnotes

[1] 542 U.S. 692 (2004).

[2] An important question beyond the scope of this article is how one distinguishes between a state practice that violates customary international law and a state practice that replaces old with new customary international law. For example, to what extent would the war in Iraq give rise to a new customary international law norm of anticipatory self-defense? *See* John Alan Cohen, *The Bush Doctrine and the Emerging Norm of Anticipatory Self-Defense in Customary International Law*, 15 Pace Int'l L. Rev. 283 (2003).

[3] 28 USC § 1331 (2000).

[4] 28 USC § 1350 (2000).

[5] 304 U.S. 64, 78 (1938).

[6] 630 F.2d 876 (2d Cir. 1980).

[7] *Id.* at 885.

[8] *Id.* at 887, n.22.

[9] 726 F.2d 774 (D.C. Cir. 1984).

[10] *Id.* at 801.

[11] *Id.* at 805.

[12] 542 U.S. 692 (2004).

[13] *Id.* at 738.

[14] *Id.* at 712.

[15] *Id.* at 724.

[16] In dissent, Justice Scalia wrote that "[t]his turns our jurisprudence regarding federal common law on its head. The question is not what *prevents* federal courts from applying the law of nations as part of the general common law, it is what *authorizes* that peculiar exception from *Erie*'s fundamental holding that a general common law *does not exist*." 541 U.S. at 744 (emphasis in original).

[17] *Id.* at 725.

[18] *Id.* at 729.

[19] *Id.* at 736.

[20] *Id.* at 733, n.21.

[21] *Id.* at 734-735.

[22] *Id.* at 731, n.19.

Labor and Employment Law

Unions and National Security: Does the NLRB Have Jurisdiction over Privately-Employed Airport Screeners? Should it Decline to Exercise Jurisdiction?

*By John R. Martin**

I. Introduction

After the September 11, 2001 attacks, Congress felt so strongly about airport and airline security that it created a federal agency—the Transportation Security Administration (TSA)—to be in charge of airport screening. All airport screeners must be TSA employees, with the exception of a pilot program operating in five airports where private companies provide the screeners.[1] In January 2003, the head of TSA issued a directive forbidding unions from obtaining monopoly-bargaining power over airport screeners, citing national security concerns.

One of the five airports in the pilot program is the Kansas City International Airport. A union—the International Union, Security, Police & Fire Professionals—recently petitioned the National Labor Relations Board (NLRB) to be certified as the exclusive bargaining representative for private airport screeners there.[2] The NLRB regional director granted the union's petition and conducted a certification election. Before the results of the election were certified, the NLRB granted the employer's request to review the regional director's decision to exercise jurisdiction. *Firstline Transp. Sec., Inc. (Int'l Union, Sec., Police & Fire Prof'ls)*, Case 17-RC-12354, 2005 WL 1564866 (NLRB June 30, 2005) (order granting review).

The NLRB must decide whether it has jurisdiction over private airport screeners and, if so, whether it will exercise jurisdiction over the screeners and certify the union as the exclusive representative (if the union wins the certification election). Because monopoly bargaining for TSA-employed screeners is not permitted due to national security concerns, it would be anomalous, and illogical, to permit monopoly bargaining by a union that represents private screeners who perform the same functions as TSA-employed screeners.

The union has no doubt about the importance of this case for the entire airport security industry. Robert D. Novak reported in a recent column: "Steve Maritas, director of organizing for the Security, Police and Fire Professionals, has said the NLRB ruling regarding the baggage screeners 'could really change a whole industry' and open the door for 'more national security workers to unionize.'"[3]

II. Background

A. Aviation and Transportation Security Act

In November 2001, Congress passed the Aviation and Transportation Security Act (ATSA), which created the Transportation Security Administration within the Department of Transportation.[4] The head of TSA was called the "Under Secretary of Transportation for Security." The Under Secretary is "responsible for day-to-day Federal security screening operations for passenger air transportation and interstate air transportation;" is to "develop standards for the hiring and retention of security screening personnel;" is to "train and test security screening personnel;" and is "responsible for hiring and training personnel to provide security screening at all airports in the United States."[5]

In addition to the screeners employed by TSA, Congress directed the Under Secretary to create a pilot program for screening personnel employed by private screening companies.[6] The private screening personnel must meet all the requirements applicable to TSA-employed screeners.[7] The compensation level of private screeners must at least equal that of TSA-employed screeners.[8] Federal government supervisors must oversee all screening by private screeners.[9]

Legislative history suggests that Congress intended TSA-employed screeners and privately-employed screeners to be treated the same. The House bill directed the TSA to assume total responsibility over airport security screening,[10] but did not mandate that screeners be federal employees. All screening would be "supervised by uniformed Federal personnel" of the TSA.[11] The Under Secretary would "deputize. . .all airport screening personnel as Federal transportation security agents."[12]

The Senate passed a companion bill on October 11, 2001.[13] In this bill, federal employees must carry out all airport screening duties, under the supervision of the Attorney General.[14]

When the Senate bill was sent to the House, the House struck all language that required screeners to be federal employees.[15] The House also inserted language permitting screeners to be employed by private employers.[16]

The House-Senate conference committee considered the Senate bill and the House amendments.[17] The committee agreed that the federal government would be responsible for airport screening.[18] On the issue of privately-employed screeners, the committee reached a compromise that would permit private screeners so long as they worked under the supervision of the TSA.[19]

The ATSA became law on November 19, 2001, providing for TSA-employed screeners while permitting the use of private screeners under certain conditions. The compromise between the House and Senate allowing for private screeners provides no basis to think that Congress intended to permit monopoly bargaining power over private screeners while TSA-employed screeners could not be unionized. All screeners do the same job under TSA's supervision. All screeners carry out security functions.

B. TSA manages, supervises, and controls private screeners.

The Under Secretary chose Kansas City International Airport (MCI) as one of the five airports for the pilot program.[20] Firstline Transportation Security, Inc. (Firstline) was the screening company chosen to provide screeners to TSA at MCI.[21] TSA directs Firstline's screeners, and the screeners are subject to TSA's policies and guidelines.[22] TSA must certify that each screener applicant meets TSA standards before the applicant is offered employment by TSA.[23]

Every newly hired screener goes through a training process administered by "TAIs"—trainers who are certified by TSA.[24] TSA training managers observe and oversee the training process.[25] If the new employee passes the training process, TSA certifies him or her.[26] TSA managers control, supervise, and oversee private security screeners as the screeners perform their passenger and baggage screening functions.[27] TSA uses Firstline's workforce at TSA's discretion.[28] TSA sets the pay range for Firstline's employees.[29] TSA provides and repairs the equipment used by Firstline's employees in passenger and baggage handling.[30]

C. The Under Secretary denied monopoly-bargaining power.

On January 8, 2003, the Under Secretary issued a memorandum denying unions monopoly-bargaining power over airport screeners.[31] The memorandum reads in full:

> By virtue of the authority vested in the Under Secretary of Transportation for Security in Section 111(d) of the Aviation and Transportation Security Act, Pub. Law No. 107-71, 49 U.S.C. § 44935 Note (2001), I hereby determine that *individuals* carrying out the security screening function under section 44901 of Title 49, United States Code, *in light of their critical national security responsibilities,* shall not, as a term or condition of their employment, be entitled to engage in collective bargaining or be represented for the purpose of engaging in such bargaining by any representative or organization. (emphasis added)

The Federal Labor Relations Authority upheld the Under Secretary's directive, concluding that the ATSA "leaves unfettered discretion to the Under Secretary to determine the terms and conditions of employment for screener personnel in the TSA."[32]

III. The NLRB has no jurisdiction over private screeners.

When the Under Secretary issued the directive in 2003, there were approximately 55,600 screeners employed by TSA serving over 400 U.S. airports.[33] The pilot program using private screeners at MCI and four other airports began in the fall of 2002.[34] The Under Secretary was well aware of these private screeners, yet his memorandum uses language as broad as possible, covering all "individuals" engaged in screening. He did not use the term "federal employees," which would exclude private screeners. Using the authority given to the Under Secretary by ATSA, he prohibited monopoly bargaining power over private screeners, both federally employed and privately employed. The NLRB therefore has no jurisdiction over private screeners.

One could argue that the Under Secretary had no authority under the ATSA to forbid unionization of private screeners. The Under Secretary based his authority on a provision of the ATSA that granted him authority to "employ, appoint, discipline, terminate, and fix the compensation, terms, and conditions of employment of Federal service for such a number of individuals as the Under Secretary determines to be necessary to carry out the screening functions."[35] Can private screeners be in "Federal service," or can only federal employees be in "Federal service?"

Reading the ATSA as a whole, it is clear that Congress intended TSA-employed screeners and private screeners to be treated identically, including with regard to monopoly bargaining. They do exactly the same jobs, under the direct control and supervision of TSA managers. They are both in "Federal service," since the federal government took over airport screening as its responsibility. Congress directed the Under Secretary to "provide for the screening of all passengers and property" in the United States.[36]

The Under Secretary is given broad discretion in overseeing the "personnel management system" of TSA.[37] The Conference Report on the bill states: "The Conferees recognize that, in order to ensure that Federal screeners are able to provide the best security possible, the Secretary must be given wide latitude to determine the terms of employment of screeners."[38] The Conference Report thus treats all screeners as "Federal screeners." It would make no sense to give the Under Secretary broad powers over personnel—sufficient power in fact to forbid unionization—and yet not give him the same powers over private screeners.

Strangely, TSA submitted a statement to the NLRB claiming that the January 8, 2003 ban on monopoly bargaining did not apply to private screeners.[39] TSA took no position as to whether the NLRB has jurisdiction over private screeners, or whether the NLRB should decline to exercise jurisdiction. TSA gave no explanation or argument as to why the ban on monopoly bargaining did not apply to private screeners. Why TSA took this position is a mystery. Here is one guess: TSA believes that public-sector unions will pressure Congress and TSA into explicitly permitting monopoly bargaining power over TSA-employed screeners. TSA does not want to further anger unions by opposing unionization of private screeners, when it is, in TSA's view, inevitable that TSA will eventually have to deal with the American Federation of Government Employees or some other union.

IV. If the NLRB decides it could assert jurisdiction, it should decline to do so.

The NLRB has broad discretion whether to exercise jurisdiction over a case. The Supreme Court has written:

> Even when the effect of activities on interstate commerce is sufficient to enable the Board to take jurisdiction of a complaint, the Board sometimes properly declines to do so, stating that the policies of the Act would not be effectuated by its assertion of jurisdiction in that case.[40]

A. Exercising jurisdiction will damage national security.

TSA's mission is "to prevent terrorist attacks within the United States" and "reduce the vulnerability of the United States to terrorism."[41] The legislative history of the ATSA makes clear that national security was the reason Congress created the Transportation Security Administration.[42] The Under Secretary determined that airport screeners should not be subject to monopoly bargaining "in light of their critical national security responsibilities."[43]

The "national security responsibilities" of TSA-employed screeners and private screeners are the same. The statutory requirements for private screeners are exactly the same as for screeners employed by TSA.[44] Private screening companies must "provide compensation and other benefits to [employees] that are not less than the level of compensation and other benefits provided to [screeners employed by TSA]."[45] It would be just as damaging to national security to permit private screeners to be subject to monopoly bargaining as it would be for TSA-employed screeners.[46] It makes no sense for the 48,000 TSA-employed screeners to be exempt from monopoly bargaining, while the Board grants to a union monopoly-bargaining power over private screeners at the five airports in the pilot program. One NLRB member has recently urged the Board to balance rights under the National Labor Relations Act (NLRA) with legitimate "national security" concerns.[47]

B. The risk of a strike

1. Unions engage in strikes even when strikes are forbidden by law.

The ATSA does not permit striking by airport screeners.[48] Making strikes illegal, however, does not eliminate the danger that a union will strike. Strikes in the public sector, even when they are illegal, are commonplace.

For example, during the 1993-94 school year, 42 teacher strikes kept nearly 215,000 school children in the United States out of class.[49] Teacher strikes were illegal in over half the states where they occurred, but all occurred in states that have monopoly bargaining for teachers.[50] As Albert Shanker, late president of the American Federation of Teachers union, freely admitted: "[A] strike in the public sector is not economic—it is political. . . . One of the greatest reasons for the effectiveness of the public employees' strike is the fact that it is illegal."[51] Mr. Shanker knew that unions and union officials are seldom held to account for ordering strikes and work slow-downs, or threatening such actions, to intimidate elected officials and taxpayers.

2. Public-sector strikes endanger vital public services.

Police union militants in New York City;[52] Prince George's County, Maryland;[53] Wilmington, Delaware;[54] and Pontiac, Michigan,[55] to name but a few, have in recent years threatened or carried out so-called "blue flu" job actions, potentially endangering public safety, as a collective-bargaining tool. The Baltimore police strike of 1974 led to widespread looting, shooting, and rock-throwing.[56] During the Kansas City fire fighters' strike of 1975, strikers set up picket lines around burning buildings.[57]

Then-San Francisco Mayor Joseph Alioto's home was pipe-bombed hours after he warned on television that striking police officers would be fired if they did not return to work.[58] The bomb shattered windows and seriously damaged the front door and porch steps.[59]

Striking fire fighters in Dayton, Ohio, sat idly by while fires destroyed up to twenty-nine (29) buildings throughout the city.[60] Thirty (30) families were left homeless.[61] During a strike in Kansas City, strikers vandalized fire fighting equipment. Fire extinguishers were filled with flammable liquid, oxygen tanks were emptied, and the fuel tanks of trucks were fouled with water.[62]

During a 23-day strike by Chicago fire fighters and paramedics, more than 20 people died in fires[63]—an extraordinary number for a relatively short period. In one fire alone, three children and two adults died as a fire station near their home remained unmanned.[64]

3. A strike by a private screeners union would be especially harmful.

A strike by a private-screeners union would, at a minimum, cause a major disruption to airlines and travelers. At worst, a strike by a private-screeners union could threaten national security. The government would be faced with a terrible choice: (1) reduce air travel, and therefore economic activity, until new screeners could be trained and placed; or, (2) reduce the efficacy of screening procedures and thereby increase the chance of terrorism.

C. The risk of a terrorist-infiltrated union

In the 1930s, 1940s, and 1950s, many unions in the United States were infiltrated, controlled, or even headed by members of the Communist Party.[65] A congressional subcommittee that included then-Congressman John F. Kennedy received testimony that:

> Communists had infiltrated into the ranks of labor unions and that their activities constitute a grave menace to the industrial peace of the United States. . . . [T]hey ultimately seek to destroy our capitalistic system and to overthrow our form of government by force and violence. To this end they encourage sit-down and slow-down strikes, mass picketing, goon squads, and violence.[66]

The most alarming example of union domination by the Communist Party was the strike in 1941 by United Auto Workers Local 248 at the Allis-Chalmers Manufacturing Company in Milwaukee.[67] The Supreme Court wrote: "Congress heard testimony that the strike had been called solely in obedience to Party orders for the purpose of starting the 'snowballing of strikes' in defense plants."[68] Congress responded to these findings by including Section 9(h) in the Taft-Hartley Act. Section 9(h), which was later repealed, required each union official to file an affidavit with the NLRB declaring that he was not a Communist and did not seek the violent or illegal overthrow of the United States government.[69]

If a union is granted exclusive representation of private airport screeners, there is a similar risk that the union hierarchy will be infiltrated by a terrorist agent or that the union will be controlled by someone working with terrorists.[70] The terrorist could then use his influence with the union to make it easier for a terrorist colleague to board a plane or to get a bomb through baggage

screening.[71] Or the terrorist could more indirectly weaken national security, by organizing a strike or work slow-down. The NLRB should avoid this national-security risk by declining jurisdiction over privately-employed airport screeners.

V. If the NLRB does not decline jurisdiction for national security reasons, it should overrule *Management Training Corp.* and re-institute the "government control" test or the "intimate connection" test.

Section 2(2) of the NLRA exempts from Board jurisdiction "the United States or any wholly owned Government corporation, . . .or any State or political subdivision thereof."[72] Historically, the NLRB declined jurisdiction over governmental contractors if the government had effective control over the terms and conditions of employment of the contractor's employees.

A. The intimate connection test

Before 1979, the NLRB used the intimate connection test when deciding whether to assert jurisdiction over private employers who had contracted with exempt governmental entities.[73] The intimate connection test had two prongs. First, does the "exempt employer exercise[] substantial control over the services and labor relations of the nonexempt contractor, so that the latter is left without sufficient autonomy over working conditions to enable it to bargain efficaciously with the union?"[74] If the answer was "yes," the Board would decline jurisdiction. If the answer was "no," the NLRB would examine "the relationship of the services performed to the exempted functions of the institution to whom they were provided."[75] If the contractor provided services to the governmental employer which related directly to the governmental purpose, the NLRB would decline to assert jurisdiction.[76]

B. The governmental control test

In 1979, the NLRB abandoned the intimate connection test in favor of the governmental control test.[77] The NLRB concluded that the first prong of the intimate connection test—"whether the employer would be able to bargain effectively about the terms and conditions of employment of its employees—is by itself the appropriate standard for determining whether to assert jurisdiction."[78] The NLRB criticized "intimate connection" as too vague to be workable.[79]

The Board later refined and reaffirmed the governmental control test in *Res-Care, Inc.*[80] The Board distinguished between a "core group" of bargaining subjects, which is limited to "wages and fringe benefits," and other bargaining subjects, such as hiring, firing, promotions, demotions, transfers, and grievances.[81] If the contractor does not have final say over wages and fringe benefits, then meaningful collective bargaining by the contractor is not possible, and the Board will decline to exercise jurisdiction.[82]

C. Management Training Corp.

In 1995, the NLRB overturned the governmental control test in *Management Training Corp. (Teamsters Local 222)*.[83] The Board would now assert jurisdiction over any contractor that "meets the definition of 'employer' under Section 2(2) of the Act. . .and. . .meets the applicable monetary jurisdictional standards."[84] Whether the contractor could engage in meaningful bargaining with its employees was no longer a factor the Board would consider.[85] The Board explained:

> The Employer in question must, by hypothesis, control some matters relating to the employment relationship, or else it would not be an employer under the Act. In our view, it is for the parties to determine whether bargaining is possible with respect to other matters and, in the final analysis, employee voters will decide for themselves whether they wish to engage in collective bargaining under those circumstances.[86]

D. Returning to the governmental control or intimate connection test

The airport-screener case amply demonstrates why the Board should overturn *Management Training Corp.* and re-institute the governmental control test. TSA controls nearly every term and condition of employment for Firstline's employees. TSA sets the compensation range for Firstline employees,[87] which is the key factor under *Res-Care, Inc.* Moreover, TSA supervises, manages, and oversees every aspect of the employee's working day.[88] TSA provides and repairs the equipment used by Firstline's employees in passenger and baggage handling.[89] TSA must approve any applicant before Firstline may hire the applicant as a screener.[90]

Thus, it is clear that Firstline cannot engage in meaningful collective bargaining with the union, and that TSA controls the private screeners' terms and conditions of employment. It is hard to imagine what terms Firstline and the union would negotiate, except that the union would demand and in all likelihood win a compulsory unionism clause, forcing non-union members to pay union fees.[91] Because it makes little sense to certify a union as exclusive bargaining agent when there is nothing meaningful over which to bargain, the Board should overrule *Management Training Corp.* and decline to exercise jurisdiction over privately-employed airport screeners.

It is also clear that the private screeners provide a service that is intimately connected with TSA's purpose. TSA's purpose is to screen airport passengers and baggage, and private screeners do the same job as TSA-employed screeners. Private airport screeners are analogous to the private fire fighters in *Rural Fire Protection Co.*, in which the Board declined to assert jurisdiction.[92] The Board wrote: "[I]t plainly appears that the Employer's firefighting services furnished to the city of Scottsdale, utilizing fire stations and major firefighting equipment owned and maintained by the city, are intimately related to Scottsdale's municipal purposes."[93] The Board should decline to exercise jurisdiction over a private screening company whose services are so intimately connected with an exempt entity. Moreover, the Board should be especially hesitant to assert jurisdiction over a contractor when that contractor provides the same service as the contracting federal agency whose mission is to protect national security.

VI. Conclusion

It is inconsistent and illogical to prevent monopoly bargaining power over TSA-employed screeners while permitting monopoly bargaining power over privately-employed screeners performing the same national security functions. TSA seemingly prohibited monopoly bargaining for all screeners in its January 8, 2003 directive, and it has given no reason for later contending that its directive does not apply to private screeners. For the sake of

national security and rational policymaking, the NLRB should either decide that it has no jurisdiction over private airport screeners, or decline jurisdiction under its broad discretion.

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Footnotes

[1] As of November 19, 2004, airports could apply to TSA to use privately-employed screeners. The five airports in the pilot program and two other, regional airports are the only airports to have applied so far.

[2] When a union is certified as the exclusive bargaining agent under the National Labor Relations Act ("NLRA"), the company must bargain with the union. *See* 29 U.S.C. § 158 (a)(5) (unfair labor practice for company to refuse to bargain with certified union). The union acts as bargaining agent for all employees in the bargaining unit, regardless of union membership or nonmembership and regardless of whether the individual employee voted for the union. *See id.* § 159(a). In states that do not have a Right to Work law, the union may bargain for, and almost always wins, the right to collect union dues from employees. The employee cannot be forced to pay for union costs unrelated to collective bargaining, such as political spending. *See* Communications Workers v. Beck, 487 U.S. 735 (1988).

[3] Robert D. Novak, *Estate Tax Politics*, Sept. 2, 2005, *available at* http://www.theconservativevoice.com/articles/article.html?id=7981.

[4] TSA was subsequently moved to the Department of Homeland Security (DHS). *See* 6 U.S.C. § 203. The head of TSA is now known as the Assistant Secretary of Homeland Security for TSA. For sake of clarity, this article will refer to the head of TSA as the "Under Secretary."

[5] 49 U.S.C. § 114(e).

[6] *See id.* §§ 44919, 44920.

[7] *See id.* § 44919(f).

[8] *Id.*

[9] *Id.* § 44920(e).

[10] Airport Security Federalization Act of 2001, H.R. 3150, 107th Cong. § 102 (2001).

[11] *Id.*

[12] *Id.*

[13] Aviation Security Act, S. 1447, 107th Cong. (2001).

[14] *Id.* § 108.

[15] Brief of Amicus Curiae the Honorable Dick Armey at 4, *Firstline Transp. Sec., Inc.*, Case 17-RC-12354 (NLRB).

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.* at 5 ("Former Leader Armey was instrumental in orchestrating this compromise, and in doing so, communicated the intent that the private screeners be considered the same as TSA employed screeners for purposes of collective bargaining.").

[20] Decision & Direction of Election at 4, *Firstline Transp. Sec., Inc.*, Case 17-RC-12354 (NLRB Region 17, May 27, 2005).

[21] Employer's Request for Review of Regional Director's Decision at 3, *Firstline Transp. Sec., Inc.*, Case 17-RC-12354 (NLRB).

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.* at 3-4.

[28] *Id.* at 3.

[29] *Id.* at 4.

[30] *Id.*

[31] Jt. Ex. 1, *Firstline Transp. Sec., Inc.*, Case 17-RC-12354 (NLRB).

[32] *United States Dep't of Homeland Sec.* (Am. Fed'n of Gov't Employees), 59 F.L.R.A. 423, 430 (2003) (citing 49 U.S.C. § 44935 Note (Pub. L. No. 107-71, § 111(d), 115 Stat. 620 (2001))).

[33] Transportation Security Administration, Screener Rightsizing Fact Sheet (Sept. 29, 2003), *available at* http://www.tsa.gov/public/display?theme=44&content=711 (last visited Sept. 7, 2005). TSA downsized to approximately 48,000 screeners on September 25, 2003. *Id.*

[34] Randolph Heaster, *Attempt to organize post-9/11 spins into national test case*, Kansas City Star, Aug. 30, 2005, at D1.

[35] 49 U.S.C. § 44935 Note (Pub. L. No. 107-71, § 111(d), 115 Stat. 620 (2001)) (emphasis added).

[36] *Id.* § 44901(a).

[37] *Id.* § 114(n).

[38] Conference Report on S. 1447, Aviation and Transportation Security Act, 147 Cong. Rec. H8262-01, H8278 (2001).

[39] Statement of the Transportation Security Administration, *Firstline Transp. Sec., Inc.*, Case 17-RC-12354 (NLRB).

[40] NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 684 (1951); *see also* Pikeville United Methodist Hosp. v. United Steelworkers, 109 F.3d 1146, 1151 (6th Cir. 1997) ("It is true that in some instances, the NLRB may, in its own discretion, choose not to exercise the jurisdiction that it may otherwise invoke."). One court explained:

> [I]t is clear that the Board has the broadest jurisdictional authority possible under the Constitution, and that it may, but need not, decline jurisdiction in certain cases in exercise of its discretion. Thus, the extent to which the Board chooses to exercise its statutory jurisdiction is a matter of administrative policy within the Board's sound discretion. In the absence of extraordinary circumstances, or abuses of that discretion, such a discriminatory exercise of jurisdictional discretion by the Board is not subject to review by the Federal courts.

San Juan Racing Ass'n v. Lab. Relations Bd., 532 F. Supp. 51, 53 (D.P.R. 1982) (citations omitted).

[41] *United States Dep't of Homeland Sec*. (Am. Fed'n of Gov't Employees), 59 F.L.R.A. 423, 424 (2003).

[42] *See* Alex C. Hallett, Note, *An Argument for the Denial of Collective-Bargaining Rights of Federal Airport Security Screeners*, 72 Geo. Wash. L. Rev. 834, 852-54 (2004) (discussing legislative history of ATSA). Hallett writes:

> The pervasive feeling of Congress at the time of passage was that national security was the paramount concern. The national-security function of the airport screeners under the new TSA was compared to the functions of the Capitol Police, the Secret Service, and the FBI. . . .

Id. at 852.

[43] Jt. Ex. 1, *Firstline Transp. Sec., Inc.*, Case 17-RC-12354 (NLRB).

[44] *See* 49 U.S.C. § 44919(f) (private screening employees must "meet all the requirements" applicable to TSA screeners).

[45] *Id.*

[46] *See* discussion *infra* (regarding problems of public-sector strikes).

[47] *ITT Indus., Inc*. (UAW), 341 N.L.R.B. No. 118, at *9, 2004 WL 1099004 (2004) (Battista, Chairman, dissenting).

[48] 49 U.S.C. § 44935(I).

[49] *Teacher Strikes 1993-1994: A Survey of Activity*, Gov't Union Critique, July 29, 1994, at 1-3.

[50] *State Public Sector Bargaining Statutes*, Gov't Union Critique, Aug. 13, 1993, at 5-7.

[51] Albert L. Shanker, *Why teachers need the right to strike*, Monthly Lab. Rev., Vol. 96, No. 9, at 50 (Sept. 1973).

[52] Dan Janison, *NYPD Adds to Ranks*, Newsday, Aug. 19, 2004, at A3.

[53] Jamie Stockwell, *'Blue Flu' Could Hit Prince George's*, Wash. Post, Aug. 7, 2001, at B1.

[54] Press Release, Office of Mayor James M. Baker, "Blue Flu" Update (July 13, 2004), *available at* http://www.ci.wilmington.de.us/mayorpress/2004/0713_bluefluupdate.htm.

[55] Korie Wilkins, *Blue flu bug bites Pontiac*, Daily Oakland Press, July 16, 2005, *available at* http://www.theoaklandpress.com/stories/071605/loc_20050716003.shtml.

[56] Ralph de Toledano, The Municipal Doomsday Machine 38 (Jameson Books 1976) (1975).

[57] *Id.* at 53.

[58] Randolph H. Boehm & Dan C. Heldman, Public Employees, Unions, and the Erosion of Civic Trust 150-51 (Greenwood Publishing Group 1982).

[59] Andrew H. Malcolm, *Emergency Called in San Francisco; Firemen Join Strike*, N.Y. Times, Aug. 21, 1975, at 1, 28.

[60] Editorial, *Firemen in Ohio Wrong*, Omaha World-Herald, Aug. 14, 1977.

[61] *Id.*

[62] *Arson, Sabotage Burden Makeshift Fire Crews*, Kansas City Star, Oct. 4, 1975.

[63] *Judge Lowers Union Fines—Except One*, San Diego Daily Transcript, Mar. 17, 1980.

[64] Nathaniel Sheppard, Jr., *Fires Kill 7 persons in Chicago*, N.Y. Times, Mar. 6, 1980, at A16.

[65] *See, e.g.*, American Communication Ass'n v. Douds, 339 U.S. 382, 388-89 (1950) (summarizing congressional findings of Communist control of labor unions). In that era, Communists "managed to infiltrate the highest command posts of the CIO." Howard Kimeldorf, Reds or Rackets? 9 (Univ of California Pr 1988). Communists played a "big role" in the United Auto Workers. Bert Cochran, Labor and Communism 108 (Princeton: University Press 1977). In the "most momentous single strike in American labor history"—the 1936 nationwide strike against General Motors and its suppliers—"Communists were prominent in the conduct of the strike. . . ." *Id.* at 119-22. During World War II, Communists retained control of eighteen international unions affiliated with the CIO, including the United Electrical Workers (UE), the two maritime unions, the New York-based transport workers, and the fur and leather union. *Id.* at 208. In fact, Communists controlled the UE until the 1960s. *Id.* at 295-96. Between March and November 1941, there were nine Communist-led-strike disputes certified to the National Defense Mediation Board. *Id.* at 165. And there were eight Communist-threatened-strike disputes certified to the Board during the same time period. *Id.* at 166. The West Coast's International Longshoremen's and Warehousemen's Union (ILWU) was a strong bastion of Communist unionism. Kimeldorf, *supra* at 5. The ILWU was "'one of the great successes of the Communist Party in establishing a native working-class base. . .approximat[ing] the Leninist image.'" *Id.* (citation omitted).

[66] Irving G. McCann, Why the Taft-Hartley Law? 114 (New York, Committee for Constitutional Government 1950) (quoting the subcommittee report).

[67] "Local 248 of the UAW, which conducted the Allis-Chalmers strike, was Communist-oriented from its early inception to 1947,

and a dominant force in both the Milwaukee and Wisconsin CIO. It was, therefore, a major Communist operation whose influence radiated out well beyond its immediate confines." COCHRAN, *supra* note 65, at 166. In another important strike from 1941—at North American Aviation in Los Angeles—"Communists dominated the leadership" of the UAW local. *Id.* at 177. The strike did not end until President Roosevelt ordered government seizure of the plant, and 2,500 Army troops "moved in with fixed bayonets to disperse the picket lines and open the plant." *Id.* at 179.

[68] *Douds*, 339 U.S. at 385.

[69] *See id.* at 386.

[70] The federal government is concerned about Islamic extremists penetrating American institutions. For example, Senator Kyl expressed concern that "there have been an increasing number of instances in which Wahhabists have successfully penetrated key U.S. institutions, such as the military and our prison system." *Terrorist Recruitment and Infiltration in the United States: Prisons and Military as an Operational Base: Hearing Before the Senate Subcommittee on Terrorism, Technology, and Homeland Security*, 109th Cong. (2003) (statement of Sen. John Kyl, Subcommittee Chairman), 2003 WL 22333480.

[71] TSA has had to fire at least two Islamic-terrorism supporters from its ranks of baggage screeners. Debbie Schlussel, *Pro-Terror Rapper*, Frontpagemag.com, July 25, 2005, *available at* http://www.frontpagemag.com/Articles/ReadArticle.asp?ID=18887. It is an open question whether TSA would be able to terminate immediately a unionized private screener.

[72] 29 U.S.C. § 152(2).

[73] *See National Transp. Serv., Inc*. (Truck Drivers & Helpers Local Union 728), 240 N.L.R.B. 565, 565-66 (1979) (discussing and overruling intimate connection test).

[74] *Rural Fire Prot. Co*., 216 N.L.R.B. 584, 585 (1975).

[75] *Id.* at 586.

[76] *Id.*

[77] *See National Transp. Serv., Inc.*, 240 N.L.R.B. 565.

[78] *Id.* at 565.

[79] *Id.* at 566.

[80] 280 N.L.R.B. 670 (1986).

[81] *Res-Care, Inc.*, 280 N.L.R.B. at 673-74.

[82] *Id.* at 674.

[83] 317 N.L.R.B. 1355 (1995).

[84] *Management Training Corp.*, 317 N.L.R.B. at 1358.

[85] *Id.*

[86] *Id.*

[87] Employer's Request for Review of Regional Director's Decision at 4; *see also* 49 U.S.C. § 44919(f) (private employer must provide compensation and other benefits equal to that of TSA-employed screeners).

[88] Employer's Request for Review of Regional Director's Decision at 3-4.

[89] *Id.* at 4.

[90] *Id.* at 3.

[91] Kansas City International Airport is located in Missouri, which is not a Right to Work state. Missouri permits compulsory union-fee clauses in collective bargaining agreements. Kansas, a Right to Work state, forbids compulsory union-fee clauses. Kan. Const. art. 15, § 12.

[92] 216 N.L.R.B. 584 (1975).

[93] *Id.* at 586.

Religious Accommodation in Forced Union Dues Environments

*By Bruce N. Cameron**

Protecting conscience has always been a national priority in the United States. The Founding Fathers' determination to protect conscience is reflected in the declaration of the First Amendment to the U.S. Constitution that "Congress shall make no law. . .prohibiting the free exercise [of religion]." More recently, this national consensus is embodied in Title VII of the Civil Rights Act of 1964[1] (Title VII), which requires employers and unions to attempt to accommodate sincere religious beliefs in the workplace.

As the size of government and its regulation of society grow, employees who take their religious beliefs seriously find that their beliefs more and more often collide with rules that result from government regulation. For example, both the National Labor Relations Act[2] (NLRA) and the Railway Labor Act[3] (RLA) provide for a single labor union to be the exclusive bargaining representative[4] of all employees, regardless of an employee's religious or political views. Concern for personal religious belief has always been an anti-majority, anti-collective principle.

The touch of government transforms what was a private organization into a monopoly bargaining agent for all employees. The result is that even in contracts between private employers and "private" unions, employees are forced by the mechanism of the government to accept a single agent to negotiate their working conditions with their employer. In a free society it is extraordinary to force individuals of various religious views to accept a single agent for a matter as important as an individual's vocation.

One of the earliest Christian commentaries on labor unions is the 1891 encyclical by Pope Leo XIII titled *On Capital and Labor* (also known as *Rerum Novarum*). Pope Leo wrote that the principal goal of labor unions (worker "associations") was "moral and religious perfection."[5] Pope Leo instructed:

> Social organization [of labor unions] as such ought above all to be directed completely by this goal. For otherwise, they would degenerate in nature and would be little better than those associations in which no account is ordinarily taken of religion.[6]

Of the major Christian denominations, the Catholic Church has traditionally been viewed as a strong supporter of organized labor. Yet, from its earliest pronouncement on worker associations, the Church saw moral perfection as the overriding goal for associating with a labor union. During the years when modern labor unions were taking shape, the Catholic Church remained constant in its teachings about the need for religious compatibility among employees who were members of labor unions.[7]

Because "moral and religious perfection" should be the first priority for any labor union representing Catholic employees, the current "one size fits all" collectivist approach of monopoly bargaining hardly seems to fit Catholics, particularly given the liberal positions of today's unions on such issues as marriage and abortion.

For other Christian churches the fit is even more troublesome. Some Christian churches teach that the activities of labor unions are intrinsically immoral.[8] The Biblical injunction against Christians being "yoked together with unbelievers" is a well-known Christian teaching.[9] Thus, the governmental requirement of a single employee organization acting as the exclusive bargaining representative runs up against the religious beliefs of many employees.

Even more intrusive on individual religious beliefs is the fact that both the NLRA and the RLA permit employers and unions to enter into agreements which require all employees to join or financially support the exclusive bargaining representative.[10] Employees of faith are not only required to accept representation by a labor organization that runs counter to their moral principles, but they can be forced to financially support the labor union as a condition of employment.

Given the primary role of the government in creating a potential conflict between the religious faith of an employee and compulsory union support, the good news is that federal and state governments have taken steps to protect the religious integrity of employees who find that supporting the labor union at their place of work is inconsistent with their religious beliefs.

What are these protections? Employees of faith have three basic options: 1) they can opt out of paying for union political and ideological activities that conflict with their conscience; 2) if their state has a Right to Work statute, employees can work without supporting the union in any way; and, 3) employees whose faith is in conflict with the activities of their union can, under Title VII and its state-level equivalents, require employers and unions to attempt to accommodate them. Just as religious beliefs vary considerably, so do the nature of employee religious objections to supporting a labor union. These protections and the way in which they "fit" various religious beliefs are discussed in turn.[11]

Membership and Political Spending Protections: For some employees, their conscience is clear if they are allowed to refrain from union membership and are relieved of paying for that part of the union fees which goes to support what they believe to be immoral activities.

This kind of objection is protected by the courts. Employees need not have a religiously based objection to

be entitled to refrain from union membership or to pay a reduced union fee that excludes expenses for political, ideological, and social causes. An objection on any basis is sufficient to obtain this accommodation.

In *Abood v. Detroit Board of Education,*[12] the U.S. Supreme Court considered whether public employees had a First Amendment right to refuse to support the political and ideological activities of their unions, notwithstanding statutory or contractual agreements that required all employees to either join or financially support the union. The Supreme Court ruled that public employees who object to supporting union activities outside the realm of collective bargaining are entitled to reduce their compulsory union fees to reimbursement for bargaining costs only. Employees cannot be required to support the union's political, public policy, and ideological activities.[13]

The U.S. Supreme Court has decided two additional cases under the two major federal labor laws covering private sector workers: the NLRA and the RLA. Those two cases, *Machinist v. Street* (RLA)[14] and *Communications Workers v. Beck* (NLRA),[15] established that no employee could be required to be a member of a labor union or support the political and ideological agenda of any union.

With those three cases, *Abood, Street,* and *Beck*, the right of virtually every employee in the United States to refuse union membership and pay a reduced union fee was established under either the controlling statute or the First Amendment to the U.S. Constitution. In general, however, the right to refuse union membership and the right to opt out of union political and ideological expenses is an inadequate remedy for employees of faith.

Right to Work Laws: If an employee works in one of 22 Right to Work states[16] the employee has complete freedom to decide whether to join or financially support a labor union.[17]

If the employee cannot support a labor union because of conscience, those beliefs are completely protected by the Right to Work law. In Right to Work states, employers and unions are prohibited from agreeing to compel employees to join or financially support the union.[18] The only exceptions are for employees who work in the railroad and airline industries[19] and those who work on federal enclaves over which the state has ceded all jurisdiction.[20]

Unions typically use their monopoly bargaining status to impose a penalty on those employees who take advantage of a Right to Work law by deciding not to join the union. These penalties include the loss of a voice and a vote in the employee's working conditions.[21]

Title VII and the Development of the Charity-Substitution Payment: The serious clash between an employee's religious belief that he cannot support a union and the statutory or contractual requirement that all employees pay union fees as a condition of employment has been met by the courts under Title VII with an unusual solution. This solution, called a "charity substitution payment," permits the religious objector to pay the amount of the union fees to a mutually agreed upon charity. Paying the union fees to charity not only satisfies the union's claim that everyone must pay, it also keeps the employee's conscience clear.

The right of a broad range of religious objectors to make the charity substitution payment did not arise overnight. The earliest cases arose in the 1970s and early 1980s. They involved employees who were members of churches which had specific church doctrine prohibiting union membership.[22] These cases generally involved Seventh-day Adventists, who, as discussed above, have a doctrine proscribing union membership.[23]

What about a religious objector who is not a Seventh-day Adventist? The first expansion of the charity substitution doctrine came in *IAM v. Boeing*.[24] The religious objector in *Boeing*, Thomasine Nichols, had the same deeply held religious beliefs as Seventh-day Adventists. She could not be a member of any labor union. She was not, however, an Adventist. In fact, she wasn't even an official member of the church she had regularly attended for twenty years.

The United States Court of Appeals, over the vigorous objection of the International Association of Machinists union, held that she was entitled to the charity substitution accommodation based purely upon her personal religious beliefs, even though she was not a member of any church.[25]

The next extension of the doctrine came in *EEOC v. University of Detroit.*[26] The University of Detroit is a Jesuit institution. The religious objector in that case, Dr. Robert Roesser, was a member of the university faculty and of the Roman Catholic Church. Affiliates of the National Education Association represented the University's faculty.

The case arose when Dr. Roesser learned that the NEA and its state affiliate were pro-abortion lobbies. Dr. Roesser, consistent with the Catholic Church's historic teachings about the moral issues involved in supporting a labor union, determined that his religious beliefs prevented him from joining the union or paying any union fee flowing to the NEA and its state affiliate. He asked for an accommodation, which the University and union refused. Dr. Roesser suffered discharge rather than compromise his conscience.

Dr. Roesser's case was factually unlike the earlier cases in two ways. First, Dr. Roesser did not have a *per se* objection to labor unions. He could have been a member of the NEA if it had not taken a pro-abortion position. Second, the inaccurate public perception that the Catholic Church had historically been regarded as promoting unions created the impression that Dr. Roesser was taking a position contrary to the teachings of his church.[27]

The United States Court of Appeals in *University of Detroit* determined that individual religious belief is the proper focus of inquiry. Because Dr. Roesser's individual beliefs prevented him from associating with the NEA and its state affiliate, the court determined that he was entitled to an accommodation which would allow him to redirect his money away from the objectionable union.[28]

The Procedure for Membership and Political Spending Objections: The procedure for protecting an employee's religious beliefs varies with the nature of the employee's religious objections. If an employee wants to resign his union membership, he is merely required to put the union on notice of this. Unions are not permitted under federal law to place any restrictions on the right of an employee to resign from membership.[29]

If the employee's conscience requires that he withhold both membership in the union and a certain amount of his union fees, notice to the union is again required. This objection, however, can be a very simple "I object to paying for more than the costs of collective bargaining. I specifically object to paying for political and ideological expenses. Please reduce my union fees accordingly." No explanation of the nature of the religious belief is required because all objections, regardless of whether or not they are religious, entitle the employee to pay a reduced fee.[30]

The practical problem with a reduced fee payment is knowing how much the fee should be reduced to protect the employee's conscience. In *Chicago Teachers Local 1 v. Hudson,*[31] the U.S. Supreme Court addressed this problem. Assume that union dues are $500 a year. The union tells employees that the objector's fee is $450 a year for collective bargaining. How would an employee know if $450 is the correct amount? Must employees trust union officials to correctly calculate the collective bargaining costs?

The answer is "no:" employees do not have to trust union officials. Ronald Reagan said, "Trust, but verify." The Supreme Court in *Hudson* said essentially the same thing. Union officials, when they make the demand for payment, must give potential objectors independently "verified" financial information[32] so that employees can make their own judgment on whether the union's fee claim is correct. Generally, courts have interpreted the "verified" requirement to mean that the union must provide an audited financial statement of its expenses along with an explanation of which expenses are properly included in the union's reduced fee.[33]

If the employee looks at the union's numbers and decides the union is correctly claiming only those expenses that do not offend the employee's conscience, the employee lets the union know he wishes to pay only the reduced fee and that is the end of it. The employee pays what the union claims is chargeable. Various unions have different twists to their procedures. However, generally the employee must object to pay the reduced fee (as calculated by the union). The difference between the dues amount and the reduced fee is the employee's money which he can use as he sees fit.

On the other hand, if the employee looks at the union's financial figures and thinks they include expenses which conflict with his conscience, the employee can make the union prove the legitimacy of its fee claim. In *Hudson*, the Supreme Court placed upon unions a requirement that they must provide employees with a hearing before an "impartial decision maker" if the employee thinks the union's numbers are wrong.[34]

To obtain a hearing on a further reduction, the employee must make an objection known to the union. Objecting, and thereby letting the union know its calculations are at issue, is the key to obtaining a hearing on the question. Most unions will not reduce the fee amount unless the employee objects. No union will undertake the burden of proving its fee claims in a hearing unless an employee objects.

At the hearing, the union carries the burden of proof, not the employee. The union must prove that its agency fee numbers are correct.[35] Until the union proves these numbers, the union does not get any of the employee's disputed money. This is another requirement the Supreme Court placed upon unions in *Hudson*. The employee's money stays in an escrow account until the union proves its fee claims over disputed money.[36]

Of course, if an employee does not dispute part of the fee, and the employee agrees that the union is entitled to a certain portion of the fee, then that amount goes to the union. By the same token, any amount that the union agrees was used for politics goes to the employee. So it is just the disputed money that is held in escrow.[37]

At the hearing, the general standard for determining the correct amount of the fee provides that the union can charge objectors for collective bargaining and contract administration expenses but cannot charge them for political or ideological expenses, or other expenses not related to bargaining.[38]

Procedures for Employees Who Cannot Support the Union at All: Employees whose conscience does not allow them to pay any money to the union must give notice of this problem to the union and the employer. The notice must indicate the nature of the employee's religious beliefs so that the union and employer will know that some accommodation is sought.[39]

If the employer and union are unwilling to accommodate the religious objector through a charity substitution payment, the objector must file a timely charge with the local office of the Equal Employment Opportunity Commission and the corresponding state agency. The EEOC is the federal agency that enforces the rights of religious objectors under Title VII of the Civil Rights Act. Filing with

the EEOC (or the corresponding state agency) is a prerequisite to bringing the employee's claim to court.[40]

In every state, a timely charge may be filed within 180 days of the failure to accommodate. In most states, this time period for filing can be extended to 300 days.[41]

Conclusion

Religious objectors today have at their disposal a wide array of rights to protect various requirements of the conscience. No employee in the United States can be required to be a union member. Employees covered by Right to Work laws are not required to pay any union fees. Employees who are not covered by Right to Work laws have the right to limit their fee payment to reimbursement for collective bargaining costs. Employees whose sincere religious objections bar them from paying any money to the union are able to redirect their entire union fee to charity.

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Footnotes

[1] 42 U.S.C. § 2000e *et seq*.

[2] 29 U.S.C. § 151 *et seq*.

[3] 45 U.S.C. § 151 *et seq*.

[4] 29 U.S.C. § 159(a) (NLRA); 45 U.S.C. § 152 Fourth (RLA).

[5] Pope Leo XIII*, Rerum Novarum* ¶ 77 (Papal Encyclical, 15 May 1891).

[6] *Id.*

[7] Pope Pius XI, *Quadragesimo Anno* ¶ 32 (Papal Encyclical, May 15, 1931).

[8] The Seventh-day Adventists and the Mennonites are the two largest Christian denominations which teach that their members should never join or financially support a labor union because of the clash of values between the teachings of the church and practices of modern labor unions. *Industrial Relations: A Statement of Position of the Mennonite and Brethren in Christ Churches* (1941); *Mennonites and Industrial Organizations* (Special Committee of the Mennonite General Conference, 1937); *Seventh-day Adventist Relationship to Labor Organizations in the United States*, 1973 Annual Council; *Working Policy*, North American Division of the General Conference of Seventh-day Adventists, HC 30 10 Historical Position (1996-97 ed.).

[9] 2 Corinthians 6:14 (NIV).

[10] NLRA: 29 U.S.C. § 158(a)(3); RLA: 45 U.S.C. § 152 Eleventh.

[11] One remedy that does not currently exist is a religious objector's right to opt out of monopoly bargaining. There is some current scholarly agitation to allow multiple bargaining representatives. *See* Charles J. Morris, The Blue Eagle At Work: Reclaiming Democratic Rights In The American Workplace (ILR Press, 2005). However, no religious objector appears to have requested that relief in any reported federal case.

[12] 431 U.S. 209 (1977).

[13] *Id.* at 233-37.

[14] 367 U.S. 740 (1961).

[15] 487 U.S. 735 (1988).

[16] These twenty-two states are: Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Iowa, Kansas, Louisiana, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming.

[17] To avoid a question of pre-emption of these state Right to Work laws, Congress passed a specific provision permitting them. 29 U.S.C. § 164 (b).

[18] Of course, even in states where employees are not protected by a Right to Work law, compulsory unionism requirements are generally a matter of agreement between the union and the employer. If an employee works under a collective bargaining agreement that fails to require employees to either join the union or pay union fees, the employee is free to follow his or her religious beliefs.

[19] *Compare* 45 U.S.C. § 152, Eleventh *with* 29 U.S.C. § 164(b).

[20] *See, e.g.* Lord v. Local 288, Electrical Workers*,* 646 F.2d 1057 (5th Cir. 1981).

[21] There is authority, rejected by most unions, supporting the proposition that employees who join the union can object to their dues being used for politics. *See Abood*, 431 U.S. at 212 n.2; *Ellis*, 466 U.S. at 439 n.2; *but see* Kidwell v. TCU, 946 F.2d. 283 (4th Cir. 1991). Whether an employee of faith would be willing to join the union to obtain a voice and a vote in his working conditions on the basis that he could refuse to pay for union activities which conflict with his conscience would depend on the employee's religious beliefs.

[22] McDaniel v. Essex, 571 F.2d 338 (6th Cir. 1978); 696 F.2d 34(1982); Tooley v. Martin-Marietta, 648 F.2d 1239 (9th Cir. 1981); Nottleson v. Smith Steel Workers, 643 F.2d 445 (7th Cir. 1981); Anderson v. General Dynamics, 589 F.2d 397(9th Cir. 1978); Burns v. Southern Pacific Transp. Co., 589 F.2d 403 (9th Cir. 1978); Cooper v. General Dynamics, 533 F.2d 163 (5th Cir. 1976).

[23] Adventists were probably the source of the charity substitution payment idea. They lobbied for the insertion of this principle into the NLRA in 1974, when it was amended to cover nonprofit, nonpublic hospitals such as those owned by the Seventh-day Adventist Church. The Church had established a large number of hospitals as part of its religious outreach to the community, in which many Adventists were employed. Adventists wanted to avoid having to force their own employee church members to support labor unions in contradiction to church doctrine. 120 Cong. Rec. 12950-55 (Remarks of Sen. Ervin, brief of Seventh-day Adventist Church and statement of W. Melvin Adams); 120 Cong. Rec. 22575 (remarks of Sen. Williams);

and 120 Cong. Rec. 22577 (remarks of Sen. Cranston).

[24] 833 F.2d 165 (9th Cir. 1987).

[25] *Id.* at 169-70.

[26] 904 F.2d 331 (6th Cir. 1990).

[27] This perception was bolstered by the fact that the University was a Jesuit institution, and it was a Catholic priest who had discharged Dr. Roesser for his refusal to support the union.

[28] *University of Detroit,* 904 F.2d at 335.

[29] *See* Pattern Makers v. NLRB, 473 U.S. 95 (1985).

[30] *See* Chicago Teachers Local 1 v. Hudson, 475 U.S. 292, 306 n.16 (1986); *Abood,* 431 U.S. at 238.

[31] 475 U.S. 292 (1986).

[32] *Id.* at 307, n.18, 310.

[33] *See e.g.,* Second Circuit: Andrews v. Educ. Ass'n of Cheshire, 829 F.2d 335, 340 (2d Cir. 1987); Third Circuit: Hohe v. Casey, 956 F.2d 399, 415 (3d Cir. 1992); Fourth Circuit: Dashiell v. Montgomery Cty., 925 F.2d 750, 756-57 (4th Cir. 1991); Sixth Circuit: Lowary v. Lexington Local Bd. of Educ., 903 F.2d 422, 431-32 (6th. Cir. 1990) Seventh Circuit: Ping v. Nat'l Educ. Ass'n, 870 F.2d 1369, 1374 (7th Cir. 1989) (quoting Lowary v. Lexington Local Bd. of Educ., 704 F. Supp. 1461, 1466 (N.D. Ohio 1988)); Ninth Circuit: Knight v. Kenai Peninsula Borough Sch. Dist., 131 F.3d 807, 813 (9th Cir. 1997); D.C. Circuit: Ferriso v. NLRB, 125 F.3d 865, 867-72 (D.C. Cir. 1997).

[34] *Hudson,* 475 U.S. at 307.

[35] *Id.* at 306; *Abood,* 431 U.S. at 239-40 n.40.

[36] *Hudson,* 475 U.S. at 309-10.

[37] *Id.* at 310.

[38] *Abood,* 431 U.S. at 236; *see also* Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991) (applying the general standard).

[39] Smith v. Pyro Mining, 827 F.2d 1081, 1085 (6th Cir. 1987); Protos v. VW of America, 797 F.2d 129, 133 (3d Cir. 1986); Philbrook v. Ansonia Bd. of Educ., 757 F.2d 476, 481 (2d Cir. 1985), *aff'd in part, rev'd in part*, 479 U.S. 60 (1986); Anderson v. General Dynamics, 589 F.2d 397, 401 (9th Cir. 1978); Brown v. General Motors, 601 F.2d 956, 959 (8th Cir. 1979); Redmond v. GAF Corp., 574 F.2d 897, 901 (7th Cir. 1978).

[40] 42 U.S.C. § 2000e-5(f)(1).

[41] 42 U.S.C. § 2000e-5(e)(1).

WALK THIS WAY[1]: *IBP, INC. V. ALVAREZ* OPENS THE ROBERTS COURT ERA

*BY BETSY K. DORMINEY**

On November 8, 2005, a unanimous Supreme Court, per Justice Stevens, held that employees must be compensated for time spent waiting or walking to the work station after donning "unique or specialized gear." IBP, Inc. v. Alvarez, No. 03-1238, 546 U.S. __, 126 S. Ct. 514 (2005). This eagerly-anticipated decision heralded the beginning of a new era for the Court under the leadership of Chief Justice John Roberts. If this decision is any indication, those anticipating momentous change should curb their enthusiasm. *Stare decisis* is under no immediate threat.

I. Background

It was judicial activism that started this in the first place. In 1938 Congress passed the Fair Labor Standards Act (FLSA),[2] the last big brick of the New Deal edifice, requiring minimum wages and overtime pay. In short order, the Supreme Court, guided by ambitious plaintiffs' lawyers, found that activities hitherto considered noncompensable by employers, such as riding from the entrance of a mine to the mine face[3] or greasing up one's arms prior to making pottery,[4] were compensable under the FLSA. That was an expensive surprise for employers. There were class actions galore, with verdicts and settlements in the millions (in 1940's dollars). Feeling the heat, Congress soon passed the Portal-to-Portal Act[5] in 1947, specifically to undo much that the Court had done by expansively interpreting the FLSA.

The Portal-to-Portal Act excluded from compensable hours time spent "(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and (2) activities which are preliminary to or postliminary to said principal activity or activities which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities."[6] Preliminary and postliminary activities, such as clothes-changing and walking to the work station, were henceforth excluded from compensable time.

Of course, this was hardly the end of the matter. Portal-to-Portal Act regulations provided that the compensable workday would begin and end with the employee's performance of a "principal activity,"[7] and the battle shifted to that definitional terrain. Although normal clothes-changing had been defined as a preliminary or postliminary activity in the Portal-to-Portal Act, in 1956 the Court held that, for employees in a battery plant who worked with caustic chemicals, clothes-changing at the beginning of a shift and showering at the end were "integral and indispensable" to their principal activities and therefore time spent in those activities and walking that occurred thereafter was compensable under the FLSA.[8] Thus, the territory covered by the FLSA was expanded by accretion to include activities "indispensable and integral" to the employee's "principal activity" under the "continuous workday rule."[9] Regulations were adopted institutionalizing the "continuous workday" rule, which held that once the real work of the day commenced, the employer could not "stop the clock" except for *bona fide* rest or meal breaks.[10]

Plaintiffs' lawyers, still tantalized by the prospect of discovering compensable time that employers might have overlooked, continued to file suit, now using the "opt-in" collective action procedures that the Portal-to-Portal Act had tacked onto the FLSA.[11] Large employers whose employees had to engage in some sort of preparation before commencing work were attractive targets: the food processing industry, in which the U.S. Department of Agriculture prescribed smocks and hairnets, and workers traditionally were compensated based on "line time" rather than individual time card entries, were especially appealing targets for litigation. The U.S. Department of Labor did its part as well, conducting an enforcement blitz in that industry starting in the late 1990's that produced a $10 million settlement from one poultry processor (although the Department won none of the cases actually litigated).

II. The Cases Before The Court

Alvarez was filed by Washington beef and pork processing plant workers who sought compensation for time they spent walking to their work stations after donning "unique and specialized" gear. As the Supreme Court recited, all workers had to wear "outer garments, hardhats, hairnets, earplugs, gloves, sleeves, aprons, leggings, and boots"; many, especially those who used knives, also wore a variety of protective equipment, including "chain link metal aprons, vests, Plexiglas armguards, and special gloves."[12] The District Court held, and the Ninth Circuit Court of Appeals affirmed, that donning such elaborate equipment was "integral and indispensable" to the principal activity of slaughtering pigs and cows, and that *Steiner* required pay for post-donning and pre-doffing walking time. In contrast, the Court of Appeals observed that "the time employees spent donning nonunique protective gear was '*de minimis*' as a matter of law.'"[13]

Tum v. Barber Foods, Inc. (331 F.3d 1 (1st Cir. 2003)) was filed in Maine and involved similar issues, but in a chicken processing plant. Chicken is lighter than pork or beef, in many ways. In contrast to the virtual body-armor the beef packers wear, workers in a chicken plant mostly wear smocks, hairnets, earplugs, and, occasionally, boots, gloves, arm guards and sleeves. The District Court granted partial summary judgment for the employer. It held that donning and doffing clothing and equipment that was required by the employer or the Department of Agriculture, as opposed to clothing and equipment which the employees chose to wear, was an integral part of their work and therefore rang the compensability bell.[14] However, the time employees spent waiting to receive the gear to be donned was held to be preliminary, and thus noncompensable.[15] The case

proceeded to a jury trial on the issues not disposed of on summary judgment, and the jury found in favor of the employer, specifically finding that much of the donning and doffing time was *de minimis* and therefore noncompensable under the FLSA. The employees appealed, arguing *inter alia* that the District Court had erred in finding noncompensable time spent walking to the production floor after donning gear. The First Circuit affirmed the District Court's grant of partial summary judgment in favor of the employer and the subsequent defense verdict.[16]

III. The Court's Decision

IBP sought certiorari, as did the employees in *Tum*, and the Supreme Court decided to hear the cases together, granting the petitions to address the narrow question of the compensability of post-donning, pre-doffing walking time.[17] The Supreme Court, invoking *Steiner*, held that time spent walking between changing and production areas was compensable. *IBP, Inc.* was affirmed and *Tum* affirmed in part, reversed in part, and remanded.

The Court began its analysis with IBP, listing the various items of gear worn by the production workers in the plant. It noted that the employer already paid the employees for four minutes of clothes-changing time daily, but that the workers generally were compensated only for "line time," which starts when the first piece of meat enters the production line and ends when the last piece exits the line. The District Court and Court of Appeals had held that donning and doffing protective gear that was unique to the jobs at issue were compensable under the FLSA because they were integral and indispensable to the work of the employees who wore the equipment. Those courts reasoned from there that walking time after the donning and before the doffing of that "unique protective gear" therefore was compensable because it occurred during the "continuous workday" decreed by the FLSA's regulations. The District Court had denied as *de minimis*, and therefore noncompensable under the FLSA, time required to don and doff "nonunique" gear such as hard hats, ear plugs, safety glasses, boots and hairnets. The Supreme Court tested these conclusions against a three-part analysis of the text, purpose, and regulations of the Portal-to-Portal Act and concluded that "any activity that is 'integral and indispensable' to a 'principal activity' is itself a 'principal activity' under §4(a) of the Portal-to-Portal Act," and that the continuous workday theory made all walking that occurred after such activities compensable under the FLSA.

Turning to *Tum*, the Court, in passing, noted that those employees, like the production workers in *IBP, Inc.*, wore various combinations of sanitary and protective gear, but were paid on the basis of individualized time cards they punched at the production floor entrances. The Magistrate Judge had concluded that donning and doffing of required clothing and equipment (as opposed to optional items the employees could choose) was integral and indispensable and therefore compensable, but that time they spent waiting to collect clothing and equipment was excluded under the Portal-to-Portal Act. The question of the compensability of the actual donning and doffing time had been submitted to a jury, which concluded that actual donning and doffing time was *de minimis* and therefore noncompensable. The Supreme Court concluded that time spent waiting to doff such gear was compensable because part of the continuous workday, but that time spent waiting to don was not.

As so often is the case, what the Court did not say in its decision has caused more controversy than any of its pronouncements. Although the Court appears to hold that donning and doffing activities that are "integral and indispensable" to the employee's "principal activities" are compensable, it left employers to guess what makes an item of sanitary or protective gear "integral and indispensable." The Supreme Court did not directly address this issue in the *IBP, Inc.* portion of the decision, instead apparently assuming that the District Court and Court of Appeals got it right when they ruled that time employees spent donning and doffing nonunique protective gear was "*de minimis*" as a matter of law."[18] However, the Ninth Circuit had found that time required to don and doff certain items—boots, hairnets, and earplugs, to name only three—was *de minimis* and therefore excluded from compensable time under the FLSA, not the Portal-to-Portal Act. So, is a smock, which nearly all food processing workers are required by the U.S. Department of Agriculture to don prior to entering the production floor, more like a hairnet and therefore noncompensable as *de minimis*, or more like a protective sleeve and therefore 'integral and indispensable' enough to trigger compensability? Inquiring minds want to know, but will not necessarily find an answer within the Court's opinion. Plaintiffs' lawyers certainly will argue for compensability.

The situation is complicated by policies and practices that may vary from state to state, even plant to plant: in some plants the veterinarians employed by the U.S. Department of Agriculture allow employees to don smocks at home, and it seems unlikely that at-home donning would trigger compensability. Different rules may prevail in unionized workplaces, where §203(o) of the FLSA allows employers and employee unions to settle preliminary and postliminary pay issues through collective bargaining.[19]

Another looming question is what the U.S. Department of Labor will do about this decision. The Solicitor of Labor has pursued poultry processors in the past, notably winning a $10 million dollar settlement against Perdue Farms,[20] but all the donning and doffing cases that have actually been litigated, up to and including *Tum* in the First Circuit, were won by the employers.[21]

IV. Conclusion

As far as prognostication about future Supreme Court trends goes, this case seems to say mainly that the principle of *stare decisis* remains in robust good health. *Steiner*'s holding that "integral and indispensable" activities start the clock seems to have guided the Court here. One could have wished for a few more bright lines to guide compliance, and

one can certainly anticipate continued debate about what constitutes "integral and indispensable" activities and "unique" and "nonunique" gear, but on the whole the Supreme Court seems to be sticking to precedent when it comes to statutes and regulations. How it will approach Constitutional questions remains to be seen.

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Footnotes

[1] Young Frankenstein (1974, Mel Brooks, Producer). Igor (pronounced "Eye-gore") to Dr. Frankenstein ("Fronken-steen"), upon leaving Transylvania Station: "Walk this way." (Observing, then indicating, by hunched limp), "No, *this* way."

[2] 29 U.S.C. § 201 *et seq*.

[3] Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, 321 U.S. 590 (1944).

[4] Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946).

[5] 29 U.S.C. §§ 216(b), 251-262.

[6] 29 U.S.C. § 254(a).

[7] 29 C.F.R. § 790.6(a).

[8] Steiner v. Mitchell, 350 U.S. 247 252-53 (1956).

[9] 29 C.F.R. § 790.6(b).

[10] 29 C.F.R. § 790.6(b); 12 Fed. Reg. 7658 (1947).

[11] 29 U.S.C. § 216(b).

[12] IBP, Inc., 126 S. Ct. at 521.

[13] *Id*. at 522, citing IBP, Inc. v. Alvarez, 339 F.3d 894, 904 (9th Cir. 2003).

[14] *IBP, Inc*., 126 S. Ct. at 525.

[15] *Id*.

[16] Tum v. Barber Foods, 360 F.3d 274 (1st Cir. 2003).

[17] The question upon which the Court granted certiorari in *Tum* was "Do employees have a right to compensation for time they must spend waiting at required safety equipment distribution stations?" Tum v. Barber Foods, Inc., 125 S. Ct. 1295 (2005) (granting petition for certiorari). In *IBP, Inc.*, the question was "Whether walking that occurs between compensable clothes-changing time and the time employees arrive at or depart from their actual work stations constitutes non-compensable "walking. . .to and from the actual place of performance of the principal activity" within the meaning of Section 4(a)" of the Portal-to-Portal Act. IBP, Inc. v. Alvarez, 2004 WL 424055 (petition for certiorari).

[18] 126 S. Ct. at 523, quoting Alvarez v. IBP, Inc., 339 F.3d at 904.

[19] 29 U.S.C. § 203(o); *see also* Bejil v. Ethicon, 269 F.3d 477 (5th Cir. 2001), Turner v. City of Philadelphia, 262 F.3d 222 (3d Cir. 2001); Anderson et al. v. Cagle's et al., No. 1:00-CV-166-2 (WLS) (Order of December 8, 2005 granting summary judgment to the employer, possibly the first post-*IBP, Inc.* case decided by a District Court).

[20] News Release, U.S. Department of Labor, Perdue Farms Agrees to Change Pay Practices and Pay Millions in Back Wages to 25,000 Poultry Workers (May 9, 2002).

[21] *See, e.g.,* Anderson v. Pilgrim's Pride, 147 F. Supp.556 (E.D. Tx. 2001), *aff'd*, 44 Fed. Appx. 652 (5th Cir. 2002); Pressley v. Sanderson Farms, 2001 WL 850017 (S.D. Tx. 2001), *aff'd*, 33 Fed. Appx. 705 (5th Cir. 2002); Tum v. Barber Foods, 360 F. 3d 274 (1st Cir. 2004); Anderson et al. v. Cagle's et al., No. 1:00-CV-166-2 (WLS).

LITIGATION

FEE COUNSEL—THE ANTIDOTE FOR COLLUSIVE CLASS ACTION FEE AGREEMENTS

*BY LEWIS GOLDFARB**

Without the contingent fee, class action litigation in the United States would not exist, and millions of consumers and investors would be denied well-deserved redress. Because of the contingent fee, however, class action lawyers often receive excessive compensation for their representation, usually at the expense of their clients. The reason for this anomaly is three-fold: (1) the "client" in class action litigation is poorly positioned to supervise class attorneys; (2) the vast majority of class actions are resolved before trial with settlements that include "clear-sailing" provisions (agreements by defendant not to contest a specified fee); and (3) the current system lacks adequate controls to safeguard the class from collusive fee agreements.

In enacting the Class Action Fairness Act (CAFA) last year, Congress took a major step toward fixing the problem of abusive class action settlements by restricting the use of coupons rather than cash as compensation for class members.[1] The one abuse that continues unabated, however, is the collusive setting of exorbitant counsel fees that end up being paid for by class members out of a "common fund."[2] Because the defendant has no economic incentive to oppose the fee, the reviewing court is denied a full airing of the merits of the fee claim. Class action complexities and the time pressure created by burgeoning litigation dockets further complicate the district court's challenge in ruling on class counsel's fee request. Objectors often add to the court's burden rather than assist the court because they too are seeking a piece of the action. In many cases, the result is speedy approval of fee applications following cursory judicial review at both the trial and appellate levels.

One possible solution to this problem is the appointment of "fee counsel." A fee counsel is an experienced class action litigator whose sole responsibility is to review the fee application from a neutral vantage point. A seasoned class action litigator is almost uniquely able to evaluate the reasonableness of a fee request by considering, among other things, the degree of skill and risk involved in prosecuting the case and the uniqueness of the legal theories involved. If the parties are informed early in the process that fee counsel will be called upon to opine on the fee petition, they will likely be deterred from the kind of overreaching often found in common fund settlements.

This article describes the problems inherent in common fund settlements and proposes the appointment of "fee counsel" to protect the interests of the class by insuring that the Court has adequate information to assess the reasonableness of plaintiffs' attorneys' fees.

I. The Absence of a True Attorney-Client Relationship Undermines Effective Review of Fee Applications

In the traditional attorney-client relationship, the attorney's fee is agreed upon before representation begins. In the case of personal injury or other consumer litigation, the attorney is willing to invest in the outcome of the litigation and accept a fee on a contingent basis. At the outset, the fee arrangement is explained to the prospective client, who can agree to it, negotiate different terms, or hire a different lawyer. Individual plaintiffs often remain involved in the litigation as it progresses in order to ensure the best possible outcome. Since the fee is determined before the litigation commences, it is not an issue at the time of settlement. Full disclosure, client involvement, and a client with a real interest in the outcome of the litigation are the hallmarks of the attorney-client relationship that are lost in the class action setting.

Class action litigation turns this relationship on its head. In most class actions, it is the lawyer, not the client, who is the prime mover behind the class action and who has the greatest interest in the litigation.[3] The named plaintiff, or "client," is often sought out by the attorney and perhaps even promised a reward of a few thousand dollars to play the designated role. The putative class members rarely learn about the litigation until receiving notice of the settlement or other outcome of the litigation. Thus, as long as plaintiffs' counsel can persuade the court that the benefits conferred upon the class are fair and reasonable, counsel has free rein to seek the highest fee award attainable.

In the case of common fund settlements, which constitute the majority of class action settlements, defendants have little incentive to restrain the amount of the fee since it has no impact on the ultimate cost of the settlement. Even assuming that fee negotiations are conducted separately from negotiations over the terms of settlement as ethics rules require, there is no adversary process to inhibit the calculation of fees. The district court is left to conduct its own analysis of the sought-after fees to protect the interests of the class, a task few courts have the time or resources to do in a rigorous way.

A clear-sailing clause—an agreement on the defendant's part not to challenge the fee request—can further compromise a settlement's integrity. Such clauses effectively leave a court to its own devices in assessing a fee request.

Some settlements even give defendants a reversionary interest in the fund after distribution to class members. Reversionary interests create an incentive for counsel on both sides to inflate the face value of the settlement in order

to gain court approval of a correspondingly high counsel fee knowing that the actual pay-out to class members will be substantially smaller.

II. Current Situation: Judicial Review of Attorney Fee Claim

The prevailing regulatory response to unrestrained attorneys' fees in class settlement is to require judicial scrutiny of the settlement proposal.[4] CAFA armed the courts last year with specific authority to limit attorneys' fees to a fair percentage of the actual value (as distinguished from face value) received by class members in a non-monetary or coupon settlement.[5] This should discourage the inflation of attorneys' fee awards based on the face value of coupons that few class members will realistically want to redeem. It will not, of course, place any restraints on negotiated fees in common fund, cash settlements.

Federal Rule of Civil Procedure 23 requires court approval of all class action settlements. The trial judge is required to provide "a thorough. . .review of fee applications . . .in all class action settlements."[6] Indeed, the court should "exercise the highest degree of vigilance in scrutinizing [a] proposed settlement[]."[7] The "need for close judicial scrutiny of fee arrangements" is especially "acute" in cases involving common fund agreement.[8] The financial incentives for both the defendant and plaintiffs' lawyer present a "danger. . . that the lawyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment for fees."[9] Since 1985 courts have been applying "heightened scrutiny" to settlements that include clear-sailing provisions.[10] The application of this standard has resulted in the unilateral reduction of attorneys fees in certain cases.[11] So too have appellate courts occasionally exercised vigilance in the area of fees because of their impact on the class, sometimes adding their perspective that district courts should obtain the help of an expert to assist with the fee analysis.[12]

In one case that presents a fairly typical situation, the Third Circuit remanded a fee approval petition for reevaluation and rebuked the district court for its cursory review of the agreed upon fee award and its failure to make "its reasoning and application of the fee-awards jurisprudence clear." The Third Circuit called to the district court's attention the availability of a court-appointed fee expert to assist it in the performance of its duties.[13] Appellate decisions like the Third Circuit's are praiseworthy, but comparatively rare. The reality is that most fee awards go unchallenged at all levels of the court system for reasons explained herein. The trial court's review of attorneys' fees that are part of a comprehensive settlement package is clearly not an effective check on unchallenged attorneys' fee provisions, as illustrated by the occasional appellate reversals of fee awards and the widespread sense of outrage over fees that are not commensurate with class recovery.[14]

The greatest obstacle to judicial intervention is lack of judicial resources. District court dockets are notoriously crowded, which means that judges have correspondingly less time to devote to each individual case. Federal Rule of Evidence 16(a)(5) goes so far as to state that "[because settlement] eases crowded court dockets and results in savings to the litigants and the judicial system, settlement should be facilitated at as early a stage of the litigation as possible." Approving a proposed settlement clears a crowded docket while rejecting it prolongs the litigation. The court faces only a small risk of reversal for settlement approvals, but rejections are likely to be appealed. As one judge noted when approving a particularly controversial settlement: "[i]n deciding whether to approve this settlement proposal, the court starts from the familiar axiom that a bad settlement is almost always better than a good trial."[15]

The lack of adversarial sparring over fees often leaves courts without the information they need to evaluate a lawyer's assertions in support of his fee request. Judges presiding over settlement proceedings are removed from their normal adjudicatory role and assume a managerial role—but a managerial role that can only really be effective if the parties make a true adversarial presentation. But in a typical fairness hearing, plaintiff's counsel urges approval of the fee, defense counsel stands silent concerning the fee, and the settlement waits on judicial approval.[16] "The court can't vindicate the class's rights because the friendly presentation means that it lacks essential information."[17] The court is left to scrutinize the fee on its own, searching out the relevant information to do its job—information that may be readily available to, but not forthcoming from, the defendant.

While endorsing the role of the district judge as fiduciary for absent class members, courts have also recognized that evaluation of a fee award is not a task for which judges are particularly well suited. "It is no insult to the judiciary to admit that a court's expertise is rarely at its most formidable in the evaluation of counsel fees."[18] Accordingly, the trial court is given wide latitude in determining whether to enlist the aid of a special fee counsel or expert in assessing the fee petition. "A district court that suspects that the plaintiffs' rights in a particular case are not being adequately vindicated *may* appoint counsel. . .to review or challenge the fee application."[19]

III. Third Party Participation in Class Settlements

The need for objective, third party input in the fee determination is beyond dispute. However, the only meaningful third party input in the typical case comes from objectors, and, far from restraining plaintiffs' attorneys' fees, objectors may actually raise them. Objectors increase the costs of class litigation by delaying the approval of a proposed settlement, increasing settlement expenses borne by the parties, and postponing the class' receipt of its award. Occasionally these increased costs may be justified because they lead to heightened judicial scrutiny of settlements. Too often, though, the actions of objectors yield no benefit to the class and may even be harmful. The same pecuniary interests that motivate class counsel often explain why objectors' counsel become involved in a case. In many

instances, therefore, objectors cannot be relied upon as an effective safeguard against excessive fee agreements.

Time and again, courts have expressed frustration at the time wasted on account of objectors, who put forward duplicative or faulty information as they rush to claim a share of the common fund. One case involved a "canned" set of objections that named a defendant not involved in the case and concerned points unrelated to the subject matter of the litigation, leading the court to observe that the goal of "professional objectors who seek out class actions" is "to simply extract a fee by lodging generic, unhelpful protests."[20] In another class action, the court sorted through a complicated factual scenario about an objector's alleged contributions and concluded that one of the objector's statements was "at least somewhat hyperbolic at best, and somewhat false at worst."[21] In *Vollmer v. Publishers Clearing House*, the appellate court voiced its frustration with the objecting counsel who knew nothing about the terms of the proposed settlement and "demonstrated great unfamiliarity with the nature of his complaint."[22]

The fees sought by objectors may deplete the money available to the class.[23] At the same time, the objector process has been called an "extortion game" by commentators[24] who have also pointedly observed that "fee objections are pointless. . . . [T]heir only purpose is to enrich strategic objectors who threaten to 'hold up' settlements by appealing unless they are paid to disappear."[25] In a class action against Louisiana-Pacific Corporation that alleged a failure of building siding materials, a mediator awarded a $400,000 fee to objectors who didn't surface until after a $375 million settlement (that included a $25 million fee award to class counsel) had been negotiated.[26] The objectors' appeal of the excessiveness of the fee award was withdrawn when they were bought off with an increased fee of $1 million for their last minute entry to the settlement.[27] The fee was defended by the court, which observed that "it was better to get finality than to hold the settlement up any further."[28]

This is not to say that all objector action springs from improper motives, nor does all objector action necessarily impede the class action process. Many objectors are motivated to intervene upon discovering clearly collusive settlements that deprive class members of the real benefits of their causes of action. Public interest groups, such as Public Citizen and the Trial Lawyers for Public Justice, are "beneficial objectors" who represent parties' true interests without any desire to frustrate the class action process. Yet these groups have limited resources and their actions, by no means insubstantial, are too small in number to be primary safeguards for the class. The Federal Judicial Center has found that in cases where objections were filed, more than 90% of the settlements were approved without change.[29]

In addition to private objectors, government agencies have become players in class action litigation. The Federal Trade Commission has challenged proposed class attorneys' fees awards and, since 2002, has filed six briefs opposing proposed class settlements for excessive fees or insufficient benefits to class members. State attorneys general are also active in protecting their citizens from exploitive class action settlements. Recognizing the importance of this role, Congress included in CAFA a provision requiring notice of proposed class action settlements to the appropriate state or federal regulatory official within 10 days of court filing. Nonetheless, given the limited resources available to government agencies to do their job, the involvement of government authorities in the settlement approval process will never be sufficient to adequately police the excessive attorneys' fee deals that are so common in common fund settlements.

IV. Solution: Implementation of a Fee Counsel

The criticism in recent years of fee awards in common fund class action settlements suggests just how ineffective the current system is: the class cannot supervise the class attorney, the class attorney is enabled to overreach, the defense is ambivalent about the fee calculation, objectors are often unhelpful, and the court's limited resources simply will not allow for adequate review of fee petitions. All of these factors, and the growing public focus on abusive fee settlements in class actions, suggest the need for a new approach to fee application approval—the appointment of fee counsel.

The legal basis for the retention of a fee counsel already exists. Rules 53 and 54 of the Federal Rules of Civil Procedure authorize the use of masters when fees and accounting are at issue.[30] Rule 23 specifically authorizes such delegation in the class action context: "The court may refer issues related to the amount of the award to a special master or to a magistrate judge."[31] The *Manual for Complex Litigation* states, "[i]f fee requests are extensive or vigorously contested, the court should consider appointing an expert under Fed. R. Evid. 706 or refer the applications to one or more special masters appointed under Fed. R. Civ. 53."[32] And the Court's authority to appoint a technical expert is also deeply rooted in case law.[33]

Capturing the essence of the need for fee counsel in common fund cases and endorsing the notion that courts need the help, Judge Posner commented on the absence of customary adversarial proceedings and said that class counsel are:

> like artists requesting a grant from the National Endowment for the Arts. Grant-making organizations establish non-adversarial methods for screening applications; perhaps we need something like that for cases like this. The appointment of a special master to advise the court is an obvious possibility, one frequently used in fee matters and especially appropriate in a case such as this that lacks an adversary setting.[34]

The January 2006 Report of the ABA Task Force on the Contingent Fee further supports the use of fee counsel, particularly in common fund settlements that include clear sailing agreements. While stopping short of recommending a prohibition against clear sailing agreements, the ABA Report urges the courts to "give serious consideration" to the use of the appointment of counsel for the class in connection with fee determinations.[35] After citing with approval a 1985 Third Circuit Report on Class Actions that includes a similar recommendation, the ABA Report offers the following suggestion: "There is no reason. . .why counsel for the class could not be appointed at the conclusion of the litigation to attempt, on behalf of the class . . .to provide an adversarial presentation on fees that might otherwise be absent."[36]

The complexity and breadth of the factors that the court must consider when analyzing the fee award in a common fund case virtually require the involvement of an expert with the time and expertise to conduct a "robust assessment of the fee award" and set forth a "reasoned basis and conclusion."[37] Some of these factors are quantitative, such as the size of the fund, the number of class members benefited, and the number and nature of the objectors.[38] Others, such as the complexity, duration and risk of the litigation and the difficulty of establishing liability and maintaining a class, require the expertise of a seasoned class action litigator. An experienced fee counsel is ideally suited to perform this role and increase the likelihood of appellate approval of the settlement and fee award.

Implementation of a fee counsel would not only ease the pressure on the judiciary, but would also speed the approval of settlements because the fee counsel's calculation would occur at the same time as the judge's review of the merits of the settlement. Additionally, plaintiffs' counsel may be more likely to present a balanced, well-documented fee application knowing that this separate inquiry would transpire.

V. Conclusion

To ensure that the class action mechanism remains an effective means of free and equal access to the courts, greater scrutiny must be paid to fee awards, especially now as the stakes have risen for all system participants. While the rules of the game have evolved to give more authority to courts to prevent other abuses, insufficient attention has been given to the problem of excessive attorneys' fees in common fund settlements. The use of fee counsel as described above can go some way toward closing this expanding loophole. Judicial review would be fortified, attorneys' fees would be reined in, and the settlement process would be more equitable for the class.

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Footnotes

[1] Public Law 109-2, 119 Stat. 4 (2005) (codified at 28 U.S.C. § 1712(a) (2005)).

[2] Under the "common fund doctrine," a party that secured "a fund for the benefit of others, in addition to himself, may recover his costs, including his attorney's fees, from the fund itself or directly from the other parties enjoying the benefit." Savoie v. Merchants Bank, 84 F.3d 52, 56 (2d Cir. 1996).

[3] *See, e.g.*, Saylor v. Lindsley, 456 F.2d 896, 900 (2d Cir. 1972) ("[N]amed plaintiffs are essentially figureheads, merely the 'key to the courthouse door,'. . .who play no real role in directing the litigation.").

[4] Krell v. Prudential Ins. Co. of Am.(*In re* Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions), 148 F.3d 283, 333 (3d Cir. 1998) (noting that a "thorough judicial review of fee applications is required for all class action settlements.").

[5] 28 U.S.C. § 1712 (a) (2005).

[6] *In re* GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 819 (3d Cir.1995).

[7] Reynolds v Beneficial Nat'l Bank, 288 F.3d 277, 279 (7th Cir 2002).

[8] *In re* Agent Orange Prod. Liab. Litig., 818 F.2d 216, 224 (2d Cir. 1987) ("The test to be applied is whether, at the time a fee sharing agreement is reached, class counsel are placed in a position that might endanger the fair representation of their clients and whether they will be compensated on some basis other than for legal services performed.").

[9] Weinberger v. Great Northern Nekoosa Corp., 925 F.2d 518, 524 (1st Cir. 1991).

[10] Malchman v. Davis, 761 F.2d 893, 908 (2d Cir. 1985) (Newman, J., concurring); *see also, e.g.*, Weinberger v. Great N. Nekoosa Corp., 925 F.2d 518, 524-25 (1st Cir. 1991) (citing the Newman concurrence in *Malchman* and concluding that "heightened judicial oversight of this type of agreement [is] highly desirable"); *In re* Skinner Group, Inc., 206 B.R. 252, 262 n.14 (N.D. Ga. 1997) (citing Newman concurrence and observing that "inclusion of such a 'clear sailing' provision. . .merely justifies the Court's application of heightened scrutiny when evaluating the class counsel's ultimate fee request; it should not be read as an independent ground for withholding approval of the entire settlement"); Levit v. Filmways, Inc., 620 F. Supp. 421, 423-24 (D. Del. 1985) (acknowledging the "inherent dangers" of a clear sailing clause and quoting extensively from Newman concurrence).

[11] *See, e.g.*, *Levit*, 620 F. Supp. at 427; Duhaime v. John Hancock Mut. Life Ins., 989 F Supp. 375, 379-80 (D. Mass 1997).

[12] *In re* Cendant Corp. Prides Litig., 243 F. 3d 722, 727 (3d Cir. 2001).

[13] *Id.* at 735.

[14] *See, e.g.*, Miles Moore, *BFS Settles Nationwide Class Action Suit; Tire Maker to Modify Certain Models, Launch Education Program,* Rubber & Plastics News, Aug. 4, 2003 (citing the proposed settlement in *Shields v. Bridgestone/Firestone Inc.*, No. E-0167637, 2003 WL 22319083 (Tex. Dist. Ct. July 24, 2003), in which the court was presented a settlement in which members of the class received nothing and the lawyers would be awarded $19 million); Edward D. Murphy, *et al.*, *Conflict and Change; Maine's Employment and Price Levels Remained Stable Last Year, but its Economy Experienced Plenty of Turmoil*, Portland Press Herald, Jan, 4, 2004 (citing the settlement in *Ramsey v. Nestle Waters N. Am., Inc.*, No. 03 CHK 817 (Ill. Cir. Ct. 2003), in which customers received discounts or free water for 5 years while class counsel received $1.35 million in fees.).

[15] *In re* Warner Communications Sec. Litig., 618 F. Supp. 735, 740 (S.D.N.Y. 1985).

[16] *See, e.g.*, Alleghany Corp. v. Kirby, 333 F.2d 327, 347 (2d Cir. 1964) (Friendly, J. dissenting) (noting "[o]nce a settlement is agreed, the attorneys for the plaintiff. . .link[s] arms with their former adversaries to defend the joint handiwork'), *aff'd en banc by an equally divided court*, 340 F.2d 311 (2d Cir. 1965); Kamilewicz v. Bank of Boston Corp., 100 F.3d 1348, 1352 (7th Cir. 1996) (Easterbrook, J., dissenting) (parties "may even put one over on the court, in a staged performance"). Scholars warn that the interests of attorneys putatively on opposite sides of the case may become so closely aligned following settlement that there is a significant danger of collusion.

[17] Kamilewicz v. Bank of Boston Corp., 100 F 3d 1348, 1352 (7th Cir. 1996).

[18] *In re* Cendant Corp. Litig., 182 F.R.D. 144, 150 (D.N.J. 1998).

[19] Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 201, (3d Cir. 2000) (emphasis added).

[20] Shaw v. Toshiba Am. Info. Sys., Inc., 91 F. Supp. 2d 942, 974 (E.D. Tex. 2000).

[21] French v. Selden, 59 F. Supp. 2d 1152, 1160 (D. Kan. 1999).

[22] 248 F.3d 698, 704 (7th Cir. 2001).

[23] Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 UCLA L. Rev. 991, 1047, n 293 (2002) (noting that too many cooks spoil the broth, and adding more attorneys depletes the settlement pool).

[24] Richard B. Schmitt, *Legal Beat: Objecting to Class Action Pacts Can Be Lucrative for Attorneys*, Wall St. J, Jan 10, 1997, at B1 (quoting Professor Susan Koniak who refers to objector participation as an extortion game).

[25] *See, e.g.*, Admin. Office of U.S. Courts, Civil Rules Advisory Committee Report 233 (quoting Professor Charles Silver).

[26] *Court Clears Accord in Louisiana-Pacific Class Action Lawsuit*, Wall St. J., Apr. 23, 1996, at A4.

[27] *Id.*

[28] *See* Schmitt, *supra* note 24 (quoting United States District Judge Robert E. Jones).

[29] Fed. Jud. Center, Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 58 (1996).

[30] Fed. R. Civ. P. 53 (d)(3); Fed. R. Civ. P. 54 (d)(2)(D).

[31] Fed. R. Civ. P. 23(h)(4).

[32] Manual for Complex Litigation (Fourth) § 14.231 at p. 207 (2004).

[33] *See, e.g.*, Danville Tobacco Ass'n v. Bryant-Buckner Assoc., 333 F.2d 202, 208 (4th Cir. 1964) (stating that the term "'Master' was a misnomer. In truth [the appointee] did not serve as a master. . . . [T]he Court chose him as an expert for its guidance."); Scott v. Spanjer Bros., Inc., 298 F.2d 928, 930 (2d Cir. 1962) ("Appellate courts no longer question the inherent power of a trial court to appoint an expert under proper circumstances, to aid it in the just disposition of a case." (citing *Ex parte Peterson*, 253 U.S. 300 (1920))).

[34] *In re* Cont'l Ill. Sec. Litig., 962 F.2d 566, 573 (7th Cir. 1992).

[35] ABA Task Force on Contingent Fees, Report on Contingent Fees in Class Action Litigation 31 (Jan. 11, 2006).

[36] *Id.* at. 32.

[37] *In re* Rite Aid Corp. Sec. Litig., 396 F.3d 294, 302 (3d Cir. 2005).

[38] *See, e.g.*, *Gunter*, 223 F. 3d at 195 n.1.

The Lawsuit Abuse Reduction Act: A Sound Federal Reform

*By Sherman Joyce**

A great deal of attention is given to litigation that results in nine-figure awards or outrageous class action settlements. These cases garner intense media attention and, on occasion, even serve as fodder for Jay Leno or David Letterman.

For a small business, however, even mundane litigation with far fewer dollars on the line can be a serious concern. This litigation can often be the difference between a viable and successful business and one that ends up shutting its doors. Armed with a small filing fee and little more time than it takes to fill out a form complaint, just about anyone can file a lawsuit against a small business. It costs much more, however, for a small business to defend against lawsuits in a legal system that is rigged, in effect, to allow for frivolous claims and legal extortion.

Small business owners lost their weaponry against frivolous lawsuits when Federal Rule of Civil Procedure 11 was changed in 1993. The change rendered Rule 11 less potent by allowing judges to refuse to sanction a lawyer, even after finding a claim frivolous. It also established a 21-day "safe harbor" that gives the plaintiffs' lawyers a free pass to withdraw frivolous pleadings without sanction. They can simply change the words of the pleading, file it again, and so it goes on.

The 1993 changes are not limited to the federal courts. They also triggered automatic, similar changes in state rules in a number of jurisdictions. As a result, plaintiffs' lawyers can force small businesses to settle cases for amounts just under the expected cost of defending against a claim. To small business owners, the cost of settling these claims can have devastating effects.

According to a 2005 report by the National Federation of Independent Business Research Foundation, the median total cost to a small business to settle a legal dispute is about $5,000. Businesses often have few options to recoup these costs as raising prices is not always an option. Instead, small business owners are driven to cut operating expenses by laying off employees or, even, in extreme cases, to close their operations.

In addition to dealing with the direct financial impact imposed by settlement costs, small businesses also face the loss of profits associated with the time spent defending against the claim. Oftentimes, small business owners are extensively involved in all aspects of litigation, forcing them to take time away from running their company, which can ultimately affect their bottom line. Even if a small business is able to survive the financial repercussions of a frivolous claim, it still can be adversely affected by the substantial emotional hardship on the owners and potentially change the tone of the business for years to come.

A Tool to Stem Frivolous Claims

The Lawsuit Abuse Reduction Act (LARA), H.R. 420, addresses head-on the problems associated with frivolous lawsuits. LARA, which is supported by over 330 organizations, will help rein in frivolous claims by restoring mandatory sanctions on attorneys, law firms, or parties who file frivolous lawsuits and by abolishing the "safe harbor" provision that allows parties and their attorneys to avoid sanctions during the 21-day window allowed by the 1993 changes to Rule 11 of the Federal Rules of Civil Procedure. In addition, the legislation will permit monetary sanctions including reimbursement of reasonable attorney's fees and litigation costs in connection with frivolous lawsuits and extend Rule 11's provisions preventing frivolous lawsuits to apply to state cases in which a state judge finds that the case substantially affects interstate commerce by threatening jobs and economic losses to other states.

LARA also builds on the provisions in the federal Class Action Fairness Act of 2005 (CAFA) that were intended to stop litigation tourism to "Judicial Hellholes." Judicial Hellholes are jurisdictions in which plaintiffs enjoy an unfair (and often very considerable) advantage over defendants. Personal injury lawyers seek out these places because they know that they will likely be able to procure a positive outcome in their courts—an excessive verdict or settlement, a favorable precedent, or both. LARA allows a plaintiff to file a personal injury case where he or she resides at the time of the filing, resided at the time of the alleged injury, or the place where the alleged injury occurred. LARA also allows for claims to be filed where the defendant's principal place of business is located or where the defendant resides if the defendant is an individual.

Staying Consistent with Federalism Principles

Under LARA, state court judges would be responsible for determining whether a claim has substantial impact on interstate commerce. That is the trigger that requires application of the federal rule. These would be cases that threaten to bankrupt a multi-state industry, risk loss of out-of-state jobs, or could have a major impact on the interstate economy. Of equal importance is the fact that state court judges would retain total power to determine whether or not a claim or defense was frivolous and, if it was, what sanction should be applied against the attorney who brought the frivolous claim. LARA gives judges an extra tool that enables them to keep their courts fair and balanced.

The goal of LARA's other major provision—putting a stop to litigation tourism—also is consistent with basic principles of federalism. State courts should not be overrun by claims of individuals who do not live, work, or pay taxes in the state or county unless the claim arose there. This litigation tourism floods local courts with lawsuits more appropriately heard in other jurisdictions, increasing the workload of state court judges and diverting limited judicial

resources. It delays justice for local residents whose cases compete for judicial time with those cases that have no relation to the forum.

The CAFA solved a major inequity by allowing interstate class actions to be removed to federal court. We have learned recently, however, that some plaintiffs' attorneys are voiding CAFA's reach by limiting the number of claimants in a case to ninety-nine. It is imperative that we address this inequity, which allows plaintiffs' lawyers to take advantage of a Judicial Hellhole through litigation tourism. As the debate on LARA continues, addressing these scenarios will be central to the effort.

LARA offers an opportunity to solve some of the worst problems in today's civil justice system while respecting the prerogative of state court judges. Supported by a united business community, LARA already has passed the U.S. House of Representatives with bipartisan support and now heads to the Senate for consideration. Now is the time to build upon tort reform successes from this past year and keep pushing for the passage of LARA to address litigation tourism and the No. 1 civil justice concern of small businesses and many others: frivolous lawsuits.

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Professional Responsibility

An Offer They Won't Refuse

*By Joseph C. Zengerle and Andrew P. Morriss**

Editor's Note: This article was written before the 8-0 decision handed down by the United States Supreme Court in* Rumsfeld v. FAIR *on March 6, 2006, in which the Court ruled that the Solomon Amendment does not violate the right to free speech when it forces law schools to allow a "discriminatory employer" such as the military on campus.

On December 6, 2005, a group of law schools, professors and students asked the Supreme Court to strike down the Solomon Amendment, a federal law that conditions funding for universities on the requirement that the universities afford military recruiters the same access to students that they grant other employers. This group told the Court that enabling military recruiters to interview students for careers in the Judge Advocate General's (JAG) Corps in law school facilities is unconstitutional because the Amendment thereby compels the law schools to endorse "the military's. . .explicit policy" of discriminating on the basis of sexual orientation. Not only are the law schools and other complainants wrong on the law and the facts, but their attack on equal access to campuses for JAG recruiters, if successful, would help perpetuate one of the worst legacies of the Vietnam War: The divide between the American academy and the American military.

This divide between universities and the military can be seen in the law schools' challenge to what they repeatedly and erroneously label as a *military* policy: the mandatory "Don't Ask, Don't Tell" policy adopted by Congress and signed by President Clinton. These law schools (unlike a coalition of law school faculty and students who have filed a brief with the Court opposing complainants) disguise the fact that the military is simply following the directive of *Congress* to exclude openly gay service members. Any other behavior by "the military" would (we hope) raise far more serious issues than this lawsuit does, because it would mean military leaders were ignoring their civilian (and constitutional) superiors.

Ironically then, what the law schools seek to do is penalize the military for adhering to the rule of law. Of course, mischaracterizing the issue by declaring that the military is engaged in "invidious discrimination" instead of legally mandated behavior allowed plaintiffs' lead counsel to claim on the front page of *The New York Times* that striking the Solomon Amendment would affirm law schools' right to exclude "bigots." But compliance with a federal statutory obligation, which the complaining law schools themselves accept as valid, is profoundly different from the sort of voluntary—and sometimes illegal—behavior at which law schools' antidiscrimination policies are aimed. The failure of the law schools to acknowledge this distinction suggests the deeper problem in American higher education.

Law schools, and universities generally, must be open forums where academic freedom encourages all sides to be heard. It is to foster open discussion of all issues that we reward faculty with lifetime tenure in their jobs, a rarity in today's economy, and fund state universities that house even the most virulent critics of American society. The further irony is that, while loudly complaining about the alleged infringement on their right to speak (as though they would be taken to adopt the personnel policies of employers allowed to recruit), the law schools are seeking to restrict their students' freedom of inquiry.

In a competitive market, of course, such limitations on access would likely succumb to market pressures, for schools with more employers would out-compete schools with fewer. In a competitive market Congress would have no need to be concerned about any individual law school's behavior toward JAG recruiters (or anyone else). But legal education is not a fully competitive marketplace, and has not been for almost a hundred years. The potent combination of the American Bar Association and the law school trade association, the Association of American Law Schools (AALS), has dampened competition and distorted market forces.

In the *Journal of Legal Education,* law professor George Shepherd recently argued that these two organizations acting together require American law schools to engage in a wide range of cost-increasing behavior that help price legal education out of the reach of the poor, including many minorities, while primarily benefiting the faculty. Regarding the case under discussion, an AALS policy would require essentially all law schools to make their career services unavailable to JAG recruiters. Congress, in the exercise of its constitutional power to "raise and support Armies," successfully countered this lack of competition by bribing universities to override their law schools and allow JAG recruitment on an equal footing. Having lost the special position sought by their anticompetitive behavior, law schools are now asking the courts, among other things, to restore it.

Law schools represent a privileged segment of the academic community generally, and many of the complaining law schools are distinctly more selective than most. It is equal access to their students which these schools would deny at a time when the best qualified JAG officers are needed to confront the difficult questions facing our armed forces today. The American military's commitment to the rule of law is so strong that JAG officers play an active role

in advising combat operations and other defense policies, as well as developing and executing military justice standards, which is why supporting the military's access to the broadest and best pool of future lawyers is critically important.

This is the ultimate irony the complaining law schools create: They seek to deprive the military of graduates exposed to the values they claim to have taught. The impact of their denying equal access contributes to the perception of the continuing role class plays in the makeup of military manpower, a characteristic intensified by the all-volunteer nature of the force since the draft ended a generation ago. If these law schools are indeed committed to the notion of justice and equal treatment, enriching the ranks of military lawyers with their graduates and sharing the sacrifices of military service should be an important goal, not one cast aside in favor of contesting a statutory personnel policy this case cannot affect while perhaps reliving fond memories of some faculty members' days on the barricades of the 1960s.

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RELIGIOUS LIBERTIES

SUPREME COURT CONSIDERS CHALLENGE TO OREGON'S DEATH WITH DIGNITY ACT: *GONZALES V. OREGON* AND THE RIGHT TO DIE

Editor's Note: This article is reprinted with permission from the Pew Forum on Religion and Public Life. It was originally released on September 30, 2005 as a Legal Backgrounder. The Pew Forum on Religion & Public Life delivers timely, impartial information to national opinion leaders on issues at the intersection of religion and public affairs; it also serves as a neutral venue for discussions of these matters. The Forum is a nonpartisan organization and does not take positions on policy debates. Based in Washington, D.C., the Forum is directed by Luis Lugo and is a project of the Pew Research Center. The Forum is located at 1615 L Street, NW Suite 700, Washington, DC 20036–5610. For more information, please visit www.pewforum.org.

On October 5, 2005, the Supreme Court will hear oral argument in *Gonzales v. Oregon*, a case arising from the conflict between Oregon's Death with Dignity Act (DWDA) and the U.S. attorney general's interpretation of the federal Controlled Substances Act of 1970 (CSA). The federal law controls the distribution of drugs by regulating those who are registered to prescribe and dispense them, and by assigning drugs to categories of risk or medical usefulness. Oregon's Death with Dignity Act permits physicians to prescribe a lethal dose of drugs to certain terminally ill patients, who may then choose to end their own lives. The law was initially enacted in 1994 through a voter initiative, but a court injunction delayed its implementation until 1997, when voters again approved the measure in a second referendum. The court then lifted the injunction. Almost immediately, federal legislators and executive branch officials focused on the Oregon law's potential conflict with the federal Controlled Substances Act.

The administrator of the federal Drug Enforcement Administration (DEA) initially determined that physician-assisted suicide is not a "legitimate medical purpose" under the CSA. But then-Attorney General Janet Reno overruled that determination and found that the statute "does not authorize [the DEA] to prosecute, or to revoke registration [under the CSA] of, a physician who has assisted in a suicide in compliance with Oregon law." In 1998 and 1999, federal legislators, led by then-Senator John Ashcroft, introduced two bills designed to amend the CSA to state explicitly that physician-assisted suicide is not a "legitimate medical purpose," and that the registration of a doctor prescribing controlled substances for that purpose may be revoked. Neither bill passed, and Oregon doctors and pharmacists were left free to prescribe and fill prescriptions under the DWDA without fear of losing their registrations under the CSA.

By 2001, however, the legal landscape had changed dramatically; John Ashcroft was now attorney general. Using his authority under the CSA and its regulations, Ashcroft reversed Janet Reno's position on the Death with Dignity Act. In a ruling known as the "Ashcroft Directive," he determined that physician-assisted suicide is not a "legitimate medical purpose." Any doctor who prescribes drugs for the purpose of assisting a patient's suicide—and any pharmacist who fills a prescription written for that purpose—is likely to violate the CSA, the attorney general ruled, and risks loss of his or her privilege to prescribe drugs as well as possible criminal penalties.

An Oregon doctor and pharmacist, joined by patients and the state of Oregon, immediately filed suit to block enforcement of the Ashcroft Directive. The plaintiffs contented that the Directive exceeds the attorney general's authority under the CSA. The law was intended to combat the illegal traffic in narcotics, they argued, not to regulate the practice of medicine, which is an area traditionally left to state control. A federal district judge enjoined enforcement of the Ashcroft Directive, and the attorney general appealed. On May 26, 2004, the U.S. Court of Appeals for the Ninth Circuit ruled in favor of the plaintiffs and held the Ashcroft Directive "unlawful and unenforceable." Attorney General Ashcroft petitioned the U.S. Supreme Court to hear the case in its 2005-2006 term. By the time the court agreed to hear the case, in February 2005, Ashcroft had been replaced by Alberto Gonzales.

Gonzales v. Oregon arises out of the morally charged debates and lawsuits surrounding end-of-life decision-making, seen most recently in the nationwide controversy involving Terri Schiavo. The debates and the cases that accompanied them are the focus of the first section of this backgrounder. Although these controversies ensure that *Gonzales v. Oregon* will generate much public interest, the case will not be resolved on broad moral, political, or even constitutional terms. Instead, as is described in the second section of this backgrounder, the Supreme Court's decision will likely involve technical legal questions about statutory interpretation and the deference courts should accord to certain decisions of federal administrative officials.

The End-of-Life Debate

The debate over the legal, ethical and political implications of death and dying is a relatively recent phenomenon. Prior to the scientific and technological revolutions of the 19th and 20th centuries, most people died at home, often quite rapidly from viral or bacterial infections or various other diseases for which there was no effective treatments.

The idea of using drugs or other means to hasten

someone's painful end, while not unheard of, was frowned upon at all levels of American society. Traditional Jewish and Christian teachings consider taking one's own life to be a grave sin. Moreover the Hippocratic Oath and other medical codes of conduct have long prohibited doctors from assisting in the taking of life, even if the patient wants to die prematurely.

The modernization of health care in the 20th century dramatically changed the character of death and dying. People began to routinely die in hospitals. More importantly, new technologies, such as the artificial respirator, allowed doctors to prolong life, often for substantial periods of time.

By the 1950s, a small body of writers and thinker in the United States and Europe began to argue in favor of voluntary euthanasia. These arguments gained wider acceptance in the 1960s as the civil rights movement, the sexual revolution and other social movements helped to expand notions of personal freedom. In 1967, the first "right to die" bill was introduced in the United States—in the Florida legislature. It failed, as did a similar measure in the Idaho legislature in 1969.

In the 1970s the end-of-life debate vaulted onto the national stage, thanks in large part to the highly publicized case of Karen Ann Quinlan. Quinlan, a 21-year-old New Jersey woman, fell into a coma in April 1975, possibly due to mixing valium and alcohol. Despite efforts to resuscitate her, she never regained consciousness. Quinlan was later judged to be in a "chronic persistent vegetative state," a condition in which the patient is judged to have no remaining cognitive functions. She was surviving with the assistance of an artificial respirator.

Several months after Karen's hospitalization, her father and legal guardian, Joseph Quinlan, determined that she would not want to be kept alive in her present condition. When he directed the hospital to remove her respirator, her treating physician refused, prompting Mr. Quinlan to sue in state court for the right to remove his daughter's life support. After a highly publicized trial, the court ruled against Quinlan.

The decision was overturned on appeal to the New Jersey Supreme Court, and Joseph Quinlan was granted the right to remove his daughter from the respirator. Writing for a unanimous court in *In re Quinlan*, New Jersey Chief Justice Richard J. Hughes found that Karen's (and by extension Joseph's) right to terminate her life support was grounded in the U.S. Constitution's unwritten right to privacy. That right had solidified in the years just before *Quinlan*, notably in two landmark Supreme Court cases, *Griswold v. Connecticut* (1965) and *Roe v. Wade* (1973).

In *Griswold*, the Supreme Court found that specific provisions of the Bill of Rights, when taken together, create certain privacy protections. This idea—that privacy protections "emanate" from the Bill of Rights—was affirmed in *Roe*, which expanded the privacy sphere to create a right to abortion.

Griswold specifically concerns the right of married couples to seek contraception counseling. But, as Chief Justice Hughes noted, the privacy right enumerated in *Griswold* "is broad enough to encompass a patient's decision to decline medical treatment under certain circumstances in much the same way as it is broad enough to encompass a woman's decision to terminate pregnancy under certain conditions," as in *Roe*.

Ironically, Karen Quinlan continued to live after her respirator was removed. She did not die until 1985, nine years after the case had been resolved.

In the years following the *Quinlan* decision, many state legislatures passed living will statutes. Living wills were conceived in 1969 by human rights lawyer Louis Kutner as a way to allow patients to refuse life-sustaining treatment in cases where they are no longer able to communicate their wishes. State courts also weighed in during this time with a variety of decisions on end-of-life issues, including a 1985 New Jersey Supreme Court ruling allowing a hospital to remove a feeding tube from a patient in the last stages of terminal cancer.

In 1990 the right-to-die debate reached the Supreme Court, when it took up *Cruzan v. Director, Missouri Department of Public Health*. The case involved Nancy Cruzan, a Missouri woman who was left in a persistent vegetative state following a car accident in 1983. Five years after her accident, Cruzan's condition had not improved and her parents asked that her feeding tube be removed. But the Missouri Department of Health refused, prompting the family to challenge the decision in state court.

The case worked its way to the Missouri Supreme Court, which ruled in favor of the state, arguing that the state has a strong interest in preserving life, an interest embodied in its laws, including the criminalization of homicide. Given this state interest, and Nancy's lack of a living will, the court ruled that the Cruzan family could only terminate life support if there was "clear and convincing evidence" that she would have wanted such treatment withdrawn. The Cruzan family presented evidence that Nancy had stated her desire not to live as a "vegetable," but that evidence was judged to be insufficient by the state's high court.

The Supreme Court upheld the state court's rationale by a vote of 5-4. Writing for the majority, then-Chief Justice William Rehnquist agreed that the Due Process Clause of the 14th Amendment gives Nancy Cruzan and other patients a "liberty interest" in declining treatment. But, he continued, in cases like this, where the patient is not competent to make decisions for herself and must rely on family members to do so, states have the right to establish procedures to ensure that decisions made by surrogates conform, as best as

possible, to the wishes expressed by the patient when still competent. What's more, Rehnquist argued, "Missouri may legitimately seek to safeguard the personal element of [these decisions] through the imposition of heightened evidentiary standards." In sum, requiring "clear and convincing evidence" of the patient's intent before life support is withdrawn did not violate Cruzan's constitutional right to terminate treatment.

In a concurring opinion, Justice Antonin Scalia couched his support for Missouri in completely different terms, arguing that end-of-life questions should be left to state legislatures, not federal courts. "American law has always accorded the State the power to prevent, by force if necessary, suicide—including suicide by refusing to take appropriate measures necessary to preserve one's life," he wrote. Moreover, Scalia argued, "the point at which life becomes 'worthless,' and the point at which the means necessary to preserve it become 'extraordinary' or 'inappropriate,' are neither set forth in the Constitution nor known to the nine justices of this Court any better than they are known to nine people picked at random from the Kansas City phone directory."

Writing for the dissent, Justice William Brennan argued that Nancy Cruzan's liberty rights outweighed the state's obligation to protect her wishes or life in general. This argument was echoed and expanded upon in a separate dissent by Justice John Paul Stevens, who concluded that "the meaning and completion of her life should be controlled by persons who have her best interests at heart—not by a state legislature concerned with only the 'preservation of human life.' "

In spite of the fractured character of the Cruzan decision, the Supreme Court for the first time implicitly recognized the right to refuse treatment in extraordinary circumstances. Indeed, when the case was remanded back to the state courts for retrial, a judge determined that the Cruzan family had met the "clear and convincing" standard and allowed Nancy to be disconnected from her feeding tube and to die.

In some ways, *Cruzan* presaged another high-profile case, that of Terri Schiavo, the severely brain-damaged Florida woman whose situation became a national media story from 2003 until her death in 2005. But in striking contrast to *Cruzan*, state courts in the *Schiavo* case consistently affirmed the right of Michael Schiavo, Terri's husband and legal guardian, to remove her feeding tube and allow her to die. Moreover, federal courts, including the Supreme Court, were unwilling to intervene in the case, even after Congress passed a law authorizing the federal judiciary to intervene.

In the years immediately following *Cruzan*, a number of states held referenda on legalizing physician-assisted suicide for certain terminally ill patients. In Washington state in 1991 and then in California the next year, voters rejected these measures. Even when voters in Oregon approved the Death with Dignity Act in 1994, it did not come into legal force until 1997, owing to court challenges and a second state referendum that unsuccessfully sought to nullify the Act.

The Oregon law only applies to patients who are terminally ill and likely to die within six months, a diagnosis that must be confirmed by two physicians. In addition, eligible patients must possess the mental capacity to give informed consent, cannot suffer from depression and must sign a written declaration in front of two witnesses stating that they are competent and acting voluntarily. Finally, while doctors may prescribe the lethal drugs, the dose must be administered by the patient.

Glucksberg* and *Quill

While states on the West Coast were grappling with right-to-die referenda, several challenges to state laws prohibiting physician-assisted suicide were working their way to the Supreme Court. Two suits, *Washington v. Glucksberg* and *Vacco v. Quill*, were filed on the grounds that a law prohibiting doctors or others from assisting terminally ill patients to prematurely end their lives violates the liberty interest under the 14th Amendment's Equal Protection Clause. In both cases, federal appeals courts agreed and declared the laws—from Washington state in Glucksberg and New York in *Quill*—to be unconstitutional. In *Quill*, for instance, the Court of Appeals for the Second Circuit ruled that since New York allowed terminally ill patients to remove life-support systems in order to quickly end their lives, it should also allow dying patients other means to hasten death, including physician-assisted suicide.

But the Supreme Court rejected these arguments in twin unanimous decisions issued in 1997, ruling that state laws prohibiting assisted suicide are constitutional. Writing for the majority in *Glucksberg*, Chief Justice Rehnquist argued that in order for something to be specially protected by the Due Process Clause, it must be "deeply rooted in this nation's history and tradition," such as the right to marry and raise children. Neither marriage nor child rearing are specifically guaranteed by the Bill of Rights, but both have been deemed a liberty interest, protected by the Due Process clause.

According to Rehnquist, the right to physician-assisted suicide does not rise to the level of a deeply rooted historical right. Indeed, he argued, states have traditionally outlawed the practice and continue to do so. In this context, Rehnquist wrote, physician-assisted suicide cannot be compared with the removal of life support. The right to refuse medical treatment has a long history in the nation's traditions and laws, he argued, and was deemed to be constitutionally protected in *Cruzan*.

Finally, the chief justice looked at the constitutionality of Washington state's law prohibiting physician-assisted suicide. Although the right to assisted suicide is not protected under the Due Process Clause, he wrote, the law

prohibiting it must still advance a legitimate state interest in order to be constitutional. In this case, Rehnquist argued, Washington state's prohibition met a number of legitimate interests, including the state's broad interest in preserving life and protecting the depressed and mentally ill.

A number of justices issued concurring opinions in *Glucksburg*. Sandra Day O'Connor, while agreeing that the Constitution offered no broad right to suicide, left open the possibility that someone "experiencing great suffering" might have a constitutional right to control "the circumstances of his or her imminent death."

In his concurrence, Justice Stevens took O'Connor's rationale a step further, writing that there are times when hastening death "is entitled to constitutional protection." Steven essentially argued that the court's earlier decision in *Cruzan* is a counterweight to *Glucksburg,* requiring constitutional boundaries on right-to-die issues to stand somewhere between the two decisions. "Although there is no absolute right to physician-assisted suicide," Stevens wrote, "*Cruzan* makes it clear that some individuals who no longer have the option of deciding whether to live or die because they are already on the threshold of death have a constitutionally protected interest that may outweigh the State's interest in preserving life at all costs."

The opinions in *Quill* largely paralleled those in *Glucksburg*. Once again, Rehnquist wrote for the unanimous majority, with O'Connor, Stevens and others concurring. And once again, the majority rejected the argument that physician-assisted suicide was a constitutionally protected right. While *Glucksburg* and *Quill* upheld prohibitions on physician-assisted suicide, they did not in any way address the question of whether a law like Oregon's Death with Dignity Act would be constitutional. Neither will the upcoming *Gonzales* case.

Gonzales v. Oregon

Under the Controlled Substances Act, no person may "manufacture, distribute or dispense" a controlled substance except in conformity with the conditions established by the law. The Controlled Substances Act requires physicians to register with the attorney general in order to prescribe controlled substances, and then restricts such prescriptions to those that are "issued for a legitimate medical purpose." A prescription issued by a physician that lacks a legitimate medical purpose is legally indistinguishable from a prescription drug dispensed by a non-physician. Both fall outside the CSA's rules for distributing controlled substances. The law also gives the attorney general the authority to revoke a physician's registration for violations of the CSA or other acts "inconsistent with the public interest."

Soon after Oregon voters re-approved the Death with Dignity Act in 1997, then-DEA Administrator Thomas Constantine determined that the CSA prohibited the use of controlled substances as envisioned by the Oregon law, because a prescription for a lethal dose does not constitute a "legitimate medical purpose." Several months later, however, then-Attorney General Reno overruled the DEA determination. She concluded that Congress enacted the CSA to address the traffic in illegal and unauthorized drugs and to address problems of substance abuse. Congress, she reasoned, did not intend "to displace the states as the primary regulators of the medical profession, or to override a state's determination as to what constitutes legitimate medical practice in the absence of a federal law prohibiting that practice." Moreover, Reno found that the law's legislative history in no way indicates that Congress meant for the attorney general to resolve the complex moral and legal questions of physician-assisted suicide.

The Ashcroft Directive

On Nov. 9, 2001, then-Attorney General Ashcroft issued an interpretive rule, known as the Ashcroft Directive, that reversed his predecessor's legal analysis of the conflict between the DWDA and the CSA. The Ashcroft Directive relies on an opinion written by the Department of Justice Office of Legal Counsel, which analyzes the legal framework of the CSA and the attorney general's authority under the Act, along with the broad policy and legal context of assisted suicide. The Ashcroft Directive's ruling contains three main elements.

First, the Directive asserts the authority of the attorney general to identify and establish a uniform national definition of "legitimate medical purpose," as used in the CSA and its implementing regulations. An important decision of the Supreme Court that year, *United States v. Oakland Cannabis Buyers' Coop*. (2001), lends weight to the Directive. In *Oakland Cannabis*, a California grower-distributor of marijuana claimed that its cooperative enterprise was exempt from the reach of the CSA because it provided the drug only to those eligible to use it under California's "medical marijuana" statute, enacted in 1996. When the DEA filed suit to stop these activities, the grower asked the court to recognize a "medical necessity" exception to the CSA, one that would permit those charged with improper use of drugs to defend themselves against the charge by showing the medical usefulness of the drug.

The U.S. Court of Appeals for the Ninth Circuit ruled in favor of the grower, but the U.S. Supreme Court reversed the lower court's ruling. The high court held that the CSA assigns expressly to the attorney general or Congress the authority to determine which drugs are listed. In this case, Congress specifically determined that marijuana was one of those drugs with "no currently accepted medical uses." Once such a determination is made, the Court held, only Congress or the attorney general may revise the drug's status and declare such medical uses to exist. Neither states nor private entities possess the authority to decide, for purposes of the CSA, whether marijuana or any other drug has a medical use, the court said.

Second, the Office of Legal Counsel opinion, on which

the Ashcroft Directive relies, asserts that the Oregon law represents a significant departure from the legal and ethical norms governing medical care. The office surveyed a broad range of state laws and professional standards for health care practitioners. It concluded that across all other U.S. jurisdictions, and among virtually all the major organizations of medical professionals, physician-assisted suicide is uniformly regarded as outside the range of "legitimate medical purposes" for which controlled substances may be prescribed.

Third, the Ashcroft Directive declares the attorney general's intention to sanction non-complying practitioners, and instructs DEA officials to monitor compliance in Oregon. Specifically, the Directive states that Oregon's legalization of physician-assisted suicide is not a defense to those who violate the terms of the CSA by prescribing or dispensing drugs for purposes of assisting in a patient's suicide.

The day after the Ashcroft Directive was issued, Oregon filed suit in federal district court to block its enforcement. Health care providers and terminally ill patients soon joined the state's lawsuit against the attorney general. Although the district court granted the plaintiffs' motion to enjoin the Directive, it lacked jurisdiction to hear the suit and transferred the case to the U.S. Court of Appeals for the Ninth Circuit, which asserted jurisdiction over the case and continued the injunction.

On May 26, 2004, a divided panel of the Ninth Circuit struck down the Ashcroft Directive, holding that the attorney general's rule "violates the plain language of the CSA, contravenes Congress' express legislative intent and oversteps the bounds of the attorney general's statutory authority." In dissent, Judge J. Clifford Wallace argued that the court should have applied ordinary standards of administrative law to the case, which would have accorded far greater deference to the Ashcroft Directive and its determination of "legitimate medical purpose" under the CSA. The attorney general sought review of the Ninth Circuit's decision in the Supreme Court, and the high court agreed to hear the case in its October 2005 term.

Arguments in Gonzales

Although its context is morally and politically charged, *Gonzales v. Oregon* presents the court with a common, though doctrinally convoluted, question of administrative law and statutory interpretation. Should courts defer to agency interpretations of a regulation or statute, or should they review such interpretations with a more critical eye? More concretely, should courts defer to the attorney general's interpretation of "legitimate medical purpose" as used under the CSA and its regulations, or should they apply greater scrutiny to the attorney general's ruling in the Ashcroft Directive?

Answers to that question fall across a broad spectrum of judicial deference to agency interpretations, from substantial deference (with very little judicial scrutiny) on one side, to virtually no deference (with intense judicial scrutiny of the agency interpretation) at the other. In *Gonzales v. Oregon*, the parties have advanced three distinguishable approaches to the issue of judicial deference, one falling toward each end of the spectrum and another lying in the middle.

1. No Deference—Federalism and the Clear Statement Rule

In their most ambitious argument, which prevailed in the Ninth Circuit, the respondents—those who are challenging the Ashcroft Directive—contend that the Directive merits no judicial deference because the attorney general lacked the legal authority to issue such a rule. This argument rests on the claim that the CSA reflects a "delicate balance between federal regulation of controlled substances and state control of medical practice." Although control of drug distribution clearly falls within federal power under the Constitution's Commerce Clause, respondents argue, the same cannot be said of the doctor-patient relationship or medical practice more generally. More intrusive federal regulation of the doctor-patient relationship pushes up against the limits of federal power under the Commerce Clause. "By attempting to regulate physician-assisted suicide," the Ninth Circuit held, "the Ashcroft Directive invokes the outer limits of Congress' power by encroaching on state authority to regulate medical practice."

When faced with a regulation that "invokes the outer limits" of Congress' constitutional authority, courts engage in a two-part analysis. First, they demand that an agency show that Congress has clearly authorized it to push these limits. If an agency does not show that it has clear congressional authority, the regulation is deemed invalid. Second, even if the agency can make that showing, the regulation may still be invalid, because the court may ultimately find that Congress exceeded the "outer limit" of its authority under the Constitution.

Respondents in *Gonzales* argue that granting authority to the attorney general under the CSA to determine a national standard of "legitimate medical purposes" for which drugs may be prescribed would inevitably lead to federal encroachment on the state's power to regulate the doctor-patient relationship, and raise serious concerns under the Commerce Clause. In other words, such a grant would "push up against," and quite possibly exceed, the limits of Congress' constitutional authority. Given this, respondents contend, courts should scrutinize the CSA to find a clear statement granting the attorney general that authority. Finding none, the court should decline to recognize (or defer to) the attorney general's definition of "legitimate medical purpose," at least as applied to the practice of physician-assisted suicide. Therefore, the attorney general's interpretive rule should be deemed invalid, and the court would have no reason to move to the second part of the analysis, and decide whether or not Congress actually exceeded its constitutional authority.

Although the Ninth Circuit Court agreed with respondents' argument, and held that the Ashcroft Directive lacked legal authority because Congress did not clearly grant such authority to the attorney general, the Supreme Court is unlikely to reach the same conclusion. The demand for a clear statement of congressional authority rests on a prior conclusion that the challenged regulation or interpretation "invokes the outer limits" of federal authority, and the Supreme Court is likely to conclude that the Ashcroft Directive falls well within those limits. Earlier this year, the Supreme Court, in *Gonzales v. Raich* (2005), concluded that Congress has authority under the Commerce Clause to prohibit even the intrastate, personal growing and possession of marijuana for medical use. If Congress may regulate the personal possession of marijuana, it follows that it may also regulate the prescription of drugs by doctors, since doctors are normally paid and the drugs are virtually always purchased through channels of interstate commerce. Therefore, the Ashcroft Directive is not likely to "invoke the outer limits" of federal authority under the Commerce Clause, so the Supreme Court will not require a clear statement of the attorney general's authority to make the challenged determination.

2. Substantial Deference to Agency Interpretations of Agency Regulations

In *Gonzales* the attorney general argues that the Supreme Court should accord the Ashcroft Directive "substantial deference" because it only interprets a regulation made by the agency, not the CSA statute itself. The Supreme Court, in an earlier case, *Seminole Rock v. Bowles* (1945), ruled that courts must defer to the agency's interpretation of its own rules "unless it is plainly erroneous or inconsistent with the [agency's own] regulation." The Ashcroft Directive interprets the phrase "legitimate medical purposes" in the context of a regulation that defines the purpose for which a lawful prescription may be issued. Thus, the attorney general contends, the Supreme Court should accept the Directive's definition of that phrase unless the respondents show that the definition is "erroneous or inconsistent with the regulation."

If the Supreme Court accepts the attorney general's argument that the Ashcroft Directive merits the substantial deference of *Seminole Rock*, the respondents will have a virtually insurmountable burden of proving defects in the attorney general's definition of "legitimate medical purpose." Nothing in the CSA or its regulations forbids the attorney general from making rules governing medical purposes, and the substance of the definition chosen—that assisted suicide is not a "legitimate medical purpose"—cannot reasonably be deemed an erroneous determination, since all states but Oregon follow such a rule.

3. Intermediate Deference to Agency Interpretations of Statutes

Although the Ashcroft Directive seems to interpret an agency regulation, and thus would warrant application of the *Seminole Rock* standard of review, it is possible that the Supreme Court will analyze the Directive under a less deferential standard, drawn from *Skidmore v. Swift & Co.* (1944), which applies to certain agency interpretations of statutes. The *Skidmore* standard is far more contextual than either the clear statement rule used by the Ninth Circuit or the *Seminole Rock* standard. *Skidmore* requires courts to consider the "thoroughness evident in the [agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade."

If the Supreme Court follows *Skidmore* in analyzing the Ashcroft Directive, it is likely to focus on two features of the Directive. The first is its apparent inconsistency with the CSA and prior administrative practice. As former Attorney General Reno concluded in her 1998 opinion letter, Congress intended the CSA primarily to combat the illegal trade in drugs, including prescription drugs diverted out of the legitimate chain of distribution. All regulations and enforcement actions prior to the Ashcroft Directive focused on this illegal traffic in drugs. The Directive, however, departs from that focus, and attempts to regulate conduct that a state has brought within the bounds of lawful medical practice. Respondents contend that the Directive's novel reach reflects its lack of statutory authority. Yet the attorney general argues that the respondents' claim is no different from that of doctors or patients in California who wish to prescribe or use medical marijuana, a drug categorically prohibited by the CSA. In each context, the CSA gives the attorney general the authority to regulate doctors' prescriptions of a drug.

Second, the Court is likely to find significant the attorney general's evaluation—largely contained in the 2001 Office of Legal Counsel opinion—of broad public and professional understandings of "legitimate medical purposes." In ruling that Oregon's Death with Dignity Act, with its permission to prescribe drugs for assisted suicide, falls outside the range of legitimate medical purposes, the attorney general cited the current professional codes of virtually all healthcare professions, along with a wide range of opinion polls. Unlike the clear statement rule or the *Seminole Rock* standard, however, the contextual character of the *Skidmore* analysis renders uncertain any prediction about its outcome.

Although *Gonzales v. Oregon* involves the highly charged context of assisted suicide, its resolution will turn on routine considerations of the relationships between federal and state law; Congress and the executive branch; and reviewing courts and executive branch interpretations of law. The fact that the health professions have, for the most part, repudiated assisted suicide may, however, influence at the margin some of the Court's judgments about these relationships. In that way, ethical and social considerations about assisted suicide may creep back into what is otherwise a question of interest only to lawyers.

TELECOMMUNICATIONS

THE DANGERS OF MANDATING NETWORK NEUTRALITY

*BY BRYAN N. TRAMONT AND J. WADE LINDSAY**

Some communications policymakers have recently become strong advocates of a government requirement to ensure the benign-sounding concept of "Network Neutrality." Network Neutrality, as defined in a recent Federal Communications Commission (FCC) Policy Statement, holds that consumers are entitled to: (1) access lawful Internet content of their choice; (2) run applications, and use services of their choice; (3) connect devices of their choice to any broadband platform so long as they do not harm the network; and (4) benefit from competition among network providers, application and service providers, and content providers.[1] While these are fitting aspirations for America's broadband future, there are significant dangers at this stage of the market with reifying these principles into a new and complex *ex ante* regulatory structure or enforcement regime. Indeed, a robust broadband marketplace and the emergence of new broadband platforms may well depend on regulatory restraint—not regulatory action.

By now it is evident that Internet Protocol or "IP-Enabled" services, many of which are accessed over the public Internet, have had and will continue to have an enormous impact on our Nation's communications landscape. As a truly global network providing instantaneous connectivity to individuals and services, the Internet has become one of the greatest drivers of consumer choice and benefit, technical innovation, and economic development in the United States. Customers are beginning to substitute IP-Enabled services for traditional telecommunications services and networks; customers today speak with each other using Voice over Internet Protocol (VoIP) instead of circuit-switched telephony and view content over streaming Internet media instead of broadcast or cable platforms. These new advanced services are transforming our Nation's and the world's communications industry and driving more and more Americans to subscribe to broadband services.

This explosive development has occurred "in an environment that is free of many of the regulatory obligations applied to traditional telecommunications services and networks."[2] But now some federal policymakers are considering imposing broad new regulation on the broadband platform. These policymakers argue that a preemptive Network Neutrality regulatory regime is necessary to ensure that Internet users continue to have open and unfettered access to online content and services. Without such regulation, they contend, the cable and telephone companies will use their control over their networks to give advantage to preferred applications and content and otherwise exploit their market power.

Policymakers should be extremely cautious and skeptical in developing a new regulatory paradigm based on these principles. Thus far, there is little evidence of a broad market failure that would require such regulation. Indeed, there are strong economic and business reasons to believe that network providers have no real long term incentive to engage in such behavior. And, perhaps most troubling, efforts to draft and enforce rules that will adequately respect and continue to foster the innovation, investment, and competition that has typified the Internet seem predestined to fail.

Network Neutrality and Broadband Regulation

As the cable and communications companies roll out high-speed broadband platforms capable of providing IP-Enabled services and applications to customers throughout the United States, regulatory policymakers are wrestling with fundamental questions regarding how these platforms and the services that ride over them should be regulated. The FCC has established a largely "hands off" regulatory paradigm for high-speed broadband facilities capable of bringing IP-Enabled services to the public. Cable modem and digital subscriber line (DSL), the two current dominant broadband platforms, are now regulated as information services under Title I of the Communications Act of 1934, as amended, which places a high value on the free market for facilities-based providers.[3] With regard to IP-Enabled services, the FCC has determined that VoIP services are not subject to telephone company regulation by state public utility commissions, but are rather obligated to comply solely with a national set of standards.[4] Finally, the FCC has consistently urged "the great majority" of IP-based services "should remain unregulated."[5]

There is, however, a growing unease with this commitment to regulatory restraint among some policymakers. They have become concerned that there is a need for rules to guarantee consumers open and unfettered access to online content and services in the future. As FCC Commissioner Copps recently put it:

> This new era of telecommunication is rife with all sorts of exciting opportunities for both consumers and entrepreneurs. But there are also new perils. . . . [L]arge carriers "are starting to make it harder for consumers to use the Internet for phone calls or swapping video files." The more powerful and concentrated our facilities providers grow, the more they have the ability, and perhaps even the incentive, to close off Internet lanes and block IP byways. I'm not saying this is part of their business plans today; I am saying we create the power to inflict such harms only at great risk to consumers, innovation and our nation's competitive posture. Because, in practice, such stratagems can mean

> filtering technologies that restrict use of Internet-calling services or that make it difficult to watch videos or listen to music over the web. . . .This is why. . .enforceable net neutrality principles. . .are so vital.[6]

Recently, the FCC moved beyond the *Policy Statement* and incorporated its Net Neutrality principles as enforceable conditions on the recent mergers of SBC with AT&T and Verizon with MCI.[7] The FCC also required the merged entities to provide "naked" or stand-alone DSL services.[8] This requirement was specifically intended to serve as a prophylactic measure to ensure that the merged entities would not discriminate against VoIP services by requiring consumers to purchase DSL only bundled with voice service. Earlier in 2005, the FCC's Enforcement Bureau adopted a Consent Decree settling allegations that Madison River Telephone Company was blocking customers' ability to use VoIP through one or more VoIP service providers.[9]

Chairman Martin has charted a thoughtful course regarding Net Neutrality issues. Chairman Martin oversaw the release of the *Net Neutrality Policy Statement*, emphasizing his belief that "consumers should be able to use their broadband internet access service to access any content on the Internet."[10] At the same time, he recognized that "cable and telephone companies' practices already track well with the Internet principles" endorsed in the *Policy Statement.*[11] He also expressed his confidence that "the market place will continue to ensure that these principles are maintained" and that "regulation is not, nor will be, required."[12] In a Commission facing difficult decisions and evenly divided between two Republicans and two Democrats, however, Net Neutrality proponents are in a strong position to press for a more aggressive regulatory posture.

In addition to the FCC's efforts, Net Neutrality is a central theme in the debate surrounding proposed telecommunications reform legislation. The House Energy and Commerce Committee Revised Discussion Draft and the Draft Broadband Investment and Consumer Choice Act in the Senate each put forth Net Neutrality provisions that address the same concerns expressed in the *Net Neutrality Policy Statement.*

The Principle of Network Neutrality

Net Neutrality proposals appear to be driven by the belief that cable and telephone companies have what is in effect a broadband duopoly that will allow them to use their market power to dominate the broadband platform and the content, services, applications, and devices that depend on it. Consumers Union, for example, told the House Energy and Commerce Committee that:

> Giving network operators the power to dictate services opens the door to the "cabilization" of the Internet. Cable and telephone company giants are encouraged. . .to bundle more services together in take-it-or-leave-it packages and to make it harder, not easier, for competing communications service providers and Internet applications developers or service providers to reach the public. . . . This duopoly dribbles out bandwidth increasingly in bundles that are unaffordable for most Americans.[13]

Net Neutrality advocates argue that, as cable and telephone companies pursue vertical integration of the broadband conduit with IP-Enabled services or applications, they are coming into competition with other Internet-based services such as Vonage, Google, or Yahoo!. This competition in turn creates incentives for the cable and telephone companies to leverage their supposed market power over the physical layer of the broadband platform to bar or discriminate against competitors and to limit customers' use of their services or applications. For instance, cable and telephone companies might create a "walled garden" blocking access to competitors' websites, or blocking competing applications or services from their networks. The network providers may elect to give priority to their own content, applications, or services by degrading the delivery of the content, applications, and services of their competitors. Or they may prevent consumers from attaching wireless routers to the edge of their networks. The network providers could also speed up or slow down particular uses and charge competing services to use the "express lanes" on their networks.

Net Neutrality advocates fear that such practices would ultimately stifle the promise of broadband to provide consumers with unlimited access to diverse sources of information and services and prevent the emergence of competitive alternatives to dominant cable and telephone providers. These parties therefore urge policymakers to establish "[s]trong, enforceable nondiscrimination provisions. . . essential to continued growth and competition in not just broadband service, but also for continued innovation in Internet content, services, and applications."[14] In essence, then, Net Neutrality would be a new regulatory regime aimed at preventing cable and telephone companies from exercising market power based on their control over their networks.

Network Neutrality—Regulations Ahead of Their Time

Those who favor a vast new regulatory regime based on Net Neutrality principles place at risk the core, long term strength of the broadband marketplace in the United States. First, it assumes that the broadband marketplace of the future will be a duopoly between cable and wireline. If that were ultimately to occur, then perhaps some type of Net Neutrality regulation would be warranted. However, public policy should instead be focused on maintaining economic incentives for new broadband platforms to emerge, increasing competition, and eliminating whatever marketplace incentives there are for the dominant carriers to engage in the anticompetitive misconduct Net Neutrality is intended to thwart. Finally, in an ecosystem as complex as the Internet, transforming ideals like Net Neutrality into workable and enforceable regulations is an overwhelmingly complex task and is one that may well frustrate the development of new

broadband platforms.

Policymakers should recognize that, at this point, there is scant evidence of the types of anticompetitive behavior that Net Neutrality is designed to prevent. Indeed, the *Madison River* case is the sole adjudicated example to date of a network provider unfairly blocking access to websites or online services today.[15] Moreover, there are sound reasons why the cable and telephone companies are not now and will not likely in the future engage in the kind of discriminatory and anticompetitive "bad acts" that Net Neutrality is intended to remedy.

First, the market power problem that Net Neutrality presumes is not likely to occur. Net Neutrality assumes that cable and telephone companies, as the current dominant broadband platforms, have overwhelming market power. While these platforms may enjoy a dominant position in the market today, the market is in fact typified by a competitive free-for-all with "several emerging platforms and providers, both intermodal and intramodal, in most areas of the country."[16] The FCC's Wireline Competition Bureau reports that high-speed connections[17] to end users by means of satellite or terrestrial wireless technologies increased by 30% during the second half of 2004, and connections by means of fiber optics and electric power lines increased by 9%.[18] Furthermore, providers continue to invest billions of dollars in expanding competitive broadband networks to compete with cable and DSL.[19] The continuing development of such competitive broadband platforms undermines any justification for the adoption of Net Neutrality as competition creates incentives for network operators to keep their networks open to meet consumer needs. At a minimum, it makes no sense to impose a new regulatory regime against these emerging entrants as they seek to make a mark in the broadband marketplace.

Second, the existing marketplace already acts strongly to discipline network operators from adopting unduly restrictive limitations on the use of their networks. Broadband networks are extraordinarily expensive to construct and network operators can recover their investment only by carrying traffic. Network operators thus have no incentive to unreasonably restrict or encumber consumers' use of the network; to do so will lead to consumer frustration and encourage consumers to reduce their usage or to leave the network altogether. In a recent example, subscribers to the social-networking site MySpace began experience trouble accessing YouTube—a competing site—and even experienced erasures of any reference to YouTube.[20] MySpace subscribers reacted with indignation and appear to have forced a resolution of the problems.[21]

Net Neutrality's Potential Unintended Consequences

In short, the government should not undertake broad, new *ex ante* regulation of the Internet, absent any substantial evidence of actual harm or the imminent likelihood of harm. The explosive development of the Internet has occurred precisely because the Internet remains free of the "regulatory obligations applied to traditional telecommunications services and networks."[22] Further, a minimal regulatory environment is critical to promote continued infrastructure investment and encourage the ubiquitous availability of broadband to all Americans.[23] Government interference, by contrast, would discourage investment and innovation in broadband networks and may have the perverse result of solidifying a "broadband duopoly."

Net Neutrality regulation would effectively dampen the incentives for continued investment and innovation in broadband networks. Simply put, in order to justify deploying broadband networks and next-generation technologies, network providers must have the ability to generate revenue from the networks. To that end, network operators may wish to promote their own branded content and services by offering access and services in bundled packages or with premium quality of service. They may also enter joint or exclusive marketing arrangements with service and content providers as a mechanism for differentiating themselves from competitors. These types of offerings can create rewarding online experiences for users and can help network operators entice consumers to use their networks. Satellite radio offers an excellent example of this point. XM Satellite Radio and Sirius Radio both utilize exclusive content arrangements and have leveraged these arrangements to enhance their competitive positions. Indeed, it appears that such exclusive agreements have been a major factor in the fledgling satellite radio industry's ability to expand to over 10 million subscribers in the last three years.

Net Neutrality might also have the perverse result of reinforcing the "broadband duopoly" that it is intended to address. In capital intensive industries, forcing competitors to differentiate themselves solely on the basis of cost gives large, incumbent companies an enormous advantage based upon economies of scale.[24] Large companies have larger customer bases over which to spread the costs of their networks, allowing them to charge each customer less.

Allowing networks to differentiate themselves on the basis of product and service offerings, on the other hand, provides important opportunities for small entities and new market entrants.[25] A new entrant may be able to survive and compete with the larger incumbent network providers by offering specialized services or exclusive content which justify the higher prices necessitated by the entrant's smaller customer base. For example, as Professor Yoo points out in his working paper for the Vanderbilt University Law School, if network operators are allowed to restrict the connectivity to their networks, it would be easy to envision three distinct networks competing to serve end users: one optimized for traditional Internet applications such as e-mail and website access; another incorporating security features to facilitate e-commerce and guard against viruses; and a third that facilitates applications such as streaming media and VoIP.[26] Each consumer would thus be able to choose and pay for only the degree of connectivity that she needs and wants. The ability to promote proprietary services and content

would similarly allow new entrants to develop bundles of services and content catering to niche markets where customers value such services and are willing to pay more for the package.

Net Neutrality: The Practical Dilemma

At its most benign, Net Neutrality can be viewed as a necessary, albeit temporary, regulatory remedy for anticompetitive "bad acts" such as the port blocking that occurred in *Madison River*. *Madison River*, however, represents the "easy case" in which government intervention may well have been necessary to address a specific instance of anticompetitive conduct on the part of an identified network provider. The arrival of additional competitive broadband platforms should eliminate the need for such intervention as competition compels carriers to keep their networks open. Many Net Neutrality proponents nevertheless support establishing a broad new *ex ante* regulatory structure to prevent network providers from generally discriminating in terms of access to its network or in the content, applications, and services running on their network.

It is not at all clear that government could, as a practical matter, craft enforceable regulations that would meet this goal. There are many legitimate reasons for carriers to engage in some forms of theoretically "discriminatory" conduct. Access to networks may need to be limited in order for operators to maintain the technical integrity of their network, to prevent the spread of viruses, to disrupt the distribution of unlawful content such as child pornography, or to manage capacity. Similarly, network operators may need to prioritize the transmission of certain time sensitive traffic such as streaming video to avoid delays in users receiving such traffic. Moreover, as discussed above, there are legitimate reasons for network operators to develop branded content and services by offering access and services in bundled packages or entering joint or exclusive marketing arrangements with service and content providers as a mechanism for differentiating themselves from competitors.

Can policymakers craft a readily-understood distinction between lawful and unlawful discrimination given these realities? Can a set of *ex ante* rules resolve issues such as whether network providers can provide select services or applications with exclusive access to a premium level of service quality or speed? Can a network operator sign an exclusive arrangement with a local television station to provide content? Can a network operator prevent consumers from accessing pornography? Could an equipment manufacturer sign an exclusive deal with a network provider for a sleek new handset? How will regulators enforce nondiscrimination requirements? If my broadband service provider signs a deal with the local newspaper that creates a speedy link to their content, is that a violation of Net Neutrality? If my wireless carrier prevents the use of certain applications because they consume too much spectrum bandwidth does that run afoul of the rules?[27]

The answer to these questions is likely to be no. More important, the Internet has thrived in part because policymakers have been humble in their assessment of their own abilities to control it. Congress itself has enshrined the idea that "it is the policy of the United States" that the Internet remain subject to "the vibrant and competitive free market. . .unfettered by Federal or State regulation."[28] Efforts to define "nondiscriminatory" Internet access or applications—or to assess the technical impact of various operating protocols places policymakers squarely in the middle of the broadband business and network operations. Yet the strength of the vibrant marketplace has been derived in large part from policymakers' reluctance to assume such a prominent position in the marketplace. The Net Neutrality principles—with their unintended consequences—should not tempt policymakers to reassess their role in this booming market.

The principles of Net Neutrality signal important policy signposts for network operators today who may be tempted to engage in anticompetitive conduct in order to gain short term market advantage. However, moving beyond these principles into detailed rules or enforcement may well put at risk the long term consumer benefits that will be derived from multiple broadband platforms. In the end, it is the broadband network, the "last mile" connection to the consumer, which at this stage of its development has a substantial degree of concentration. Thus, competition policy would be better served by fostering competition in the networks that provide broadband.[29] Net Neutrality does not serve this goal, and may in fact undermine efforts to promote the continued development of facilities-based competition. In effect, Net Neutrality could sacrifice competition in broadband networks, in order to preserve one vision of competition elsewhere. Even if these harms were not realized, the complexity and costs associated with development, implementation and enforcement of a Net Neutrality regulatory regime outweigh its consumer benefits. For now, policymakers are best served by keeping a watchful eye on broadband networks and developing policies that guarantee the health and freedom of the Internet in the long term through competition between platforms rather than through regulation.

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Footnotes

[1] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 1498 (2005) ("*Net Neutrality Policy Statement*").

[2] *IP-Enabled Services*, 19 FCC Rcd 4863 (2004).

[3] 47 U.S.C. §§ 151-161; National Cable & Telecommunications Ass'n v. Brand X Internet Services, 125 S.Ct. 2688 (2005) (upholding the FCC's decision to regulate cable modem service as an information service under Title I of the Act); *Appropriate Framework for*

Broadband Access to the Internet Over Wireline Facilities, 20 FCC Rcd 14853 (2005), petition for review pending; Time Warner Telecom Inc. v. FCC, 3d Circuit No. 05-4769 (filed Oct. 26, 2005) (finding that DSL-based Internet access should likewise be regulated under Title I).

[4] *Vonage Holding Corp.*, 19 FCC Rcd 22404 (2004), petition for review pending; Minnesota Public Utilities Comm'n v. FCC, 8th Circuit No. 05-1069 (filed Jan. 6, 2005); *see also Petition for Declaratory Ruling that Pulver.Com's Free World Dialup Is Neither Telecommunications nor a Telecommunications Service*, 19 FCC Rcd 3307 (2004)(holding that an Internet application enabling computer-to-computer telephony only among Pulver "members" was to be regulated under Title I of the Act).

[5] *Id.* at ¶ 35.

[6] *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75, Statement of Commissioner Michael J. Copps, Concurring, pp. 3-4, 2005 FCC Lexis 6386 (rel. Nov. 17, 2005).

[7] *See Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75, 2005 FCC Lexis 6386 (rel. Nov. 17, 2005); *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, 2005 FCC Lexis 6385 (rel. Nov. 17, 2005).

[8] *See id.*

[9] *Madison River Communications, LLC and affiliated companies*, 20 FCC Rcd 4295 (EB 2005).

[10] *See* Press Release, FCC, Chairman Kevin J. Martin, Comments on Commission Policy Statement (August 5, 2005), *available at* 2005 FCC LEXIS 4494.

[11] *Id.*

[12] *Id.*

[13] Gene Kimmelman, Senior Director of Public Policy and Advocacy, Consumers Union, Testimony before the United States House of Representatives, Energy and Commerce Committee, Subcommittee on Telecommunications and the Internet, November 9, 2005, pp. 3-4 (http://energycommerce.house.gov/108/Hearings/11092005hearing1706/Kimmelman.pdf).

[14] Consumers Union Testimony at 4.

[15] *See Madison River Communications,* 20 FCC Rcd 4295.

[16] *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 FCC Rcd 14853 at ¶ 3.

[17] Industry Analysis and Technology Division, Wireline Competition Bureau, High Speed services for Internet Access: Status as of December 31, 2004, at p. 2 (rel. July 2005) (http://www.fcc.gov/wcb/stats). High speed services refer to services offering transmissions to the subscriber at a speed in excess of 200 kpbs in at least one direction. *Id.*

[18] *Id.*

[19] *See, e.g.,* Edward A. Salas, Vice President, Network Planning, Verizon Wireless, Statement before the United States House of Representatives, Energy and Commerce Committee, Subcommittee on Telecommunications and the Internet, November 9, 2005, pp. 2-3 (Verizon Wireless has "invested well over $1 billion in expanding our EVDO offering to encompass more than 170 major metropolitan markets and 84 major airports across the nation, and we will continue to expend the customers' ability to access this amazing technology")(http://energycommerce.house.gov/108/Hearings/11092005hearing1706/Salas.pdf).

[20] Bosman, Julie, *Lesson for Murdoch: Keep the Bloggers Happy*, N.Y. Times, January 2, 2006, *at* http://www.nytimes.com.

[21] Factiva, *Murdoch to take on Yahoo! with MySpace.com*, Brand Republic, January 11, 2006 (www.brandrepublic.com).

[22] *IP-Enabled Services*, 19 FCC Rcd 4863 (2004).

[23] *See Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 FCC Rcd 14853 at ¶ 1.

[24] Christopher S. Yoo, "Beyond Network Neutrality," Vanderbilt University Law School, Public Law & Legal Theory, Working Paper Number 05-20, at pp. 30-31 (http://assets.wharton.upenn.edu/~faulhabe/732/NNYoo.pdf).

[25] *See* Yoo at pp. 30-31.

[26] *See id.* at p. 33.

[27] Yang, Catherine, *At Stake: The Net as We Know It*, BusinessWeek Online, December 15, 2005, *at* http://businessweek.com/technology/content/dec2005/tc20051215_141991.htm.

[28] 47 U.S.C. § 230(b)(2).

[29] Yoo at p. 16.

Deregulating Cable TV: The Time is Now!

*By William Cox and David Graulich**

Since 1996, the communications industry has undergone a deregulatory phase that has transformed how American homes receive telecommunications, television, and Internet services. Deregulation will likely continue over the next two years at a more rapid pace as telephone companies finally deliver on their fiber deployment plans and compete with cable TV providers for voice, video, and data services (the long-promised "triple play").

Deregulation ought to be good news for consumers, investors, and businesses. The troubling question, however, is what *kind* of deregulation will unfold over the next two years.

The emergence of home satellite providers DirecTV and the DISH Network as legitimate competitors to cable TV is evidence that a deregulatory environment is breeding competition. If further cable deregulation is guided by the right policies, cable TV can be transformed from its current status—a monopoly provider—to one in which a consumer can choose freely among several independent choices.

Regulatory parity would treat competitors neutrally and equally, and consumers would benefit from lower prices and higher value. Innovation and creativity would thrive. On the other hand, the existing cable regime could be subjected to *pseudo-deregulation*—a mere re-shuffling, in which one muddle of rules favoring a particular group is replaced by another muddle that favors a newly-anointed incumbent (probably a fiber-bearing phone company).

The worst-case scenario is that a poorly conceived, clumsily executed deregulatory plan by regulators will favor incumbents while leaving consumers with limited or no choice. That is the model to be avoided.

Three Different Industries

Cable deregulation does not simply involve cable TV and the multi-channel video provider market. Rather, this deregulatory bouillabaisse involves the convergence and blending of three different communications industries (telecommunications, cable television, and information services) each with its own regulatory history and profile.

Telecommunications is the most heavily regulated of the three, with rules dating back to the 19th Century. The primary regulatory instrument for telecom is Title II of the Telecommunications Act of 1996 (TA96), an ambitious but heavily criticized piece of reform legislation that has dissatisfied just about everybody.

Cable television is less heavily regulated than telecom, but still is encumbered with a bifurcated regulatory scheme that includes the Federal Communications Commission for some issues and state authorities for others. On the federal level, cable is regulated chiefly by TA96's Title VI. At the local and state level, cable is regulated pursuant to franchise agreements that grant monopolies to individual providers for fixed time periods.

Now there is the new terrain of information services, driven by the Internet and the explosive growth of Internet Protocol (IP) as an alternative pipeline for voice, video, data, and whatever else entrepreneurs can dream up. Most of this industry remains unregulated, although the FCC has some discretion to set rules for information services under Title I of TA96.

Franchises: A Game of Monopoly

The regulatory system for cable television is based on the concept of a franchise. While there have been various legal challenges to the franchise system over the years (*e.g.*, City of Los Angeles v. Preferred Communications, 476 U.S. 488 (1986)), the basic franchise model has endured. Localities got involved with cable regulation as an extension of public rights-of-way management. Typically, a municipality or other local franchising authority grants a right to provide service to a specific geographic area (franchise territory) to a cable television company for a set number of years. In most cases, the cable firm must offer cable service to all residents, regardless of income level or location within the municipality. Technically, the franchise is non-exclusive, but due to the economic realities of universal service and the capital intensive nature of building a cable system, the initial franchisee cable company has a monopoly.

The company receiving the franchise typically must also provide certain "free" services, such as subsidizing the broadcast of city council meetings and reserving a channel for the local school board. Of course, these services aren't "free," any more than the car wash at your local gas station is "free" after you buy a thankful of gasoline. Ultimately, the services, known in the industry as PEG (Public, Educational and Governmental) are reflected in the rates that the winning franchise charges each household.

Pseudo-Deregulation in California

A classic example of pseudo-deregulation was the proposed legislation in California referred to as the Strickland Amendment, introduced in the California legislature during 2003 as Assembly Bill 2242. One critic called it "The Cable Incumbents' Preservation Act." Strickland was supported by Verizon, the telecommunications company, and sought to apply one set of rules to cable companies and another set of rules to telecommunications, even though they would be providing the same video and broadband services.

This dual set of rules was proposed in the name of increasing competitive choice by reducing the barriers to

entry into the cable market for telecom providers. In reality, however, Stickland would have imposed different sets of rules on competitors providing equivalent services. If home builders such as Lennar can build and operate their own cable systems, why can't a mega Regional Bell Operating Company (RBOC) like Verizon play by the same rules as Lennar and the existing cable providers? Moreover, maintaining existing franchise requirements, such as the PEG requirements, for traditional cable providers only seems unfair and unnecessary in a world where consumers would have three or more competitive choices. Fortunately, the Strickland amendment expired in committee and never came to a full legislative vote, but another bill with a similar intent is likely to re-emerge in California.

Deregulation: Do it Right

Some common sense guidelines can help shape a cable system that works to benefit consumers instead of working against consumer interests. Here are four fundamentals:

1. A competitive market, such as the flowering VOIP market, is achieved through a market-driven, regulation-minimalist approach. Computers, Internet services, and now VOIP have flourished because they compete in a world of little government regulation. The rough-and-tumble marketplace has driven this growth, that's the right model for cable television's future—minimalist regulation.

The heavily-regulated telecommunications model is obsolete, but special interests want to keep it alive. The job for consumers and voters is to keep the pressure on elected officials so that they maintain a light bureaucratic hand on this emerging landscape.

Localities *do* need to keep a role as managers—and, occasionally, police—of the public rights-of-way in this multi-wire competitive world. But we have to be vigilant to see through the cleverly written new regulations that purport to be pro-competitive, while their effect is to protect one entrenched competitor over another.

2. An IP world dictates a deregulated approach where cable franchises are largely eliminated, and local governments manage the public rights-of-way on a non-discriminatory basis for cable firms and Telco's alike. The old model of community control of cable has outlived its usefulness. Let's get towns and cities out of the TV business. Their proper role is a specific, limited one—managing the physical assets of their communities.

3. The only snags are legal in nature—namely, existing state and federal statutes that require and perpetuate cable franchises. State statutes that require cable providers to serve the entire geographic area of a franchise territory may have outlived their usefulness. Initially designed to ensure that low income areas were not left out, these state laws now serve to protect incumbent cable providers and keep out new competitors that cannot afford such an extensive build-out. In addition, federal statutes with similar requirements are in need of change to allow competition to flourish.

At the federal level, there is also confusion as to whether video services offered over Internet protocol (IP) are properly regulated as cable services, telecom services, or information services. The ruling in summer 2005 by the U.S. Supreme Court decision in the *Brand X* case has significant bearing on this issue. In *Brand X*, the FCC determined that high-speed Internet cable modem services provided by cable operators should be classified as information services. This decision was challenged and overturned by the Ninth Circuit Court of Appeals. The Supreme Court upheld the FCC's decision, with Justice Thomas, writing for the majority, citing judicial deference to the FCC's expertise.

4. The best policy is to overhaul cable franchise statutes to provide regulatory parity for cable companies and Telco's and enable the market—not government bureaucrats—to drive the development of video and broadband offerings to consumers. A level playing field is the best playing field. Some knowledgeable observers advocate that Telco's get the benefit of a grace period, during which they will be sheltered by favorable rules, so that they can make the enormous investment required to ramp up in the cable business. We can see some merit in that idea, but only if the provisions have a strict time cap—say three years—and are non-renewable.

Conclusion

Cable television used to be about getting good reception in your living room when you watched local broadcast stations and HBO. Today, cable TV is at the epicenter of America's information industries, with vast ramifications for the national economy, global competitiveness, and even homeland security. The deregulatory policies being enacted currently will determine whether this industry flourishes or falters. It's essential that, this time, we do deregulation right.

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Book Reviews

The Common Law Tradition: A Collective Portrait of Five Legal Scholars

by George Liebmann

*Reviewed by Bradford A. Berenson**

What is the role and relevance of legal academia in the larger society? Do law professors matter? If so, why and in what context? What attitudes and habits of mind are most conducive to excellence in law teaching? How have law schools and those who make their careers in them changed over the past four decades?

Anyone interested in these questions will find abundant food for thought in George Liebmann's new book, *The Common Law Tradition: A Collective Portrait of Five Legal Scholars*.

At the center of the book are biographical and bibliographical surveys of five law professors from the University of Chicago in the 1960s: its Dean, Edward H. Levi; Harry Kalven, Jr., who collaborated with sociologists on empirical studies of the American jury in the Chicago Jury Project; legendary contracts scholar and father of the Uniform Commercial Code Karl Llewellyn; constitutional law professor Philip Kurland; and the original serious student of the theory and practice of administrative law, Kenneth Culp Davis. Liebmann was a student at Chicago during the time these five men taught, and he appears to have been personally acquainted with all of them. His portraits are therefore admiringly rendered, salted with enough anecdote and personal reflection to keep the reader's attention.

The chapters devoted to the individual portraits of these legal scholars canvass their lives and work. At times they devolve into fairly dry recitations of the career achievements of their subjects and summaries of their major works and the reactions of other scholars to those works. But at their best, these chapters bring their subjects to life and allow the reader to understand not only what these men did with their lives, but why, and why it mattered.

The chapter devoted to perhaps the most interesting of these figures, Ed Levi, discusses not only his academic work on antitrust law and legal process but also his tenure as Dean of the Law School, as Provost and then President of the University of Chicago during the politically and racially turbulent times of the 1960s, and his work in government in the Antitrust Division of the Justice Department and then later as its Attorney General. We learn that although Levi was both a founder of the law and economics movement and a legal realist, his career was devoted, in a sense, to an ideology of being non-ideological. As Liebmann describes it, Levi was a consummate institutionalist and process-oriented conservative. He led an effort to assimilate the teachings of social science into law and favored a jurisprudence of restraint, according courts less latitude in interpreting statutes and more in areas where the common law reigned, but always demanding gradualism and practical accommodation to the needs of the democratic process. In the constitutional arena, "[h]is concerns centered less on individual rights than on the structure of divided and separated government that protected them."

In the 1950s and 1960s, Levi became involved in a number of controversial episodes as a university administrator, and in each, he displayed the mature professional and practical judgment that characterize the best lawyers. In 1951, a star Chicago law student, George Anastaplo, precipitated what eventually became a 5-4 decision in the Supreme Court by refusing on principle to respond to questions concerning affiliation with the Communist Party on his Illinois State Bar application. Levi attempted to dissuade Anastaplo from taking this position, correctly as it turned out: Anastaplo lost his case. In another incident involving the taping of jury deliberations by the Chicago Jury Project, Levi took responsibility for the taping (which had court approval) in the subsequent congressional investigation, helping to defuse the crisis. When racial politics reared its head on campus in the late 1960s—in the form of demands by black radicals for quasi-separatist preferences in admissions, curriculum, housing, and faculty appointments, backed up by sit-ins and boycotts of various kinds—Levi steadfastly refused to compromise and yet managed to avoid further provoking the demonstrators or inflaming the situation. Avoiding mistakes made by other university administrators, he neither used force nor offered amnesty or concessions; he allowed the passions of the agitators to exhaust themselves and then used university disciplinary processes to mete out consequences. Levi explained that:

> The university must stand for reason and for persuasion by reasoning. . .It is most unfortunate and in the long run disastrous for a university to exemplify expediency which avoids or solves conflicts by the acceptance of ideas imposed by force. . .This approach requires candor, consistency and openness, but also effective discipline. The discipline will be difficult. But the university owes this much to itself, and it also owes this much to the larger society.

Although not unsympathetic to the goals of the civil rights movement, Levi clearly hoped that the legal system could serve as a muffler or cooling pond of sorts that would help sublimate the passions of the civil rights movement into constructive, responsible, incremental change. As Liebmann explains, "he defined the function of the bar not in the manner of the rights-centered legal activist generation that followed but more modestly, as 'a coordinating influence, a strategic intermediary between the people, between the government and the individual, between ideas and their application.'" Levi also valued intellectual diversity on campus and declined invitations to pursue other sorts through, for example, racial preferences:

> Once you determine quality by race or creed, there will be a leveling in this country. Then only

universities outside this country will have intellectual excellence.

As Attorney General, Levi was involved in numerous issues with contemporary resonance. He responded to allegations of abuse of law enforcement, intelligence, and investigative resources during the Nixon years; adopted many of the internal Justice Department guidelines that still govern certain activities of federal law enforcement agencies; helped initiate the process of sentencing reform that culminated years later in the Sentencing Guidelines; managed controversies over school busing; and grappled with issues relating to special prosecutors and what became independent counsels (he believed the Independent Counsel Act unconstitutional). Although many of these issues and controversies could benefit from more in-depth and multi-dimensional treatment than Liebmann affords them, even a cursory description impresses the reader with the variety and significance of the issues Levi confronted.

Of special interest given President Bush's two recent Supreme Court appointments, Liebmann suggests that Levi was instrumental in securing the appointment to the Supreme Court of John Paul Stevens, with whom he had taught a course in antitrust law. When Justice Douglas resigned, Levi counseled President Ford that it would be unwise to choose a nominee from within his administration, expressly taking himself out of the running. He then evaluated a number of leading candidates, and in internal administration deliberations apparently tipped subtly in favor of Stevens, praising his "discipline and self-restraint." Years later, however, Levi also steadfastly supported the failed confirmation of Robert Bork, whom he had been responsible for hiring as Solicitor General. The superficial paradox appears to be explained by the fact that Levi valued quality and intellect above ideology and displayed a laudable, but from today's perspective old-fashioned, loyalty to persons he esteemed, regardless of the partisan politics of the moment.

The other four professors surveyed in *The Common Law Tradition* covered less ground in their careers, but their work and attitudes shared much in common with Levi's. The profile of Harry Kalven, perhaps the weakest of the five, emphasizes the broad range of his academic interests: in addition to being a celebrated torts professor, Kalven wrote influential works on income taxation, automobile insurance, juries and jury reform, and the First Amendment, the latter of which receives extended treatment from Liebmann. Kalven devoted a substantial part of his professional energy to the Chicago Jury Project, an extensive empirical study of the functioning of civil and criminal juries whose wealth of data is credited in part with sustaining support for the jury system. Such work reflected what Liebmann describes as the central animating principle of Kalven's thought: a concern "with values and doctrine, but doctrine conditioned by immersion in fact."

Karl Llewellyn comes across in Liebmann's account as a more colorful character. An expatriate American who joined the German army in World War I and earned the Iron Cross before the U.S. entered the war, Llewellyn was an idiosyncratic master stylist, part poet and part legal technician, who passionately advocated the serious study of legislation and then put his principles into practice as the father of the Uniform Commercial Code. From his continental experiences, he also urged the study of comparative law. He inspired first-year law students with rousing words about their chosen profession. He believed the law "is one part of wisdom: trade, culture, and profession in one. . .a pitiful, brave flame. Some warmth, some light, some touch of burning courage. What have you more to ask—or to ask to be?" He also participated actively in the affairs of the real world, advocating strongly, for example, on behalf of Sacco and Vanzetti (whom the light of history has now shown, along with other causes celebres of the American Left, to be guilty of the offenses for which they were executed).

Llewellyn shared the deep faith of the other subjects of Liebmann's book in the common law process and in the values of judicial restraint. As Llewellyn himself described it, he "put [his] faith, rather, as to substance, in a means; in that ongoing process of effort to come closer to the Good, that ongoing process of check-up and correction, which is the very life of case law." As Liebmann notes, "Law, for him, was not a method by which the enlightened imposed their views on society. . . . Courts as well as legislature were under a duty to be democratic in their approach and to enforce society's preferences, not their own." Thus, Liebmann concludes, somewhat sardonically, that "[h]is philosophy is one of bottom-up jurisprudence, of respect for private ordering, and of government by consent of the governed. Hence its current lack of appeal."

Phillip Kurland began his career in the Department of Justice and in private practice, but within several years of graduation from law school had found his way back as a law teacher. His career as a professor was marked by a passionate interest in the Supreme Court and its jurisprudence—Kurland was the founder and editor of *The Supreme Court Review*, a publication dedicated to responsible analysis and criticism of the Supreme Court— and in matters of religious freedom. Indeed, his crowning achievement was the publication of the *The Founder's Constitution*, a collection of source materials for constitutional interpretation grouped by the section of the Constitution to which they pertained. But Kurland was no originalist. Rather, "[h]e believed in the relevance of history, not as a literal guide for the present, but as a means of exposing the interests at stake, and for its assistance in elevating discourse from the immediate to the general. He believed also in the common law, case-by-case method, and in the assimilation of the past that the method required." As Liebmann remarks, "This made him a conservative in the Burkean sense, quite a different thing from the legal conservatism now fashionable."

Kurland's process-oriented conservatism and Frankfurter-style judicial restraint caused him to be a trenchant critic of the Warren Court. He felt that the Court was engaged in an arrogant jurisprudence by fiat, heedless of the soft but vital constraints of persuasive reasoning and respect for precedent. Yet, in 1987, he testified against Robert Bork, primarily because he objected to Bork's recourse to an overarching philosophy of originalism. Despite Kurland's belief in judicial restraint, his highest belief was in a style of restrained and modest legal reasoning that abjured grand theories or all-purpose approaches to interpretive questions. Liebmann tells us that "[h]e deplored 'the widespread development of legal theory to determine rules of law,' favoring instead 'a system of induction from examples to rules.'" Kurland pledged fealty to "the liberal tradition," which he described as "a tradition born in

doubt rather than faith and maintained by skepticism rather than belief."

Finally, Kenneth Culp Davis, the great treatise-writer on administrative law, is portrayed as bulldog in the classroom and one of the original scholars tasked with coming to grips with the vast administrative state wrought by the New Deal. Serving while a junior professor as a staff attorney on the Attorney General's Committee on Administrative Procedure, Davis began the empirical study of administrative process for which he would long be known. Davis placed his faith in procedural restraints and guarantees of regularity in the exercise of governmental power that, by the end of his life, he found wanting in judicial process, especially at the Supreme Court level. Davis felt that "[t]he two best procedures clearly are Congressional procedure and rulemaking procedure." He felt adjudicative processes, whether in courts or in agencies, were inferior "because of the typical absence of factual studies even when needed and because nonparties who may be importantly affected are typically denied notice and opportunity to submit written materials." He remarked that "[t]he astonishing but undeniable fact is that the Supreme Court in its own lawmaking commonly violates the standard that courts of appeals unanimously require from agency lawmaking. . .forbidding an agency to depart from a precedent without acknowledging it is doing so and explaining why." Davis's lodestars were transparency, procedural fairness and regularity, and fact-based decisionmaking. His celebration of "practical men" could well serve as a fitting coda to Liebmann's survey not only of Davis's life but also of the other four Chicago professors covered in Liebmann's book:

> Practical men never work out detailed values in advance; they keep their 'system of values' vague and flexible, and then they make value choices in concrete contexts. . .decision makers have a better sense for values when they can draw significantly from immediate facts and circumstances than when they try to think about values in the abstract. . .rational decisionmaking usually includes the further development of values. Practical men do not artificially separate values from the compounds in which they come, and I am not convinced they should usually try to.

Although the chapters dedicated to Levi, Kalven, Llewellyn, Kurland, and Davis form the physical heart of the book, much of its soul resides in the Introduction and the Conclusion. This is where Liebmann synthesizes the larger lessons of these mens' lives and explores themes that run through their careers which cast into relief the current state of the legal academy, clearly a subject of central concern to Liebmann.

In part Liebmann's book is a paean to a traditional and process-oriented form of judicial restraint. He explains that one of the important themes that unites all of his subjects is that "[t]hey were convinced that the law served best when it served its own values, and that predictability, incremental change, conformity to community needs and customs, and respect for ascertainable legislative will were high among these." Indeed, *The Common Law Tradition* serves as a timely reminder that responsible voices from the legal academy, including on the Left, were dismayed by Warren court activism and warned of the threat to judicial legitimacy it posed. The five professors profiled by Liebmann all criticized on principled, legal process grounds major decisions of that era, including in sensitive areas such as desegregation. All five indeed were openly critical of the reasoning of *Brown v. Board*. In the result-focused climate of legal discourse evident today in the recent confirmation hearings of Judge Alito, many actors in the political process (and in the academy as well) would do well to recall that one might level good-faith criticism at cases whose outcomes one considers desirable. Liebmann's scholars remind us that legal reasoning is not, and should not be, simply a tool by which a judge arrives at his preferred result; it is a method that, when practiced properly, has an integrity all its own.

Liebmann's book also invites the reader to reconsider the importance of statutes, administrative processes, local government, and empirical research in the world of law and legal scholarship. These were all areas of major professional interest to the scholars profiled. Liebmann comments that the country's major law reviews are filled with articles that would not "be of the slightest use to practitioners" and that "none contain fully worked out proposals for statutory reform. Legislation remains a subject untaught in our law schools; state and local government remain stepchildren of our curriculum." He notes that from the New Deal era forward, many of the most significant legislative reforms—which in most meaningful respects have a greater power to transform society and solve its problems than do judicial decisions—were originated and given life, at least in substantial part, by legal academics, whereas the most significant legislation of the modern era (welfare reform comes to mind) have been reflexively opposed by most of the professoriate.

But at its core, *The Common Law Tradition* is a reminder of the relevance—or at least the potential relevance—of the legal academy. It is clearly written from the perspective of an individual who believes that legal thinkers can and should matter, and that their contributions to society ought to consist of more than theoretical law review articles read only by their colleagues. The book is full of distilled insights into the legal academy and its relationship to the legal profession and society as a whole. In essence, Liebmann offers the University of Chicago Law School of the 1960s as a yardstick by which to measure the evolution and change, largely for the worse, of the legal academy in the ensuing decades.

Liebmann contrasts the practical, real-world impact of the scholarship of his subjects with the airy theorizing of today's elite professors. Whether building support for the jury system, designing a new architecture for commercial law, or writing foundational treatises, the Chicago professors profiled by Liebmann were applying their legal minds to tasks that would have an impact on how law was practiced in the private sector or in government, the two primary arenas in which law and the daily life of the nation intersect. He believes that, as a result, "their influence on the larger society was more considerable than any comparable group of today's highly politicized law professors." Liebmann quotes Anthony Kronman of Yale commenting on the "powerful. . .disdain for practical wisdom" that characterizes today's law professoriate and Judge Harry Edwards criticizing "today's legal academics, whose adventures in cloud-cuckoo land are of no interest to the

bar." Liebmann contrasts this attitude with that of his subjects, all of whom "were vehement in their rejection of the relevance of high theory to the work of lawyers."

Indeed, in reading Liebmann's profiles, it is striking to note how many legal academics played leading roles in government during that era. In addition to the five scholars profiled, the pages of *The Common Law Tradition* are peopled by individuals such as Nicholas Katzenbach, Thurman Arnold, Bernard Meltzer, Robert Bork, William O. Douglas, Paul Bator, and Rex Lee, all legal academics whose knowledge and insights found practical outlet and application in significant government service. By contrast, even a quick survey of the individuals commanding the heights of legal policy in the government today reveals, with certain exceptions, a striking absence of talent from the academy. The Attorneys General, Assistant Attorneys General, White House Counsels, Solicitors General, and other major legal policymakers of today—think, for example, of Alberto Gonzales, Harriet Miers, Ted Olson, Bill Barr, Paul Clement, C. Boyden Gray, Hew Pate, Tim Flanigan, David Addington, or David Leitch—by and large come from backgrounds in private practice. The two newest additions to our Supreme Court, John Roberts and Sam Alito, similarly exemplify the trend. It seems almost impossible to imagine a law professor today duplicating Ed Levi's feat and becoming Attorney General of the United States.

Whether this is because of some difference in the academy, some difference in law professors themselves, or some difference in government and society at large is difficult to say. But most top lawyers and legal minds in the 21st century who have any kind of a practical bent are shunning the academy. And the changes illuminated by Liebmann's book certainly suggest that is at least in part because the academy shuns them. As a result, the places where law is studied and the places where law is practiced are increasingly divorced from one another. Liebmann appears to feel strongly that all of those places are made the poorer for it.

The current intellectual climate at elite law schools may be partly to blame. Liebmann also uses his portrait of Chicago in the 1960s to indict that climate, which he perceives to be too often doctrinaire, uncivil, and intellectually narrow-minded. During the era Liebmann writes about, "[t]he outlook was empirical and tolerant, two words rarely used to describe today's legal academy. These common values were carried into expression by a group of men (and one woman) who did not think of themselves as part of a cult or faction, and who were not ruled by the herd instinct." The passion for diversity among the scholars he profiles was a passion for intellectual diversity; Liebmann comments that "for too many of [their] academic successors, at Chicago and elsewhere, 'diversity' is a cloak for a spoils system whose real aim is conformity of opinion and the homogenization of society." Liebmann argues that "the atmosphere of pluralism and tolerance," which fostered reasoned and civil debate, "was the seedbed of th[e] individual creativity" he celebrates in these scholars. By contrast, the universities of today, "and their outside rivals, 'think tanks,' are harsher places, dedicated more to fostering competing orthodoxies." Rather than serve as earnest explorers of practical wisdom, "There are today too many law professors who have field marshals' batons in their knapsacks."

There are promising signs that the trend may be turning back toward the ideal celebrated by Liebmann, at least in some places. Harvard Law School under the Deanship of Elena Kagan, for example, now offers courses in legislation, sponsors the Berkmann Center, which is meaningfully engaged in the cutting edge issues of law and policy raised by information technology, and has recently hired a number of the country's most dynamic and creative young conservative legal thinkers. According to *The Common Law Tradition*, the prescription for restoring America's greatest law schools to health is clear, and the potential benefits to society great: Rediscover and celebrate the value of intellectual diversity; make law school campuses a place where respect, civility, and reason reign in the place of partisanship and ideological strife; and above all, remember that law is the applied, not theoretical, physics of American society.

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Divided By God: America's Church-State Problem —and What We Should Do About It

by Noah Feldman

*Reviewed by Richard W. Garnett**

The Supreme Court this past summer handed down rulings in three closely watched, eagerly anticipated, and—as it happened—not surprising cases: In *Van Orden v. Perry,* a bare five-Justice majority announced that the 44-year-old Ten Commandments monument on the grounds of the Texas State Capitol did not unconstitutionally "establish" religion. A different, but no less narrow majority concluded in *McCreary County v. ACLU* that a different, less longstanding Ten Commandments display lacked a "secular purpose" and so *did* violate the First Amendment's Establishment Clause. And in *Cutter v. Wilkinson,* a refreshingly unanimous Court declared that the federal Religious Land Use and Institutionalized Persons Act—which, among other things, requires prisons receiving federal funds to go beyond the Free Exercise Clause's requirements in accommodating inmates' religious practices—does not unconstitutionally privilege religion.

As many Court-watchers predicted, these decisions all turned on tricky line-drawing: When does a permissible recognition of the role of faith in our Nation's history become an illegal endorsement of religion? How is a "religious" monument to be distinguished from a "secular" display *about* religion? When do judges' efforts to reduce religious strife cause the very divisions they are intended to prevent? Where is the line between the accommodations of religion that the Constitution permits—even encourages—and the privileging of believers that it forbids?

The reaction to these opinions on editorial pages, over the airwaves, in coffee shops, and around the blogosphere confirmed that these and similar questions about government, religion, and public life are as intriguing, and confounding, as ever. Enter Professor Noah Feldman's latest, *Divided by God*.

Divided by God is readable, warm, and engaging; it provides a narrative, a diagnosis, and a prescription. The author's commendable hope is for "reconciliation between the warring factions that define the church-state debate and . . .much else in American politics." And, his opening premise and observation is the claim that, although "the overwhelming majority of Americans. . .say they believe in God, . . .a common understanding of how faith should inform nationhood can no longer bring Americans together. To the contrary, no question divides Americans more fundamentally than that of the relation between religion and government."

Justice Souter observed in one of the recent Ten Commandments cases—and Feldman would agree—that "the divisiveness of religion in current public life is inescapable." Still, Feldman insists that the rival "camps" in the culture wars share the same goal: "Legal secularists," in his account, see "religion as a matter of personal belief and choice largely irrelevant to government" and are "concerned that values derived from religion will divide us, not unite us." "Values evangelicals," on the other hand, "insist on the direct relevance of religious values to political life" and believe that "convergence on true, traditional values is the key to unity and strength." The two groups share, however, the hope of "reconciling national unity with religious diversity." While "[v]alues evangelicals think that the solution lies in finding and embracing traditional values which we can all share and without which we will never hold together[,]" the "[l]egal secularists think that we can maintain our national unity only if we treat religion as a personal, private matter, separate from concerns of citizenship."

Unfortunately, Feldman contends, the reconciliation both groups seek is undermined by the Court's misshapen Establishment Clause doctrine. He argues that the Framers' clear aim was to protect the liberty of conscience by forbidding taxation and public spending in support of religious institutions; the Supreme Court, however, has permitted public funding of parochial schools and religious charities. At the same time, the contemporary Court aggressively polices, and often censors, public displays and "endorsements" of religious symbols and messages, even though the founding generation "did not think the state needed to be protected from the dangers of religious influence, nor were they particularly concerned with keeping religious symbolism out of the public square."

In Feldman's view, the way to unity-in-diversity is to flip things around: We should "permit and tolerate symbolic invocation of religious values and inclusive displays of religion while rigorously protecting the financial and organizational separation of religious institutions from institutions of government." "Values evangelicals," he states, "must recognize that government funding of religion will, in the long run, generate disunity, not unity." At the same time, "legal secularists" must abandon their unfounded hostility to religious expression, arguments, and symbols in the public sphere.

Feldman is generous and fair-minded, so it might seem a bit churlish to suggest that, in the end, it is he, and not the Justices, who has things backwards. Feldman's proposed solution—"no coercion, and no money"—owes a lot to the quite contestable claim that school-voucher programs

"create[ ] conflict and division," and are more threatening to "national unity," than are government sponsored displays of religious symbols or other official, "inclusive" endorsements of religion. To shore up this claim, Feldman endorses the common but unconvincing claims that educational choice and religious schools "promot[e] difference and nonengagement," and do not "promote a common national project" but instead "generate balkanized values." In fact, though, recent research by Notre Dame's David Campbell, David Sikkink, and others indicates that there is every reason to think that the kind of religious schools that participate in choice programs are *at least* as successful at forming other-regarding, engaged, and tolerant citizens as are the public schools, whose current ability to "promote a common national project" Feldman fails to question. At the same time, and even though Feldman's critique of the "legal secularist" program is powerful, it is hard to agree with him that, given cultural realities, an increase in public displays of religious symbols is a recipe for *less* division.

In any event, it is not clear that reducing—let alone eliminating—"divisiveness" in American public life is possible or desirable, let alone the First Amendment's mandate. True, nearly thirty-five years ago, in *Lemon v. Kurtzman*, Chief Justice Warren Burger declared that state programs or policies could "excessive[ly]"—and, therefore, unconstitutionally—"entangle" government and religion, not only by requiring or allowing intrusive public monitoring of religious institutions and activities, but also through what he called their "divisive political potential." Government actions burdened with such "potential," he reasoned, pose a "threat to the normal political process" and "divert attention from the myriad issues and problems that confront every level of government." Chief Justice Burger asserted also, and more fundamentally, that "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect."

Certainly, this "political division" argument is enjoying something of a renaissance. Justice Breyer, for example, in his crucial concurring opinion in one of the Court's recent Ten Commandments cases, identified "avoid[ing] that divisiveness based on religion that promotes social conflict" as one of the "basic purposes of [the Religion] Clauses." He then voted to reject the First Amendment challenge to the public display at issue in part because, in his view, to sustain it "might well encourage disputes" and "thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid."

In fact—as John Courtney Murray once observed—"pluralism [is] the native condition of American society" and that the unity toward which Americans have aspired—*e pluribus unum*—is a "unity of a limited order." Those who crafted our Constitution believed that both authentic freedom and effective government could be secured through checks and balances, rather than standardization, and by harnessing, rather than homogenizing, the messiness of democracy. It is both misguided and quixotic, then, to employ the First Amendment to smooth out the bumps and divisions that are an unavoidable part of the political life of a diverse and free people and perhaps also an indication that society is functioning well.

Feldman is right to observe that our religious diversity —which "has often been called a blessing and a source of strength or balance" also remains a "a fundamental challenge to the project of popular self-government." The divisions that run through our politics and communities make appealing to many a more managerial approach to politics and public life. Division and disagreement, though—about important things—is, this side of Heaven, a fact. Accordingly, we should, in Murray's words, "cherish only modest expectations with regard to the solution of the problem of religious pluralism and civic unity." Madison's warning remains as powerful as ever:

> Liberty is to faction what air is to fire, an aliment without which it instantly expires. But it could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.

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Our Culture, What's Left of It: The Mandarins and the Masses

by Theodore Dalrymple

*Reviewed by Margaret A. Little**

Theodore Dalrymple, the pen name of a British doctor and writer, has justly been recognized as one of the most insightful cultural and social critics of our time. In his new collection of essays, Dalrymple examines world culture, spanning the globe from the slums and prisons of modern Britain to Third World relief operations to the Asian subcontinent to the Muslim suburbs of Paris. It is seen through the lens of literature, social criticism, artistic display, popular culture, the clash of transplanted cultures, philosophy and economics, ranging from Shakespeare to Marx, Orwell to Keynes, Turgenev to Woolf.

In fact, this book is worth the price of purchase for one essay alone, that being his 2002 essay "Barbarians at the Gates of Paris." It is simply chilling in its prescience of the breakdown of the rule of law and the conflagrations in the housing projects outside France's lovely, but frozen and unwelcoming urban centers. The book also includes his essay, "When Islam Breaks Down" named by David Brooks of *The New York Times* as the best journal article of 2004.

Dalrymple is an extraordinarily well-read polymath, who brings a scholar's insight to the world of arts and letters, society and politics that are the wide-ranging subjects of this book. Because Dalrymple spent years practicing medicine in Third World countries, and the rest of his career providing medical care to Britain's extensive underclass and prison populations, he brings something far more valuable to this enterprise than just an academic's wide reading list and a willingness to state his opinions His mother, a refugee from Nazi Germany and his father, a committed communist, lend his personal history a deep understanding of how the ideologies of 20th Century intellectuals have not only destroyed facile optimism in man's capacity for progress, but did so by genocide conducted by formerly civilized nations that would have been unthinkable in the early decades of that century. As Dalrymple notes, the fragility of civilization is one of the enduring lessons of the last century. From this unique vantage point, Dalrymple concentrates his gaze on our current world culture, and anatomizes the current moral decline and policy madnesses of liberal bureaucrats that are destroying the ordered liberty upon which western culture's fragile claim to civilization rests.

His prior book, "Life at the Bottom: *The Worldview that Makes an Underclass,"* (also recommended reading), is a detailed dissection of the cultural ethos of modern day Britain's underclass, raised in a culture of resentment and dependency, fueled by an ethic devoid of personal responsibility that is largely the construct of liberal upper-class ideologies. This book, by contrast but also continuation, seeks a larger canvas upon which to examine the perilous and often toxic effects of social policy that demean personal initiative, hard work, personal responsibility, and bourgeois values. Instead, these effects celebrate transgression, cause blame-shifting, moral equivalence, and cultural relativism. These and other products of the intellectual class's blind and destructive ideas are sold as dogma to the underclass through the ideologies of its social, educational and political policy makers and other modern instruments of public decay and disorder including popular culture and the media. He brings a clear-eyed and non-dogmatic realism to these essays, enhanced by his abiding love of the arts and letters and the insights that the best of our cultural inheritance can bring to the task of living an informed civic life dedicated to alleviating the misery of others, the focus of his own daily efforts.

Like Montaigne, Dalrymple's subjects range widely, from the brilliant "How to Read a Culture" illumination of pre-Revolutionary Russia, to his predictive meditation on the Le Corbusier cites of Paris, to essays on literature, art, popular culture, and his beloved Shakespeare. He does not flinch from the problem of evil, indeed opening his book with a meditation on it entitled *The Frivolity of Evil*, a subject to which he returns again and again, whether through a study of MacBeth, his own attraction to the underside of life ("*A Taste for Danger*"), or the grim and sordid realities of serial murder ("*A Horror Story*"). In addition to mediations on writers such as Shakespeare, Orwell, Turgenev and Marx, he includes a host of neglected writers and thinkers that shed valuable insight on modern European and world culture. One virtue of this book is that it brings a number of lesser known or unknown writers to the reader's attention and edification and understanding of just how European civilization came to such disastrous ends, and how its ideological exports continued to fester in the cultural revolution of China, the killing fields of Cambodia or the demagoguery that piled up corpses at a terrifying rate in Rwanda just ten years ago.

Though these meditations would appear to be addressing vastly different arenas of life and human experience, a common thread of respect for the accumulated social values that comprise what we call civilization emerges again and again. He skewers the academics and social theorists who champion transgression and who posit that they, and their new systems of thinking are wiser than more traditional outmoded mores, where "disregard of convention is regarded as a virtue in itself." As he notes,

> Having spent a considerable proportion of my professional career in Third World countries in which the implementation of abstract ideas and ideals has made bad situations incomparably worse, and the rest of my career among the very extensive British underclass, whose disastrous notions about how to live derive ultimately from the unrealistic, self-indulgent, and often fatuous ideas of social critics, I have come to regard intellectual and artistic life as being of incalculable practical importance and effect.

Dalrymple's insights encourage us to pay attention to the culture around us, never letting us forget that no century more urgently than the 20th—with its charnel houses of totalitarian regimes—demonstrates better how fragile civilization is and remains.

His insights are distilled from his active engagement with the most fragile and troubled parts of his own culture in Britain and throughout the world. One example—"It was in Africa that I first discovered that the bourgeois virtues are not only desirable but often heroic." Invited to share a meal in the home of a hospital worker, he was deeply impressed with the immaculately clean, tidy furnishings of the modest home to which he had been invited. Never again would he bring the disdain of the 1960s generation to the daily heroism of a person holding squalor and decay at bay with the simple virtues of homemaking.

Although Dalrymple's focus is often on the places of failure in our culture, the book does not leave one with a dystopian sense of doom and gloom. Quite the contrary. His bracing and fearless look at the underclasses and political madness the world over is leavened by his acknowledgement that the fact of progress is undeniable:

> Mankind has indeed become ever wealthier and ever healthier. The life expectancy of an Indian peasant, for example, now exceeds by far that of a member of the British royal family at the apogee of political power. In much of the world, poverty is no longer absolute. . .it is relative. Its miseries are no longer those of raw physical deprivation but those induced by comparison with the vast numbers of prosperous people by whom the relatively poor are surrounded and whose comparative wealth the poor feel as a wound, a reproach, and an injustice.

It is this culture of envy, resentment, and entitlement fueled by the fatuous and destructive ideas of left-wing social critics that Dalrymple takes on as a poisonous legacy from the mandarins to the masses, bent on infusing the very poorest and most vulnerable classes with a self-destructive —and incidentally class affirming—cultural ethos of dependency and decay. In essays such as *What We Have to Lose, How—and How Not—to Love Mankind,* and *The Dystopian Imagination* (or in his prior book, *We Don't Want No Education*) he shows how chic disdain for the hard-won cultural values of past generations inevitably leads to failure, violent cycles of abuse, and ignorance that hold the underclass at the bottom of the heap for generations, regardless of the geography of the underclass in question. He urges us to pay close attention to the occupations of the underclass, to the popular culture and received social values foisted upon them. He stresses the importance of working to preserve the best of our cultural values of free will, moral judgment, accountability, and respectability that have allowed western civilization to represent the best hope for further attainments.

Dalrymple's unflinching gaze into the darkest recesses of human existence as well as his experience and understanding throughout many cultures and times, gives this book not just moral authority but experiential wisdom. Too many pundits lack engagement with or even understanding of the grim state of the underclass or the starkest calamities of our time. Dalrymple's quotidian immersion in dark places light the world over and his willingness to confront the problem of evil put him in the worthy company of the best essayists and cultural and political critics such as Orwell, Burke and Montaigne. The incisive and unconventional wisdom of these beautifully written and grounded essays will stay with the reader, and like the best of Orwell's essays, equip the reader with the tools to deconstruct the mad notions and effects of widely-accepted modern social policies, mass-media and popular culture.

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