

THE

# FEDERAL LAWYER

The Magazine of the Federal Bar Association

Volume 62, Issue Four

## Spotlight on Administrative Law Judges

**MAY 2015**

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### **FBA Events**

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Conference  
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Annual Meeting and Convention  
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Volume 62, Issue Four

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## President's Message

by Matthew B. Moreland



# Thank You to Public Sector Attorneys

### **I wanted to assert my presidential privilege in this**

edition of *The Federal Lawyer* to thank all of the public sector attorneys and judiciary for their dedication. I would be remiss if I did not extend thanks to the wonderful support staff of judicial assistants, paralegals, and administrators keeping the administration of justice and the operation of the public sector running. All of these amazing employees dedicate their time to keep the system moving and provide the public sector legal support and advice. Whether it be as a court administrator or someone providing a public service or answering the questions of the public, I not only thank you as a former servant but also as a recipient of such support.

I, like many college students, worked my way through college with traditional jobs in the service industry from bellman and valet to waiter. It was only after I was admitted to law school that I thought as a lawyer I would be done with working in the service industry. Little did I realize I was only changing from one way of serving the public to another. It was almost 20 years ago when I finished the bar exam on a Friday and reported to work on Monday in federal court as a law clerk in the Eastern District of Louisiana. I walked into the courthouse complex in New Orleans for my first day as a public servant and enjoyed every minute of the wonderful opportunity from there forward. During my two years in the court system within the "New Orleans federal court family," I was reminded that I was there to serve at the discretion of my judge to serve the law, and to serve the public who were so dependent on the many pending motions before the court. There were many long days, but in the end being able to serve and fulfill my duty was very fulfilling. As I am being called to my first federal court jury duty in the courthouse where I cut my teeth as a young lawyer, I long for the days when I worked in the courthouse. While I could take credit for not trying to escape jury duty, it gives me an opportunity to see my court family and to thank them for showing up every day to fulfill

the duties of a public servant.

Public sector attorneys often do not get glory with their job, but instead are required to deliver the bad news or administer decisions or processes that, while not ideal, are necessary to continue in our civilized society. It is this perspective that allows the public sector servant to continue to do his or her tasked job efficiently and without finality in sight. Occasionally, you have the opportunity to perform a very rewarding task, whether it be helping someone complete a final step in an application process or informing someone that his or her request no matter how small or large, has been granted. It is these opportunities that make the continued effort all the more gratifying.

It is well recognized that public servants do this work for significantly less pay than those providing similar support or services in the private sector, and this is all the more reason to be appreciative. I think about a good friend of mine who works in legislative support on Capitol Hill. He will go unnamed, but I must note he has an amazing job of educating and supporting the lawmakers of our great country while still maintaining the role of the unsung hero. Being able to explain in detail the many facets of issues of potential legislation and how it can affect many, or sometimes just a few, is a large task and requires a great deal of analysis. Through people like him, I do feel that we are in good hands with our public servants.

I wish I could thank all of the different persons who work in the public sector and serve to make our communities and country move forward, but I am sure I would miss many whole departments if I tried to name them all. So please let this serve as a resounding thank you for all your hard work and dedication from those you serve! ☺

A handwritten signature in black ink, appearing to read "Matthew B. Moreland". The signature is fluid and cursive, with a large initial "M" and "B".

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## At Sidebar

by Hon. Karoline Mehalchick

# Making the Case for Pro Bono Work

### Supreme Court Justice Sonia Sotomayor has said,

“We educated, privileged lawyers have a professional and moral duty to represent the underrepresented in our society, to ensure that justice exists for all, both legal and economic justice.”<sup>1</sup> Pro bono legal work is work done by lawyers on behalf of those litigants who cannot afford to help themselves. Each year, many of the cases filed in our federal courts are filed by indigent litigants who may have meritorious claims but cannot afford representation.

The American Bar Association’s Model Rule 6.1 states, in part: “Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year.” The vast majority of states have adopted the model rule in some form, either in their own rules of professional conduct, through a bar resolution, or in some other form.<sup>1</sup> For example, Florida’s Rules of Professional Conduct state, in pertinent part, “Each member of The Florida Bar in good standing, as part of that member’s professional responsibility, *should* (1) render pro bono legal services to the poor and (2) participate, to the extent possible, in other pro bono service activities that directly relate to the legal needs of the poor.” Fla. ST B.A. Rule 4-6.1 (emphasis added). Pennsylvania’s Rules of Professional Conduct state that “[a] lawyer *should* render public interest legal service.” 204 Pa. Code § 6.1 (emphasis added). The State Bar of California has a Pro Bono Resolution, adopted in 1989 and amended in 2002, which urges all attorneys to devote at least 50 hours per year to providing or enabling “the direct delivery of legal services, without expectation of compensation other than reimbursement of expenses, to indigent individuals, or to not-for-profit organizations with a primary purpose of providing services to the poor or on behalf of the poor or disadvantaged, not-for-profit organizations with a purpose of improving the law and the legal system, or increasing access to justice.”<sup>2</sup> Rule 6.1 of the Colorado Rules of Professional Conduct states that “[e]very lawyer has a professional responsibility to provide legal services to

those unable to pay.” Colo. ST. RULES PROF. CONDUCT Rule 6.1. The preamble to Ohio’s Rules of Professional Conduct<sup>3</sup> notes:

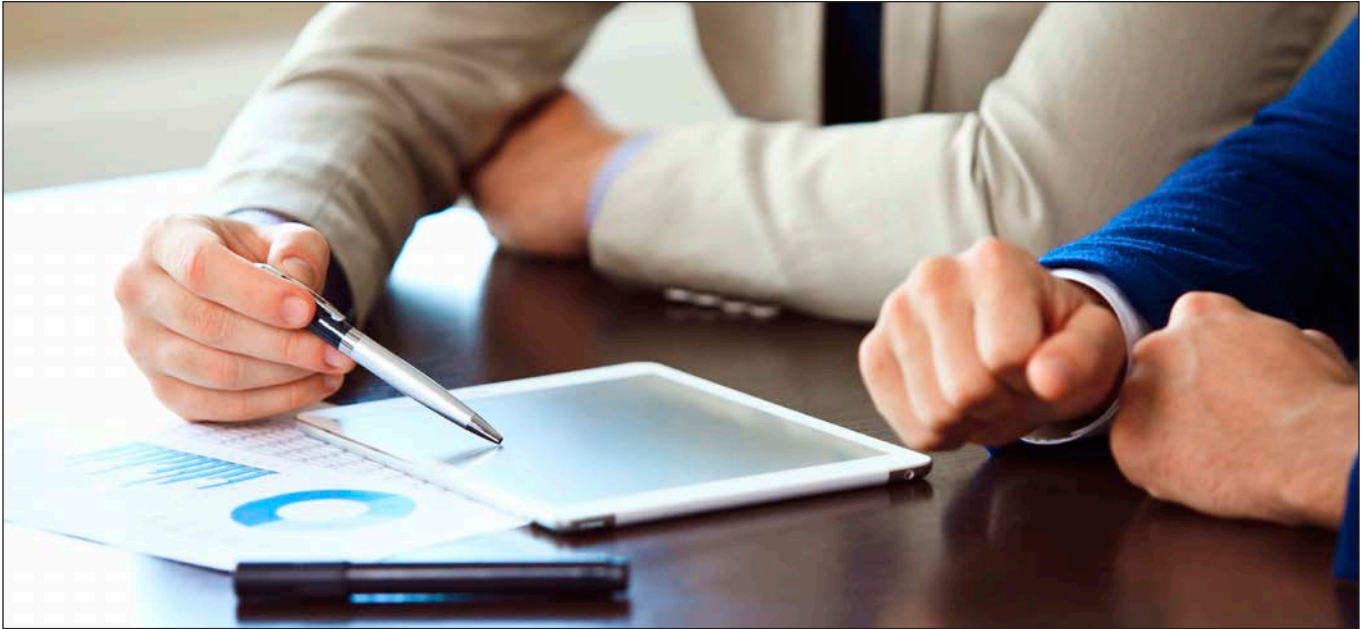
A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

Judge Edward Roy Becker of the Third Circuit wrote in the case of *Tabron v. Grace*, 6 F.3d 147, 157 (3d Cir. 1993), “Representation of indigent litigants is ... an important responsibility of members of the bar. ... We encourage lawyers within this circuit to volunteer for such service, and we urge the district courts ... to seek cooperation of the bar in this regard.” Further, Title 28 of the United States Code provides federal courts with a mechanism to appoint pro bono counsel to pro se litigants. Section 1915(e)(1) provides that “[t]he court may request an attorney to represent any person unable to afford counsel.” 28 U.S.C.A. § 1915(e)(1).

However, despite the suggestion by the American Bar Association’s model rule, the number of rules of professional conduct adopted by the states and bar associations, and even the ability of the court to request representation, many district courts still struggle to locate resources to assist pro se, indigent litigants. One of the resources that is crucial to our system of justice is assistance from members of the bar. In federal court, pro se plaintiffs often seek appointment of counsel in cases involving important civil rights, such as claims made pursuant to 42 U.S.C. § 1983 or other

---

*Hon. Karoline Mehalchick is a U.S. magistrate judge in Scranton, Pennsylvania, where she was appointed to the bench of the U.S. District Court for the Middle District of Pennsylvania on July 15, 2013. Prior to entering on duty with the court, she was a partner with the law firm of Oliver, Price & Rhodes. At the firm, she developed an extensive trial and appellate practice and represented a broad range of clients in both state and federal courts, including the U.S. Supreme Court. Her practice included general civil litigation, commercial litigation, education law, civil rights, labor and employment, and personal injury. She is a graduate of the Schreyer Honors College of the Pennsylvania State University (1998, B.S., geosciences) and the Tulane University School of Law (2001, J.D.). After graduating from law school, she served as a law clerk to Hon. Trish Corbett, judge of the Court of Common Pleas of Lackawanna County. Judge Mehalchick is active in a number of legal and community organizations. She has been active in the Federal Bar Association for several years, and is a past president of the Middle District of Pennsylvania Chapter. She currently serves as one of two Third Circuit vice presidents of the Federal Bar Association. Additionally, she sits on FBA’s Editorial Board for The Federal Lawyer and is a member of the Professional Ethics Committee.*



allegations of violations of their constitutional rights. Volunteer attorneys are sometimes needed to help pro se indigent litigants avoid what might otherwise be unjust consequences. Generally speaking, the court has evaluated the case and made a determination that the case may have some merit and appointment of counsel is appropriate. When the court makes a determination that appointment of counsel may be appropriate, it will grant a request for appointment of counsel and then often turn to local chapters of the Federal Bar Association for help in locating a suitable volunteer attorney. Many chapters have pro bono chairs or committees assigned the task of coordinating these requests.

The Middle District of Pennsylvania Chapter of the Federal Bar Association has such a program. Attorneys are encouraged to enroll in the chapter's pro bono panel upon admission to practice before the district court by completing the form provided upon admission to practice before the district court, and can do so by contacting the chair of the pro bono program. The chapter's pro bono chair is responsible for acting upon the court's requests for volunteer attorneys. Most districts make an effort not to overburden any one attorney or firm by making frequent requests of the same individual or firm. Some courts and local chapters have funds available to defray some out-of-pocket litigation expenses, and some chapters or local bar associations offer malpractice coverage to pro bono panel attorneys who may not otherwise be insured.

Why should you volunteer to be a pro bono attorney with your local federal court? First, though § 1915(e)(1) does not permit district courts to require attorneys to represent indigent litigants in civil cases (*see Mallard v. U.S. Dist. Court for S. Dist. of Iowa*, 490 U.S. 296, 109 S. Ct. 1814, 104 L. Ed. 2d 318 (1989)), the plain language of the ABA Model Rule and the various state rules of professional conduct indicates pretty clearly that pro bono work is something attorneys *should* do. Second, the litigants who have been identified by the court as needing counsel generally need your help. Volunteering as a pro bono attorney is a way in which you can help those who very much need your assistance. Third, volunteering as a pro bono attorney is a wonderful way to expand your experience and practice. Whether you are a newer attorney looking for some first-hand litigation experience rather than hours of document

review, or you are a more seasoned attorney who has spent years building a commercial practice and now are looking for a new challenge, volunteering as a pro bono attorney in a federal civil rights action gives you an opportunity to explore something new. If you are a newer attorney, it may be a chance to take the lead at briefing dispositive motions, first-chair a trial, or argue before an appellate court. Pro bono opportunities help build litigation skills in young lawyers—a benefit not only to the lawyer herself but also to her firm. Such experience also helps a younger lawyer build a network and recognition with opposition counsel, the court, and the client. Cultivating these relationships could, in turn, lead to other opportunities.

U.S. Supreme Court Justice Ruth Bader Ginsburg is quoted as saying, “Lawyers have a license to practice law, a monopoly on certain services. But for that privilege and status, lawyers have an obligation to provide legal services to those without the wherewithal to pay, to respond to needs outside themselves, to help repair tears in their communities.”<sup>4</sup> Volunteering as a pro bono attorney with your federal court is a chance to give back in a rewarding fashion by providing services to those in need of your special expertise. ☉

## Endnotes

<sup>1</sup>The Hispanic Outlook in Higher Education, November 2002 from content.time.com/time.nation/article/0,8599,1900943,00.html.

<sup>2</sup>American Bar Association's State Pro Bono Ethics Rules, [www.americanbar.org/groups/probono\\_public\\_service/policy/state\\_ethics\\_rules.html#appendix\\_a](http://www.americanbar.org/groups/probono_public_service/policy/state_ethics_rules.html#appendix_a).

<sup>3</sup>Pro Bono Resolution, adopted by the Board of Governors of the State Bar of California at its Dec. 9, 1989, meeting and amended at its June 22, 2002, meeting, [cc.calbar.ca.gov/LinkClick.aspx?fileticket=ILe2Zrg9bG0%3d&tabid=1195](http://cc.calbar.ca.gov/LinkClick.aspx?fileticket=ILe2Zrg9bG0%3d&tabid=1195).

<sup>4</sup>Ohio Rules of Professional Conduct (Effective Feb. 1, 2007; as amended effective June 1, 2014), [www.supremecourt.ohio.gov/LegalResources/Rules/ProfConduct/profConductRules.pdf](http://www.supremecourt.ohio.gov/LegalResources/Rules/ProfConduct/profConductRules.pdf).

<sup>5</sup>Remarks from Justice Ruth Bader Ginsburg, 2014 Pro Bono Institute Annual Conference, [www.probonoinst.org/events/annual-conference/2014-pbi-annual-conference/remarks-from-justice-ginsburg/](http://www.probonoinst.org/events/annual-conference/2014-pbi-annual-conference/remarks-from-justice-ginsburg/).



## From the Foundation

by Martha Hardwick Hofmeister

# The Foundation and the Public Good

### You may have seen the following phrases used on the

Foundation's printed materials, such as on our annual giving brochure or in our written correspondence:

*The Foundation of the Federal Bar Association was chartered by Congress as a 501(c)(3) nonprofit organization in 1954. Donations may be considered tax deductible as charitable contributions.*

What does this language really mean? What exactly is a “non-profit” organization? Why are donations tax deductible? And how does the Foundation of the Federal Bar Association fit in with the idea of charity?

### Some Historical Context

Many people point to Alexis de Tocqueville's *Democracy in America* as a good starting point to describe the vital role of the nonprofit sector in American society. Following his extensive travels in the United States in 1831–'32, Tocqueville wrote about the American phenomenon of forming “associations” of all types—professional, social, civil, and political—and emphasized the American culture of voluntary action on behalf of the common good.

Indeed, this culture of forming “associations” still exists, almost 200 years after Tocqueville's observations. According to the National Center of Charitable Statistics, there are now more than 1.5 million nonprofit organizations registered in the United States, including public charities, private foundations, and many other types of organizations, such as chambers of commerce, fraternal organizations, and civic leagues.

### Benefiting the Public Interest

The nonprofit sector plays an indispensable role in society and the economy today, distinct from both the public sector (government) and the private sector (business). There are many kinds of nonprofits, serving many types of societal needs: religious congregations, universities, hospitals, environmental groups, art museums, youth recreation associations, international aid groups, health and human services, medical research, and much, much more.

The Internal Revenue Service defines more than 25 categories of organizations that are exempt from federal income taxes, but for most people, a “nonprofit” refers to what the tax code classifies under section 501(c)(3) as a “charitable” organization, or one

that has as its purpose to benefit the public interest.

Congress recognizes this important public role of the nonprofit sector by making certain organizations tax-exempt, enabling them to dedicate their funds to fulfilling their missions. Furthermore, Congress encourages the American people to support these organizations financially by allowing many taxpayers to deduct their charitable contributions.

According to the “Giving USA 2014” report, charitable giving in the United States jumped 4.4% to \$335.17 billion in 2013. The vast majority of this giving comes not from large corporations or wealthy foundations but from individual donors supporting their favorite charities and institutions. Donations from individuals represent 72% of all charitable giving.

### Gifts to the Foundation of the Federal Bar Association

The Foundation of the Federal Bar Association is recognized by the IRS as a 501(c)(3) charitable organization. Our organizational purpose is in support of the public good, as exemplified by our mission:

- To promote and support legal research and education
- To advance the science of jurisprudence
- To facilitate the administration of justice
- To foster improvements in the practice of federal law.

Consistent with best practices of leading nonprofits, the Foundation of the Federal Bar Association is governed by a volunteer board of directors, who affirm that the Foundation is fulfilling its public purpose. The board of directors develops strategic plans to provide for organizational growth and is focused on the long-term health and sustainability of the organization.

As a nonprofit organization, the work of the Foundation is made possible by charitable gifts from FBA members like you. We recognize that there are many local, regional, and national nonprofit organizations doing excellent work on causes that are important to you; thank you for supporting your profession through your gifts to the Foundation. ☺



# Take a Closer Look at the **FOUNDATION** of the Federal Bar Association



The Foundation of the FBA provides **Chapter Community Outreach Grants** of up to \$5,000 to support community service or outreach projects that involve FBA chapter participation. Projects must address the need for legal services in the community or fall under any component of the Foundation's mission.

Past grants have included funding for an oral history to celebrate the 50th anniversary of the Civil Rights Act; a legal writing program; a diversity seminar; a self-help legal clinic; a mentoring program and many others.

Programs such as these are made possible by gifts from FBA members like you. Take a closer look at the Foundation of the Federal Bar Association. Learn more about our initiatives and how you can support our work. Visit [www.fedbar.org/Foundation](http://www.fedbar.org/Foundation) today.

**Grant  
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## Washington Watch

by Bruce Moyer

# A Return to the Past in Combatting Frivolous Litigation

### For more than a decade, Congress has considered

a variety of legislative proposals aimed at curbing so-called frivolous lawsuits brought in the federal courts. A smattering of bills, largely supported by business interests, have been introduced in both chambers to revise pleading requirements and put greater teeth into judicial sanctions against attorneys and parties associated with abusive lawsuits.

The proposals under current consideration would reinstate the sanctions framework under Rule 11 of the Federal Rules of Civil Procedure, as adopted in 1983 and eliminated a decade later in 1993. The proposals also would eliminate a part of Rule 11 that permits a party to withdraw challenged pleadings on a voluntary basis without penalty. A separate set of legislative proposals would specifically address abusive litigation tactics in the patent arena.

This month's column will focus on attempts in Congress to curb "frivolous lawsuits" through statutory amendment of Rule 11. Next month's column will spotlight efforts to deter abusive patent litigation by so-called "patent trolls" and other nonpracticing entities that allegedly extort expensive settlements from valid patent holders.

In response to both sets of proposals, the Federal Bar Association has urged Congress to exercise caution and to respect the independence of the Federal Judiciary and its procedures for creating rules and mechanisms that deter and apply sanctions against abusive litigation practices.

### "Letting Lawyers Instead of Their Conscience Be Their Guide"

Since 2004, leading Republican House lawmakers have introduced bills seeking to deter litigiousness at the slightest provocation and make attorneys more accountable. This group has included the former chairs of the House Judiciary Committee, Rep. James Sensenbrenner (R-Wis.) and Rep. Lamar Smith (R-Texas), as well as its current chair, Rep. Robert Goodlatte (R-Va.). Their commitment has been guided by Will Rogers' observation that Americans are "letting lawyers instead of their conscience be their guide." As a 2004 House report suggested, frivolous lawsuits have had a "corrosive effect on American culture and values, threatening America's churches, schools, doctors, sports, playgrounds, friendly relations and even the Girl Scouts and other family institutions."

The current proposals under consideration in Congress would require mandatory sanctions against attorneys and parties for baseless suits under Rule 11. They also would strike the "safe harbor" provisions in Rule 11 that allow lawyers to withdraw allegedly frivolous claims by withdrawing them within 21 days. These proposals most frequently have been contained in bills popularly called the "Lawsuit Abuse Reduction Act" (LARA). During the last Congress, the LARA of 2013 (H.R. 2655) passed the House by a 228-195 vote, largely along party lines, but the legislation stalled in the Senate, primarily over concerns raised by the

Federal Judiciary and bar groups, including the Federal Bar Association (FBA).

### Back to the Future?

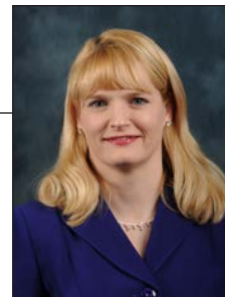
One of the most noteworthy concerns raised about LARA lies in the way the legislation would return Rule 11 to the same version of the rule that was in place from 1983 to 1993, when it became the subject of widespread criticism in the legal community, leading to its current form, after consideration by the Judicial Conference, the Supreme Court, and Congress.

As the Committee on Rules and Practices of the Judicial Conference of the United States stated in a 2013 letter to the House Judiciary Committee, "We greatly appreciate, and share, the desire to improve the civil justice system in our federal courts, including by reducing frivolous filings. But legislation that would restore the 1983 version of Rule 11 by undoing the 1993 amendments would create a 'cure' far worse than the problem it is meant to solve. The 1983 provision for mandatory sanctions was eliminated because it did not provide meaningful relief from the litigation behavior it was meant to address, and instead generated wasteful satellite litigation that had little to do with the merits of cases and that added to the time and costs of litigation."

The FBA, in similar comments to Congress, also noted how attorneys practicing in the 1980's had witnessed the transformation of Rule 11 into a pernicious tool of abuse. It created a significant incentive to file unmeritorious Rule 11 motions to try and pressure plaintiffs into financial settlements. Some aggressive lawyers were known to file Rule 11 motions in response to virtually every filing. In addition, those same aggressive lawyers used Rule 11 motions as a weapon to create conflicts of interest—or at least, the potential appearance of conflict—between their opposing lawyers and clients, when the opposing lawyer was forced to respond personally to accusations of having violated Rule 11.

"The increasing number of unmeritorious Rule 11 motions led to more and unnecessary tensions between opposing lawyers, which in turn fueled a decline in civility and professionalism in litigating other aspects of the lawsuit," the FBA noted in a Dec. 11, 2013 letter to the Senate Judiciary Committee. "The rule provided a disincentive to abandon or withdraw a pleading or claim that lacked merit – thereby admitting error and risking sanctions—even after determining that it no longer was supportable in law or fact."

Today, with both legislative chambers under control by the same party, will Rule 11 return to its contentious past? Pent-up pressures for change could tip the scales, but procedural obstacles in the Senate will likely force a stalemate once again. ☺



# Integral and Indispensable Principal Activities

**State and federal laws often overlap in litigation,** resulting in litigated claims proceeding in a simultaneously parallel manner in state and federal courts, or the claims may be resolved together in the federal action. Frequently, the federal court must determine whether federal law preempts state law or if dismissal of the state or federal action is required. The requirement for preemption or dismissal often facilitates the ultimate issues to be determined by the federal court. A recent U.S. Supreme Court ruling in *Integrity Staffing Solutions Inc. v. Busk*, 574 U.S. —, 135 S.Ct. 513 (2014), illustrates the interplay between federal and state statutes in employment litigation. More significantly, the Supreme Court addressed

passed through metal detectors.”<sup>2</sup> Importantly, this screening process was performed after the employees had terminated their shift and resulted in delaying Integrity employees from exiting the warehouse for at least 25 minutes.

“Jesse Busk and Laurie Castro worked as hourly employees of Integrity Staffing at [Amazon] warehouses in Las Vegas and Fenley, Nevada, respectively,” and they objected to Integrity’s failure to pay its employees for the additional 25 minutes spent engaging in post-shift screening procedures.<sup>3</sup> An additional claim regarding Integrity’s failure to properly compensate the plaintiffs asserted that Integrity required its employees “to walk long distances to clock out and clock back in, which alleg-

**“The fact that an employer could conceivably reduce the time spent by employees on any preliminary or postliminary activity does not change the nature of the activity or its relationship to the principal activities that an employee is employed to perform.”**

**—Justice Thomas, *Integrity Staffing Solutions Inc. v. Busk*, 574 U.S. —, 135 S. Ct. 513, 519 (2014).**

whether the Fair Labor Standards Act (FLSA) provides additional compensation for employees when an employer requires additional tasks to be performed by the employee after the employee’s work day has concluded.

Integrity Staffing Solutions Inc. (Integrity) contracted with Amazon to provide employees for warehouse staffing in several states. Integrity employees “retrieved products from the [warehouse] shelves and packaged those products for delivery to Amazon customers.”<sup>1</sup> As Integrity employees completed their shift, Integrity loss-prevention policies required the “employees to undergo a security screening before leaving the warehouse at the end of each day. During the screening, employees removed items such as wallets, keys, and belts from their persons and

edly diminished their meal period by as much as 10 minutes,” or one-third of their 30-minute lunch break.<sup>4</sup> The employees argued that the theft-prevention screening procedures were accomplished only for the benefit of their employers and that the screening time “could have been reduced to a de minimis amount by adding more security screeners or by staggering the termination of shifts so that employees could flow through the checkpoint more quickly.”<sup>5</sup> Busk and Castro joined a putative “class action against Integrity, to recover unpaid wages and overtime, liquidated damages, and attorneys’ fees and costs under the Fair Labor Standards Act (“FLSA”), 29 U.S.C. §§ 201-216, and Nevada labor law, NRS §§ 608.018, 608.019, and 608.030.”<sup>6</sup>

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*Caroline Johnson Levine is the chair of the Federal Bar Association’s State and Local Government Relations Section and is an appointed member of The Federal Lawyer Editorial Board. She is also the vice chair of the Florida Bar’s Committee on Professionalism and is an appointed member of the Senior Lawyers Committee. She has been appointed by the Florida Bar Board of Governors to the Supreme Court Commission on Professionalism.*

The U.S. District Court for the District of Nevada dismissed the employee's state class claims because "state law class claims which are predicated on the same acts and circumstances as a simultaneously asserted FLSA claim collective action must be dismissed due to the conflicting 'opting' mechanisms."<sup>7</sup> Further, the district court dismissed the federal claims entirely because the employee's claims did "not demonstrate that the security process is integral and indispensable to their principal activities as warehouse employees fulfilling online purchase orders. Instead these allegations fall squarely into a non-compensable category of postliminary activities such as checking in and out and waiting in line to do so."<sup>8</sup>

The U.S. Court of Appeals for the Ninth Circuit reversed the district court, stating that "[a]lthough some district courts have held that a FLSA collective action cannot be brought in the same lawsuit as a state-law class based on the same underlying allegations, all circuit courts to consider the issue have held that the different opting mechanisms [required by FLSA and Fed.R.Civ.P. 23(c)(2)(B)(v)] do not require dismissal of the state claims."<sup>9</sup> The Ninth Circuit found "that FLSA's plain text does not suggest that a district court must dismiss a state law claim."<sup>10</sup> Further, 29 U.S.C. § 216 (b) "does not address state-law relief,"<sup>11</sup> and there is no evidence that "suggests that FLSA is not amenable to state-law claims for related relief in the same federal proceeding."<sup>12</sup> Finally, the Ninth Circuit found that the employees properly stated a "plausible claim for relief" as the "security clearances are necessary to [the] employees' primary work as warehouse employees and done for Integrity's benefit."<sup>13</sup>

Integrity appealed the decision of the Ninth Circuit to the U.S. Supreme Court, which granted certiorari. The issue presented to the Supreme Court was "whether the employees' time spent waiting to undergo and undergoing security screenings is compensable under the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.*, as amended by the Portal-to-Portal Act of 1947, § 251 *et seq.*"<sup>14</sup>

Prior to the *Integrity* case, the Supreme Court explained the

statutory purpose for the enactment of FLSA in 1938, which "established a minimum wage and overtime compensation for each hour worked in excess of 40 hours in each workweek."<sup>15</sup> Further, employer violations of FLSA could result in civil liability, to include attorney's fees. Because FLSA did not define the term "work," the Supreme Court determined that "work" is an activity "required by the employer and pursued necessarily and primarily for the benefit of the employer and his business."<sup>16</sup>

This interpretation of FLSA's provisions resulted in a "flood of litigation" and "unions and employees filed more than 1,500 lawsuits under the FLSA. These suits sought nearly \$6 billion in back pay and liquidated damages for various preshift and postshift activities."<sup>17</sup> Congress subsequently determined that the Supreme Court's interpretation of FLSA created an "emergency," which required statutory action in order to avoid "immense liabilities" and the "financial ruin of many employers."<sup>18</sup> Accordingly, Congress amended FLSA by enacting the Portal-to-Portal Act in 1947. The Act provided that employers would not be required to provide employee compensation for "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."<sup>19</sup>

In *Integrity*, the Supreme Court wrote that its consistent interpretation of FLSA, as amended by the Portal-to-Portal Act, has defined the "term 'principal activity or activities' [to] embrac[e] all activities which are an 'integral and indispensable part of the principal activities.'"<sup>20</sup> Further, the Supreme Court held that employee participation in post-shift loss-prevention screenings did not fall within the principal activities that the employees were hired to perform. This is apparent because "Integrity staffing did not employ its workers to undergo security screenings, but to retrieve products from warehouse shelves and package those products for shipment to Amazon customers."<sup>21</sup> Further, the loss-prevention screenings "were not 'integral and indispensable' to the employees' duties as warehouse workers" because the screenings are not "an intrinsic element of those activities and one with which the employee cannot

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dispense if he is to perform those activities.”<sup>22</sup> Additionally, it was not a principal activity of the employment agreement because “Integrity Staffing could have eliminated the screenings altogether without impairing the employees’ ability to complete their work.”<sup>23</sup>

The Supreme Court unanimously reversed the decision of the Ninth Circuit and held that “an activity is integral and indispensable to the principal activities that an employee is employed to perform—and thus compensable under the FLSA—if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities.”<sup>24</sup> The Supreme Court rejected the employee’s argument that the screening time was compensable because Integrity required its employees to participate in post-shift screenings in order to remain employed. Rather, the Supreme Court clarified that “if the test could be satisfied merely by the fact that an employer required an activity, it would sweep into ‘principal activities’ the very activities that the Portal-to-Portal Act was designed to address.”<sup>25</sup> As a resolution, the Supreme Court stated that an employee who objects to a lack of compensation for post-shift requirements should raise the issue “to the employer at the bargaining table, see 29 U.S.C. § 254(b) (1), not to a court in an FLSA claim.”<sup>26</sup> Therefore, *Integrity* found that employees need not be compensated by their employers when employees fulfill post-shift employer requirements that are not integral and indispensable principal activities. ☺

## Endnotes

<sup>1</sup>See *Integrity Staffing Solutions Inc. v. Busk*, 574 U.S. —, 135 S.Ct. 513, 515 (2014).

<sup>2</sup>*Id.*

<sup>3</sup>*Id.*

<sup>4</sup>See *Busk v. Integrity Staffing Solutions Inc.*, 2011 WL 2971265 at \*1 (D. Nev).

<sup>5</sup>See *Integrity*, 135 S.Ct. at 515.

<sup>6</sup>*Id.*

<sup>7</sup>See *Busk*, 2011 WL 2971265 at \*3; *Otto v. Pocono Health*

*System*, 457 F.Supp.2d 522 (M.D. Pa. 2006).

<sup>8</sup>*Busk*, 2011 WL 2971265 at \*4, citing 29 C.F.R. § 790.07(g); *IBP Inc. v. Alvarez*, 546 U.S. 21, 40, 126 S.Ct. 514, 163 L.Ed.2d 288 (2005) (holding “the fact that certain preshift activities are necessary for employees to engage in their principal activities does not mean that those preshift activities are integral and indispensable to a principal activity”).

<sup>9</sup>See *Busk v. Integrity Staffing Solutions Inc.*, 713 F.3d 525, 528 (9th Cir. 2013); *Knepper v. Rite Aid Corp.*, 675 F.3d 249, 253-62 (3d Cir. 2012); *Ervin v. OS Rest. Servs. Inc.*, 632 F.3d 971, 976-79 (7th Cir. 2011); *Shahriar v. Smith & Wollensky Rest. Grp.*, 659 F.3d 234, 247-49 (2d Cir. 2011).

<sup>10</sup>See *Busk*, 713 F.3d at 528.

<sup>11</sup>See *Knepper*, 675 F.3d at 259.

<sup>12</sup>See *Ervin*, 632 F.3d at 977.

<sup>13</sup>See *Busk*, 713 F.3d at 531.

<sup>14</sup>See *Integrity*, 135 S.Ct. at 515.

<sup>15</sup>*Id.* at 516.

<sup>16</sup>See *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598, 64 S.Ct. 698, 88 L.Ed. 949 (1944); *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 690-91, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946) (holding that a “statutory workweek” included “all time during which an employee is necessarily required to be on the employer’s premises, on duty or at a prescribed workplace”).

<sup>17</sup>See *Integrity*, 135 S.Ct. at 516.

<sup>18</sup>29 U.S.C. §§ 251(a)-(b).

<sup>19</sup>29 U.S.C. §§ 254(a)(1).

<sup>20</sup>*IBP, Inc. v. Alvarez*, 546 U.S. 21, 40, 126 S.Ct. 514, 163 L.Ed.2d 288 (2005) (quoting *Steiner v. Mitchell*, 350 U.S. 247, 252-253, 76 S.Ct. 330, 100 L.Ed.2d 267 (1956)).

<sup>21</sup>See *Integrity*, 135 S.Ct. at 518.

<sup>22</sup>*Id.*

<sup>23</sup>*Id.*

<sup>24</sup>*Id.* at 519.

<sup>25</sup>*Id.*

<sup>26</sup>*Id.*

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## Corporate and Association Counsel Division

by Rachel V. Rose, J.D., M.B.A.

# What You Need To Know: Dodd-Frank Pay-Ratio Disclosure Rules

### Compensation is at the forefront of everyone's mind.

Both in-house and external counsel may be called upon to provide advice in relation to executive compensation. If the company is a publicly traded company, additional Securities and Exchange Commission (SEC) reporting obligations exist pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank)<sup>1</sup> and related securities laws and regulations.

Before diving into the specifics, it is important to appreciate the nuances of some basic terms that are referenced in the proposed rule: mean, median, and mode. “The ‘mean’ is the ‘average’ you’re used to, where you add up all the numbers and then divide by the number of numbers. The ‘median’ is the ‘middle’ value in the list of numbers. To find the median, your numbers have to be listed in numerical order, so you may have to rewrite your list first. The ‘mode’ is the value that occurs most often. If no number is repeated, then there is no mode for the list.”<sup>2</sup> Because of the September 2013 SEC proposed rule implementing Section 953(b) of Dodd-Frank requiring companies to disclose the median of the annual total compensation of its employees and the ratio of the median to the annual pay of its chief executive officer (CEO),<sup>3</sup> appreciating the aforementioned terms is imperative. Presently, no final rule exists, but counsel should remain vigilant.

### Dodd-Frank Section 953(b)

In general, Section 953 addresses executive compensation disclosures. The first part of this section of the law amended Section 14 of the Securities Exchange Act of 1934 (15 U.S.C. 78n) by adding the provision of pay versus performance.<sup>4</sup> Basically, the SEC requires each “issuer to disclose in any proxy or consent solicitation material for an annual meeting of the shareholders of the issuer a clear description of any compensation required to be disclosed under section 22 of title 17, Code of Federal Regulations (or any success thereto), including information that shows the relationship between the executive com-

pensation actually paid and the financial performance of the issuer, taking into account any change in the value of the shares of stock and dividends of the issuer and any distributions.”<sup>5</sup> This is accomplished by adhering to the guidelines in the rules, which are discussed below.

Like most areas of law, there is discretion by the government agency, as well as exceptions to the general rule described above. First, Congress gave the SEC discretion to permit various exchanges to “prohibit the listing of any security of an issuer that is not in compliance with the requirement.”<sup>6</sup> The opportunity to cure defects within a timely manner was also provided, as well as the controlled company exemption.<sup>7</sup> So, what is a controlled company for purposes of this provision?

[A] “controlled company” means an issuer—

- (A) that is listed on a national securities exchange or by a national securities association; and
- (B) that holds an election for the board of directors of the issuer in which more than 50 percent of the voting power is held by an individual, a group, or another issuer.<sup>8</sup>

These items lay the foundation for the SEC’s proposed rule for pay ratio disclosure, which was released in September 2013.<sup>9</sup>

### Proposed Rules

The SEC voted 3-2 to set forth new rules in accordance with Section 953 of Dodd-Frank, “requir[ing] public companies to disclose the ratio of the compensation of its chief executive officer (CEO) to the median compensation of its employees.”<sup>10</sup> The proposed rules were effectuated in September 2013.<sup>11</sup> Looking on the bright side, no particular methodology was prescribed for determining the pay ratio, hence giving different types of companies discretion over how that is determined.

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For example, a company would be permitted to identify the median employee based on total compensation using either its full employee population or a statistical sample of that population.

A company could, for example, identify the median of its population or sample:

- Using annual total compensation as determined under existing executive compensation rules.
- Using any consistently used compensation measure such as compensation amounts reported in its payroll or tax records. A company would then calculate the annual total compensation for that median employee in accordance with the definition of total compensation set forth in the SEC's executive compensation rules.<sup>12</sup>

When a population is utilized, all full-time, part-time, seasonal, and temporary employees who were employed at the end of the fiscal year by the company and its U.S. and foreign subsidiaries need to be included. One way to reduce the ratio is to include health benefits in the compensation amount. This benefit reduces the gap between the CEO and the employees.

### What it Means For General Counsel

Despite receiving more than 127,000 comments, the SEC still has not provided additional guidance or issued a final rule. A good place to start is reviewing the SEC's website for guidance and updates. Also, find a good statistician to conduct the mean, median, and mode valuations. "As required by the Dodd-Frank Act, median employee total compensation would be calculated using the definition of 'total compensation' in existing executive compensation rules, namely Item 402(c)(2)(x) of Regulation S-K. Item 402(c)(2)(x) requires companies to provide extensive compensation information about the CEO and other named executive officers, which is not ordinarily calculated for all employees."<sup>13</sup> Finally, review all relevant and referenced laws and regulations.

As I learned at a recent continuing legal education (CLE) presentation, there are a couple of key items companies should be cognizant of disclosing in their compensation discussion and analysis, according to Michael Kesner:

- [T]he ratio of the CEO's annual total compensation for the fiscal year to the median employee's annual total compensation for year;
- [T]he methodology used to determine the median employee; and
- [O]ther assumptions and estimates used to identify the median employee or total compensation (or elements of total compensation).<sup>14</sup>

Because the final rules have not been approved to date, it is unlikely that the first year of compensation subject to the pay ratio test would be 2015, with disclosure requirements in 2016. Instead, it looks like 2016 would be the first year of the test, with commencement of disclosure occurring in 2017.



### Conclusion

The pay-ratio disclosure rule is significant in many ways. By appreciating what the fundamental terms are, what resources are needed, and what disclosures are required, counsel can be proactive. Doing so will help prevent a commission from potentially prohibiting the listing of the issuer. ☉

### Endnotes

<sup>1</sup>Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111-203 (Jul. 21, 2010).

<sup>2</sup>See [www.purplemath.com/modules/meanmode.htm](http://www.purplemath.com/modules/meanmode.htm) (last accessed Dec. 6, 2014).

<sup>3</sup>*Id.* at Section 953—Executive Compensation Disclosures, available at [www.gpo.gov/fdsys/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf](http://www.gpo.gov/fdsys/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf).

<sup>4</sup>*Id.* at Section 953(a)(i).

<sup>5</sup>*Id.*

<sup>6</sup>*Id.* at Section 953(f)(1).

<sup>7</sup>*Id.* at Section 953(f)(2),(3).

<sup>8</sup>*Id.* at Section 953(g)(1), (2)(A), (B).

<sup>9</sup>Securities and Exchange Commission, *SEC Proposes Rules for Pay Ratio Disclosure*, available at [www.sec.gov/News/PressRelease/Detail/PressRelease/1370539817895#.VIOJ-r6aHKA](http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539817895#.VIOJ-r6aHKA).

<sup>10</sup>*Ibid.*

<sup>11</sup>See [www.sec.gov/rules/proposed/2013/33-9452.pdf](http://www.sec.gov/rules/proposed/2013/33-9452.pdf) (last accessed, Dec. 6, 2014).

<sup>12</sup>*Supra*, n. 10.

<sup>13</sup>*Ibid.*

<sup>14</sup>Michael Kesner, *Presentation—SEC's CEO Pay-Ratio Disclosure Rules: Do Tell*, Joint Committee on Employee Benefits, 2014 Executive Compensation National Institute (Nov. 13, 2014).



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# Balancing the Scales: The Weights and Means of Maintaining Well-Being Throughout Law School

## Common maxim states that in order to identify

a problem, one must freely and openly admit that a problem exists in the first place. Overflowing amounts of psychological research and studies have been conducted among practicing attorneys. The results undoubtedly indicate the presence of depression, anxiety, substance abuse, suicide, and other mental or physical conditions. As a legal community, these problems affect the entire profession.

Recently, research is delving deeper into the legal profes-

sion. Now that the first step of identifying the problem has taken place, the task is to remedy the problem. As is the case with any tree or plant, healthy roots leads to a robust, strong, and long-lasting existence. The same rings true for the future of the legal profession. Emphasizing student health and well-being throughout law school may be achieved by many avenues that depend on individual concerns and needs.

As a general proposition, law schools across the country should consider deviating slightly from the pressure-cooker

**“The legal profession appears to be facing significant problems, manifested both in decreasing overall professionalism in the field, and in decreased health and well-being among individual lawyers.”<sup>1</sup>**

sion psyche by examining its roots: law students. A 2014 survey of law student well-being sheds light on a persistent problem facing legal education. The numbers reflect a startling trend in overall student well-being and the legal education environment. Consider the following results of the survey:

- 89.6% of respondents have had a drink of alcohol in the last 30 days.
- 21.6% reported binge-drinking at least twice in the past two weeks.
- 20.4% have thought seriously about suicide sometime in their life.
- 6.3% have thought seriously about suicide in the last 12 months.
- 17.4% of respondents screened positive for depression, with 20 percent indicating that they had been diagnosed with depression at some time in their life.
- Roughly one-sixth of those with a depression diagnosis had received the diagnosis since starting law school.<sup>2</sup>

theory of year-end exams. Instead, legal education should focus on fostering a conduit of communication, trying to affirm a student’s understanding of substantive material, and providing exercises that promote mental stability. These small steps will ensure students receive positive reinforcement throughout the law school experience, and this may foster implementation in the legal profession when senior attorneys assist interns, associates, or clients.

As mentioned, vast amounts of literature have been published regarding the well-being of practicing attorneys, but little empirical evidence is available to find a causal link between mental health and law school.<sup>3</sup> This may be due to the difficulty in measuring and ascertaining an issue that is subjective in nature; although, in recent years, scholars have developed theories seeking to explain and assist the issue—a few approaches are detailed below. A common denominator among these theories is that legal education may be a source of negative health-related issues among practicing attorneys and students. Research suggests that negative aspects of legal education include:

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- Excessive workloads, stress, and competition for academic superiority.
- Institutional emphasis on comparative grading.
- Lack of clear and timely feedback.
- Excessive faculty emphasis on analysis of linear thinking, causing loss of connection with feelings, personal values, and sense of self.
- Teaching practices that are isolating or intimidating and content that is excessively abstract or unrelated to the actual practice of law.<sup>4</sup>

A leading article on the topic of law student well-being, specifically depression, is “Stemming the Tide of Law Student Depression: What Law Schools Need to Learn from the Science of Positive Psychology.” Todd Peterson and Elizabeth Peterson emphatically argue a direct correlation between the demanding law school classroom environment and the mental well-being of law students. One finding that should be of stark concern to the legal education system is that 44 percent of law students meet the criteria of clinical levels of stress, higher levels of alcohol and drug abuse, and anxiety.<sup>5</sup>

At first glance, this statistic may seem realistic and somewhat explainable, meaning that a preconceived notion about law school is that it is supposed to be stressful, challenging, and mentally taxing on a student. This proverbial mental battle royale may be considered a condition precedent to successfully running the law school gauntlet, but is this really what law school is about? The answer, like the law, is difficult to ascertain but can be understood with proper methods.

Leading scholars in the area of law student well-being are Kennon Sheldon and Lawrence Krieger. Particularly, Sheldon and Krieger have dived deep into the problems facing law students and propose different courses of action, some of which provide very insightful advice for individual students and law schools alike. As a primary assertion, Sheldon and Krieger argue that the intense pressure and competitive atmosphere reorients a student’s moral compass, and, instead of seeking personal value, students move toward superficial rewards and image-based values.<sup>6</sup> Krieger notes some telltale signs that students may exhibit, should the struggle become too much. Specifically, if a student is usually outgoing and shifts to an anxious and down-trodden demeanor, that student may be internalizing problems. Also, a shift in a student’s interest in continuing education may allude to a shift in a student’s mental state, impacting a shift in values.

Additionally, Sheldon and Krieger observe that attributing factors that minimize student health can, at the same time, be beneficial to legal education.<sup>7</sup> Every student undoubtedly feels and internalizes the self-motivation to succeed in law school, but it is how these emotions materialize or do not materialize in which a problem arises. For example, a student may very well internalize inner success in mastering the rule against perpetuities in property law, but how is this student supposed to materialize this inner satisfaction? For many schools, the answer lies merely in a year-end exam in which a student is challenged to recall essentially all course material.

This traditional concept may very well be a great indicator of what the student has substantively learned throughout the span

of the entire semester. However, without cementing the student’s knowledge on a particular subject as it is learned, this student may spend the entire year grasping a concept in an incorrect way. Therefore, a possible solution may be having law schools implement periodic quizzes or concept review papers that allow students to gauge their substantive understanding of the topic and receive positive (or negative) feedback from the professor.

This solution, as Ruth McKinney, Clinical Professor of Law Emeritus at the University of North Carolina School of Law, states, is not found in the year-end test approach. Rather, the solution is taking incremental steps throughout the semester to positively increase a student’s morale. For this assertion, McKinney believes the self-efficacy theory is relevant. This theory is applicable in narrow, specific, and concrete goals. Thus, one can achieve an objective by controlling the outcome of a desired result—or, control the means, and the desired end is achievable. As a base supposition, it must be presumed that students of law begin with low self-efficacy due to absence of feedback. McKinney identifies four facets of self-efficacy that may substantially increase mental well-being of a law student:

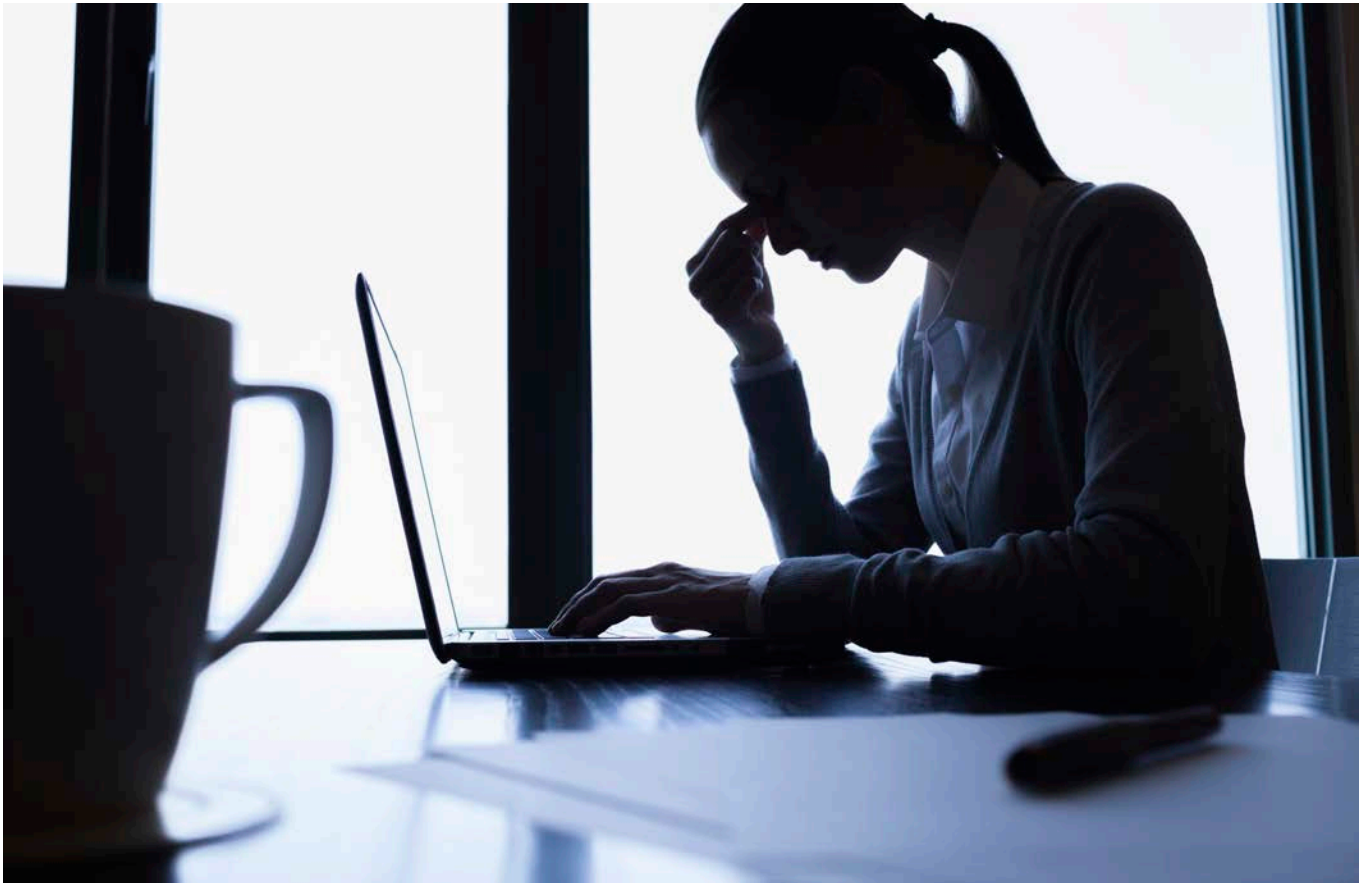
1. Personal experience
2. Vicarious experience
3. Social feedback
4. Physical and emotional reactions

Personal experience refers to the commonly recognized notion of the term, meaning that a law student gains self-efficacy through personal experience. For McKinney, personal experiences should not necessarily be easily obtained, but positive reinforcement of these personal experiences is necessary. A possible solution is found in the concept that sharing personal experiences within the classroom, and having them reinforced by peers outside the classroom, will lead to higher self-efficacy.

In correlation, vicarious experience is directly related to the law school experience and a primary facet of why law students exhibit stress: competition. It is uncommon to find a student that does not compare himself or herself to another student. This is the quintessential dilemma of law school: Class rank is on the mind of every student. McKinney suggests that the more a student could learn vicariously, or through the successes of a whole class, the more self-efficacy students might achieve.

Social feedback, or what McKinney calls “social persuasion,” is tied to the feedback that a student receives on the work completed. The problem of law student mental health may be directly rooted in this aspect because, as law students are well aware, the crux of doing well in law school depends on doing well on a semester-ending, comprehensive essay or expansive multiple-choice exam. As McKinney suggests, and as other literature echoes, for a student to successfully overcome mental health-related issues, the student must receive some sort of positive feedback that affirms a student’s understanding of a particular subject.

Conversely, this feedback must be realistic. For example, professors may promote positive social feedback or positive personal experience by stepping outside the bounds of the Socratic method. Schools may implement a series of in-class sample exam questions or, as some interactive classrooms utilize, technol-



ogy that allows students to take an in-class quiz or respond to a specific question on the board. These simple and quick steps will, even if minutely, affirm a student's conceptualization of a particular subject-matter area.

Perhaps one of the most difficult facets to ascertain is physical and emotional reaction, because it is purely subjective in nature. If a student contemplates negative emotions, this evokes a feeling of past failures, whereas positive thoughts evoke feelings of past accomplishments. Therefore, promoting positive thoughts within the context of legal education evokes a positive future outlook.<sup>8</sup>

An interesting approach has been proposed by the American Association of Law Schools and explained by Scott Rogers in his article "The Mindful Law School: An Integrative Approach to Transforming Legal Education." This approach seeks to actively engage the student body rather than taking an after-the-fact assessment of a student. For Rogers, mindfulness in legal education stands for the proposition that formal and informal practices may be cultivated to encourage present-moment awareness.<sup>9</sup>

A facet of this approach is taking legal terms and introducing synonyms that correlate to make a student pause and think. In what is coined "jursight," legal terms such as "justice" may be transformed into "just is"—meaning that students may take an issue in solidarity and think about what "just is." This present-sense awareness focuses a student's attention to the task at hand, rather than invoking panic of all other work.<sup>10</sup>

The University of California at Berkeley School of Law and the University of Miami School of Law actively integrate the mindfulness approach. Berkeley, for example, offers a course called Effective and Sustainable Law Practice: The Meditative

Perspective. This semester-long class is one of the most popular among the students, and it teaches aspects of walking meditation, breath awareness, and compassion. As one student positively noted, "When I meditate regularly, I find it easier to engage in the learning process without being distracted or paralyzed by self-doubt."<sup>11</sup>

In 2008, Miami School of Law professor Scott Rogers implemented a similar program with the incoming 1L class. Miami Law utilized two meditation periods throughout the day during Wellness Week, and the school received massive amounts of feedback. In particular, the program encompasses the arguments of Sheldon, Krieger, and McKinney by actively promoting positive reinforcement. As a result of the program, one student noted, "when I was called on in other classes, I did not stress because I realized it was just an event that my answering the question right or wrong should not send me into a negative circle."<sup>12</sup>

The American Bar Association (ABA) has initiated what it calls the Law Student Mental Health Initiative and has named March 27 as National Mental Health Day in law schools across the country (*Yale Journal of Health Policy*). This initiative encourages law schools to "sponsor educational programs and events that teach and foster breaking the stigma associated with severe depression and anxiety amongst law students and lawyers."<sup>13</sup> The ABA provides a Mental Health Toolkit that details how a school may approach Mental Health Day by explaining signs associated with mental health, as well as providing multiple outlets to seek assistance.<sup>14</sup>

Additionally, the Dave Nee Foundation, created in 2006, is a non-profit organization that was created in memory of a law student who took his own life after a battle with depression. A fantastic tool created

by the foundation seeks to provide a conduit of communication for law students to voice concerns about themselves or fellow students. The LawLifeline, co-created by the Jed Foundation and Dave Nee Foundation, provides not only students but also practicing legal professionals the opportunity to do a self-evaluation and reach out for help. Students are then able to search the site for mental-health assistance programs at their individual school.<sup>15</sup>

Law student physical and mental well-being should be of utmost importance to law schools around the nation. Schools and peers must take it upon themselves to actively engage in a conversation with students and faculty to identify potential areas of change and improvement. By actively engaging students and promoting incremental feedback to each individual student throughout the year, schools and students may see a rise in overall student well-being. Mental health may come with a preconceived negative connotation, but it does not need to. Undoubtedly, every person has felt down and out at some point in his life, and it is the responsibility of the legal community to break ties with the connotation and progressively move toward a healthy, strong, and robust future.

[B]eing able to see and advocate for both sides of any argument is good; losing your own personal moral, ethical or aesthetic judgment about right and wrong, true and false; that is bad.

[B]eing confident in stating a position and sticking to it is good; being arrogant, overbearing, and unable to listen to others is bad.

[W]anting to work in a high-paid, high-status, corporate law firm is good; wanting that because it seems like any other choice is second-rate, and in spite of all the contrary goals or expectations you have coming into law school ... well, I think that's bad.<sup>16</sup> ☉

## Endnotes

<sup>1</sup>Lawrence Krieger and Kennon Sheldon. *Does Legal Education have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being*, BEHAV. SCI. LAW 22; 261-286 (2004).

<sup>2</sup>ABA Law Student Division and ABA Commission on Lawyer Assistance Programs and the Dave Nee Foundation, *Substance Abuse Mental Health Toolkit: for Law School Students and Those Who Care About Them* (2014), [www.americanbar.org/content/dam/aba/administrative/law\\_students/mhw-handbk.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/law_students/mhw-handbk.authcheckdam.pdf).

<sup>3</sup>Lawrence Krieger and Kennon Sheldon. *Does Legal Education have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being*, BEHAV. SCI. LAW 22; 263 (2004).

<sup>4</sup>*Id.* at 262.

<sup>5</sup>Peterson, Todd David and Peterson, Elizabeth Waters, *Stemming the Tide of Law Student Depression: What Law Schools Need To Learn from the Science of Positive Psychology*, YALE JOURNAL OF HEALTH POLICY, LAW, AND ETHICS: Vol. 9: Iss. 2, Article 2 at 3 (2013).

<sup>6</sup>*Does Legal Education have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being*, BEHAV. SCI. LAW 22, at 264.

<sup>7</sup>*Id.*

<sup>8</sup>Ruth Ann McKinney, *Depression and Anxiety in Law Students: Are We Part of the Problem and Can We be Part of the Solution?*,

8 LEGAL WRITING 229 (2000).

<sup>9</sup>Scott L. Rogers, *The Mindful Law School: An Integrative Approach to Transforming Legal Education*, TOURO L. REV. 1189 (2012).

<sup>10</sup>*Id.*

<sup>11</sup>University of California Berkeley Law, *The Mindfulness Initiative at Berkeley Law* report, January 2014 (2014), [www.law.berkeley.edu/files/2014\\_BIML\\_Report\\_WebVersion.pdf](http://www.law.berkeley.edu/files/2014_BIML_Report_WebVersion.pdf).

<sup>12</sup>Miami Law Mindfulness in Law Program, [www.miamimindfulness.org/index.html](http://www.miamimindfulness.org/index.html).

<sup>13</sup>Mental Health Initiative, American Bar Association, [www.americanbar.org/groups/law\\_students/initiatives\\_awards/lshealth.html](http://www.americanbar.org/groups/law_students/initiatives_awards/lshealth.html).

<sup>14</sup>ABA Law Student Division and ABA Commission on Lawyer Assistance Programs and the Dave Nee Foundation, *Substance Abuse Mental Health Toolkit: for Law School Students and Those Who Care About Them*, (2014), [www.americanbar.org/content/dam/aba/administrative/law\\_students/mhw-handbk.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/law_students/mhw-handbk.authcheckdam.pdf).

<sup>15</sup>Jed Foundation and Dave Nee Foundation, LawLifeline, [www.lawlifeline.org/facts](http://www.lawlifeline.org/facts).

<sup>16</sup>Barbara Glesner Fines, *Law School and Stress*, LawLifeline, [www.lawlifeline.org/articles/458-law-school-and-stress](http://www.lawlifeline.org/articles/458-law-school-and-stress).

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# Report From the Front: The Grass Is Always Greener

## In 2012, 55 percent of Colorado voters approved

a constitutional amendment legalizing recreational marijuana.<sup>1</sup> Effective Jan. 1, 2014, legislation and regulations were in place, and Colorado became the first state to legalize the sale and use of marijuana.<sup>2</sup> As an attorney licensed in both Illinois and Colorado, I thought it my duty to investigate this legal phenomenon and report to my colleagues at the bar.

Colorado's legalization conflicts with federal law, under which the sale and possession of marijuana is still a crime. The state legislation thus tests the boundaries of federalism in unique ways. The medical use of marijuana under a doctor's prescription is a different animal and is legal in numerous states, including both Illinois and Colorado. State regulation of such medical marijuana varies widely.

Visitors to Venice Beach in California, for example, are greeted with "The Doctor Is In" placards outside flimsy beachside booths, promising (for a fee, of course) a quick diagnosis and a medical marijuana prescription. Illinois doctors: Don't try this!

But in Colorado the private purchase, possession, and use of marijuana is now legal and regulated. Colorado residents may even grow up to six marijuana plants in their home. Licensed dispensaries sell marijuana in plant form for smoking; in pill form; and in edibles, such as candy bars and brownies.

All these products must be produced by licensees within the state of Colorado (due to the federal prohibition). As of this writing, Colorado dispensaries are lobbying Congress to be able to use bank accounts and credit cards—federal laws now criminalize their use in drug dealing.

Individual communities can opt out of the law and ban dispensaries in their towns. Some resort communities have done so, such as Estes Park and Colorado Springs. The public smoking of marijuana is still illegal, as is driving while impaired. Marijuana may not be taken out of Colorado. Signs at Denver International Airport remind travelers of this, and the Transportation Security Administration at the airport is amassing a huge quantity of marijuana abandoned by departing passengers.

Proponents of the Colorado law argued that legalization would

free up law enforcement resources for more important priorities, that taxing marijuana would raise new revenue, and that marijuana is relatively harmless. Only time will tell. Usually such advocacy claims are exaggerated. *The Denver Post* reports that a black market for cheaper, unregulated marijuana still exists. The underlying premise for all this effort, of course, is that a chemically induced euphoria constitutes a form of needed recreation. And this is being tested in Colorado of all places, where the fresh mountain air and breathtaking scenery have for centuries produced a natural "high" for residents and visitors alike. The literature and warnings provided by the dispensaries suggest, as we shall see, that there are real dangers from marijuana use.

For research purposes only, I recently visited two legal marijuana dispensaries in Central City, Colorado, a storied old mining town west of Denver. Central City was a boom-and-bust gold-mining locale for decades: "The Richest Square Mile on Earth." It still boasts a world-class opera company and an 1895 opera house. Its latest boom-and-bust adventure (before legal marijuana) was casino gambling, which prospered in the 1990s but is largely moribund now. Central City's newest crap shoot is reposed in two dispensaries open to the public: Green Grass and Annie's.

Annie's is a secured back room of a souvenir shop in the historical 1890s downtown area. After showing my ID through the locked glass door, I was buzzed into the inner sanctum where there were two glass counters. One counter contained medical marijuana (generally much more potent doses of THC, the active chemical), and the other counter displayed the recreational products. In the recreational counter, there were a variety of items for sale. Leafy, green cannabis in small glass jars came in numerous flavors: Purple Haze, Ice Crush, Strawberry Cough, Motivation, Coal Train, and El Nino. What's a customer to do? Selecting ice cream at Baskin-Robbins is easier! The very nice saleslady explained that there are two basic types of product: sativas and indicas. According to the sales brochure, sativas "tend to produce stimulating feelings," while the indicas "tend to produce sedated feelings." I bought the nonresident maximum of a quarter ounce of a sativa blend for \$18. Colorado residents may buy up to one ounce at a time. The

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saleslady carefully weighed and parceled out the leafy, green substance into a black plastic can branded “Strainwise: Higher Living.”

The tar and smoke from marijuana can't be healthy for one's lungs. So Annie's also sells marijuana in pill form and in candy and brownies. For \$20 I bought a plastic bottle of Edipure Cherry Bombs that contained 10 pills with 10 mg each of THC (and only 11 calories). “Consume with caution” is the rather unhelpful warning on the bottle. For another \$20 I bought a cannabis-infused candy bar labeled as the Incredible Mile High Mint. This bar was marked into 10 squares of 4.5 grams each with 7.5 mg of THC (and 75 calories each). The dose was one square at a time, to be “consumed with caution” and subject to the caveat that “the intoxicating effect of this product may be delayed by two or more hours.” The Mile High Mint packaging also warns that “[t]his product was produced without regulatory oversight for health, safety, or efficacy.” So it's buyer beware in the Old West.

Each of these products carried a Colorado Department of Revenue retail marijuana tax stamp. The saleslady placed my treasures into a zipper-sealed plastic container because marijuana must be transported in a closed container. Annie's claimed it could accept credit cards because it was also a souvenir shop. This did not sound correct to me, so I paid cash.

The promotional literature and the fact sheet handed out with my purchase contain warnings and disclaimers that Colorado lawyers will learn to love. Ad cards for Annie's bear the slogan “Take Your Game Higher,” and, as noted, its descriptions of “caution,” “intoxicating effect,” “sedated feelings,” and “stimulating feelings” betray danger and risk. Both marijuana stores have websites touting their wares: [www.strainwise.com](http://www.strainwise.com) and [www.greengrassmmj.info](http://www.greengrassmmj.info).

The fact sheet contradicts itself in several respects. It claims that “smoking cannabis does not increase your risk of lung or other cancers.” But then it advocates inhaling the smoke via a vaporizer or water pipe to reduce the amount of “tars and other carcinogens that you otherwise would inhale” and to absorb “some of the THC and other cannabinoids.” While claiming remarkable therapeutic benefits from marijuana use, the fact sheet also warns that the substance can “increase anxiety,” “increase paranoia,” and induce “feelings of tiredness.” Just what some people need!

One of the strengths of our federalism is that states can dare to be different and can experiment. Let's see how Colorado's effort works. Right now there is sort of an armed truce with the federal government, which has announced that it will not prosecute marijuana transactions in states that legalize and regulate its use. But this could change. Litigation is sure to follow when there are accidents or injuries to users and others. Early numbers show that the tax receipts realized from legal marijuana are well below the projections. So the jury is still out, and it will be interesting to follow developments.

By the way, the marijuana I bought remains unopened, and it remains in Colorado! ☺



## Endnotes

<sup>1</sup>Colorado Constitution, Article 18, Section 16.

<sup>2</sup>See [www.colorado.gov/marijuanainfodenver/](http://www.colorado.gov/marijuanainfodenver/).

## Editorial Policy

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## Jumping In — A Different Approach to Expert Evidence

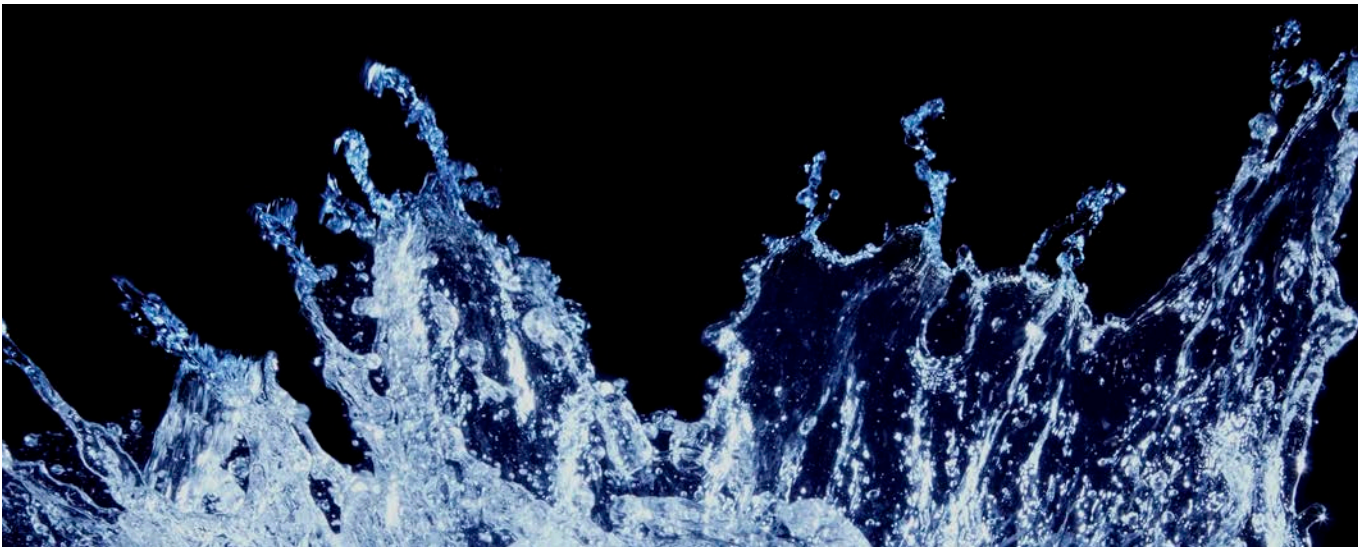
**When a lawyer told me he heard I had been "hot-tubbing"** in my courtroom, I confess I did not know how to respond. It turns out, what I thought was a novel approach to dealing with expert testimony on a complex matter was not so novel. Put on your swimsuits and hop in while I explain.

Faced with multiple motions for class certification in an antitrust multidistrict litigation, I decided that I needed to see the several key experts identified in the briefing. Their affidavits and sworn deposition testimony needed to be tested. The lawyers clamored for a full-blown evidentiary hearing, including formal cross-examination of opposing expert witnesses. Indeed, some went so far as to argue it would be a denial of due process not to grant a hearing. I disagreed. But I needed a hearing—hundreds of pages submitted by counsel were not enough! We read the briefs, but still had questions. And, not surprisingly, the experts were at odds with each other on a number of points. I felt I needed to see them and to question them directly. This would not be a traditional hearing for counsel to wax on, but a focused hearing with direct contact between me and the experts.

I set the matter for oral argument with the following conditions: At the beginning of each session, all experts for that session will be sworn. This court, the experts, and counsel for each side will then

engage in a discussion, structured around this court's questions. That conversation may include back-and-forth directly between the experts, in a point/counterpoint fashion, with this court moderating. For instance, this court may ask the plaintiffs' expert to comment on critiques by the defendants' expert with respect to an aspect of his impact model, then ask [defense experts] to respond, and so on. This court may invite counsel to join in the legal aspects of that discussion, or comment on the legal consequences of the expert back-and-forth (e.g., what would follow, as a legal matter, from accepting or rejecting a particular expert's criticisms). Counsel in each session may also make opening statements (not to exceed 10 minutes each, delivered before discussion with the experts) that show why plaintiffs have or have not met Rule 23's requirements.

With the stage set and a full day set aside for hearing on several motions, I sent to counsel ahead of time a set of questions that I wanted to be the focus of our discussion. I often employ this practice. It forces me to be prepared, and it gives counsel a preview of what I may be thinking. Instead of a seat-of-the-pants response, counsel have time to give my questions some thought (hopefully) and provide me with any additional support, either from the record or from the case law, that might help resolve the questions.



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It was great to have the experts in the courtroom at the same time, nearly face-to-face, with questions they could not duck, and to have the opposing expert comment on what he or she had just heard. I suspect the lawyers were a bit nervous ahead of time because they were not in control of the questioning. But it was great fun for me (perhaps because I'm a former trial lawyer) to be engaged directly with the key testimony that I needed to rule on class certification. More importantly, the hearing allowed me to assess the expert opinions on tough economic issues.

I found the experience rewarding and will not hesitate to utilize it again in the right case. What is "the right case?" One that involves multiple experts and a lengthy record, or perhaps a complex *Markman* hearing. The procedure requires the dueling experts to focus on the same point at the same time. And the "point/counterpoint" dialogue—as opposed to the traditional appellate-type monologue—is a better way of evaluating the accuracy of an expert's opinion. There is no hiding.

Some describe this "concurrent expert evidence technique" as "hot-tubbing" and point out that while the Federal Civil Rules do not specifically provide for this practice, Federal Evidence Rule 611 gives courts "control over the mode and order of examining witnesses and presenting evidence so as to ... make those procedures effective for determining the truth and avoid wasting time." See "Is There Room in American Courts for an Australian Hot Tub?" *The Metropolitan Corporate Counsel*, Volume 21, No. 5 (May 2013). And if a district judge and the experts "jump" in the hot tub for purposes of determining whether the expert's testimony is admissible—for example, to decide a *Daubert* motion—when the "splashing" subsides, there is a better chance of reaching a correct conclusion. See FED. R. EVID. 104(a) ("The court must decide any preliminary question about whether ... evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.").

Throwing everybody in the water at the same time allows the court, counsel, and experts to confront each other directly. Counsel may also follow up and direct questions to the experts. They may ask questions of their own expert to clarify or rehabilitate—or question the opposing expert to drive a point home. In short, everyone gets a swing. The Australian courts deserve credit for this approach. Surveys of Australian judges found that 95 percent were satisfied with the procedure, felt it increased objectivity and quality of expert evidence, found it made comparisons easier, and enhanced the judge's ability to fulfill the court's role of fact-finding (*The Problems of Partisan Experts and the Potential for Reform Through Concurrent Evidence*, 32 REV. LITIG. 1, 38 (2013)).

As it turns out, a few of my American federal colleagues have tried the hot-tub technique, including in antitrust cases (*Experts in the Tub*, 21-SUM Antitrust 95). While its use in American courts appears to be limited to a bench trials and judicial fact-finding, it may also be helpful in trials where jurors have to make difficult decisions based on complex expert testimony. I'm looking for that right case and, hopefully with agreement from the parties, will take the hot-tub experience to trial. All I need to do is waterproof the courtroom! ©

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Join us for the presentation of the Younger Federal Lawyer Awards, which are bestowed upon outstanding government and military attorneys who have attained high standards of professional achievement, and the Robyn J. Spalter Outstanding Achievement Award, which aims to recognize the achievements of a younger lawyer who is playing a role in the future growth of the FBA.

### FBA BUSINESS MEETINGS

The Annual Meeting portion of this week consists of many types of business meetings. From board meetings to collaborative discussions, from section leadership meetings to the National Council Meeting, the business of running the Federal Bar Association is a large focus of this week's events.

### NETWORKING RECEPTION AT THE UTAH NATURAL HISTORY MUSEUM

The Utah Chapter invites all conference attendees to experience Salt Lake City's natural origins at the Utah Natural History Museum! Located on the campus of the University of Utah, the museum aims "to illuminate the natural world and the place of humans within it."

### PRESIDENTIAL INSTALLATION BANQUET

Join the Federal Bar Association for a black-tie optional banquet marking the formal installation of Mark K. Vincent as the FBA national president for FY 2016. The banquet will also feature the presentation of the FBA's two highest honors: the Sarah T. Hughes Civil Rights Award and the Earl W. Kintner Award.



There's something for everyone at the FBA Annual Meeting and Convention—visit [www.fedbar.org/FBACon15](http://www.fedbar.org/FBACon15) today!

**Federal Bar Association**

## **PLANNED CLE SESSION TOPICS**

In Winter 2015, the Federal Bar Association received more than 70 proposals for presentations at the Annual Meeting and Convention in Salt Lake City! The wide variety of presentations below were chosen to reflect the breadth of federal practice issues that FBA members encounter, as well as practical skills that every attorney can use.

**THE HOTTEST TREND IN FEDERAL COURT LITIGATION: THE FALSE CLAIMS ACT**

**EFFECTIVE REPRESENTATION IN MEDIATION**

**RETURNING OUR WARRIORS TO WORK: EMPLOYMENT LAW ISSUES**

**BANKRUPTCY FOR NON-BANKRUPTCY ATTORNEYS: NAVIGATING THE UNFAMILIAR WORLD OF BANKRUPTCY COURTS AND AVOIDING COMMON PITFALLS**

**ZEALOUS ADVOCACY AND COOPERATION ARE NOT MUTUALLY EXCLUSIVE CONCEPTS IN DISCOVERY**

**THE OBAMA ADMINISTRATION'S REFORM OF FEDERAL GRANTS AND COOPERATIVE AGREEMENTS**

**MARRIAGE EQUALITY AND NEW FRONTIERS IN EQUAL PROTECTION**

**OBAMA'S IMMIGRATION EXECUTIVE ACTIONS: WHAT IT WILL MEAN FOR EMPLOYERS**

**THE IMPACT OF LEGAL MARIJUANA USE ON THE WORKPLACE**

**MONEYBALL TAKES THE BENCH: A STATISTICAL ANALYSIS OF JUDGES AND COURTS**

**WHAT IS A PONZI: PROVING A PONZI AND THE IMPLICATIONS OF A PONZI FINDING**

**OVERVIEW OF FEDERAL CRIMINAL ANTITRUST ENFORCEMENTS AND TIPS ON EFFECTIVELY RESPONDING TO THE SAME**

**NEW DEVELOPMENTS IN FEDERAL INDIAN LAW: TRIBAL COURT JURISDICTION OVER NON-INDIANS AND VIOLENCE AGAINST WOMEN'S ACT IMPLEMENTATION**

**ANATOMY OF A PRO BONO CIVIL RIGHTS TRIAL AND APPEAL: WHY FBA LAWYERS SHOULD LITIGATE PRO BONO PRISONER RIGHTS CASES**



**ASSISTING RE-ENTRY TO OUR COMMUNITIES (ARC) PROGRAM IN THE DISTRICT OF UTAH**

**THE AFFORDABLE CARE ACT AND THE IMPACT OF HOBBY LOBBY AND KING**

**AVOIDING LEGAL MALPRACTICE CLAIMS**

**THE PROPOSED WATERS OF THE UNITED STATES RULE UNDER THE CLEAN WATER ACT**

**THE CARROT AND THE STICK: HOW TO EFFECTIVELY USE RULE 68 OFFERS AND  
WHEN TO REJECT THEM**

**PRACTICAL STRATEGIES FOR ADDRESSING THE EVOLVING PATENT-DAMAGES LANDSCAPE**

**THE RENEWED DEBATE OVER UNPUBLISHED APPELLATE OPINIONS**

**FEDERAL INTERNET LAW & CIVIL REMEDIES: HOW FEDERAL STATUTES IMPACT CIVIL DISPUTES  
INVOLVING ELECTRONIC MEDIA AND CYBERSPACE**

**LOOK FOR A FULL SCHEDULE OF THESE CLE SESSIONS IN THE NEXT  
ISSUE OF *THE FEDERAL LAWYER*!**

# 2015 FBA Awards

*Do you know of any award-worthy federal lawyers, outstanding FBA chapters, or exceptional FBA newsletters? Nominate them today for the 2015 Federal Bar Association awards!*

*Applications for all awards are available at [www.fedbar.org/awards-program](http://www.fedbar.org/awards-program). The deadline for receipt of all applications is June 2, 2015. Each of these awards will be presented at separate functions during the 2015 FBA Annual Meeting and Convention in Salt Lake City, Utah. Award recipients will be prominently recognized on [www.fedbar.org](http://www.fedbar.org) and in The Federal Lawyer immediately following the presentations in Salt Lake City.*

## **Earl W. Kintner Award for Distinguished Service**

The Earl W. Kintner Award for Distinguished Service is presented as a lifetime contribution award to an FBA member who has displayed long-term outstanding achievement, distinguished leadership, and participation in the activities of the association's chapters, sections, and divisions throughout the nation over a career of service. The prestigious award honors the late National President Earl W. Kintner, whose two terms (1956-57 and 1958-59) and continued service to the association and its affiliated organizations (president of the Foundation of the FBA and the Federal Bar Building Corporation) serve as the highest standard of dedicated service. The Kintner Award is not intended to recognize purely local contributions, no matter how worthy.

## **Hon. Sarah T. Hughes Civil Rights Award**

Named after the renowned federal district judge from Dallas, Texas, the Sarah T. Hughes Civil Rights Award was created to honor that man or woman who promotes the advancement of civil and human rights among us and who exemplifies Judge Hughes' spirit and legacy of devoted service and leadership in the cause of equality. Judge Hughes was a pioneer in the fight for civil rights, due process, equal protection, and the rights of women. The award will be presented each year to an attorney or judge whose career achievements have made a difference in advancing the causes that were important to Judge Hughes. Such work may include either ground-breaking achievement or a body of sustained and dedicated work in the area of civil rights, due process, and equal protection.

## **Ilene and Michael Shaw Public Service Award**

Made possible by the generous contributions of Ilene and Michael Shaw, the Federal Bar Association seeks each year to recognize the many public service programs sponsored by FBA chapters nationwide. Designed to assist and encourage members in providing service to their communities, the Ilene and Michael Shaw Public Service Award not only gives needed funds to continue such worthwhile efforts, but also provides seed money to plan and implement public service programs. A \$2,500 grant will be awarded to the recipient.

## **Ilene and Michael Shaw Younger Lawyer Public Service Grant**

These grants enable FBA chapters to provide service to the public through the development and implementation of public service projects and pro bono law related services. To encourage an increased and continued commitment to public service responsibility by young lawyers, these projects should be administered under the auspices of a chapter Younger Lawyer Committee. A \$2,500 grant will be awarded to the recipient. All FBA chapters are encouraged to apply. However, chapters without an existing Younger Lawyer Committee will be required to establish one to administer the grant.

## **Elaine R. "Boots" Fisher Award**

The Elaine R. "Boots" Fisher Award was established by the FBA Northern District of Ohio Chapter as a memorial to the outstanding and unselfish contributions made by "Boots" Fisher to improve the quality of life and opportunities for all persons. The award is intended to stimulate,

encourage, and recognize exemplary community, public, and charitable service by FBA members. A grant will be awarded to the recipient.

## **Robyn J. Spalter Outstanding Achievement Award**

Named in honor of the late National President Robyn J. Spalter, the award aims to encourage younger members of the federal bar to attain and uphold high standards of professional achievement by bestowing upon them public recognition for their important efforts. Robyn Spalter always focused on the importance of new and younger lawyers and the role that they would play in the future growth of the FBA.

## **Younger Federal Lawyer Awards**

The primary goal of this program is to encourage younger federal lawyers to attain high standards of professional achievement and to accord public recognition for outstanding performance. Any civilian or military attorney who is employed by the U.S. government shall be eligible to receive an award except for the following: No nominee will be considered if he or she has reached or will reach age thirty-six (36) before Sept. 1, 2015; no nominee will be considered if, at the time the award is presented, he or she has served with the government as an attorney less than three continuous years; no nominee will be considered for an award if the services constituting the primary basis for his or her nomination were required because of a political consideration.

## **Chapter Activity Awards**

The FBA recognizes the diligent work and accomplishments that outstanding FBA chapters have made throughout the year. Two levels of recognition will be awarded: (1) Presidential Excellence Awards and (2) Presidential Achievement Awards. Awards will be given to all chapters whose applications demonstrate that the chapter has fulfilled the established criteria. Additionally, Presidential Citation Awards may be given to those chapters that do not qualify for either of the Chapter Activity Awards categories, but have held an outstanding event or program in the last year.

One chapter from the Presidential Excellence level of recognition will be chosen as the Chapter of the Year. This award will be presented to the chapter that has most effectively demonstrated its support and promotion of the Federal Bar Association's objectives as reflected in chapter programs and membership related efforts. This chapter will receive special recognition at the Annual Meeting and Convention and in The Federal Lawyer.

## **Newsletter Recognition Awards**

These awards recognize the best newsletters published by chapters in each of the four chapter groups, as well as those published by sections, divisions, and committees to stimulate and encourage continued production of these valuable communication tools. Any FBA chapter, section, division, or committee that has published at least two issues of its newsletter in the previous year, is eligible to enter. Judging of the newsletters will focus on overall sustained quality of the publication, and will emphasize service to the membership. Judges will also consider content, creativity, and design.



## Auto insurance that makes the most of your connections.

Did you know that as a Federal Bar Association member, you could **save up to \$427.96 or more** on Liberty Mutual Auto Insurance?<sup>1</sup> You could save even more if you also insure your home with us. Plus, you'll receive quality coverage from a partner you can trust, with features and options that can include Accident Forgiveness<sup>2</sup>, New Car Replacement<sup>3</sup>, and Lifetime Repair Guarantee.<sup>4</sup>



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<sup>1</sup>Discounts are available where state laws and regulations allow, and may vary by state. Figure reflects average national savings for customers who switched to Liberty Mutual's group auto and home program. Based on data collected between 9/1/12 and 8/31/13. Individual premiums and savings will vary. To the extent permitted by law, applicants are individually underwritten; not all applicants may qualify. <sup>2</sup>For qualifying customers only. Subject to terms and conditions of Liberty Mutual's underwriting guidelines. Not available in CA and may vary by state. <sup>3</sup>Applies to a covered total loss. Your car must be less than one year old, have fewer than 15,000 miles and have had no previous owner. Does not apply to leased vehicles or motorcycles. Subject to applicable deductible. Not available in NC or WY. <sup>4</sup>Loss must be covered by your policy. Not available in AK. Coverage provided and underwritten by Liberty Mutual Insurance Company and its affiliates, 175 Berkeley Street, Boston, MA. ©2014 Liberty Mutual Insurance



# Work in Their Own Words: Administrative Law Judges



**Hon. Susan L. Biro**



**Hon. Beverly Bunting**



**Hon. Bart A. Gerstenblith**



**Hon. Peter B. Silvain**



## What was your practice background before you became an administrative law judge (ALJ)?

SLB

I was a partner in a law firm in Washington, D.C., specializing in civil litigation, including commercial, construction, medical malpractice, and contested adoption cases.

BB

There does not seem to be a “typical” background for an administrative patent judge (APJ) at the Patent Trial and Appeal Board (PTAB) of the U.S. Patent and Trademark Office (USPTO), other than we each have a technical background in addition to our legal qualifications. In my case, I was a design and development engineer for an automotive company during the day and law student at night. At the suggestion of a friend, I became a patent attorney and transitioned to the general counsel’s office as the company’s first female patent attorney. In order to better balance family demands, I went into private practice with an intellectual property (IP) boutique firm, doing patent preparation and prosecution. Later, seeking new challenges, I moved to a general litigation firm to gain more patent litigation and licensing experience.

BAG

My practice background was primarily in patent litigation, owing largely to my experience clerking for Judge Kent A. Jordan at the U.S. District Court for the District of Delaware and now-Chief Judge Sharon Prost at the U.S. Court of Appeals for the Federal Circuit following law school. I also had experience handling prosecution matters before the Patent and Trademark Office, an interest that was kindled by working as an intern during my last semester of law school for Administrative Patent Judge Eric Grimes at the Board of Patent Appeals and Interferences, as the board was known then.

PBS

After clerking, I worked for several years as a trial attorney both in private practice and as an assistant county attorney. Then I worked for eight years trying appellate cases for the U.S. Department of Labor before administrative appellate bodies and the U.S. Courts of Appeal.

## What appointment or selection process did you go through to become an ALJ?

SLB

All federal ALJs go through the same appointment/selection process. The U.S. Office of Personnel Management (OPM) periodically holds a competitive examination for the ALJ position. The examination is given in three parts: a qualifications section, a written examination, and an oral examination. OPM then creates a numerical list of qualified candidates for hire based upon the exam results. All the federal agencies fill their openings for ALJs from the list or by placing an advertisement and selecting a current ALJ serving at another agency. I applied and sat for the examination in about March 1993. As is the case with most ALJs, I was initially hired as an ALJ off the list by the Social Security Administration

(SSA) and assigned to its office in the Bronx, New York, in October 1994.<sup>[1]</sup> After two years with SSA, I applied for an open ALJ position with the Environmental Protection Agency (EPA) in Washington, D.C. I began as an ALJ with EPA in November 1996 and was selected by the EPA administrator to be EPA’s chief ALJ in February 1997.

BB

The opening of the first satellite office of the USPTO in July 2012 created the opportunity for me to become an APJ. The application itself involved responding to detailed questions concerning my patent prosecution and litigation experience as well as technical background. Additionally, I provided representative writing samples indicative of my analytical and communication skills. After being selected, as this is an appointed position, my candidacy ultimately had to be approved by the U.S. Secretary of Commerce.

BAG

I applied by submitting the requested application materials in response to a posting at [usajobs.gov](http://usajobs.gov). After receiving confirmation that my application met the minimum qualifications and was forwarded to the selecting official, I attended an in-person interview at the Patent and Trademark Office before Chief Administrative Patent Judge James D. Smith, now-Acting Deputy Chief Administrative Patent Judge Scott Boalick, and two of the section Lead Administrative Patent Judges. Thereafter, I was appointed by the Secretary of Commerce as an administrative patent judge.

PBS

The process took almost a year. Initially, candidates submit extensive information about their legal experience and its applicability to the position of being an administrative judge. After an initial review by the Office of Personnel Management (OPM), a portion of the candidates were selected to continue the process. This entailed a four-hour written examination, an extensive panel interview with senior judges and OPM management, and a security background investigation. OPM then provided the candidates with competitive scores and placed them on a register for agencies to interview for potential appointments.

## What kind of matters do you handle?

SLB

I adjudicate adversarial administrative cases arising under federal environment laws, including the Clean Water Act; Clean Air Act; Federal Insecticide, Fungicide, and Rodenticide Act; Resource Conservation and Recovery Act; Toxic Substances Control Act; and Emergency Planning and Community Right-to-Know Act, as well as selected cases brought before a variety of other administrative agencies, including cases brought before the National Oceanic and Atmospheric Administration involving the Marine Mammal Protection Act and the Magnuson-Stevens Fishery Conservation and Management Act, pursuant to a reimbursable interagency agreement.

**BB**

As an APJ, I handle both ex parte appeals and American Invents Act of 2011 (AIA) trial matters. In an ex parte appeal, the patent applicant is challenging the adverse final decision by the patent examiner as to the patentability of the particular patent application. I also consider AIA petitions challenging the patentability of issued patents and manage the AIA trial, if determined to institute trial, through to the final written decision. The review of both types of proceedings involves primarily the written record. The main difference, however, is that the ex parte appeal can be resolved in a matter of weeks once the panel begins its review and deliberation; whereas, once an AIA trial is instituted, resolution occurs, by statute, one year from date of institution.

**BAG**

I principally handle ex parte appeals and post-grant reviews, most commonly inter partes reviews and covered business method patent reviews.

**PBS**

In the Department of Labor's Office of Administrative Law Judges, we preside over formal adversarial hearings concerning many labor and employment related matters. We hear and decide cases arising from over 80 labor-related statutes and regulations. These include cases concerning coal miners' claims for black lung benefits, longshore workers' and defense contractors' compensation claims, whistleblower complaints (involving corporate fraud, nuclear, environmental, pipeline safety, aviation and commercial trucking statutes), civil rights, alien labor certifications and attestations, minimum-wage disputes, enforcement actions involving the working conditions of migrant farm laborers, discrimination and civil fraud claims in federal contracts and programs, disputes involving employee polygraph tests, ERISA recordkeeping requirements and standards of conduct in union elections.

### What is your approach to resolving matters?

**SLB**

I believe the litigants appearing before me would say that I take a very pragmatic approach to resolving matters. All parties in cases coming before EPA's Office of Administrative Law Judges are first offered an opportunity to conserve time and money and reach a mutually agreeable resolution, without proceeding to hearing, by participating in a strictly time-limited alternative dispute resolution (ADR) process with an ALJ serving as the neutral. If the ADR process fails, and the case is assigned to me for adjudication, I endeavor to move the case expeditiously towards hearing and thus resolution by maintaining tight case-management controls and setting clear and firm filing requirements and time deadlines in order to focus the hearing only on the critical matters actually in dispute. Parties are also encouraged to file a variety of prehearing motions and engage in prehearing procedures to maximize the amount and quality of the time spent at hearing on the factual issues that are actually in dispute.

**BB**

My goal is to get it right. Therefore, in considering both ex parte appeals and AIA trial matters, my personal strategy is to resist forming an opinion until I have thoroughly reviewed and considered the entire record. In certain situations, I let the opinion "rest" a short period of time and revisit using a fresh perspective.

**BAG**

My goal is to render decisions fairly and impartially. I strive to reach the "right" answer. I am also mindful of the relative burdens on the parties appearing before me. Many times, an issue can be decided based on whether a particular burden has or has not been met, especially when an issue may be a very close call.

**PBS**

After providing an adequate period of discovery, I hold a formal adversarial hearing. On most occasions I travel to a courthouse in the area where the parties and witnesses are located. These hearings can range from a few hours to several weeks, depending on the complexity of the issues and the number of witnesses. After reviewing a transcript of the proceedings, the parties submit post-hearing briefs. I then draft and issue a detailed written decision. The Office of Administrative Law Judges' mission is to render fair and equitable decisions under the governing law and the facts of each case.

### Do you have a staff, and, if so, how do you use them?

**SLB**

The Office of Administrative Law Judges is presently staffed by three full-time ALJs, one part-time retired annuitant ALJ, four staff attorneys, one office administrator, one docket clerk, and two legal assistants. The staff attorneys, judges, and other staff work collaboratively to efficiently process all the cases pending on all of the judges' dockets.

**BB**

APJs do not have staff personnel assigned directly. Rather, we interact closely with and rely on a team of professionals, including staff attorneys and paralegals, throughout the entire decision-making process. For example, the paralegals are responsible for docketing, processing, and mailing of our decisions.

**BAG**

Most Administrative Patent Judges do not have a personal staff; rather, we share a team of administrative professionals and paralegal support staff. The administrative and paralegal staff perform very important and necessary functions in supporting the work of the Administrative Patent Judges. The administrative staff working in information technology and human resources keep our workstations operational, manage hearings, and perform a lot of work "behind the scene." Our paralegals review nearly all filings and our draft decisions, handle our correspondence with the parties, and in some instances, assemble the relevant documents in a given case.

**PBS**

The Judges have legal technicians and law clerks (who become attorney advisors after passing the bar) to assist in handling our cases. They are essential to the process, and we are very fortunate to have experienced and dedicated staff.

### Describe a typical week at work for you.

**SLB**

There are two typical types of workweeks. If I am in hearing, usually I fly to the hearing locale on Sunday or Monday, continuing to prepare for the hearing along the way. The hearing takes place over the following days, day after day, often from very early in the morning until the courthouse closes (and sometimes ever after that), in an effort to most efficiently complete the hearing within the time allocated to it and save both government and party resources. If I am not in hearing, I arrive in the office at 6:30 a.m. and work usually until 5 p.m. or later drafting orders on motions and decisions after hearing, and otherwise managing the office, including its staffing, budgeting, cases, and intra-agency and interagency relations.

**BB**

Currently, my docket includes primarily AIA trial matters, as well as some ex parte appeals. With over 25,000 docketed ex parte appeals and averaging over 100 AIA petitions filed each month, there is no shortage of work! In fact, the PTAB's AIA trial docket has quickly become one the busiest patent courts in the United States. We review ex parte appeals and AIA trial matters generally as a three-judge panel. Although I am located in the Detroit satellite office of the USPTO, paneling is not geographic specific, enabling interaction with colleagues across the country. In an ex parte appeal, our review is based on the written record, and the appellant can request an oral hearing before the panel. Because an AIA trial matter is more akin to district court litigation and involves limited discovery, the panel has more interaction with the petitioner and patent owner. For example, the panel considers motions and otherwise resolves disputes between the parties, usually through conference calls and written orders. In addition, the APJs meet periodically via webinars to facilitate the exchange of ideas, share experiences, and discuss recent developments in patent law.

**BAG**

I now telework 100 percent of the time, so unless there is a hearing or in-person meeting at the office, I usually work from home. All of our files are electronic, which makes telework incredibly convenient and efficient, saving me two-plus hours of a commute each day. A typical week involves me reviewing anywhere from two to three ex parte appeals, assigned to me as the primary author, three to five ex parte appeals on which I am paneled, and one to four post-grant review filings, including petitions, motions, or other issues that arise.

## U.S. Federal Agencies Utilizing Administrative Law Judges

Coast Guard  
 Commodity Futures Trading Commission  
 Department of Agriculture  
 Department of Health and Human Services/  
 Department Appeals Board  
 Department of Health and Human Services/  
 Office of Medicare Hearings and Appeals  
 Department of Housing and Urban Development  
 Department of the Interior  
 Department of Justice/Executive Office for  
 Immigration Review  
 Department of Labor  
 Department of Transportation  
 Department of Veterans Affairs  
 Drug Enforcement Administration  
 Environmental Protection Agency  
 Equal Employment Opportunity Commission  
 Federal Aviation Administration  
 Federal Communications Commission  
 Federal Energy Regulatory Commission  
 Federal Labor Relations Authority  
 Federal Maritime Commission  
 Federal Mine Safety and Health Review  
 Commission  
 Federal Trade Commission  
 Food and Drug Administration  
 International Trade Commission  
 Merit Systems Protection Board  
 National Labor Relations Board  
 National Transportation Safety Board  
 Nuclear Regulatory Commission  
 Occupational Safety and Health Review  
 Commission  
 Office of Financial Institution Adjudication  
 Patent and Trademark Office  
 Postal Service  
 Securities and Exchange Commission  
 Small Business Administration  
 Social Security Administration

Other federal agencies may request the U.S. Office of Personnel Management to lend them Administrative Law Judges from other federal agencies for a period of up to six months.

Source: [www.aalj.org/agencies-employing-administrative-law-judges](http://www.aalj.org/agencies-employing-administrative-law-judges)

**PBS** Most weeks involve writing decisions in cases which have been tried, issuing orders resolving parties' disputes, holding telephone status conferences with parties, preparing for hearings, and conducting hearings.

### What was the toughest matter you had to resolve?

**SLB** Frankly, I always view the decision I am currently drafting as my toughest. Currently, most of my EPA cases involve very complex areas of science and novel issues of law and will potentially affect practices across a whole industry and/or the relinquishment of hundreds of thousands of dollars or more in civil administrative penalties. They are aggressively and effectively contested by very experienced and competent attorneys for both sides. As such, in order to reach a decision, I must go through a labyrinthine process of evaluating all the evidence, both documentary and testimonial, and researching all the applicable law, including the often elaborate regulatory schemes and history. Once I reach a conclusion, I must then draft a written decision which will clearly, simply, and logically explain the basis for my conclusion, incorporating therein all the relevant evidence, law, and arguments offered by the parties. These decisions can be 100 pages or more in length.

**BB** In patent law, it's all about the claim. The toughest case I had to resolve involved an AIA petition, and the decision whether to institute trial hinged on how we interpreted a particular claim limitation. In the end, however, it was the ambiguity in the patent itself surrounding the particular claim limitation that influenced our construction—which turned out to be different than either party's proposed construction.

**BAG** After working on over 300 ex parte appeals and numerous post-grant review proceedings, the toughest matters are typically those where the arguments on each side are very poor. In such circumstances, it can take a lot of work just trying to figure out what is being argued before I can even think about how a case should be decided. I believe many of my fellow administrative patent judges feel the same way.

**PBS** Many of the cases we hear involve inherently complex medical, financial, or scientific evidence. Some of the financially related whistleblower cases (i.e., Sarbanes-Oxley and Dodd-Frank matters) present particularly complex factual scenarios which must be unraveled in making a decision. These often present a significant challenge.

### With respect to attorneys appearing before you, what approaches have you seen that work well?

**SLB** I have great respect for attorneys who know their case, by which I mean they know what they need to prove in order to prevail and what evidence they intend to use to prove it. They thoughtfully utilize the pre-hearing process to narrow the facts and issues in dispute and make the most of the limited time available at hearing. Attorneys who know their case are usually confident and have no difficulty acting courteously and professionally towards their opponent and the tribunal.

**BB** In both ex parte appeals and AIA trial matters, I tend to favor concise, logical arguments directed to the heart of the dispute. Recognizing that AIA trial matters usually involve long-standing disputes directed to the same patent in other proceedings, e.g., district court or International Trade Commission, I appreciate attorneys that are respectful of our time and cooperate with opposing counsel to resolve differences without seeking panel involvement.

**BAG** Whether referring to attorneys appearing in person for a hearing or on paper in briefing, the best approach is always to put forth your best arguments and leave out the rest. Clearly explain the position you are advocating and why it should prevail over the other positions put forth in a case. In other words, don't lead us to the edge without telling us how to get over it.

**PBS** Professionalism is paramount. This includes striving to be professional in the tenor of conversations with opposing counsel, the thoroughness and accuracy of discovery responses, and conduct at the time of trial. The best attorneys are well-prepared, courteous, and well-versed in the rules of practice and procedure.

### What approaches do not work well?

**SLB** Over the years I have found the attorneys most unsuccessful on behalf of their clients are those who are bombastic and who, in an apparent effort to show off in front of their clients, are loud, condescending, and waste time on frivolous motions, objections, and extended arguments.

**BB** In both ex parte appeals and AIA trial matters, offering numerous arguments just for the sake of argument tends to obfuscate the most persuasive (i.e., winning) argument.

**BAG** Exaggerating the strength of a position does not work well. I, along with each of my colleagues, will read the document cited and figure out, rather quickly, whether a paraphrase accurately reflects the facts. Exaggerating the strength of a position results in loss of credibility, and [that] is often difficult to regain.

**PBS** I am not impressed by lackluster preparation, overly aggressive examination of witnesses, and disorganized or incomplete evidence. None of these approaches present a case in its best light.

#### What other advice would you give to practitioners?

**SLB** Periodically, I go and speak at bar functions, open to both government and private practitioners, and I have a top-10 list of things to remember to be successful litigating before EPA ALJs. Among the most important items on the list would be: (1) to remember that EPA administrative litigation is very similar to a federal district court bench proceeding; it is not some informal process at which you can sloppily improvise or attempt to procrastinate and be successful; and (2) be creative; think how best to use each step in the process to bring you forward towards your goal.

**BB** My advice to practitioners is a reminder that the role of APJ is not one of advocate; arguments should be articulated clearly and well-supported by the facts and evidence of record. In AIA trial matters, the rules provide for conference calls to expeditiously raise and resolve issues; practitioners shouldn't wait until the last minute to request a conference call and also should be prepared to address the subject matter of the call.

**BAG** Zealously advocate for your clients, but know when to concede a point. You don't have to win every issue to win a case. In the context of post-grant review proceedings, understand that when you file a petition for review, your best case and essentially all of your evidence needs to be there and needs to clearly explain how the disclosures in a reference teach the claim language recited. Even though I and my colleagues have advanced technical training, we are not inclined to fill in the gaps for you. You need to make your case as best as possible. If not, the outcome is all too predictable.

**PBS** While attorneys may strongly disagree with an opposing counsel's assertions, they should strive to maintain their composure. Nothing is lost by maintaining calm, assertive civility. In fact, it is more likely that the attorney will gain additional respect from their client, the judge, and perhaps even from the opposing counsel. ©



# SAVE THE DATE

## OCTOBER 20, 2015



# SECURITIES LAW SEMINAR



# NEW YORK, NY



## More information to come summer 2015.



# An Introduction to Administrative Patent Judges at the Patent Trial and Appeal Board

By Michael Wagner

The Patent Trial and Appeal Board (PTAB) is a relatively new entity. Created on Sept. 16, 2012, as part of the America Invents Act (AIA), the PTAB replaced its predecessor, the Board of Patent Appeals and Interferences. Due in part to the additional procedures created by the America Invents Act, the PTAB handles a broad spectrum of patent issues at the United States Patent and Trademark Office (USPTO). The PTAB handles written appeals from patent applicants challenging the decisions of patent examiners, appeals of reexamination proceedings, derivation proceedings, inter partes review proceedings, and post-grant review proceedings.<sup>1</sup>

The PTAB is currently made up of more than 225 administrative law judges working in the USPTO headquarters in Alexandria, Virginia, and in the newly established satellite offices in Denver, Detroit, Dallas, and Silicon Valley. The USPTO is rumored to be looking to appoint an additional 60 PTAB judges by the end of the 2015 fiscal year. This trend outpaces USPTO Deputy Director Michele Lee's stated goal of 200 judges by midyear 2014.<sup>2</sup> As a comparison, in 2010, the board was made up of only 80 judges and had increased to 160 judges by the end of 2012.<sup>3</sup>

The chief judge of the PTAB is James D. Smith. Under the chief judge are two vice chief judges that each manage separate divisions. Within each division are more than 10 separate sections—each having a lead judge and several other judges.<sup>4</sup>

The PTAB judges are spread throughout the country in the newly established USPTO office locations. Currently, the majority of the judges are in the Alexandria office, with 175 judges. The Menlo Park, California, office currently has 20 judges, Denver and Dallas each have 12 judges, and Detroit has nine judges. While there are judges located in each of the regional USPTO offices, only certain proceedings are allowed to take place outside of the Alexandria office. At this time, ex parte appeals hearings are

ongoing in the Denver office, but all trial hearings are held in Alexandria. Moving forward, trial hearings may also be scheduled in the regional offices.

To prevent the judges in regional offices from having to constantly travel to and from Alexandria, those judges commonly participate on panels via video. The regional offices, along with the Alexandria office, have been outfitted with video conferencing equipment to allow for the judges to hear cases held in Alexandria.

The respective backgrounds of the judges also span a large range of patent experience. The USPTO evaluates potential judicial applicants on both objective criteria and subjective criteria, with a preference for candidates with 10 to 15 years patent prosecution and/or patent litigation experience.<sup>5</sup> Their backgrounds include private practice at both large and small firms, government practice from within the USPTO itself and from other federal agencies, and in-house counsel at large and small corporations. The judges' areas of practice and expertise are also varied, including patent prosecution, litigation, and licensing. The respective backgrounds of the judges also span a large range of patent and technical experience. With this broad amount of experience, the PTAB provides a well-rounded perspective and expertise in the area of patent law. If an incoming judge, however, feels that he or she would benefit from additional training, the PTAB provides additional optional training for its incoming judges to ease the transition into working towards the PTAB's unique mission of administratively adjudicating patent issues, including training on how to use all the new video conferencing technology that has been integrated into the offices.<sup>6</sup>

Due to the varying backgrounds of the judges and the varying technology areas that are seen by the PTAB, the PTAB has particular procedures for assigning cases to the judges and determining the appropriate judges for panels. In general, the chief judge

designates judges for panels to decide ex parte appeals, ex parte reexaminations, and inter partes reviews based on the judges' legal and technical expertise. The chief judge also designates a judge or judges to hear interferences. The judges are not allowed to change panels without authority of the chief judge or vice chief judge. When assigned to a panel for ex parte appeals, the judges are also assigned a particular role, labeled "Number 1, Number 2, and Number 3."<sup>7</sup>

The PTAB judges have been keeping busy attempting to keep up with the rigorous requirements of the newly established AIA proceedings, such as inter partes reviews (IPRs), covered business method reviews (CBMRs), post-grant reviews (PGRs), and derivation proceedings. Since those proceedings became available in 2012, through Jan. 15, 2015, there have been 2,345 IPR filings, 285 CBMR filings, three PGR filings, and eight derivation filings. So far, the PTAB has written a combined 1,531 decisions on whether the proceedings should be instituted, resulting in 1,083 trials being instituted. Of those 1,083 instituted trials, 398 have ended in settlement, 57 have resulted in adverse judgments without a written decision, and 236 have resulted in final written decisions.<sup>8</sup> Many of those final decisions have now been appealed to the Federal Circuit, which just issued its first two decisions regarding post-AIA proceedings.<sup>9</sup> Both decisions affirmed the findings of PTAB.

In addition to their new responsibilities created by the AIA, the PTAB judges also handle ex parte appeals, ex parte reexamination appeals, and a few remaining inter partes reexamination and interference proceedings. At the end of 2014, the PTAB had a staggering 25,370 ex parte appeals still awaiting decision. Of those appeals, 14,508 have been pending for more than 14 months. Adding to the workload, the PTAB also has 44 outstanding ex parte reexamination appeals, 126 inter partes reexamination appeals, and 28 interference proceedings.<sup>10</sup>

While obtaining permission to interview a PTAB judge can be difficult, prior interviews shed light on the judges' interests and concerns.<sup>11</sup> The judges generally share a concern about the growing workload created by the AIA on top of the already existing backlog but at the same time believe that the increasing number of judges has substantially alleviated those concerns. The judges also find many of the cases challenging—particularly with the changes in the law and quickly advancing technology. The judges also suggest that those challenges are what make the job interesting and enjoyable. From these public comments, it appears that the PTAB judges enjoy their work and take pride in what they do.

Understanding the PTAB and the judges making the decisions is important for anyone practicing patent prosecution or patent litigation. As more and more cases are filed before the PTAB—including on many patents concurrently asserted in district court litigation—the PTAB and its decisions will likely have an even greater importance. ©



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## Endnotes

<sup>1</sup>35 U.S.C. § 6(b).

<sup>2</sup>Jennifer Bush, Administrative Patent Judges: Not Your Typical Federal Judge (July 24, 2014), [www.mondaq.com/unitedstates/x/329902/Patent/Administrative+Patent+Judges+Not+Your+Typical+Federal+Judge](http://www.mondaq.com/unitedstates/x/329902/Patent/Administrative+Patent+Judges+Not+Your+Typical+Federal+Judge).

<sup>3</sup>Patent Public Advisory Committee Meeting Patent Trial and Appeal Board Update, USPTO (Dec. 13, 2012), [www.uspto.gov/sites/default/files/about/advisory/ppac/121312-04-ptab-update.pdf](http://www.uspto.gov/sites/default/files/about/advisory/ppac/121312-04-ptab-update.pdf).

<sup>4</sup>About the PTAB, U.S. Patent and Trademark Office, [www.uspto.gov/ip/boards/bpai/ptab\\_about.jsp](http://www.uspto.gov/ip/boards/bpai/ptab_about.jsp) (last visited Jan. 18, 2015).

<sup>5</sup>Jennifer Bush, Administrative Patent Judges: Not Your Typical Federal Judge (July 24, 2014), [www.mondaq.com/unitedstates/x/329902/Patent/Administrative+Patent+Judges+Not+Your+Typical+Federal+Judge](http://www.mondaq.com/unitedstates/x/329902/Patent/Administrative+Patent+Judges+Not+Your+Typical+Federal+Judge).

<sup>6</sup>Denise DeFranco, Profiles in IP Law: An Interview with Judge James Smith, Chief Administrative Patent Judge, U.S. Patent and Trademark Office, *LANDSLIDE* Vol. 5 No. 2 (Nov. 2012), available at [www.americanbar.org/publications/landslide/2012\\_13/november\\_december/an\\_interview\\_with\\_judge\\_james\\_smith\\_chief\\_administrative\\_patent\\_judge\\_united\\_states\\_patent\\_and\\_trademark\\_office.html](http://www.americanbar.org/publications/landslide/2012_13/november_december/an_interview_with_judge_james_smith_chief_administrative_patent_judge_united_states_patent_and_trademark_office.html).

<sup>7</sup>See PTAB Standard Operating Procedure 1 (Rev. 13), available at [www.uspto.gov/sites/default/files/documents/sop1.pdf](http://www.uspto.gov/sites/default/files/documents/sop1.pdf).

<sup>8</sup>AIA Progress, U.S. Patent and Trademark Office (Jan. 15, 2015), [www.uspto.gov/ip/boards/bpai/stats/011515\\_aia\\_stat\\_graph.pdf](http://www.uspto.gov/ip/boards/bpai/stats/011515_aia_stat_graph.pdf); Patent Trial and Appeal Board AIA Progress, United States Patent and Trademark Office (Jan. 15, 2015), [www.uspto.gov/ip/boards/bpai/stats/aia\\_statistics\\_01-15-2015.pdf](http://www.uspto.gov/ip/boards/bpai/stats/aia_statistics_01-15-2015.pdf).

<sup>9</sup>*In re Cuozzo Speed Techs. LLC*, Case No. 2014-1301 (Fed. Cir., Feb. 4, 2015); *Softview LLC v. Kyocera Corp.*, Case No. 2014-1599, -1600 (Feb. 9, 2015) (per curiam affirmation).

<sup>10</sup>December 2014 Patent Trial and Appeal Board (PTAB) Data, Data Visualization Center, USPTO (December 2014), [www.uspto.gov/dashboards/patenttrialandappealboard/main.dashxml](http://www.uspto.gov/dashboards/patenttrialandappealboard/main.dashxml).

<sup>11</sup>Gene Quinn, Exclusive: Chief Judge James Smith and Vice-Chief James Moore, *IPWATCHDOG* (Jan. 1, 2013), [www.ipwatchdog.com/2013/01/01/exclusive-chief-judge-james-smith-and-vice-chief-james-moore/id=32132/](http://www.ipwatchdog.com/2013/01/01/exclusive-chief-judge-james-smith-and-vice-chief-james-moore/id=32132/); Denise DeFranco, Profiles in IP Law: An Interview with Judge James Smith, Chief Administrative Patent Judge, U.S. Patent and Trademark Office, *LANDSLIDE* Vol. 5 No. 2 (Nov. 2012), available at [www.americanbar.org/publications/landslide/2012\\_13/november\\_december/an\\_interview\\_with\\_judge\\_james\\_smithchief\\_administrative\\_patent\\_judge\\_united\\_states\\_patent\\_and\\_trademark\\_office.html](http://www.americanbar.org/publications/landslide/2012_13/november_december/an_interview_with_judge_james_smithchief_administrative_patent_judge_united_states_patent_and_trademark_office.html); Jennifer Bush, Administrative Patent Judges: Not Your Typical Federal Judge, *MONDAQ* (July 24, 2014), [www.mondaq.com/unitedstates/x/329902/Patent/Administrative+Patent+Judges+Not+Your+Typical+Federal+Judge](http://www.mondaq.com/unitedstates/x/329902/Patent/Administrative+Patent+Judges+Not+Your+Typical+Federal+Judge); A Day in the Life of An Administrative Patent Judge, USPTO, [www.uspto.gov/ip/boards/bpai/a\\_day\\_in\\_the\\_life\\_of\\_an\\_apj.pdf](http://www.uspto.gov/ip/boards/bpai/a_day_in_the_life_of_an_apj.pdf) (last visited Feb. 12, 2015).





# Recognizing the 50th Anniversary of the Voting Rights Act

By James D. Wascher

Too many of us probably take our right to vote for granted. We never should, because so many Americans have struggled so hard and sacrificed so much to win that right. In the earliest days of our republic, the franchise was largely limited to free, white, male property owners. Property ownership requirements gradually fell by the wayside. Women gained the ballot when the 19th Amendment to the Constitution was ratified in 1920.<sup>1</sup> But racial barriers to voting remained rigid, especially in the deep South, even though the 15th Amendment to the Constitution has provided since 1870 that “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”

The Voting Rights Act of 1965<sup>2</sup> changed all of that, sweeping aside state and local laws and procedures that had disenfranchised hundreds of thousands of African-Americans, primarily in the South<sup>3</sup>, and permanently changing the landscape of American politics. Historians have rightly called the Act the most effective civil rights legislation ever adopted.<sup>4</sup> It is essential for us to remember why such a law was even necessary just 50 years ago.

The 15th Amendment was one of three post-Civil War Reconstruction amendments to the Constitution that together abolished slavery and were intended to ensure that African-Americans enjoyed the full benefits of citizenship, including the right to vote. When Congress passed the 15th Amendment and sent it to the states for ratification in February 1869, only eight out of 26 northern and border states permitted blacks to vote.<sup>5</sup> Ironically, all 11 of the former Confederate states actually allowed blacks to vote at that time—but only because the Reconstruction Act of 1867 required these states to do so as a condition of being

readmitted to the Union.<sup>6</sup> In fact, the readmission of Georgia, Texas, Virginia, and Mississippi later was conditioned on their ratification of the 15th Amendment itself.<sup>7</sup> The amendment would not have been adopted without the approval of those states.

For a brief period then, African-Americans enjoyed significant political power in the South. About 735,000 blacks—or more than 90 percent of adult black males—registered to vote in the South, compared with about 635,000 whites.<sup>8</sup> Hundreds of African-Americans were elected to state legislatures throughout the South.<sup>9</sup> The Mississippi state legislature elected two black men, Hiram R. Revels and Blanche K. Bruce, to the U.S. Senate, where Revels filled the vacancy left by Jefferson Davis when he resigned from the Senate to become president of the Confederate States of America.<sup>10</sup> Twenty other African-Americans were elected to the U.S. House of Representatives, and still others won statewide office in positions such as lieutenant governor, secretary of state, and supreme court justice.<sup>11</sup>

The deadlocked presidential election of 1876 proved to be the undoing of African-American political rights in the South. To obtain the disputed electoral votes of Florida, Louisiana, and South Carolina, allies of Republican candidate Rutherford B. Hayes apparently agreed to the withdrawal of federal troops from the South, effectively ending the Reconstruction era.<sup>12</sup> In short succession, most blacks were excluded from the political process in the South by an array of electoral changes, such as:

- At-large elections in areas where whites held a majority.
- Annexation of white neighborhoods into communities that had African-American majorities, or disconnection or retrocession of black neighborhoods from such communities.
- “White primaries” that excluded blacks from voting in the only election that really mattered (the Democratic primary).
- Consolidation of polling places to make them more cumbersome to get to.
- Failure to open polling places in black precincts, closing them early, or moving them without notice during election day
- Gerrymandering of legislative districts.<sup>13</sup>

Less subtle methods, including intimidation, violence, and

fraud, were also utilized to suppress African-American electoral participation.<sup>14</sup>

Members of Congress made one last attempt to revive enforcement of the 15th Amendment in 1890, when Massachusetts Congressman Henry Cabot Lodge<sup>15</sup> proposed legislation providing for federal boards of canvassers, to be appointed by the appropriate federal circuit court, that “would monitor elections, inspect registration lists, challenge doubtful voters, and, most important, certify the final count.”<sup>16</sup> The Lodge Federal Elections Bill passed the House of Representatives 155-149 on a virtual party-line vote (with all Democrats against and all but two Republicans for), but it died after a massive filibuster in the Senate. It would be another 67 years before Congress passed any voting-rights legislation.

Southern political leaders were not satisfied with reducing the size of the black electorate, and they sought to eliminate it entirely soon after the Lodge bill was pigeonholed. Between 1890 and 1908, states across the South adopted new constitutions, amended their constitutions, or adopted legislation designed to ensure that no African-Americans would be able to register to vote. These measures included lengthy state, county, city, and even precinct residency requirements; literacy tests or “understanding clauses” that would require an applicant to interpret a clause of the state constitution to the satisfaction of a local registrar; property ownership requirements; poll taxes; and “grandfather clauses,” which enfranchised only those whose father or grandfather had been eligible to vote in 1867—that is, whites only.<sup>17</sup> All of these constitutional and statutory provisions were race-neutral on their face, but their intent was bluntly explained by the president of the 1898 Louisiana state constitutional convention: “What care I whether it be more or less ridiculous or not? Doesn’t it meet the case? Doesn’t it let the white man vote, and doesn’t it stop the negro from voting, and isn’t that what we came here for?”<sup>18</sup> These measures were extraordinarily successful in disenfranchising African-Americans in the South. For example, black voter registration in Louisiana declined from 130,344 in 1897 to 5,320 just three years later.<sup>19</sup>

In the years following the wholesale disenfranchisement of African-Americans in the South, the battle to regain the right to vote was fought mainly in the courts, with varying degrees of success, by the National Association for the Advancement of Colored People (NAACP) under the leadership of future Supreme Court Justice Thurgood Marshall. The NAACP’s greatest success in this area came in 1944, when the Supreme Court ruled that the white primary was unconstitutional and opened the way for African-Americans to vote in Democratic primary elections in the South.<sup>20</sup> Black voter registration in the South increased significantly after this decision, rising from 3% in 1940 to 29.4% by 1962.<sup>21</sup>

Beginning in 1962, other civil rights organizations took a different, more direct approach, launching voter-registration drives throughout the South, where they were particularly successful in urban areas. But the Student Nonviolent Coordinating Committee (SNCC) and the Congress of Racial Equality (CORE) also ventured into more rural areas where governmental and private resistance was especially fierce—and often violent.<sup>22</sup> SNCC’s Bernard and Colia Lafayette went to Selma, Alabama, to open a field office in October 1962 to assist local activists in their efforts to register other blacks to vote.<sup>23</sup> At the time, only 156 of the 15,000 voting-age African-Americans “were registered in Selma’s Dallas County, and only seventy-five even tried to register during the entire

decade since 1952—all rejected, including twenty-eight college graduates.”<sup>24</sup> The SNCC-supported voter-registration campaign, including marches, demonstrations, mass meetings, sit-ins, and “freedom schools” to teach prospective registrants the skills necessary to satisfy Alabama’s onerous registration requirements, continued in Dallas County through 1963 and 1964. Those involved were subjected to beatings—Bernard Lafayette was pistol-whipped—arrests, and other forms of harassment.<sup>25</sup>

In the meantime, acting under authority granted by the Civil Rights Act of 1957,<sup>26</sup> attorneys from the Department of Justice fanned out across the South to identify jurisdictions where African-Americans had been disenfranchised in violation of the 15th Amendment and the 1957 Act. Among the first of the 61 voting-rights lawsuits filed by the Justice Department between January 1961 and June 1964 was the April 13, 1961, action seeking to enjoin the Dallas County Board of Registrars from discriminating against black applicants. It took 13 months for the case to come to trial, after which U.S. District Court Judge Daniel H. Thomas found that there was no basis for an injunction against the current board of registrars, since the violations had been committed by a prior board. The U.S. Court of Appeals for the Fifth Circuit reversed Judge Thomas on Sept. 30, 1963, and directed him to enjoin the discriminatory practices in Dallas County. Judge Thomas obliged, issuing a permanent injunction on Nov. 1, 1963. More than one year later, on Jan. 23, 1965, Judge Thomas issued a temporary restraining order prohibiting local officials, including Dallas County Sheriff Jim Clark, from interfering with registration efforts. On Feb. 4, 1965, Judge Thomas ordered the Board of Registrars to speed up the process—it was accepting only 100 applications on each of the two days per month that it was open—and set a July 1, 1965, deadline for registering all those who were eligible and wished to enroll.<sup>27</sup> Then-Assistant Attorney General for Civil Rights John Doar<sup>28</sup> wrote that “the litigation method of correction has been tried here [in Dallas County] harder than anywhere else in the South.”<sup>29</sup>

Despite the heroic efforts of local civil rights leaders in Selma, SNCC and CORE representatives and Justice Department lawyers, only 179 new black voters had been added to Dallas County’s rolls by December 1964 for a total of 335, or just about two percent of those eligible.<sup>30</sup> Local leaders then appealed to Dr. Martin Luther King Jr. and the Southern Christian Leadership Conference (SCLC) to assist them in their voting-rights campaign. King arrived in Selma on Jan. 2, 1965, and declared that “we will seek to arouse the federal government by marching by the thousands by the places of registration” and, if necessary, mounting another massive march on Washington, D.C., to “appeal to the conscience of the Congress” for voting-rights legislation.<sup>31</sup> The ensuing Alabama Project included mass meetings, marches to the courthouse in Selma, and boycotts of white-owned businesses. Sheriff Clark personally directed the official response to these protests, ordering the arrest of so many men, women, and children, including King himself, that King would write that “there are more Negroes in jail with me than on the voting rolls” in Dallas County. Clark himself punched an SCLC minister in the mouth and manhandled two female protesters, all within view of television news cameras.<sup>32</sup> Alabama state troopers attacked a night-time march in nearby Marion, after which a trooper shot Jimmie Lee Jackson as he was attempting to protect his mother from other troopers. Jackson

died eight days later, and his death prompted plans for a protest march from Selma 54 miles to the state capital in Montgomery.<sup>33</sup>

On Sunday, March 7, 1965, 600 marchers—both black and white—set out from Brown Chapel in Selma, led by SNCC Chairman John Lewis, now a congressman from Georgia, and Rev. Hosea Williams of SCLC. Just outside of town, after crossing the Edmund Pettus Bridge over the Alabama River, the march was stopped by a line of Alabama state troopers and a mounted civilian “posse” organized by Clark. After ordering the marchers to disperse, the troopers attacked with nightsticks and tear gas. The posse men followed, using clubs, whips, and barbed truncheons. In the chaos, Lewis’s skull was fractured and 55 other marchers were injured badly enough to be sent to the hospital. An ABC television news crew rushed its film of the “Bloody Sunday” carnage to New York City, and, that night, ABC interrupted the premiere of *Judgment at Nuremberg*, a movie about the trial of Nazis accused of genocide, to show 15 minutes of footage depicting the attack, provoking outrage across the country.<sup>34</sup> The aborted march “proved to be the defining moment of the campaign, and in some ways the defining moment of the civil rights movement as a whole.”<sup>35</sup>

Just eight days later, on March 15, 1965, President Lyndon B. Johnson appeared before a joint session of Congress and a national television audience to present a voting-rights bill of unprecedented scope. Johnson affirmed that “[t]here is no constitutional issue here. The command of the Constitution is plain. There is no moral issue. It is wrong—deadly wrong—to deny any of your fellow Americans the right to vote in this country. There is no issue of states’ rights or national rights. There is only the struggle for human rights.” He declared that “[w]hat happened in Selma is part of a far larger movement which reaches into every section and state of America. It is the effort of American Negroes to secure for themselves the full blessings of American life. Their cause must be our cause too. Because it is not just Negroes, but really it is all of us, who must overcome the crippling legacy of bigotry and injustice.” And then came a thunderbolt, echoing the ubiquitous civil rights anthem of the era: “And we *shall* overcome.”<sup>36</sup>

It had been just after his landslide election victory over Sen. Barry M. Goldwater in November 1964 that Johnson had directed Attorney General Nicholas Katzenbach “to write the goddamned toughest voting rights act that you can devise.”<sup>37</sup> Katzenbach immediately assigned a team of Justice Department attorneys, led by Harold H. Greene of the Civil Rights Division and Sol Linderbaum of the Office of Legal Counsel, to draft proposed legislation to end African-American disenfranchisement, both with and without a constitutional amendment.<sup>38</sup> It was their bill—later laboriously tweaked by Senate Minority Leader Everett M. Dirksen and Majority Leader Mike Mansfield—that Johnson presented to the Congress. At about the same time that he gave Katzenbach his orders, however, Johnson had warned King that he did not think he could get a voting-rights bill through the Congress in 1965 without risking the loss of Southern congressional support for his Great Society programs.<sup>39</sup>

But the nationwide furor over Bloody Sunday gave Johnson both the resolve and the public support necessary to win both speedy and overwhelming approval of the Voting Rights Act. The House Judiciary Committee began hearings on the bill on March 18, 1965, just one day after the president formally presented the

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legislation to the Congress<sup>40</sup>, and Senate hearings followed just five days later. The Senate passed the Voting Rights Act by a vote of 77-19 on May 28, 1965. The House adopted its own version on July 9, 1965, by a vote of 333-85, with strong bipartisan support in both chambers. After a conference committee resolved the differences between the two bills and each house approved the conference report, Johnson signed the legislation on Aug. 6, 1965. At his farewell press conference as president in January 1969, Johnson said that the Voting Rights Act was his greatest accomplishment. “I think it is going to make it possible for this Government to endure, not half slave and half free, but united.”<sup>41</sup>

The key provisions of the Voting Rights Act included:

- Section 2, which prohibited any state or political subdivision from enacting or enforcing any voting qualifications or prerequisites to voting, or procedures, standards, or practices that “deny or abridge the right to vote on account of race or color.”
- Section 4, which created an “automatic trigger” for the review of new voting procedures, standards, or practices in any state or political subdivision that had used a discriminatory voting “test or device” in 1964 and where less than 50 percent of age-eligible persons were registered to vote or less than 50 percent of such persons actually voted in the 1964 presidential election. The automatic trigger originally applied to the states of Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, and Virginia and to portions of Arizona, Hawaii, Idaho, and North Carolina. Section 4 also suspended existing tests and devices in the covered jurisdictions.
- Section 5, which required a state or political subdivision that was subject to the automatic trigger to submit any new voting qualification, prerequisite to voting, or standard, practice, or procedure for prior approval by the Justice Department or a three-judge federal district court panel in the District of Columbia. This practice became known as pre-clearance.
- Sections 6, 7, and 8, which authorized the attorney general to send federal voting “examiners” and “observers” to ensure that legally qualified persons could register to vote and then vote in all elections.

Although the so-called “special provisions” of the Voting Rights Act, including sections 4 and 5, were originally set to expire after five years, Congress extended them for another five

years in 1970, seven more years in 1975, an additional 25 years in 1982, and, most recently, for another 25 years in 2006. The 1970 extension amended the Section 4 automatic trigger formula by replacing 1964 election turnout data with 1968 data, and this new formula remained in place through all subsequent extensions. In 2013, the Supreme Court ruled that the Section 4 automatic trigger formula, as amended in 1970, was unconstitutional because its reliance upon data that was more than 40 years old no longer justified the intrusion of the “special provisions” on principles of federalism and state sovereignty.<sup>42</sup> By effectively eliminating the pre-clearance requirements of Section 5, the Supreme Court left the post hoc litigation remedy of Section 2 as the Voting Rights Act’s only enforcement mechanism.

The 1975 extension expanded the protections of the Voting Rights Act to language minorities, including Hispanics and Asian-Americans. The 1982 extension amended Section 2 of the Act to provide that courts could find a voting practice to be discriminatory without proof that it was intended to be, so long as it had discriminatory results, overruling the Supreme Court’s decision in *City of Mobile v. Bolden*, which had held that Section 2 only barred voting tests or devices that were “motivated by discriminatory purpose.”<sup>43</sup>

The results of the Voting Rights Act—both immediate and long-term—have been dramatic. Federal examiners registered more than 27,000 African-American voters in nine counties in Alabama, Louisiana, and Mississippi within 19 days after the Act became effective<sup>44</sup>, and more than 150,000 in five states by 1967. Another 780,000 registered with local authorities<sup>45</sup>, often with the help of SNCC, CORE, SCLC, and other organizations. The proportion of African-Americans registered to vote in the South rose from 43 percent in 1964 to 61 percent in 1968, increasing from 7 percent to 59 percent in Mississippi, from 23 percent to 57 percent in Alabama, and from 32 percent to 59 percent in Louisiana.<sup>46</sup> Cager Lee, whose grandson Jimmie’s death spurred the Bloody Sunday march and whose own father had been sold at a slave market, registered to vote on Aug. 20, 1965.<sup>47</sup> In the 1966 primary election for Dallas County sheriff, Jim Clark lost his bid for re-election—on the strength of African-American votes—but only after the Justice Department successfully sued under the Voting Rights Act to force the Dallas County Democratic Party to

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count many of those votes.<sup>48</sup>

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On the other hand, what was once known as the “Solid South”—because it was solidly Democratic in national, state, and local elections—has become solidly Republican. At the time that the Voting Rights Act was adopted, only two of the 22 senators from the states comprising the old Confederacy were Republicans: John Tower, who was elected in 1961 to succeed Lyndon Johnson representing Texas, and Strom Thurmond who, although elected as a Democrat, switched parties in 1964 to support Barry Goldwater against Johnson. Today, every single senator from the old Confederacy is a Republican. The South has formed the foundation for the electoral vote total of every successful Republican presidential candidate since 1988.

In his recent book on the Voting Rights Act, historian Gary May wrote that the Act has “transformed American democracy and in many ways was the last act of emancipation, a process Abraham Lincoln began in 1863.”<sup>52</sup> We commemorate—and celebrate—its 50th anniversary this coming August. ☉

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## Endnotes

<sup>1</sup>Alexander Keyssar, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES*, 5-7 and Tables A4 to A-9, Basic Books 2000; “Voting Rights Timeline,” AMERICAN CIVIL LIBERTIES UNION, March 4, 2005, [www.aclu.org/news/NewsPrint.cfm?ID=17621&c=32](http://www.aclu.org/news/NewsPrint.cfm?ID=17621&c=32).

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<sup>5</sup>Alexander Keyssar, *supra* note 1 at 87, 89.

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<sup>7</sup>Alexander Keyssar, *supra* note 1, at 103.

<sup>8</sup>Xi Wang, "Rebuilding African American Voting Rights in the Nineteenth Century," in Richard M. Valelly, editor, *THE VOTING RIGHTS ACT: SECURING THE BALLOT*, 9, CQ Press 2006.

<sup>9</sup>Eric Foner, *supra* note 6, at 355.

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<sup>11</sup>Eric Foner, *supra* note 6, at 353; Richard M. Valelly, *THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT*, 78-79, The University of Chicago Press 2004.

<sup>12</sup>Xi Wang, *supra* note 8, at 15.

<sup>13</sup>Gary May, *supra* note 3, at xi-xii; Alexander Keyssar, *supra* note 1, at 105.

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<sup>15</sup>Lodge was later elected to the U.S. Senate from Massachusetts and, as chairman of the Senate Foreign Relations Committee, spearheaded the successful effort to reject ratification of the Treaty of Versailles after World War I.

<sup>16</sup>Xi Wang, *supra* note 8 at 16.

<sup>17</sup>C. Vann Woodward, *ORIGINS OF THE NEW SOUTH 1877-1913*, 321-349, Louisiana State University Press 1971; Alexander Keyssar, *supra* note 1, at 111-115.

<sup>18</sup>*United States v. Louisiana*, 225 F. Supp. 353 (E.D. La. 1963) (quoting Ernest B. Kruttschnitt).

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<sup>20</sup>*Smith v. Allright*, 312 U.S. 649 (1944).

<sup>21</sup>David Garrow, *PROTEST AT SELMA: MARTIN LUTHER KING, JR. AND THE VOTING RIGHTS ACT OF 1965*, 7, 11, 19, Yale University Press 1978.

<sup>22</sup>Steven F. Lawson, *RUNNING FOR FREEDOM: CIVIL RIGHTS AND BLACK POLITICS IN AMERICA SINCE 1941*, 85, Temple University Press, 1991.

<sup>23</sup>Gary May, *supra* note 3, at 12.

<sup>24</sup>Taylor Branch, *PILLAR OF FIRE: AMERICAN IN THE KING YEARS 1963-65*, 63, Simon & Schuster 1998.

<sup>25</sup>Gary May, *supra* note 3, at 12-24, 30-40.

<sup>26</sup>The third volume of Robert A. Caro's magnificent biography of Lyndon Johnson, *MASTER OF THE SENATE: THE YEARS OF LYNDON JOHNSON*, Alfred A. Knopf 2002, tells how Johnson, as majority leader of the Senate, secured the adoption of the Civil Rights Act of 1957 to transform his expected candidacy for president in 1960 from a regional to a national level and how his Democratic Senate colleagues permitted the bill to pass, after successfully blocking any civil rights legislation for decades, in order to help Johnson achieve that goal.

<sup>27</sup>David Garrow, *supra* note 21, at 1-72; *CONGRESS AND THE NATION: VOLUME II 1965-1968: A REVIEW OF GOVERNMENT AND POLITICS*,

357, Congressional Quarterly Service, 1969.

<sup>28</sup>Doar served as special counsel to the U.S. House Judiciary Committee during its inquiry into the possible impeachment of President Richard M. Nixon in 1974. President Barack Obama presented Doar with the Presidential Medal of Freedom on May 29, 2012, citing his work in support of voting rights.

<sup>29</sup>David Garrow, *supra* note 21, at 34.

<sup>30</sup>Nick Kotz, *JUDGMENT DAYS: LYNDON BAINES JOHNSON, MARTIN LUTHER KING, JR. AND THE LAWS THAT CHANGED AMERICA*, 256 (Houghton Mifflin Co. 2005).

<sup>31</sup>David Garrow, *supra* note 21, at 39.

<sup>32</sup>Nick Kotz, *supra* note 30, at 268.

<sup>33</sup>Taylor Branch, *supra* note 24, at 593, 599.

<sup>34</sup>Nick Kotz, *supra* note 30, at 281-285.

<sup>35</sup>Steven Tuck, "Making the Voting Rights Act," in Richard M. Valelly, ed., *THE VOTING RIGHTS ACT: SECURING THE BALLOT*, 83, CQ Press 2006.

<sup>36</sup>*PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON*, 1965, I, 281-287, Government Printing Office, 1965.

<sup>37</sup>Howell Raines, *MY SOUL IS RESTED: THE STORY OF THE CIVIL RIGHTS MOVEMENT IN THE DEEP SOUTH*, 337, Penguin Books 1983.

<sup>38</sup>Nick Kotz, *supra* note 30, at 246; David Garrow, *supra* note 21, at 36-39, 41-42, 70-71.

<sup>39</sup>Nick Kotz, *supra* note 30, at 244.

<sup>40</sup>Garrow, *supra* note 21, at 110, 113.

<sup>41</sup>Colin D. Moore, "Extensions of the Voting Rights Act," in Richard M. Valelly, ed., *THE VOTING RIGHTS ACT: SECURING THE BALLOT*, 95, CQ Press 2006; [www.presidency.ucsb.edu/ws/index.php?pid=29355](http://www.presidency.ucsb.edu/ws/index.php?pid=29355)

<sup>42</sup>*Shelby County, Alabama v. Holder*, 570 U.S.—(2013).

<sup>43</sup>446 U.S. 55 (1980).

<sup>44</sup>*CONGRESS AND THE NATION*, *supra* note 27, at 362.

<sup>45</sup>Richard M. Valelly, *supra* note 11, at 205.

<sup>46</sup>James E. Alt, "The Impact of the Voting Rights Act on Black and White Voter Registration in the South," in Chandler Davidson and Bernard Grofman, eds., *QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF VOTING RIGHTS ACT 1965-1990*, 374, Princeton University Press, 1994.

<sup>47</sup>Louis Menand, "The Color of Law: Voting Rights and the Southern Way of Life," *NEW YORKER*, July 8, 2013.

<sup>48</sup>Gary May, *supra* note 3, at 188-191.

<sup>49</sup>David A. Bositis, "Impact of the 'Core' Voting Rights Act on Voting and Officeholding," in Richard M. Valelly, ed., *THE VOTING RIGHTS ACT: SECURING THE BALLOT*, 121-122, CQ Press 2006.

<sup>50</sup>*Thornburg v. Gingles*, 478 U.S. 30 (1986).

<sup>51</sup>David Remnick, *THE BRIDGE: THE LIFE AND RISE OF BARACK OBAMA*, 6, 75, Alfred A. Knopf, 2010.

<sup>52</sup>Gary May, *supra* note 3, at ix.

# Addressing the Language and Scope of the Federal Priority Act

By Claire Schenk

**THE FEDERAL PRIORITY ACT** “IS ALMOST AS OLD as the Constitution, and its roots reach back even further into the English common law” (*United States v. Moore*, 423 U.S. 77, 80 (1975)). It was enacted soon after the Revolutionary War, at a time when “many persons had necessarily become indebted to the United States” (*United States v. Fisher*, 6 U.S. (2 Cranch) 358, 392, (1805)). Some courts discussing the statute’s long history have even gone so far as to say that the FPA was part of the “early efforts of the founding fathers to make this country a union and not a confederation of states” (*United States v. Lutz*, 295 F.2d 736, 742 (5th Cir. 1961)).

The FPA, 31 U.S.C. § 3713, mandates that federal government claims receive first priority for payment when two conditions are satisfied: (1) the federal government’s debtor is insolvent, and (2) either (a) the debtor without enough property to pay all debts makes a voluntary assignment of property, (b) the property of the debtor, if absent, is attached, or (c) an act of bankruptcy is committed (31 U.S.C. § 3713(a))<sup>2</sup>. The government debt must be in existence when the insolvent debtor assigns his property, has his property attached, or commits an act of bankruptcy (*Guillermety v. Sec. of Educ. of U.S.*, 241 F. Supp. 2d 727, 733 (E.D. Mich. 2002)). If the above conditions are satisfied, the government may hold the insolvent debtor’s representatives liable to the extent of any payments made in derogation of the government’s priority. See 31 U.S.C. § 3713(b).

The statute of limitations for an action against a representative under 31 U.S.C. § 3713(b) is six years (28 U.S.C. § 2415; see *U.S. v. Moriarty*, 8 F.3d 329, 333 (6th Cir. 1993)). The statute of limitations begins to run on the date that the government’s action accrues against the insolvent debtor’s representative (*U.S. v. Renda*, 2011 WL 4474967, at \*5 (E.D. Texas 2011)). The government’s cause of action against the representative accrues when the acts that trigger the representative’s liability occur; i.e., the voluntary assignment, act of bankruptcy or attachment of property (*U.S. v. Moriarty*, 8 F.3d at 333).

## Context

Different government agencies have invoked the FPA fairly actively in recent years. Since the end of 2011, the Act has been

cited in approximately 15 cases. Of these cases, the most common circumstances involved claims against insolvent government debtors arising from unpaid estate taxes. The common facts tended to involve an executor of an estate who distributed an estate’s funds before paying debts owed to the federal government and consequently left the estate with insufficient funds to fully discharge its debt to the federal government.<sup>3</sup>

The second most common circumstances in which the government has invoked the FPA involve other kinds of taxes, such as income tax, employment tax, or gift tax. For example, in *U.S. Dept. of Justice v. Sperry*, No. 1:12-CV-0020-JMS, 2013WL 1768664 (S.D. Ind. Apr. 24, 2013), the owner of an insolvent company did not pay federal employment taxes, although he kept paying other creditors under the mistaken belief that he would be able to satisfy his government debts at a later time. The government invoked the FPA to seek the amount it alleged the company paid to other creditors while it was insolvent (*Id.* at \*3).

Although the FPA has most often been invoked in tax cases, the government has also used the FPA in other circumstances recently. For instance, in *Burns v. Burns Iron & Metal Co. Inc.*, No. S-12-024 (Ohio Ct. App. May 17, 2013), the U.S. Environmental Protection Agency (EPA) filed a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) claim against Burns Iron & Metal Company.<sup>4</sup> During the course of the CERCLA action, the three shareholders of the company entered a stock redemption agreement whereby they sold almost all their stocks as a way to fund their own retirements (*Id.* at \*1). When the EPA learned of this stock redemption agreement, it suspected that the shareholders were trying to divest the company of sufficient funds to pay for the cleanup. Consequently, the EPA pursued a potential claim under the FPA (*Id.*).

The U.S. Department of Homeland Security, Customs, and Border Protection (Customs) has also invoked the FPA. In *U.S. v. Adaptive MicroSystems, LLC*, 914 F. Supp. 2d 1331 (Ct. Int’l Trade, 2013), Customs alleged that the defendant company had misclassified its imports under duty-free tariff and consequently owed several million dollars in unpaid dues. After the defendant company became subject to a receivership action, the government claimed priority under the FPA (*Id.* at 1335).



Another notable instance in which the government has invoked the FPA in recent years related to a breach of contract by a government contractor. In *U.S. v. Renda*, 709 F.3d 472 (5th Cir. 2013), the government obtained a judgment for breach of contract against an insolvent company. Before that decision was made final, the insolvent company transferred its assets to its unsecured creditors (*Id.* at 477). The Fifth Circuit held that the insolvent company was liable to the government under the FPA for the amount of assets it had transferred to its creditors (*Id.* at 487).

The U.S. Department of Labor has also pursued a claim under the FPA against an insolvent insurance company that owed money to a special fund established by the Longshore Act (*Solis v. Home Ins. Co.*, 848 F. Supp. 2d 91, 94 (D.N.H. 2012)).

In sum, although the most common circumstance in which the government pursues claims under the FPA involves delinquent taxes, the government has also employed the Act in many other circumstances in which an insolvent entity did not assign priority to its government debts.

### What Constitutes a Claim

31 U.S.C. § 3701(b)(1) defines “claim” as “any amount of funds or property that has been determined by an appropriate official of the Federal Government to be owed to the United States by a person, organization, or entity other than a Federal Agency.”<sup>5</sup> In practice, it is very difficult to put forward a precise definition of a claim within the meaning of the FPA, because

courts have employed a very expansive definition of what a claim can be. However, it appears that as long as a debt to the federal government existed when the act of bankruptcy was committed, the government can pursue a claim under the FPA.

The Supreme Court has instructed lower courts to give the FPA “a liberal construction” (*Bramwell v. U.S. Fid. & Guar. Co.*, 269 U.S. 483, 487 (1926), *U.S. v. Coppola*, 85 F.3d 1015, 1020 (2d Cir.1996)). Consequently, “[a]ll debtors to the United States, whatever their character, and by whatever mode bound, may be fairly included” within the statute (*Bramwell*, 269 U.S. at 487). Therefore, a claim is interpreted expansively, and “courts have applied the priority statute to claims of all types” (*United States v. Moore*, 423 U.S. 77, 80 (1975)).

For instance, for the purposes of what constitutes a claim, the Supreme Court has refused to draw a distinction between liquidated and unliquidated debts. In *Moore*, a contractor defaulted on a government contract prior to insolvency. The precise amount of the government’s claim was not set until after the act of bankruptcy occurred. The defendant argued that debts that were unliquidated at the time of insolvency were not entitled to priority as claims under the Federal Priority Act.<sup>6</sup> The Supreme Court rejected this argument, making clear that *fixed but unliquidated debts still constituted a claim* for the purposes of the priority statute, noting that “the obligation here ... was fixed and independent of ‘events after insolvency’; only the precise amount of that obligation awaited future events” (*Moore*, 423 U.S. at 85).

A similar outcome was reached in *United States v. Johnson*,

No. 2:11-CV-00087, 2013 WL 3924087 (D. Utah July 29, 2013). In that case, the representatives of an estate deferred payment of federal estate tax liability, opting to make the payment in 10 annual installments. The representatives then distributed the estate's remaining assets to the heirs, noting that the heirs would each bear an equal obligation to pay the estate tax as it became due (*Id.* at \*2). At a later time, the heirs became insolvent, and the IRS invoked the FPA to collect the outstanding tax liability against the estate. The representatives of the estate argued that the government had no claim because, at the time that they had distributed the estate's assets, enough money existed to pay the government debt (*Id.* at \*14). The court rejected this argument, reasoning that the representatives had accepted the risk that the heirs may fail to pay the tax. Consequently, the court held that the government had stated a claim (*Id.* at \*16).

Courts have also held that the government had a claim within the meaning of the FPA even though its cause of action for recovery was barred by the statute of limitations<sup>7</sup>, and that a defendant's tax liabilities were subject to the government's claim of priority even though they were contested and had not been formally assessed.<sup>8</sup>

In short, because the Act has been consistently interpreted expansively, it is difficult to delineate a threshold for when a claim may arise. Nonetheless, it may be that as long as a debt existed when the act of bankruptcy was committed, the government may have a claim of priority, regardless of whether the amount of the debt was precisely determined. The statutory language of 31 U.S.C. § 3701 is similarly broad.

### Liability of Representatives of the Debtor

The FPA imposes liability upon the representatives of the person paying any part of a debt of the person before paying the federal government's claim (*see* 31 U.S.C. § 3713(b)):

A representative of a person or an estate (except a trustee acting under title 11) paying any part of a debt of the person or estate before paying a claim of the Government is liable to the extent of the payment for unpaid claims of the Government.

The representative is liable to the extent of the "unauthorized" payment (*Id.*).

Liability is not necessarily strict liability; rather, the representative needs to have knowledge of the federal government debt or notice of facts that would cause the representative to inquire as to the existence of the debt. "[I]t has long been held that in order to render a fiduciary liable ... he must first be chargeable with knowledge or notice of the debt due to the United States, at a time when the estate had sufficient assets from which to pay this debt" (*In re Estate of Denman*, 270 S.W.3d 639, 644 (Tex. App.—San Antonio 2008) (internal citations and quotations omitted); *Bank of West v. C.I.R.*, 93 T.C. 462, 474 (Tax Ct. 1989)).

One case in the Eighth Circuit has stated that the liability of a representative is dependent on three things: (1) the personal representative distributed assets of the estate, (2) the distribution rendered the estate insolvent, and (3) the distribution took place after the personal representative had notice of the government's claim (*United States v. Estate of Kime*, 950 F. Supp. 950,

954 (D. Neb. 1996) (personal representative distributed all assets of estate to himself, knowing that the estate owed the government \$140,000)). This case appears to make it a requirement (for imposition of personal liability) that the unauthorized transfer render the person or estate insolvent and not merely require that the person or estate be insolvent at the time of the unauthorized transfer. *See also U.S. v. Coppola*, 85 F.3d 1015 (2nd Cir. 1996) ("Accordingly, by the statute's express terms, liability is imposed on a representative of a debtor, including an executor of an estate, who pays a debt of the estate to another in derogation of the priority of debts owed to the United States, thereby rendering the estate insolvent."). *But see U.S. v. Estate of Dickerson*, 189 F. Supp. 2d 622 (W.D. Tex. 2001) (U.S. must show that executor distributed asset of estate, estate was insolvent, and executor had notice of debt owed to the government before the distribution; case references that transfer in violation of government's priority rendered estate insolvent, but does not make it a requirement for personal liability to attach). Because *Kime* is a decedent's estate-type case, it is possible that a court could decline to extend these three requirements for liability to directors and officers of an insolvent corporation.

When it is a corporation paying out its assets prior to satisfying its debts to the government, the potentially liable representatives are the corporation's officers and directors. *See Golden Acres*, 684 F. Supp. at 101-02 (finding that sole officers and directors of corporation were representatives of corporation and liable to the extent of the payment for unpaid claims of the government) and cases cited therein. A corporate officer and director may be presumed to know of corporate indebtedness (*In re Gottheiner*, 703 F.2d 1136, 1141 (9th Cir. 1983)).

### Limitations

Although "claims" under the FPA are interpreted expansively, the term is not unlimited in scope. The government only has a claim if the debt owed to the U.S. government exists at the time of the act of bankruptcy. Debts that do not arise until after the act of bankruptcy have already occurred cannot be claims under the FPA.

This concept is illustrated in *In Re Metzger*, 709 F.2d 32 (9th Cir. 1983).<sup>9</sup> In *Metzger*, a lawyer performed legal services for his client in the form of criminal-defense representation. After the case was submitted, the client assigned his interest in a shipping vessel to the lawyer (*Id.* at 33). Several weeks later, the trial judge sentenced the client to a prison sentence and ordered the client to pay the U.S. government a fine in the amount of \$45,000. The United States attempted to collect the \$45,000 by asserting priority in the shipping vessel the client had assigned to the lawyer (*Id.*). The Ninth Circuit concluded that at the time of the assignment of the vessel, the client was not indebted to the United States. Rather, the client only became indebted at the time of sentencing, which occurred after the assignment of property (*Id.* at 34). Because the debt owed to the United States did not exist until after the act of bankruptcy, the United States could not state a claim under the FPA (*Id.*). In short, debts not currently in existence, but which may arise in the future contingent on other events, cannot be claims.

Another limitation is that the FPA does not apply to cases under Title 11. This is an express limitation, provided for in 31



U.S.C. § 3713 (a)(2). Courts have explained that the bankruptcy code has restricted the FPA's reach. For instance, in *In Re Gottheiner*, 703 F.2d 1136, 1137 n.2 (9th Cir. 1983), the court clarified that amendments to the federal priority statute had "eliminated the government's priority rights in bankruptcy cases filed after October 1, 1979."<sup>10</sup>

### Other Defenses

The FPA is very broad, and has few limitations other than the failure to meet the statute's requirements. But even though the language of the FPA is simple and seemingly absolute, the cases suggest that there are exceptions to its coverage. See *Straus v. U.S.*, No. 97 C 8187, 1998 WL 748344, at \*3 (N.D. Ill. Oct. 20, 1998). Another, more specific statute, such as the Tax Lien Act of 1966, can create an exception to the FPA (*Id.*). As another exception, the federal government may not trump another party's lien

was required to repay its Medicare debt (*Id.*). During the period of repayment, the company became insolvent, as its liabilities exceeded its assets. Bridle Path ceased making Medicare repayments and wrote numerous checks to several entities out of its operating account (*Id.* at \*2). These checks were written to both private creditors and to the corporation owners themselves. The government claimed that Bridle Path's owners had violated the FPA by not paying their government debts first and were personally liable for the Medicare debt at the time the insolvent corporation assigned property to themselves and others. The district court agreed, and Bridle Path's representatives were held liable (*Id.* at \*4).

In *In re Gottheiner*, 703 F.2d 1136 (9th Cir. 1983), a medical doctor formed a corporation called Coordinated Health Services. The doctor was the sole shareholder of this corporation. The corporation occasionally submitted statements to the government's

## **ALTHOUGH "CLAIMS" UNDER THE FPA ARE INTERPRETED EXPANSIVELY, THE TERM IS NOT UNLIMITED IN SCOPE. THE GOVERNMENT ONLY HAS A CLAIM IF THE DEBT OWED TO THE U.S. GOVERNMENT EXISTS AT THE TIME OF THE ACT OF BANKRUPTCY. DEBTS THAT DO NOT ARISE UNTIL AFTER THE ACT OF BANKRUPTCY HAVE ALREADY OCCURRED CANNOT BE CLAIMS UNDER THE FPA.**

where the party has gained possession or title to the debtor's personal property (*Id.* \*4). The federal government may not trump another party's lien where the party has gained possession or title to the debtor's personal property (*Id.* \*4).

Another defense that can arise in very narrow circumstances is reverse preemption. Reverse preemption can occur when another federal statute requires that the states retain primacy in a given area of law absent an express intention of congress. For instance, the McCarran-Ferguson Act specifically requires that the states retain primacy in the area of insurance law absent an express intention of Congress. Consequently, in *Solis v. Home Ins. Co.*, 848 F. Supp. 2d 91, (D.N.H. 2012), a New Hampshire insurance company was permitted to pay other creditors before the federal government in accordance with a New Hampshire insurance law.

Also, because the intent of the FPA is to ensure that the government is paid first, it is not a defense that the transferee of the debtor's funds uses the funds to pay off the transferor's debts. See *U.S. v. 58th Street Plaza Theatre Inc.*, 287 F. Supp. 475, 496-97 (S.D.N.Y. 1968).

### Health Care Cases

Some cases show that the Act is periodically applied in health-care settings. For example, in *U.S. v. Bridle Path Enters Inc.*, 2001 WL 1688911 (D. Ma. 2001), the defendants owned Bridle Path, a health-care corporation that acted as a medical provider. In this role, Bridle Path submitted claims for Medicare reimbursement to its fiscal intermediary, which then made payments to Bridle Path based on cost estimates (*Id.* at \*1). These payments were then subjected to later adjustment after the reasonable cost of the claims was determined (*Id.*). After an audit, it was determined that Bridle Path had been overpaid by over \$200,000 and

fiscal intermediary, in a process similar to that described in *Bridle Path* above (*Id.* at 1138). Although the corporation soon accrued debts that exceeded its assets, the doctor directed the company to make several loans and payments to himself and other corporations in which he owned shares (*Id.*). The government claimed that these payments violated the FPA and argued that the corporation was indebted to the United States for the amount of the cash advances the corporation had received from the government insurer and not repaid (*Id.* at 1138-39). The District Court found that the corporation had been insolvent and owed a government debt at the time it assigned its assets elsewhere, and it found the doctor personally liable for this debt (*Id.* at 1138).<sup>11</sup>

Lastly, in *Garcia v. Island Program Designer Inc.*, 875 F. Supp. 940 (D.P.R. 1994), the defendant was a health service organization under Puerto Rico law. The defendant eventually became insolvent, and a court ordered its assets liquidated (*Id.* at 941). The U.S. Internal Revenue Service intervened in the state liquidation proceedings and removed the case to federal district court, claiming priority under the FPA (*Id.*). In district court, the United States was granted summary judgment (*Id.* at 947).<sup>12</sup>

### Conclusion

This statute is not widely known, and yet it can have immense importance for insolvent entities. The liberal construction that courts give the FPA gives it a fairly broad application. When government debtors become insolvent and later assign property after the act of bankruptcy, the personal representative of the debtor can be held personally liable. Further, this liability attaches even if knowledge of the government claim was only constructive. And though there are well-established limitations and defenses to the Act, they are few in number. While the Act is most often invoked

in tax and estate cases, it has also been applied in a wide variety of other contexts. Given the Act's far reach, the potential for personal liability, and its liberal construction and application, it is important that insolvent entities be aware of this Act's existence and scope. ☉



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## Endnotes

<sup>1</sup>This article consists of updated research on the Federal Priority Act (FPA), 31 U.S.C. § 3713, focusing primarily on cases since the end of 2011.

<sup>2</sup>In one case, the court set the elements out as follows: "An individual violates the Federal Priority Statute if: (1) he is insolvent, (2) he is indebted to the federal government, and (3) he makes a voluntary payment to another person before fully paying the government debt." *U.S. v. David*, 1995 WL 57502, at \*2 (E.D. Pa. 1995).

<sup>3</sup>Of the 15 cases that discussed claims brought under the FPA since the end of 2011, six of these cases related to unpaid estate taxes. See, e.g., *United States v. Whisenhunt*, No. 3:12-CV-0614-B, 2014 WL 1226177 (N.D. Tex. Mar. 25, 2014), *United States v. Anderson*, No. 2:13-CV-93-FTM-38UAM, 2013 WL 3816733 (M.D. Fla. July 22, 2013). Furthermore, three other cases from the last three years related to income or employment taxes. In other words, about 60 percent of the recent cases involved taxes. In any case, it is evident that tax delinquency is the most active area in which the government currently pursues claims under the FPA.

<sup>4</sup>*Burns* was a case about two parties seeking indemnity for losses incurred after entering a settlement with the EPA. The court does not engage in a legal discussion regarding the FPA. However, the case is significant for our purposes because its factual background makes clear that the federal government considers the FPA as a potential strategy in a variety of contexts.

<sup>5</sup>31 U.S.C. § 3701(b)(1) goes on to specify that a claim can include, without limitation, any of the following:

- Funds owed on account of loans made, insured, or guaranteed by the government, including any deficiency or any difference between the price obtained by the government in the sale of a property and the amount owed to the government on a mortgage on the property.
- Expenditures of nonappropriated funds, including actual and administrative costs related to shoplifting, theft detection, and theft prevention.
- Over-payments, including payments disallowed by audits performed by the inspector general of the agency administering the program.
- Any amount the United States is authorized by statute to collect for the benefit of any person.
- The unpaid share of any nonfederal partner in a program involving a federal payment and a matching, or cost-sharing, payment by the nonfederal partner.
- Any fines or penalties assessed by an agency.
- Other amounts of money or property owed to the government.

<sup>6</sup>This case involved an earlier but substantively indistinguishable version of the FPA.

<sup>7</sup>*United States v. Moriarty*, 8 F.3d 329, 334 (6th Cir. 1993).

<sup>8</sup>*Viles v. C.I.R.*, 223 F.2d 376, 380 (6th Cir. 1956).

<sup>9</sup>The same rationale is also used in *Cerilli v. Newport Offshore Ltd.*, 624 A.2d 835, 838 (R.I. 1993), *Guillermety v. Sec'y of Educ. of U.S.*, 241 F. Supp. 2d 727, 733 (E.D. Mich. 2002).

<sup>10</sup>See also *Davis v. Pringle*, 268 U.S. 315, 317-18 (U.S. 1925) (explaining that claims due to the United States are not entitled to priority under the Bankruptcy Act of 1898), *U.S. v. Birmingham Trust & Sav. Co.*, 258 F. 562, 563 (5th Cir. 1919) (noting that the right of the United States to claim priority under an earlier version of the FPA was "unquestionably modified and restricted" by the bankruptcy act), *United States v. Estate of Romani*, 523 U.S. 517, 531 (U.S. 1998) ("The Bankruptcy Act of 1898 ... subordinated the priority of the Federal Government's claims ... to certain other kinds of debts. This Court resolved the tension between the new bankruptcy provisions and the priority statute by applying the former and thus treating the Government like any other general creditor."). These cases dealt with an earlier version of the FPA and an earlier bankruptcy act. When the FPA was amended in 1982, these bankruptcy restrictions were expressly codified into the Act.

<sup>11</sup>This case's appeal in the Ninth Circuit focused primarily on the defendant's grounds for appeal, including collateral estoppel. However, a discussion of the district court's holdings regarding the FPA's application is included.

<sup>12</sup>The facts of this case are minimal. The bulk of the opinion discusses issues of preemption, eventually holding that the FPA was not preempted by other local Puerto Rico laws. The nuanced facts of this case are not discussed in the opinion. However, it is clear that the United States invoked the FPA successfully against a health provider.

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# 3 Signs It's Time to Refinance Your Law School Loans

By Dan Macklin

When was the last time you thought about your student loans? If you're like most law school grads, you probably try hard *not* to think about them. After all, dwelling on your five or six figures worth of debt isn't going to make it go away any faster.

But if you're one of the many borrowers who "set and forget" your student loan repayment plan after graduation, it may be worth taking a second look. If you qualify to refinance some or all of your loans at a lower interest rate, you can save a significant amount of money on interest and potentially lower your monthly bill or pay your loans off sooner than anticipated.

Unfortunately, many eligible borrowers don't know the student loan refinancing option exists. The ability to refinance and consolidate both private and federal loans has only been around for a few years, but as more and more borrowers become aware of it, a growing number are taking advantage.

How do you know if student loan refinancing is right for you? Here are three signs you should give it a closer look.

## 1. Your loans have high interest rates.

While undergrads benefit from low-interest rate subsidized federal loans, those attending law school or other graduate programs typically have to rely on higher interest rate federal Direct unsubsidized and PLUS loans (with current rates at 6.21% and 7.21%, respectively) and/or private loans (which can go even higher).

And that's not the only reason that graduate and law school borrowers have gotten the short end of the stick. In the aftermath of the 2008 credit crisis, interest rates across the board dropped to record lows—with the exception of Direct unsubsidized and PLUS loans, which remained flat at 6.8% and 7.9%, respectively, until last year's Student Loan Certainty Act brought them closer in line with prevailing rates. But for borrowers who took out these loans before 2013, the damage was already done.

The good news is that, thanks to student loan refinancing, eligible borrowers don't have to be stuck with those outdated rates. Just as a homeowner can apply to refinance a mortgage, student loan borrowers can now do the same. Reducing the interest rate through refinancing is one of the best ways to reduce your debt burden.

## 2. Your finances have improved.

Most attorneys have to spend a few years paying their dues before things start to feel comfortable from a financial perspective, but ideally as your career progresses, your degree starts to pay off in the form of a higher salary. And if you've been consistently making your student loan payments on time, perhaps your credit has improved, too. Since income and credit score are two of the key factors considered in the refinancing application process, advancements in these areas can help your chances of qualifying for a lower rate.

And depending on how quickly you intend to pay off your

loan (or how quickly you expect your income to increase), you might even consider refinancing with a variable rate student loan. Variable loan rates are typically lower than rates for fixed loans but are often tied to prevailing interest rates, which are likely to rise in the future. In other words, they're best suited for people who plan to pay off their loans quickly—before interest rates rise again.

## 3. You can't take advantage of federal loan benefits.

A common misconception about student loan refinancing is that borrowers can't refinance federal loans—a myth that was perpetuated by much of the media coverage of the proposed student loan refinancing legislation that was put forward last year. While none of the proposed bills passed, many journalists failed to mention that **federal student loan refinancing is actually available now—no legislation required.**

The real question is whether you *should* refinance federal loans, and the answer is that it depends. Usually it comes down to whether you can take advantage of certain federal loan benefits that don't transfer to private lenders through the refinance process. For example, some federal loans offer programs that may forgive all or part of your loan balance if you meet certain criteria—for example, working in public service or as a teacher for a number of years. The government also offers graduated and income-driven repayment programs (such as Pay As You Earn, or PAYE). If you can qualify for loan forgiveness or you need to make reduced payments, you may want to think twice about refinancing eligible federal loans.

However, if you don't benefit from one of these programs, and saving money is your priority, then you can apply to refinance federal loans with a lender like SoFi. You can also consider just refinancing private loans and keeping federal loans where they are—lowering the interest rate on some of your loans is better than nothing at all.

## Conclusion

Is refinancing right for you? For some borrowers, it's a no-brainer. For others, it might be an option later on. The bottom line is that you can benefit from giving your loans a second glance every so often, because the rate you were given when you took out the loan isn't necessarily the rate you're stuck with for life. ☺

*Dan Macklin is one of the founding members of SoFi, heading up the company's business development team. SoFi is a leader in marketplace lending and the largest provider of student loan refinancing, with more than \$1.75 billion in loans issued. Dan is a thought leader whose perspectives on student loan refinancing have been featured in a variety of media outlets, including CNBC, Fast Company and Mashable, as well as his personal favorite, Italian Vogue. SoFi partners with the Federal Bar Association (FBA), FBA receives consideration from SoFi, and FBA members receive a benefit.*



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## THE COORDINATION CONUNDRUM

*Parties, Candidates, and Independent Groups Push the Limit*

By Paul H. Jossey

As the barrage of half-truths, guilt-by-association, and other sharp-elbowed attack ads lit up the airwaves in the recent midterm elections, another more covert battle was also raging. Candidates, party committees, and their allied independent groups pushed the limits in the non-coordinating-coordination game. The players sought to direct resources in the most efficient way possible while staying within Federal Election Commission regulations that forbid private “material” and “substantial” discussions of advertising strategy.

Last year's winner may be the trio of the National Republican Congressional Committee (NRCC), American Action Network (AAN), and American Crossroads. CNN recently discovered a clever but nondisclosed Twitter account the groups were allegedly using to relay polling data through coded messages.<sup>1</sup> Whether these groups, particularly AAN and Crossroads, who bear the burden, actually broke any rules remains to be seen. The liberal watchdog group American Democracy Legal Fund (ADLF) filed an FEC complaint against all three on Nov. 25.<sup>2</sup>

But the larger question of how far candidates and party committees can go to provide cues to the independent groups trying to help them remains murky. Some have pointed to the guilty plea of Virginia operative Tyler Harber in February as watershed moment.<sup>3</sup> Harber ran a supposedly independent super PAC while managing the campaign of the candidate the PAC was supporting. The plea was noteworthy because it marked the first federal prosecution of a coordination case. But Harber's actions were so blatant—he used an alias and skimmed money off the transactions—that they didn't touch on the difficult line-drawing exercises campaigns and outside groups continue to face. At most, the Harber case signals the Department of Justice's interest in prosecuting political fraud cases. For the less obviously illegal scenarios, however, candidates, consultants, and outside groups will continue to push the limits.

FEC regulations proffer a three-part test (payment, conduct, and content) to determine whether a communication is coordinated and therefore must adhere to contribution limitations.<sup>4</sup> Controversy usually arises over the “conduct” prong, which contains five criteria, any of which can trigger in-kind contribution headaches for campaigns and outside spenders.<sup>5</sup>

Most close calls implicate the first three conduct factors: (1) Did the candidate or political party committee make a “request or suggestion” for the communication? (2) Was the candidate or party committee “materially involved,” or did he participate in “substantial discussions” about the communication? (3) For 2, was the request made through a publicly available forum? Each factor touches on different aspects of the law, and all three drew scrutiny this cycle.

Candidates and parties can avoid the “request or suggestion” factor by making their request to the “public generally” as opposed to a “select audience.”<sup>6</sup> In its NRCC complaint, ADLF asserts the now-infamous “BrunoGianelli44” Twitter account breached this factor by “hiding” the Twitter account in plain sight through coded messages decipherable only to its intended audience. Relatedly, both the “materially involved” and “substantial discussions” factors contain a “publicly available” exception.

But how public is public enough? New Hampshire Senate incumbent Jeanne Shaheen provided a close call. There the Democratic Senatorial Campaign Committee (DSCC) tweeted out “Important messages for New Hampshire” that linked to suggested scripts and opposition research allies could use to attack challenger Scott Brown. But the links directed to a “hidden” page on Shaheen's website apparently accessible only through the Twitter link.<sup>7</sup> On the

other end of the spectrum was U.S. Senate candidate Tom Tillis of North Carolina. His campaign raised eyebrows by posting an entire advertising strategy document online, but its thoroughly public nature relieved the campaign of any coordination concerns.

Few would doubt that but for their public nature, opposition research and advertising strategy memos would implicate the second and third factors, “material involvement” and “substantial discussions,” because they involve the candidates' “projects, activities, or needs.” But the parameters are nonetheless ill-defined according to prominent Democrat election lawyer Bob Bauer. “No one is especially clear about what amounts to a ‘substantial’ discussion or about the information that would be considered ‘material’ to the formulation of ad strategy.”<sup>8</sup>

Even if considered nonpublic, does the NRCC's internal polling qualify? According to election law professor Daniel Tokaji in an interview for the CNN article, probably not: “It may bend common sense, but not necessarily the law ... I don't think sharing polling data is going to be enough to establish that the campaign was materially involved in decisions about content, target audience or timing.”

The FEC commissioners may view the Twitter complaint differently on ideological grounds. In a previous “b-roll” imbroglio, the Commission split 3-3 on whether the use of candidate footage accessed through the candidate's website or YouTube channel constituted illegal “republishing” of campaign materials.

In the 2012 case, the Republican commissioners displayed reluctance to embroil the FEC in “b-roll” enforcement, relying on the “brief quote” exception. “The Act's republication provision is designed to capture situations where third parties, in essence, subsidize a candidate's campaign by expanding the distribution of communications whose content, format, and overall message are devised by the candidate. ... [T]he [group's] use of the video footage snippets in its own communication was consistent with the Act and Commission regulations.”<sup>9</sup> The Democrat commissioners, however, would have prosecuted the case based on a stricter interpretation of the regulation, “[T]he republished material ... is not a ‘brief quote’. ... To the contrary, the material is a central part ... appearing for 10-15 seconds of the 30-second ad.”<sup>10</sup>

Regardless of ideological differences, coordination actions have proven difficult to enforce. A recent Ohio State University study, *The New Soft Money, Outside Spending in Congressional Elections*,<sup>11</sup> revealed the frustration many operatives felt for what they believed was illegal coordination by their opponents. But even where evidence does exist, the result may be underwhelming. In 2009, Club For Growth filed a complaint against former Rep. Joe Schwarz, R-Mich., and the Republican Main Street Partnership PAC. Although the FEC did unearth emails suggesting coordination, the three-year legal battle resulted in a settlement and \$5,000 in penalties.<sup>12</sup>

# Dismissing Bankruptcy-Debtor Plaintiffs' Cases on Judicial Estoppel Grounds

By William H. Burgess

*Several times each week, courts must decide whether to dismiss lawsuits outright because the plaintiff previously declared bankruptcy but did not disclose the lawsuit in bankruptcy filings. If a plaintiff argues that the nondisclosure was "inadvertent or mistaken," her chances of avoiding dismissal depend on which jurisdiction she is in. The federal courts of appeals are split 3-3, and the remaining six have not taken a definitive position yet. This increasingly widespread application of judicial estoppel can be a case-dispositive weapon for defendants and often catches plaintiffs by surprise. This article describes the defense, the developing circuit split, and the need for eventual Supreme Court review.*

Suppose that an employee is fired in 2010. The employee declares bankruptcy and receives a discharge from the bankruptcy court in 2011. She sues her employer in district court in 2012 for discrimination based on the firing. If she did not disclose her discrimination lawsuit to the bankruptcy court in 2011, the district court where her lawsuit is pending may dismiss the lawsuit on judicial estoppel grounds. The idea is that by not disclosing the lawsuit to the bankruptcy court, the plaintiff successfully took the position that no such lawsuit existed. And the district court need not allow her to take the opposite position by continuing to prosecute the lawsuit.

The Supreme Court has said that "it may be appropriate to resist application of judicial estoppel when a party's prior position was based on inadvertence or mistake."<sup>1</sup> Many cases involving lawsuits that were not disclosed in bankruptcy turn on how the court responds to a plaintiff's argument that the nondisclosure was inadvertent or mistaken. Some plaintiffs argue that they did not know that they needed to disclose potential lawsuits that had not been filed or pending lawsuits for which they had received no money. Some plaintiffs try to fix the nondisclosure by reopening their bankruptcies. The courts of appeals are split 3-3 on how to respond.

In the Fifth, Tenth, and Eleventh Circuits, such arguments are legally irrelevant. Those courts presume that the plaintiff's nondisclosure was a deliberate falsehood unless the plaintiff can show either (1) that she lacked knowledge of the facts relevant to the undisclosed lawsuit or (2) that—even though all bankruptcy debtors have a motive to conceal assets—the particular plaintiff somehow lacked that motive. In the Sixth, Seventh and Ninth Circuits, plaintiffs who attempt to fix and explain their nondisclosures are sometimes permitted to continue with their lawsuits, depending on their good faith and the quality of their evidence and attempts to fix the nondisclosures. The Third Circuit has cases pointing in different directions, and the remaining five courts of appeals appear not to have addressed the question directly.

This differential treatment is critical. Regardless of whether the civil claims concern contracts, trademark infringement, discrimination, assault and battery, or wrongful death, judicial estoppel may extinguish the claims entirely because of the plaintiff's mistakes in bankruptcy court. More than a million people file nonbusiness bankruptcies each year.<sup>2</sup> The same problems that contribute to bankruptcy in the first place (such as firing and demotion at work, physical injuries, and medical expenses) also frequently lead to litigation.





People who file for personal bankruptcy are by definition insolvent and rarely able to afford to pay sophisticated counsel to spend extensive time preparing their filings. Mistakes on bankruptcy forms are inevitable, and a considerable number of mistakes will have consequences in later litigation. This issue—whether to judicially estop a plaintiff from continuing to prosecute a lawsuit that was not disclosed in bankruptcy—appears to arise several times each week in the federal and state courts.<sup>3</sup> A growing number of commentators are taking notice.<sup>4</sup> Several publications advise defense attorneys to check a plaintiff's bankruptcy filings to set up a potential motion to dismiss, and advise plaintiff and bankruptcy attorneys to try to avoid the problem in the first place.<sup>5</sup> Plaintiffs and defendants ignore the issue at their peril.

### Judicial Estoppel Generally

Judicial estoppel is an equitable doctrine that allows courts to prevent a litigant from taking two inconsistent positions and prevailing on both.<sup>6</sup> The general idea is that courts have inherent power to protect the integrity of their proceedings and do not have to allow litigants to manipulate them. Three examples illustrate the point. Courts do not have to tolerate it when heirs avoid

California estate tax in one case by arguing that the decedent was a New Yorker and in a later case try to take advantage of other California law by arguing that the decedent was a Californian.<sup>7</sup> Or, once an Americans with Disabilities Act plaintiff successfully challenges one defendant's failure to provide wheelchair access, courts do not have to let her to argue later that a wheelchair is unacceptable and she really requires a Segway.<sup>8</sup> Or, after New Hampshire successfully contends that its border with Maine is in the middle of the Piscataqua River, it can be prevented from arguing later that the boundary is the Maine shore.<sup>9</sup>

The final example is the Supreme Court's 2001 case, *New Hampshire v. Maine*,<sup>10</sup> which provided a restatement of three factors that "typically inform the decision whether to apply the doctrine in a particular case." First, a party's position must be clearly inconsistent with the earlier position. Second, the party must have successfully persuaded a court to accept the earlier position so that if the party prevailed on the later position, either the first or second court might appear to have been misled. Third, courts should consider whether the party asserting inconsistent positions would gain an unfair advantage if courts permit the inconsistent positions. The Court added that those factors were not "inflexible prerequisites,"

that judicial estoppel “is an equitable doctrine invoked by a court at its discretion,” and that “it may be appropriate to resist application of judicial estoppel when a party’s prior position was based on inadvertence or mistake.”<sup>11</sup> In practice, consistent with the equitable nature of judicial estoppel, and the Supreme Court’s statements about “inflexible prerequisites” and “inadvertence or mistake,” a plaintiff’s good or bad faith in advancing different positions is often dispositive of the question whether to apply judicial estoppel,<sup>12</sup> but not always.<sup>13</sup>

### **Judicial Estoppel Applied to Nondisclosing Bankrupt Plaintiffs**

The logic of applying judicial estoppel to lawsuits left off of bankruptcy disclosures turns on the disclosure obligations. Debtors must fully disclose their finances on a “statement of financial affairs.”<sup>14</sup> That includes not just houses, cars, and bank accounts but also pending or even potential lawsuits.<sup>15</sup> And debtors must certify the disclosures’ accuracy.<sup>16</sup> When a bankruptcy debtor files a disclosure, courts reason that the debtor takes the position that no pending or potential lawsuits exist other than those disclosed. When the bankruptcy court issues a discharge, it accepts that position. Thus, when the debtor later attempts to prosecute a lawsuit that was omitted from the bankruptcy disclosures, she is taking the opposite position in a trial court that the lawsuit *does* exist. As explained above, the trial court need not accept that new, inconsistent position.<sup>17</sup> Most courts agree on the foregoing principles. As the Seventh Circuit put it, “[p]lenty of authority supports the ... conclusion that a debtor in bankruptcy who receives a discharge (and thus a personal financial benefit) by representing that he has no valuable choses in action cannot turn around after the bankruptcy ends and recover on a supposedly nonexistent claim.”<sup>18</sup>

When confronted with a motion to dismiss on judicial estoppel grounds, plaintiffs frequently assert that their failure to disclose the lawsuit to the bankruptcy court was inadvertent. Some say that they did not know that they were required to disclose pending lawsuits for which they had received no money or potential lawsuits that had not been filed. Some add that they submitted their bankruptcy forms pro se or that their bankruptcy attorney failed to advise them properly. Some further argue that the defendant in their district court suit is not a creditor in the bankruptcy court, not harmed by the nondisclosure, and would receive a windfall if the lawsuit is dismissed. Finally, some attempt to avoid dismissal by reopening their bankruptcy cases and filing amended disclosures. Courts in different circuits respond differently to these arguments.

### **The Fifth, Tenth, and Eleventh Circuits’ Nearly Irrebuttable Presumption of Bad Faith**

The Fifth, Tenth, and Eleventh circuits take a dim view of inadvertence arguments. In those circuits, a debtor’s failure to disclose a lawsuit to the bankruptcy court is presumed to be deliberate and is *only* regarded as inadvertent or mistaken when “the debtor either lacks knowledge of the undisclosed claims or has no motive for their concealment.”<sup>19</sup> Put differently, those courts will *presume* bad faith or “deliberate manipulation,” when a debtor has “knowledge of the claims and a motive to conceal them.”<sup>20</sup>

Some describe this approach as an objective test, as the plaintiff’s subjective intent is irrelevant.<sup>21</sup> The first prong is narrow and operates like a statute of limitations—a debtor only “lacks knowledge of

the undisclosed claims” when she lacks knowledge of the underlying *facts*, as opposed to lacking knowledge that those facts may support a lawsuit.<sup>22</sup> The second prong—that the debtor “has no motive for ... concealment”—underscores the strictness of the test, as it is almost never met. A motive to conceal assets is considered inherent in the bankruptcy process,<sup>23</sup> and nearly always exists except where the debtor has relinquished the claim and the trustee prosecutes it for the benefit of the bankruptcy estate and creditors.<sup>24</sup> If the plaintiff argues that she did not know she needed to disclose her lawsuit to the bankruptcy court, that is irrelevant.<sup>25</sup> If she alleges miscommunication or bad advice from her bankruptcy attorney, that is also irrelevant. Litigants are bound by the actions and omissions of their attorneys, and their remedy may be a malpractice suit if those actions and omissions are sufficiently egregious.<sup>26</sup> Thus, in those circuits, judicial estoppel applies nearly automatically in most instances where bankruptcy debtors failed to disclose lawsuits and obtained discharges in bankruptcy.

The origin of that rule is the Fifth Circuit’s 1999 *In re Coastal Plains* decision,<sup>27</sup> which the Tenth and Eleventh circuits later adopted.<sup>28</sup> The Tenth Circuit’s *Eastman* decision illustrates the rule in action. A railroad worker (Gardner) was injured at work, retained a personal injury attorney, and sued the railroad under federal law in 2003. In 2004, he retained a bankruptcy attorney, filed for bankruptcy, and received a discharge, without disclosing his personal injury lawsuit. In 2005, Gardner’s personal injury attorney learned of the bankruptcy and informed the bankruptcy trustee. The bankruptcy court reopened the case and granted Gardner a new discharge. Back in the district court, however, the court granted the railroad’s motion for summary judgment on judicial estoppel grounds. On appeal and in the district court, Gardner asserted that his disclosure had been inadvertent and ultimately harmless. Gardner argued that he told his bankruptcy attorney about his personal injury lawsuit and relied on the bankruptcy attorney to file the correct papers. And he noted his disclosure was harmless because his bankruptcy was reopened and his creditors were made whole.<sup>29</sup>

The Tenth Circuit found Gardner’s inadvertence arguments legally irrelevant, and affirmed the dismissal. “Unfortunately for Gardner,” the Court remarked, “our sister circuits, for what seem to us sound reasons, have not been overly receptive to debtors’ attempts to recover on claims about which they ‘inadvertently or mistakenly’ forgot to inform the bankruptcy court.” Gardner was bound by the omissions of his bankruptcy attorney, even if neither he nor the attorney intended to deceive the bankruptcy court. And “[t]hat Gardner’s bankruptcy was reopened and his creditors were made whole once his omission became known [was] inconsequential.”<sup>30</sup>

The Fifth, Tenth, and Eleventh circuits apply their narrow definition of inadvertence consistently. Some judges in those circuits have criticized that approach,<sup>31</sup> and at least one from another circuit has defended that approach against contrary arguments.<sup>32</sup> The Fifth, Tenth, and Eleventh circuits base their rule on two related principles: the absolute importance of full disclosure by debtors in bankruptcy and the value of deterring fraud or incomplete disclosures.

First, the American bankruptcy process gives debtors a fresh start and extinguishes their debts in some measure at the expense of innocent creditors.<sup>33</sup> The integrity of the bankruptcy process therefore critically depends on full disclosures so that a process for giving honest debtors a fresh start does not enable fraud. Strictly

limiting the definition of inadvertence thus protects the integrity of the bankruptcy process by reinforcing the Bankruptcy Code's disclosure obligations.<sup>34</sup>

Second, relatedly, strict application of judicial estoppel deters fraud and deficient disclosures in the future.<sup>35</sup> For more than 100 years, courts have recognized that the bankruptcy process may offer incentives to dishonest debtors to hide assets and exploit them later.<sup>36</sup> As the First Circuit put it: "Conceal your claims, get rid of your creditors on the cheap, and start over with a bundle of rights. This is a palpable fraud that the court will not tolerate, even passively."<sup>37</sup> The Fifth, Tenth, and Eleventh circuits consistently cite that specter of fraud as a reason for taking a narrow view of inadvertence.<sup>38</sup> Thus, even where a plaintiff's actions tend to show that its nondisclosure was inadvertent or mistaken, those circuits have applied judicial estoppel to deter others. In *Eastman*, for example, the Tenth Circuit rejected Gardner's arguments for considering that he had reopened his bankruptcy and made his creditors whole. To excuse Gardner on that basis, the court held, would provide incentives to others to hide assets and only come clean when caught. "This so-called remedy," the court stated, "would only diminish the necessary incentive to provide the bankruptcy court with a truthful disclosure of the debtor's assets."<sup>39</sup>

### **The Sixth, Seventh, and Ninth Circuits' Rebuttable Presumption of Bad Faith and Broad Consideration of Evidence of Good Faith**

The Sixth, Seventh, and Ninth circuits accept the Fifth, Tenth, and Eleventh circuits' proposition that courts may presume bad faith or deliberate manipulation when a debtor has knowledge of the claims and a motive to conceal them.<sup>40</sup> In those circuits, however, the presumption is not irrebuttable, and courts consider a range of explanations from plaintiffs to rebut or avoid the presumption.

The Seventh and Ninth circuits have stated clearly that the presumption of deceit does not apply where the plaintiff reopens the bankruptcy to disclose the lawsuit to the creditors.<sup>41</sup> If a plaintiff has reopened the bankruptcy, the inadvertence inquiry is "not limited to the plaintiff's knowledge of the pending claim and the universal motive to conceal a potential asset," but also includes "more broadly, the plaintiff's subjective intent when filling out and signing the bankruptcy schedules."<sup>42</sup> In other words, those courts ask whether the plaintiff was actually trying to deceive the bankruptcy court instead of presuming deception from incomplete disclosures.

*Ah Quin v. County of Kauai* illustrates the Ninth Circuit's approach. There, the plaintiff was pursuing a district court employment-discrimination case that she did not disclose in bankruptcy. Her attorney in the discrimination case discovered the disclosure problem and alerted the defendant and the plaintiff's bankruptcy attorney. The plaintiff then reopened her bankruptcy, and submitted declarations from herself and her attorneys explaining that the earlier nondisclosure was a mistake and not in bad faith.<sup>43</sup> The district court dismissed on judicial estoppel grounds, relying primarily on the Tenth Circuit's *Eastman* decision.<sup>44</sup> The Ninth Circuit reversed and explicitly split with the Fifth, Tenth, and Eleventh circuits for four reasons. First, once a bankruptcy debtor reopens the bankruptcy and makes a full disclosure, the *New Hampshire* factors—inconsistent positions, judicial acceptance of the first position, and unfair advantage—are in some sense cured or no longer met. Second, the general

*When confronted with a motion to dismiss on judicial estoppel grounds, plaintiffs frequently assert that their failure to disclose the lawsuit to the bankruptcy court was inadvertent.*

deterrence justification that the Fifth, Tenth, and Eleventh circuits invoke is an awkward fit for the equitable doctrine of judicial estoppel—which is concerned more with the immediate case before the court than with incentives for future litigants. Third, the bankruptcy court, trustees, and creditors already have numerous tools at their disposal to discourage deception and to punish it severely when it is found. Finally, application of judicial estoppel in this manner can have perverse results: An asset (the lawsuit) is destroyed with no benefit to the bankruptcy creditors. The only winner is the defendant—an allegedly bad actor who is excused from any consequences "for the entirely unrelated reason that Plaintiff happened to file for bankruptcy and, possibly due to inadvertence, happened to omit the claim from her initial schedules." The *Ah Quin* court therefore remanded to the district court to make a factual finding on inadvertence, which the lower court had previously inferred on reasoning borrowed from the Tenth Circuit.<sup>45</sup>

The Seventh Circuit's case law is to similar effect. The Ninth Circuit's *Ah Quin* decision relied on two Seventh Circuit decisions.<sup>46</sup> And a later Seventh Circuit decision reversed a district court's application of judicial estoppel where the plaintiff made efforts to correct her initial nondisclosure.<sup>47</sup> That case, *Spaine*, applied *Ah Quin*'s holding that a "presumption of deceit does not arise if [the] debtor corrects omissions from bankruptcy schedules in [a] manner that permits bankruptcy court to assess case 'with the full and correct information.'"<sup>48</sup>

The Sixth Circuit's law appears to be aligned with the Seventh and Ninth circuits, though it has also cited the opposing view favorably. The Sixth Circuit stated in 2002 that it "adopt[ed]" the analysis of the Fifth Circuit's *Coastal Plains* decision.<sup>49</sup> Subsequent cases, however, have distinguished *Coastal Plains* and taken a much broader view of inadvertence.<sup>50</sup> The Sixth Circuit does not limit its analysis of inadvertence to asking whether the plaintiff had knowledge of the omitted claims and a motivation to conceal them. Rather, like the Seventh and Ninth circuits, the Sixth Circuit considers a broader range of evidence of good or bad faith, including the plaintiff's subjective intent, and efforts to correct initial nondisclosures.<sup>51</sup>

### **Other Circuits**

The six remaining regional circuits have not taken a definitive position.<sup>52</sup> The Third Circuit's case law points in different directions. That court accepts the reasoning of the Fifth, Tenth, and Eleventh circuits that "a rebuttable inference of bad faith arises when averments in the pleadings demonstrate both knowledge of a claim and a motive to conceal that claim in the face of an affirmative duty to

disclose.”<sup>52</sup> Yet, in another case that it has repeatedly cited and not overruled, the Third Circuit explicitly rejected the argument that “intent may be inferred for purposes of judicial estoppel solely from nondisclosure notwithstanding the affirmative disclosure requirement of the Bankruptcy Code” and stated its “unwilling[ness] to treat careless or inadvertent nondisclosures as equivalent to deliberate manipulation when administering the ‘strong medicine’ of judicial estoppel.”<sup>53</sup>

The First, Second, Fourth, Eighth, and D.C. circuits have quoted decisions of other circuits in dicta but have not directly addressed how to treat claims of inadvertence in this context. The First Circuit has explicitly reserved the question.<sup>54</sup> The Second Circuit seems not to have reached it at all.<sup>55</sup> The Fourth Circuit has stated frequently, outside of the bankruptcy context, that a party’s good or bad faith in advancing inconsistent positions “is the determinative factor” in deciding whether to apply judicial estoppel. Its most relevant case on nondisclosures in bankruptcy does not involve inadvertence arguments but rather a situation where the plaintiff did disclose a potential, not-yet-filed claim in bankruptcy and simply failed to submit an immediate update when the lawsuit actually began.<sup>56</sup> The Eighth Circuit’s most relevant case similarly did not discuss inadvertence, as there was no actual discharge in the bankruptcy proceedings.<sup>57</sup> And in the D.C. Circuit’s most relevant case, the court rejected an inadvertence argument where evidence refuted any claim of inadvertence of any kind and thus obviated any need to decide whether to adopt a broad or narrow definition of inadvertence.<sup>58</sup>

### Evaluating Competing Approaches

The 3-3 split in the federal courts of appeals has only recently crystallized. While judicial estoppel has been traced to the mid-19th century,<sup>59</sup> it was not widely recognized until recently. The D.C. Circuit said in 1980 that “judicial estoppel has not been followed by anything remotely approaching a majority of jurisdictions,”<sup>60</sup> and the Tenth Circuit rejected judicial estoppel as recently as 2003.<sup>61</sup> The Supreme Court’s 2001 *New Hampshire v. Maine* case is the Court’s first comprehensive discussion of judicial estoppel. *New Hampshire* offered a restatement of judicial estoppel and applied it to a boundary dispute between New Hampshire and Maine.<sup>62</sup> Since then, every circuit has embraced the concept. Once *New Hampshire* placed judicial estoppel into a framework, different circuits could thereafter evaluate the Fifth Circuit’s *Coastal Plains* rule in the context of that framework and adopt it, reject it, or modify it.

While courts on each side of the 3-3 split sometimes cite each other’s opinions favorably, it seems clear that there is, in fact, a split. District courts and commentators have acknowledged the developing split of authority.<sup>63</sup> And the Ninth Circuit’s *Ah Quin* decision explicitly splits with the Fifth, Tenth, and Eleventh circuits’ treatment of inadvertence and places primary importance on factors—such as a plaintiff’s subjective intent and reopening of her bankruptcy—that those circuits regard as legally irrelevant.<sup>64</sup> And it seems clear that the *Eastman* and *Ah Quin* cases described above would have been resolved differently had the jurisdictions been reversed. The current split highlights tensions between law and equity and between the objectives of deterring future bad behavior versus reaching a fair result in an individual case.

The Fifth, Tenth, and Eleventh circuits favor general deterrence and clear rules. Those courts place primary importance

on full disclosure in bankruptcy and of avoiding fraud. The best defense of that rule against contrary arguments is probably Judge Jay Bybee’s dissent in *Ah Quin*. As that dissent puts it, “when a lie is punished and future lies are deterred—especially in the context of a system so dependent on full and accurate disclosure—equity will usually have been done. ‘Come what may, anything is better than lies or deception.’”<sup>65</sup> It is better, in the view of those courts, to dismiss potentially meritorious claims that may have been omitted from bankruptcy disclosures because of negligence or ignorance than to risk involving the court in fraud or to risk creating a common-law escape hatch from the Bankruptcy Code’s disclosure requirements. That means categorically rejecting certain types of excuses for nondisclosure and putting the public on notice that nondisclosure in bankruptcy will have consequences. It is often said that ignorance of the law is no excuse, and plaintiffs’ assertions of ignorance of their disclosure obligations in bankruptcy are irrelevant in those circuits.<sup>66</sup> Thus, even though the creditors in an individual case may lose the potential value of the dismissed lawsuit, all creditors are better served in the long term by the ex ante deterrence of incomplete bankruptcy disclosures. And they are better served in the short term by the exception those circuits recognize for when the bankruptcy trustee prosecutes a lawsuit for the benefit of creditors. If the strict rule in those circuits seems inconsistent with the equitable nature of judicial estoppel, defenders of the rule respond that “courts of equity must be governed by rules and precedents no less than courts of law.”<sup>67</sup>

The Sixth, Seventh, and Ninth circuits place greater emphasis on the equitable nature of judicial estoppel and the fact that dismissing a lawsuit can only harm the plaintiff’s creditors and benefit an alleged bad actor (the defendant). In distinguishing the equitable doctrine of laches from statutes of limitations, the Supreme Court has said that “[e]quity eschews mechanical rules; it depends on flexibility.”<sup>68</sup> Courts of appeals applying judicial estoppel have consistently noted that the doctrine is meant to prevent deliberate manipulation of courts, not to function as a trap for the unwary or a strict rule.<sup>69</sup> Thus, where a plaintiff has claimed that nondisclosure in bankruptcy was inadvertent, those courts will generally look deeper into the facts of the individual case to evaluate the plaintiff’s arguments rather than applying a strict rule that makes most such arguments categorically unavailing. At least one court has found that the bankruptcy disclosure forms do not necessarily alert laypersons clearly to the need to disclose lawsuits,<sup>70</sup> and courts have held in other contexts that “willfulness” or “knowing” misconduct cannot be proved by relying on the common law presumption that every person knows the law.<sup>71</sup> In response to the argument that full disclosure in bankruptcy is important, the Ninth Circuit notes—as other courts and commentators have—that bankruptcy courts and trustees already have numerous tools at their disposal to punish actual fraud, including involuntary reopening, sanctions, revocation of discharge, and referral for criminal prosecution.<sup>72</sup>

Finally, the rule in the Sixth, Seventh, and Ninth circuits avoids the harsh result of rewarding alleged bad actors at the possible expense of innocent creditors. Dismissing a case outright on judicial estoppel grounds has potentially harsh consequences for a plaintiff who has alleged that she is the victim of some kind of wrong for which the law supplies a remedy—e.g., discrimination, fraud,

assault, breach of contract, or constitutional violations. Courts that dismiss those cases to avoid being involved in potential bankruptcy fraud by the plaintiff do so at the risk of ratifying the alleged bad conduct of the defendant in the case before them.<sup>73</sup> And by extinguishing a lawsuit, the court destroys an asset that could be used to benefit the plaintiff's innocent creditors.<sup>74</sup>

### Future Developments in Other Circuits and Supreme Court Review

It remains to be seen how the law will continue to develop, but it seems clear that the courts of appeals and district courts in First, Second, Third, Fourth, Eighth, and D.C. circuits will increasingly be asked to address claims of inadvertence.

Those courts should not make the mistake of looking at one side of the split in isolation. Nor should those courts view the competing approaches as the only possibilities. For one thing, it is questionable whether courts should adopt even a rebuttable presumption that a nondisclosure in bankruptcy is deliberate. In *eBay Inc. v. MercExchange LLC*, the Supreme Court criticized the Federal Circuit for taking a general equitable doctrine (injunctions) and adopting a special rule for patent cases of presuming irreparable harm when the plaintiff prevails at trial and then seeks an injunction.<sup>75</sup> *eBay* ruled that the decision whether to grant an injunction “must be exercised consistent with traditional principles of equity, in patent disputes no less than in other cases.” The presumption that courts draw from a bankruptcy debtor's nondisclosure resembles the subject-matter-specific presumption that the Supreme Court unanimously rejected in *eBay* as improperly displacing “traditional principles of equity.”<sup>76</sup>

For another thing, when a district court is convinced that a plaintiff should suffer some consequence for pursuing a lawsuit that was not disclosed in bankruptcy, the court may wish to consider alternatives to outright dismissal. Most courts hold that it is generally inappropriate to use a court's inherent powers to dismiss a case without considering less severe alternatives.<sup>77</sup> Courts have broad discretion under their inherent powers to tailor sanctions. Alternatives such as capping damages, permitting plaintiffs to pursue injunctive relief but not damages, or requiring plaintiffs to return to the bankruptcy court at the conclusion of the case to disclose any judgment to their creditors, or staying the case to permit reopening of the bankruptcy, might address the competing concerns better than a binary decision whether to dismiss a case or not.

It also remains to be seen how and whether the Supreme Court will intervene. In favor of review are (1) the existence of a developing split of authority with reasoned opinions on both sides, (2) the more-than-weekly basis on which this application of judicial estoppel arises in federal and state courts, and (3) the important, case-dispositive consequences of this issue for a broad range of civil claims. Against immediate review are that the split of authority has only recently developed and that further percolation—particularly in the First, Second, Third, Fourth, Eighth, and D.C. circuits—might aid the Supreme Court's review later on. Further, the courts of appeals have varied in their approaches to judicial estoppel for decades, and the Supreme Court has never previously thought that this variance warranted review to establish a uniform rule (*New Hampshire* was an original jurisdiction case.). In the meantime, district courts and courts of appeals should be aware that the case law is in flux and differs across jurisdictions. And plaintiffs, defen-

*It is questionable whether courts should adopt even a rebuttable presumption that a nondisclosure in bankruptcy is deliberate.*

dants, and their attorneys should be aware that the issue exists. Otherwise, defendants may unwittingly forfeit a case-dispositive defense, and plaintiffs may learn about the issue for the first time when served with a motion to dismiss. ☉



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### Endnotes

<sup>1</sup>*New Hampshire v. Maine*, 532 U.S. 742, 751, 753 (2001).

<sup>2</sup>1,038,720 “non-business” bankruptcies were filed in 2013 [www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2013/1213\\_f2.pdf](http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2013/1213_f2.pdf).

<sup>3</sup>A search on Westlaw's “allcases” database for “JUDICIAL ESTOPPEL /P BANKRUPT!” yields 280 results for 2013, 263 for 2012, 216 for 2012, and 185 for 2010. The search appears to generate few, if any, false positives.

<sup>4</sup>*See, e.g.*, K.M. Lewis & Paul M. Lopez, *Recent Developments in Estoppel and Preclusion Doctrines in Consumer Bankruptcy Cases; Volume I of II: Estoppel*, 66 OKLA. L. REV. 459 (2014); Theresa M. Beiner & Robert B. Chapman, *Take What You Can, Give Nothing Back: Judicial Estoppel, Employment Discrimination, Bankruptcy, and Piracy in the Courts*, 60 U. MIAMI L. REV. 1 (2005); Hon. William Houston Brown, et al., *Debtors' Counsel Beware: Use of the Doctrine of Judicial Estoppel in Nonbankruptcy Forums*, 75 AM. BANKR. L.J. 197 (2001).

<sup>5</sup>*See, e.g.*, Kyle M. Heisner, *Invoking Judicial Estoppel to Secure Dismissal*, THE LEGAL INTELLIGENCER (Nov. 25, 2014); Roman T. Galas & John P. Mueller, *Using Bankruptcy to (Es)top a Plaintiff in His Tracks*, DRITODAY (Oct. 13, 2011), [available at dritoday.org/feature.aspx?id=178](http://available.at.dritoday.org/feature.aspx?id=178); Benjamin A. Hardy, *The Bankrupt's Employment Claim—List It or Lose It*, 18 LABOR LAWYER 193 (Fall 2002).

<sup>6</sup>*New Hampshire v. Maine*, 532 U.S. 742, 750 (2001).

<sup>7</sup>*Milton H. Greene Archives v. Marilyn Monroe LLC*, 692 F.3d 983 (9th Cir. 2012).

<sup>8</sup>*Baughman v. Disney World Co.*, 685 F.3d 1131, 1133-34 (9th Cir. 2012).

<sup>9</sup>*New Hampshire v. Maine*, 532 U.S. 742 (2001).

<sup>10</sup>532 U.S. 742.

<sup>11</sup>*Id.* at 749-53.

<sup>12</sup>*See, e.g.*, *Johnson v. Or. Dep't of Human Resources*, 141 F.3d 1361, 1369 (9th Cir. 1998); *Zinkand v. Brown*, 478 F.3d 634, 638

(4th Cir. 2007).

<sup>13</sup>*Milton H. Greene*, 692 F.3d at 995 (“[C]hicanery or knowing misrepresentation by the party to be estopped is a factor to be considered in the judicial estoppel analysis and not an ‘inflexible prerequisite’ to its application.”).

<sup>14</sup>See generally 11 U.S.C. § 521; Admin. Office of the Courts, Bankruptcy Cases, at [www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/HowCourtsWork/BankruptcyCases.aspx](http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/HowCourtsWork/BankruptcyCases.aspx)

<sup>15</sup>See, e.g., *Hamilton v. State Farm Fire & Casualty Co.*, 270 F.3d 778, 784 (9th Cir. 2001); *In re Coastal Plains, Inc.*, 179 F.3d 197, 207-08 (5th Cir. 1999).

<sup>16</sup>Bankruptcy Form B7 at 11, available at [www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK\\_Forms\\_Official\\_2010/B\\_007\\_0410.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK_Forms_Official_2010/B_007_0410.pdf)

<sup>17</sup>See, e.g., *Biesek v. Soo Line R.R. Co.*, 440 F.3d 410, 412 (7th Cir. 2006); *Ah Quin v. County of Kauai*, 733 F.3d 267, 271 (9th Cir. 2013).

<sup>18</sup>*Biesek*, 440 F.3d at 412.

<sup>19</sup>*Eastman v. Union Pac. Ry. Co.*, 493 F.3d 1151, 1157 (10th Cir. 2007); *Barger v. City of Cartersville*, 348 F.3d 1289, 1295 (11th Cir. 2003); *Coastal Plains*, 179 F.3d at 210.

<sup>20</sup>*Eastman*, 493 F.3d at 1157.

<sup>21</sup>See, e.g., Nat’l Consumer Bankruptcy Rights Ctr., Inadvertence as Subjective/Objective Question in Judicial Estoppel Analysis (July 21, 2014), at [www.ncbr.org/as-subjectiveobjective-question-in-judicial-estoppel-analysis/](http://www.ncbr.org/as-subjectiveobjective-question-in-judicial-estoppel-analysis/).

<sup>22</sup>*Coastal Plains*, 179 F.3d at 208.

<sup>23</sup>*Eastman*, 493 F.3d at 1159 (positing an “ever-present motive to conceal legal claims and reap the financial rewards”) (citing cases); *Beiner & Chapman*, supra note 4, at 12 (“An analysis under *Coastal Plains* inevitably leads to the conclusion that all debtors have a motive for concealment.”).

<sup>24</sup>*Reed v. City of Arlington*, 650 F.3d 571, 573 (5th Cir. 2011) (en banc); *Parker v. Wendy’s Int’l Inc.*, 365 F.3d 1268, 1272 (11th Cir. 2004).

<sup>25</sup>See, e.g., *Coastal Plains*, 179 F.3d at 207 (scope of disclosure duty “goes without saying”); *Kamont v. West*, 83 F. App’x 1, 2 (5th Cir. 2003) (“A lack of awareness of the statutory disclosure duty is simply not relevant to the question of judicial estoppel.”).

<sup>26</sup>*Eastman*, 493 F.3d at 1157; *Queen v. TA Operating LLC*, 734 F.3d 1081, 1094 (10th Cir. 2013).

<sup>27</sup>*Coastal Plains*, 179 F.3d at 197; *Beiner & Chapman*, supra note 4, at 12 (*Coastal Plains* is “very influential in this area.”).

<sup>28</sup>*Eastman*, 493 F.3d at 1157 (10th Cir. 2007); *Barger*, 348 F.3d at 1295.

<sup>29</sup>*Eastman*, 493 F.3d at 1153-57, 1160.

<sup>30</sup>*Id.* at 1157, 1160.

<sup>31</sup>*Barger v. City of Cartersville*, 348 F.3d 1289, 1297-98 (11th Cir. 2003) (Barkett, J., dissenting); *Jethroe v. Omnova Solutions Inc.*, 412 F.3d 598, 601 n.4 (5th Cir. 2005) (acknowledging “persuasive authority” contrary to the Fifth Circuit’s *Coastal Plains* decision).

<sup>32</sup>*Ah Quin v. County of Kauai*, 733 F.3d 267, 281-86, 292-93 (9th Cir. 2013) (Bybee, J., dissenting).

<sup>33</sup>See *Williams v. U.S. Fid. & Guaranty Co.*, 236 U.S. 549, 554-55 (1915); *Marrama v. Citizens Bank of Mass.*, 127 S. Ct. 1105, 1107 (2007) (citing *Grogan v. Garner*, 498 U.S. 279, 286, 287 (1991)).

<sup>34</sup>See, e.g., *Eastman*, 493 F.3d at 1159 (“The doctrine of judicial estoppel serves to offset such motive, inducing debtors to be completely truthful in their bankruptcy disclosures.”); *Coastal Plains*, 179 F.3d at 207-08.

<sup>35</sup>*Reed v. City of Arlington*, 650 F.3d 571, 574 (5th Cir. 2011) (en banc); *Ah Quin*, 733 F.3d at 293 (Bybee, J., dissenting).

<sup>36</sup>See *First Nat’l Bank of Jacksboro v. Lasater*, 196 U.S. 115, 119 (1905); *Marrama*, 127 S. Ct. at 1107.

<sup>37</sup>*Payless Wholesale Distrib. v. Alberto Culver (P.R.) Inc.*, 989 F.2d 570, 571 (1st Cir. 1993).

<sup>38</sup>*Eastman*, 493 F.3d at 1157-58 (citing *Payless*).

<sup>39</sup>*Id.* at 1160 (quoting *Burnes*, 291 F.3d at 1288).

<sup>40</sup>*Ah Quin*, 733 F.3d at 273; *Browning v. Levy*, 283 F.3d 761, 776 (6th Cir. 2002); *Spaine v. Community Contacts Inc.*, 756 F.3d 542, 544 (7th Cir. 2014).

<sup>41</sup>*Ah Quin*, 733 F.3d at 273 (original emphasis); see also *Spaine*, 756 F.3d at 547 (citing *Ah Quin*); *Eubanks v. CBSK Fin. Grp. Inc.*, 385 F.3d 894, 897-99 (6th Cir. 2004).

<sup>42</sup>*Id.* at 276-77.

<sup>43</sup>*Id.* at 270.

<sup>44</sup>433 B.R. 320, 324-25 (D. Haw. 2010).

<sup>45</sup>*Ah Quin*, 733 F.3d at 274-76; see also *Dzakula v. McHugh*, 746 F.3d 399, 400-02 (9th Cir. 2014) (clarifying and distinguishing *Ah Quin*).

<sup>46</sup>*Id.* at 274 (citing *Biesek*, 440 F.3d 310; *Cannon-Stokes v. Potter*, 453 F.3d 446 (7th Cir. 2006)).

<sup>47</sup>*Spaine*, 756 F.3d at 547-48.

<sup>48</sup>*Id.* at 547 (quoting *Ah Quin*, 733 F.3d at 272-73).

<sup>49</sup>*Browning v. Levy*, 283 F.3d 761, 776 (6th Cir. 2002) (“Although this court is not bound by *Coastal Plains Inc.*, these two requirements for a finding of an inadvertent omission seem reasonable and appropriate. ... We therefore adopt them in our analysis of the present case.”).

<sup>50</sup>*Eubanks*, 385 F.3d at 897-99.

<sup>51</sup>See *Javery v. Lucent Techs Inc.*, 741 F.3d 686, 698 (6th Cir. 2014); *Stephenson v. Malloy*, 700 F.3d 265, 272-73 (6th Cir. 2012).

<sup>52</sup>The Federal Circuit applies regional circuit law to questions of judicial estoppel that arise in appeals from district courts. See *Wang Labs. Inc. v. Applied Computer Sci.*, 958 F.2d 355, 358. (Fed. Cir. 1992).

<sup>53</sup>*Krystal Cadillac-Oldsmobile GMC Truck Inc. v. General Motors Corp.*, 337 F.3d 314, 321 (3d Cir. 2003); *id.* at 323 (citing *Coastal Plains* with approval).

<sup>54</sup>*Ryan Operations, G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 364, 365 (3d Cir. 1996).

<sup>55</sup>*Guay v. Burack*, 677 F.3d 10, 20 (1st Cir. 2012) (“This case does not present facts that require consideration of that exception, and we leave that question open.”).

<sup>56</sup>*Whitehurst v. 230 Fifth Inc.*, 998 F. Supp. 2d 233, 259 (SDNY 2014) (“The Second Circuit has not yet told us whether good faith mistakes to include a specific asset in an earlier bankruptcy proceeding should invoke estoppel. ...”).

<sup>57</sup>*Whitten v. Fred’s Inc.*, 601 F.3d 231, 241, 242 (4th Cir. 2010) (quoting *Zinkand*, 478 F.3d at 638 (4th Cir. 2007)), overruled in part on other grounds, *Vance v. Ball State Univ.*, 133 S. Ct. 2434 (2013).

<sup>58</sup>*Stallings v. Hussmann Corp.*, 447 F.3d 1041 (8th Cir. 2006).

<sup>59</sup>*Moses v. Howard Univ. Hosp.*, 606 F.3d 789, 800 (D.C. Cir. 2010).

<sup>60</sup>See *Hamilton v. Zimmerman*, 37 Tenn. (5 Sneed) 39 (1857).

<sup>61</sup>*Konstantinidis v. Chen*, 626 F.2d 933, 938 (D.C. Cir. 1980).

<sup>61</sup>See, e.g., *NISH v. Rumsfeld*, 348 F.3d 1263, 1272 (10th Cir. 2003).

<sup>62</sup>*New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (“[W]e have not had occasion to discuss the doctrine elaborately . . .”).

<sup>63</sup>*Robinson v. District of Columbia*, 10 F. Supp. 3d 181, 186 n.3 (D.D.C. 2014) (acknowledging split); *Spain v. Community Contacts*, 2013 WL 4782158, at 5 n.2 (N.D. Ill. Sept. 6, 2013) (same); *Jethroe*, 412 F.3d at 601 n.4; *Current Circuit Splits*, 10 SETON HALL CIRCUIT REVIEW 145, 151-52 (2013) (same); Nat’l Consumer Bankruptcy Center, Ninth and Tenth Circuits Differ on Judicial Estoppel Considerations (Sept. 9, 2013), at [www.ncbrc.org/blog/2013/09/09/ninth-and-tenth-circuits-differ-on-judicial-estoppel-considerations/](http://www.ncbrc.org/blog/2013/09/09/ninth-and-tenth-circuits-differ-on-judicial-estoppel-considerations/) (similar); B. Shapiro, Las Vegas Bankruptcy Blog, The 9th Circuit vs. the 10th Circuit — Judicial Estoppel (Aug. 26, 2013), at [brianshapiro.blogspot.com/2013/08/the-9th-circuit-vs-10th-circuit.html](http://brianshapiro.blogspot.com/2013/08/the-9th-circuit-vs-10th-circuit.html) (similar).

<sup>64</sup>*Ah Quin*, 733 F.3d at 277.

<sup>65</sup>*Ah Quin*, 733 F.3d at 294 (Bybee, J., dissenting) (quoting 2 *Anna Karenina* 76 (N.H. Dole trans., 1899) (1877)).

<sup>66</sup>*Coastal Plains*, 179 F.3d at 207; *Kamont v. West*, 83 F. App’x 1, 2 (5th Cir. 2003).

<sup>67</sup>*Ah Quin*, 733 F.3d at 283 n.3 (Bybee, J., dissenting) (quoting *Holland v. Florida*, 560 U.S. 631, 649 (2010)).

<sup>68</sup>*Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946).

<sup>69</sup>See, e.g., *Perry v. Blum*, 629 F.3d 1, 13 (1st Cir. 2010); *Johnson*, 141 F.3d at 1369.

<sup>70</sup>*Fairchild v. Touchtunes Music Corp.*, No. 1-C-9699, 2002 WL 31833768, at \*3 (N.D. Ill. Dec. 12, 2002).

<sup>71</sup>*Cheek v. United States*, 498 U.S. 192, 199-200 (1991); *United States v. Isaacs*, 539 F.2d 686 (9th Cir. 1976).

<sup>72</sup>*Ah Quin*, 733 F.3d at 275; see also *Oneida Motor Freight Inc. v. United Jersey Bank*, 848 F.2d 414, 423 (3d Cir. 1988) (Stapleton, J., dissenting); *In re Griner*, 240 B.R. 432, 439 (Bankr. S.D. Ala. 1999); *Beiner & Chapman*, supra note 4, at 57.

<sup>73</sup>*Ah Quin*, 733 F.3d at 275.

<sup>74</sup>*Id.*; see also *Cannon-Stokes*, 453 F.3d at 448; *Oneida*, 848 F.2d at 422 (Stapleton, J., dissenting).

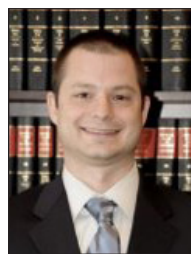
<sup>75</sup>547 U.S. 388, 393-94 (2006).

<sup>76</sup>See also *Monsanto Co. v. Geerston Seed Farms*, 561 U.S. 139, 157 (2010); *Flexible Lifeline Sys. Inc. v. Precision Lift Inc.*, 654 F.3d 989, 995-96 (9th Cir. 2011).

<sup>77</sup>See *Ready Transp. Inc. v. AAR Mfg. Inc.*, 627 F.d 402, 404-05 (9th Cir. 2010) (collecting cases).

## CONUNDRUM continued from page 53

With the stakes so high, candidates, parties, and outside spenders will continue to push the boundaries. Conversely, reformers and partisans stand at the ready to file a complaint at the slightest hint of impropriety. Indeed, some groups exist for little else. After the CNN report ran, ADLF, run by veteran Democrat operative Brad Woodhouse, almost immediately filed its FEC complaint. A glance at the group’s website reveals little except a menu of FEC and other complaints against Republicans. This should give both sides pause before pushing the coordination limits too far. ☺



*Paul H. Jossey is an election lawyer in Alexandria, Virginia. This is not intended to be legal advice. © 2015 Paul H. Jossey. All rights reserved.*

### Endnotes

<sup>1</sup>Chris Moody, *How the GOP Used Twitter To Stretch Election Laws*, updated Nov. 17, 2014, available at [www.cnn.com/2014/11/17/politics/twitter-republicans-outside-groups/](http://www.cnn.com/2014/11/17/politics/twitter-republicans-outside-groups/).

<sup>2</sup>Available at [americandemocracy.org/app/uploads/ADLF\\_Before-The-Federal-Election-Commission-11.24.14.pdf](http://americandemocracy.org/app/uploads/ADLF_Before-The-Federal-Election-Commission-11.24.14.pdf).

<sup>3</sup>Campaign Manager Pleads Guilty to Coordinated Campaign Contributions and False Statements, Department of Justice Press Release, Feb. 12, 2015, available at [www.justice.gov/opa/pr/campaign-manager-pleads-guilty-coordinated-campaign-contributions-and-false-statements](http://www.justice.gov/opa/pr/campaign-manager-pleads-guilty-coordinated-campaign-contributions-and-false-statements).

<sup>4</sup>See the FEC brochure on Coordinated Communications and Independent Expenditures, available at [www.fec.gov/pages/](http://www.fec.gov/pages/)

[brochures/indexp.shtml](#).

<sup>5</sup>11 CFR 109.21(d).

<sup>6</sup>Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 432 (Jan. 3, 2003).

<sup>7</sup>See [www.nrscc.org/blog/how-democrats-subvert-campaign-finance-laws](http://www.nrscc.org/blog/how-democrats-subvert-campaign-finance-laws).

<sup>8</sup>See [www.moresoftmoneyhardlaw.com/2014/11/coordination-controversy-twittersverse/](http://www.moresoftmoneyhardlaw.com/2014/11/coordination-controversy-twittersverse/).

<sup>9</sup>*In the Matter of American Crossroads*, (MUR 6357), Statement of Reasons, Chair Caroline C. Hunter and commissioners Donald F. McGahn and Matthew S. Peterson, Feb. 22, 2012, available at [eqs.fec.gov/eqsdocsMUR/12044312281.pdf](http://eqs.fec.gov/eqsdocsMUR/12044312281.pdf).

<sup>10</sup>*In the Matter of American Crossroads*, (MUR 6357), Statement of Reasons of Vice Chair Ellen L. Weintraub and commissioners Cynthia L. Bauerly and Steven T. Walther, Feb. 27, 2012, available at [eqs.fec.gov/eqsdocsMUR/12044312290.pdf](http://eqs.fec.gov/eqsdocsMUR/12044312290.pdf).

<sup>11</sup>Daniel P. Tokaji and Renata E. B. Strause, *The New Soft Money, Outside Spending in Congressional Elections*, (2014) available at [moritzlaw.osu.edu/thenewsoftmoney/wp-content/uploads/sites/57/2014/06/the-new-soft-money-WEB.pdf](http://moritzlaw.osu.edu/thenewsoftmoney/wp-content/uploads/sites/57/2014/06/the-new-soft-money-WEB.pdf).

<sup>12</sup>See Rachel Marcus and John Dunbar, *Rules Against Coordination Between Super PACs, Candidates Tough To Enforce*, Jan. 13, 2012, available at [www.publicintegrity.org/2012/01/13/7866/rules-against-coordination-between-super-pacs-candidates-tough-enforce](http://www.publicintegrity.org/2012/01/13/7866/rules-against-coordination-between-super-pacs-candidates-tough-enforce).





# Unmasking “John Doe” Leaks

By John Fraser

The federal government leaks secrets to a shocking extent, and yet there is at least one commonly available litigation tool that the government has failed to deploy to combat leaks. In the world outside the government, the right to control confidential information, to protect trade secrets, and to maintain the confidence of business allies, is protected by use of “John Doe” lawsuits.<sup>1</sup> These civil lawsuits name an unknown John Doe defendant and seek immediate discovery from nonparty businesses to unmask the defendant and seek civil remedies for unauthorized uses of information. The federal government has never embraced the broad use of this tool.

John Doe suits have been heavily publicized in recent years as effective tools in the investigation and deterrence of the misuses of intellectual property. In particular, thousands of John Doe suits have been filed by the entertainment industry to unmask anonymous thieves. Private industry has publicized these suits as a deterrent to piracy of intellectual property. If the federal government is to deter the unauthorized disclosure of classified information by employees and contractors, it should borrow the John Doe lawsuit from the private sector, file and

publicize such suits, and educate the federal workforce as to the use of this tool. Frequent and well-publicized use of John Doe lawsuits by the government will help to erode the culture that has developed within the federal government that tolerates leaks or regards them as unstoppable.

John Doe lawsuits should be used to supplement criminal law processes that were not specifically designed to identify anonymous sources of leaks. In any event, few defendants are identified through criminal processes, and very few are punished.<sup>2</sup> Because John Doe lawsuits and subpoenas are civil proceedings, and because business corporations may not assert Fifth Amendment rights, John Doe lawsuits are effective in unmasking anonymous actors in the private sector. Accordingly, John Doe lawsuits are crucial in identifying the heretofore unknown actors.

Civil discovery procedures allow for broader discovery than do criminal procedures. Obtaining evidence from media corporations via search warrants in a criminal case is limited under the Privacy Protection Act, whereas a subpoena of media corporation records in the civil context is not so restricted. The fruits of civil discovery may be used to initiate proceedings to suspend and revoke security clearances, to discipline errant employees and contractors, and to support criminal referrals.

The Department of Justice (DOJ) is fully authorized to represent the government in civil proceedings, and research reveals no legal bar to governmental use of John Doe lawsuits to combat unauthorized releases of classified information. DOJ needs to include this tool in its arsenal to combat the unauthorized release of classified information. DOJ should authorize and encourage U.S. attorneys to use John Doe suits to further develop those cases that cannot be successfully prosecuted in the criminal courts.

## Defining the Problem and the Opportunity

The government's historical use of criminal law to deter unauthorized disclosures of information<sup>3</sup> has not deterred the torrent of unauthorized releases of classified information that have occurred in recent years.<sup>4</sup> For example, a 2013 Rand report concluded that the organizational culture of the Department of Defense treats leaks of classified information as a "risk free" enterprise.<sup>5</sup> Edward Snowden, who now resides in Russia and conducts a campaign of leaks against the National Security Agency that once employed him as a system administrator, has been lionized in the press. President Barack Obama's administration has forcefully sought to use criminal law processes to deter leaks by employees and contractors of federal agencies.<sup>6</sup> However, to be deterred, government employees and contractors who leak classified information must first be unmasked.

## Criminal Law Is a Limited Deterrent

Historically, the government has relied on criminal law and criminal investigative procedures to deter and pursue anonymous leaks.<sup>7</sup> Executive Order 12333 requires that leaks of classified information be reported to the U.S. attorney general as criminal acts.<sup>8</sup> While some administrative remedies are available against employees and contractors who choose to commit unauthorized releases of classified information, the penalties are ineffective against anonymous actors.<sup>9</sup> The primary reliance on criminal law is due to the fact that the U.S. Code contains many criminal penalties for unauthorized releases of classified information but no directly relevant civil penalties.<sup>10</sup> For example, the Espionage Act provides criminal law remedies against unauthorized release of classified information when the release is intended to aid a foreign enemy, and in other circumstances.<sup>11</sup>

However, criminal law procedures are of limited use against anonymous leaks. Under current practice, the FBI handles leaks reported to DOJ under the relevant executive order. Attempts to narrow down the possible source(s) of a leak follow well-known investigative paths.<sup>12</sup> Criminal grand jury subpoenas are sometimes issued to reporters seeking the names of sources.<sup>13</sup> However, to be effective, all of the criminal law remedies are dependent on being able to name and indict the source of the leak after the investigation is complete.<sup>14</sup> An unknown number of criminal investigations are commenced and then closed when a defendant cannot be identified. In the normal course of a leak investigation, the FBI will be stymied by the inability to identify the source of the leak.<sup>15</sup> After exhausting all the resources of the criminal process, the matter will then be closed pending further developments. The referring agency will then be notified that the FBI is unable to move forward on the matter due to inability to identify the proper defendant.<sup>16</sup>

Very few employees or contractors have been indicted for unauthorized releases of classified information.<sup>17</sup> Judging from the recent flow of leaks, the criminal law remedies employed by the government do not adequately deter anonymous unauthorized releases of classified information.

Criminal leak investigations regularly impinge on the publishers of classified information because the publishers have directly relevant information about the source of the information they publish.<sup>18</sup> When a policy decision is made to prosecute a leak and compel grand jury testimony from a publisher, each such use of criminal legal process is met with protests about First Amendment

values and the right of the public to know and the right of the media to publish otherwise classified information that belongs to the government.<sup>19</sup> Wealthy media interests and some public-interest groups argue that any use of the criminal legal process to investigate or prosecute leaks is extreme, unbalanced, a threat to the First Amendment, contrary to public policy, and a political act against a free press.

Some of the accusations about political suppression of press rights are based on the argument that a government-issued subpoena addressed to a publisher is selective prosecution for a leak that the government did not authorize. In response to the accusation of selective prosecution, the attorney general has re-issued guidelines requiring prosecutors to use criminal and civil investigative processes against publishers and journalists only after exhausting all other approaches.<sup>20</sup> In a typical case, this exhaustion is accomplished through an FBI investigation of all nonmedia sources of information. When the defendant cannot be identified, the matter ends, because DOJ has elected not to proceed in civil court. In the private sector, a different approach is taken.

## Media Companies Use Civil John Doe Suits To Protect Their Rights and Property

Media and news companies have long been tenacious in using civil processes to protect their exclusive information rights and property.<sup>21</sup> Media entities are particularly vigilant about protecting their own trade secrets and confidential information.<sup>22</sup> In one such case, a magazine went so far as to sue a competing magazine and several of its former employees to protect its confidential process for binding its magazines and other trade secrets.<sup>23</sup> Media companies and publishers also zealously guard against copyright or trademark infringement by other media companies and individuals.<sup>24</sup> In a recent example, the Associated Press sued a news-monitoring service for copyright infringement, because the news-monitoring service delivered excerpts of 33 articles registered to the Associated Press.<sup>25</sup> While the news-monitoring service's excerpts ranged from 4.5 to 60 percent of the registered articles, the court found the defendant's assertion of fair use and other defenses unpersuasive and granted the Associated Press' motion for summary judgment.<sup>26</sup> Overall, these cases illustrate the lengths to which media companies go to protect their own confidential information from disclosure or use. Yet, when media companies use the federal discovery processes to enforce exclusive information claims, the First Amendment is not typically raised by other media parties as a bar to discovery.<sup>27</sup>

## Other Private Sector Businesses Have Aggressively Deployed John Doe Suits To Protect Confidential Information

In recent years, in response to the problem of leaking intellectual property owned by private-sector businesses, the federal courts have considered thousands of John Doe suits filed by business plaintiffs against anonymous leakers of confidential information. These suits include efforts to enforce the Copyright Act,<sup>28</sup> securities laws,<sup>29</sup> trade secret laws,<sup>30</sup> defamation laws,<sup>31</sup> and numerous other claims.<sup>32</sup> These John Doe suits utilize nationwide civil discovery to unmask John Doe defendants and proceed against them as named defendants. All of these suits start from the premise that the John Doe procedure is available to protect the confidentiality of information entrusted to persons who have violated a trust.<sup>33</sup>

## The Federal Government Uses Civil John Doe and Pseudonym Suits Sparingly

In contrast to private-sector cases, research reveals only a handful of instances where the United States has employed the John Doe civil procedure tool as a plaintiff or as a Freedom of Information Act (FOIA) party.<sup>34</sup> None of these cases involve government use of the John Doe procedure to combat leaks of classified information. However, in 2011, the United States did employ a civil complaint

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against a pseudonymous defendant to seek civil remedies. Steps were taken in civil court against a defiant and open release of classified information by a former CIA employee. In *United States v. Ishmael Jones*, the government successfully sought a permanent injunction, imposition of a constructive trust for the proceeds of a published book, and a declaration that federal law condemned the unauthorized releases of classified information.<sup>35</sup> The civil remedies in *Ishmael Jones* were decreed against a former employee who knowingly and intentionally provided classified information to a commercial publishing house for the purpose of publishing and selling a book.

There does not appear to be a reason why the government has rarely utilized the John Doe tool. In cases where the person(s) revealing secrets are not known, the civil process may well be superior to the criminal process.

Except for the self-imposed DOJ policy limits discussed above,<sup>36</sup> there are fewer restrictions on governmental use of civil discovery tools than are in place for the use of criminal procedures when media interests are involved in the case. Civil discovery is routinely recognized as more expansive than the limited discovery in criminal proceedings. Federal law and the Federal Rules of Criminal Procedure restrict the information that may be obtained from media corporations or reporters during a criminal investigation. For example, the Privacy Protection Act of 1978, 42 U.S.C. § 2000aa *et seq.*, “generally prohibits government officials from searching for and seizing documentary materials possessed by a person in connection with a purpose to disseminate information to the public.” The practical effect of this provision is to prevent law enforcement officials from using search warrants to obtain evidence from reporters in a criminal investigation unless the reporter possessing the evidence is a suspect in a crime other than receipt or possession of the information, the information the reporter possesses is classified or national defense related information, or the information is necessary to prevent death or serious bodily injury. While the Privacy Protection Act specifically addresses the use of search warrants in criminal prosecutions, there is no corresponding statutory limitation on subpoenas directed at media corporations or reporters during civil discovery.

## The Government Should Consistently Deploy This Additional Tool and Publicize Its Use

The recent torrent of leaks, the inability to unmask these actors through criminal proceedings, and the limited effectiveness of the criminal remedies deployed by the government support the aggressive use of the John Doe civil procedure tool to protect confidential information. The John Doe tool is available to the government and, in an appropriate leak case, should be employed to unmask the

source of the leak. Without the John Doe tool, the government will rarely identify, prosecute, and sanction bad actors.

### Can John Doe Suits Be of Practical Value to the Government?

Various legal, policy, and procedural questions must be addressed before a decision is made to pursue a John Doe civil action. These questions include:

- What are the legal bases for use of that procedure?
- What defenses, pitfalls, or defensive tactics should be expected to appear if a civil suit is filed?
- May evidence gathered by criminal grand juries or criminal investigations be used in the preparation of civil leak cases?
- May third parties be targeted for discovery in such a suit?
- How will media interests and public interest groups react to the use of the John Doe civil litigation tool?
- Does private sector experience with the John Doe tool permit an estimate of likely success if the government employs this procedural tool?

There can be no question that federal employees and contractors owe an enforceable fiduciary duty of care to the government that has entrusted them with confidential information.<sup>37</sup>

Further, the potential remedies that flow from a breach of the fiduciary duty are numerous. These remedies include establishment of an equitable trust to attach proceeds of the breach, including any payments, profits, and royalties.<sup>38</sup> A breach of the fiduciary duty is also a proper subject of a permanent injunction when a propensity to commit violations is shown.<sup>39</sup> Restitution or court-ordered return of the government’s property (including documents) has also been ordered.<sup>40</sup> Punitive damages may be awarded by a jury, but a judge may do so only if a jury trial is waived.<sup>41</sup>

Compensatory damages are available for a breach of contract, in addition to disgorgement of profits. The secrecy agreement signed by each employee stipulates that the government is entitled to an injunction for a breach of confidentiality because there is no adequate remedy at law.<sup>42</sup>

Employees who release classified information without authorization face the full range of administrative discipline and penalties,

including clearance revocation and suspension, reprimand, loss of pay, reassignment, demotion, and termination.<sup>43</sup>

None of these remedies or administrative actions are available to the government to deter leaks of classified information unless the government can identify the source of the leak. When the government has exhausted the criminal investigative process, the law allows the Department of Justice to proceed to the civil side of the court system to seek a remedy.<sup>44</sup> Current DOJ policy permits the FBI to provide information from its criminal investigative files to support administrative sanctions and proceedings against federal employees who are suspected of leaking classified information.<sup>45</sup>

Once a civil suit has been used to unmask source of the leak, a criminal indictment may be sought, or civil proceedings may continue, so long as due process rights are protected in the process.<sup>46</sup> While the government cannot bring a civil case only to obtain information for use in a criminal prosecution, the government does have the authority to use information obtained in the course of a civil action in a criminal prosecution where appropriate.

In addition to the case law allowing use of information obtained in civil discovery in a criminal prosecution, DOJ policy explicitly calls for its attorneys to “consider investigative strategies that maximize the government’s ability to share information among criminal, civil, and agency administrative teams to the fullest extent appropriate to the case and permissible by law ...”<sup>47</sup> Further, the attorney general recently stated that “[c]ivil trial counsel should apprise prosecutors of discovery obtained in civil, regulatory, and administrative actions that could be material to criminal investigations.”<sup>48</sup> Sharing information between civil litigators and criminal prosecutors is not only allowed but is encouraged by the attorney general.

### **Who May Be Targeted for Discovery in a Civil John Doe Suit?**

Private persons and corporate publishers of confidential government information may be targeted for discovery under DOJ regulations in both civil and criminal matters only after other sources of information have been exhausted.<sup>49</sup> Recently announced DOJ policy guidelines require that media entities be targeted for discovery “only as a last resort, after all reasonable alternative investigative steps have been taken, and when the information sought is essential to a successful investigation or prosecution.”<sup>50</sup> This new policy requires that all requests to use legal processes to obtain information from news media “be submitted to, and initially evaluated by, the Criminal Division’s Office of Enforcement Operations before they are ultimately forwarded to the Attorney General for decision.”<sup>51</sup> These procedures also require the express endorsement of the relevant U.S. attorney or assistant attorney general.<sup>52</sup> In addition, requests for authorization “to seek testimony from a member of the media that would disclose the identity of a confidential source” will also be routed through the News Media Review Committee to provide assessments of the requests.<sup>53</sup> In investigations of disclosures of classified information, DOJ’s updated policy also requires that the director of National Intelligence “certify to the Attorney General the significance of the harm that could have been caused by the unauthorized disclosure and reaffirm the intelligence community’s continued support for the investigation and prosecution before the Attorney General authorizes the Department to seek

media-related records ...”<sup>54</sup> It is important to note, however, that publishers who publish leaked confidential information are not themselves subject to civil liability for such publications.<sup>55</sup> While DOJ policy continues to be that reporters “will not be subject to prosecution based solely on newsgathering activities”<sup>56</sup>, DOJ has succeeded in persuading federal courts to commit uncooperative reporters to jail on three occasions in the last 20 years in criminal leak investigations.<sup>57</sup>

Unlike individual reporters, publishers of classified information may not simply plead the Fifth Amendment and refuse to testify in civil litigation. Individual reporters have the right to plead the Fifth Amendment and refuse to incriminate themselves by revealing a news source.<sup>58</sup> However, this right should not be confused with a reporter’s so-called privilege to refuse to testify, which does not exist under federal law.<sup>59</sup> Moreover, the press may publish what it learns, but its ability to obtain information is limited by criminal law.<sup>60</sup> While an individual reporter may plead the Fifth Amendment to avoid prosecution<sup>61</sup>, his corporate employer has no such right. In a civil proceeding in which a corporation is required under Fed. R. Civ. Pro. 30(b)(6) to provide a knowledgeable officer or employee to testify at a deposition<sup>62</sup>, the corporate publisher may not refuse to truthfully answer questions on the ground of self-incrimination.<sup>63</sup> For example, a district court recently held that a news corporation was required to provide a corporate representative to testify under Rule 30(b)(6) when the reporter involved in publishing the article at issue invoked his Fifth Amendment privilege.<sup>64</sup> The court also indicated that the corporate publisher could be subject to sanctions if it failed to provide a representative to testify.<sup>65</sup>

If publishers may not refuse to participate in civil discovery, how will they respond? Publishers and reporters have a vested interest in seeking to discourage the government from using civil litigation to uncover leaks. As they do in criminal proceedings, many journalists will risk contempt of court and seek to claim Fifth Amendment self-incrimination privileges, First Amendment privileges, reporter privileges, and other privileges to obtain, print, and disseminate classified information. They will interpose many procedural and other hurdles in order to block discovery of the name of the John Doe defendant. John Doe defendants, publishers of leaked information, and civil liberties groups may move to intervene at the earliest stages of the litigation to oppose leave to discover the identity of a Doe defendant. Media interests and John Doe defendants will seek dismissal of the suit, move to block discovery against third parties, and resist amendment of the complaint to name the actual defendant when discovery is successful.

However, based on the success rates of private sector business plaintiffs in John Doe suits, it can be expected that the privilege assertions and procedural hurdles will not generally be successful.<sup>66</sup> Corporate publishers that have written documents, emails, faxes, telephone bills, or other records of communications with John Doe defendants will have to produce those records in civil proceedings, even when an individual reporter successfully claims a Fifth Amendment privilege.<sup>67</sup>

The service of discovery subpoenas may trigger a motion to quash on the ground that the First Amendment protects the subpoena recipient from having to disclose the identity of the defendant. This type of motion will be strongly supported by

various civil liberties and well-funded publisher and media interest groups.<sup>68</sup> However, the law that has developed in private sector John Doe cases (and other intellectual-property leak cases) strongly supports the government's use of expedited discovery to identify the defendant. Although some courts recognize a qualified reporters' privilege to protect news sources<sup>69</sup>, the privilege can be overcome by the government. The government will need to show (1) a strong case on the merits, (2) a logical reason to believe that the particular recipient of a subpoena possesses directly relevant information, and (3) that all other known sources of information regarding the source of the leak have been developed and found wanting.<sup>70</sup> When the government demonstrates these three facts, the court should uphold the subpoena and require the publisher of the confidential information to identify its source.

Civil cases in which media companies have litigated with each other plainly establish that there is no general privilege for a media company to take the property of another person and then refuse to participate in civil discovery relating to that same taking.<sup>71</sup> Research has identified very few civil cases in which a media company has asserted the First Amendment when litigating the issue of leaked or stolen property.<sup>72</sup> This body of case law establishes that, when a media company is litigating against another media company, the court-compelled disclosure of confidential information does not present a First Amendment issue.

It is also possible that an objection will be raised that a John Doe suit filed by the government is unreasonable under the Fourth Amendment prohibition of unreasonable searches and seizures. However, the government may proceed against a John Doe when there is probable cause to believe that a violation of law has occurred and that the John Doe defendant may have committed the violation.<sup>73</sup> Any motion for expedited discovery should be drafted to satisfy the Fourth Amendment requirement for probable cause for a warrant or court order.

Publishers may also assert an absolute or qualified reporters' privilege under federal common law (Fed. R. Evid. 501) and the First Amendment.<sup>74</sup> In general, federal law does not recognize a privilege for reporters under the First Amendment.<sup>75</sup> Those courts that have recognized a qualified privilege have ruled in leak cases that when a leak of confidential information to a reporter is what caused the litigation, then the reporter is a proper target of discovery.<sup>76</sup> When a leak of confidential information to a reporter is the crux of the case, the statements or transmissions to the reporter are uniquely relevant, and the court will order their production if the court finds them relevant after *in camera* review.<sup>77</sup> In a civil leak case, where the central issue is who released what to the publisher of the confidential information, disclosure may be ordered when the plaintiff demonstrates the central relevance of the journalist's information.<sup>78</sup>

## Conclusion

If the federal government is to make progress in deterring leaks of confidential information, it must look to all lawful sources of innovation. The private sector, led by giant media corporations, has deployed John Doe suits to deter and punish those who compromise its secrets. The federal government should learn from the example. ☉



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## Endnotes

<sup>1</sup>A John Doe suit includes any civil suit where the identity of at least one defendant is not known at the commencement of the suit. This includes suits against John or Jane Doe, suits against pseudonymous defendants where the true identity behind the pseudonym is not known, and suits against unnamed defendants.

<sup>2</sup>The January 2015 leak conviction of a former CIA intelligence officer under the Espionage Act was referred to in the popular press as one of only three such convictions to have occurred in history of the Espionage Act. [www.nytimes.com/2015/01/27/us/politics/cia-officer-in-leak-case-jeffrey-sterling-is-convicted-of-espionage.html](http://www.nytimes.com/2015/01/27/us/politics/cia-officer-in-leak-case-jeffrey-sterling-is-convicted-of-espionage.html).

<sup>3</sup>See David E. Pozen, *The Leaky Leviathan, etc.*, 127 HARV. L. REV. 512, 515-516 (2013) (describing limited number of criminal prosecutions in last 75 years).

<sup>4</sup>Both the chairman of the House Intelligence Committee and the chairman of the Senate Intelligence Committee have condemned the recent torrent of leaks. *Press Release of Intelligence Committee*, (July 25, 2012), [intelligence.senate.gov/press/record.cfm?id=337333](http://intelligence.senate.gov/press/record.cfm?id=337333).

<sup>5</sup>James Bruce and W. George Jameson, *Fixing Leaks: Assessing the Department of Defense's Approach to Preventing and Deterring Unauthorized Disclosures*, page xi (Washington, D.C., Rand Corp., Dec. 12, 2013)

<sup>6</sup>Charlie Savage, *Former F.B.I. Agent to Plead Guilty in Press Leak*, THE NEW YORK TIMES, Sept. 23, 2013, at A1, available at [www.nytimes.com/2013/09/24/us/fbi-ex-agent-pleads-guilty-in-leak-to-ap.html?\\_r=0](http://www.nytimes.com/2013/09/24/us/fbi-ex-agent-pleads-guilty-in-leak-to-ap.html?_r=0). In 2012, a former CIA officer named Kiriakou was indicted in a leak case. See Andrea Papagianis, *Former CIA Officer Charged with Leaking Info to Journalists*, Reporters Committee (Jan. 23, 2012), [www.rcfp.org/browse-media-law-resources/news/former-cia-officer-charged-leaking-info-journalists](http://www.rcfp.org/browse-media-law-resources/news/former-cia-officer-charged-leaking-info-journalists)). The administration was reported as aggressively pursuing a second criminal leak case against former CIA employee Sterling. Michael Calderone and Dan Froomkin, *'Reporter's Privilege' Under Fire from Obama Administration Amid Broader War on Leaks*, HUFFINGTON POST (May 18, 2012), [www.huffingtonpost.com/2012/05/18/reporters-privilege-obama-war-leaks-new-york-times\\_n\\_1527748.html](http://www.huffingtonpost.com/2012/05/18/reporters-privilege-obama-war-leaks-new-york-times_n_1527748.html).

<sup>7</sup>See David E. Pozen, *supra* n. 2 at 515-516 (describing limited number of criminal prosecutions in last 75 years); see also Irina Dmitrieva, Note, *Stealing Information: Application of A Criminal Anti-theft Statute to Leaks of Confidential Government Information*, 55 FLA. L. REV. 1043 (2003) (reviewing history of government use of some criminal statutes in anti-leak cases).

<sup>8</sup>Exec. Order No. 12,333, Section 1.6(b), 46 Fed. Reg. 59941 (Dec. 4, 1981).

<sup>9</sup>Exec. Order No. 12,065, 43 Fed. Reg. 28949 (June 28,

1978) (employees who disclose classified information may be terminated from the civil service). Also 5 U.S.C. § 7532 (2013) authorizes dismissal of employees when necessary to protect national security. Similar provisions are found in 10 U.S.C. § 1609 and 50 U.S.C. § 3036(e). Administrative sanctions are also available against investigative and law enforcement personnel who disclose information without authorization under the Patriot Act, 18 U.S.C. § 2520(g).

<sup>10</sup>In 2012, the Senate considered a bill that would strip intelligence community employees who leak classified information of their pension rights, among other provisions. *Press Release of Intelligence Committee, supra* n.3. The 2012 bill was designed to overcome constitutional objections that doomed the Hiss Act, which deprived civil servants of pension rights if they engaged in espionage against the United States. See *Hiss v. United States Civil Service Commission*, 338 F. Supp. 1141 (D.D.C. 1972) (holding pension forfeiture statute unconstitutional as applied to Alger Hiss).

<sup>11</sup>18 U.S.C. § 793, *et seq.* In his book, *Necessary Secrets: National Security, the Media, and the Rule of Law*, Gabriel Schoenfeld offers a careful and well-reasoned defense of the use of the Espionage Act and other criminal statutes to prosecute media publishers of classified information and their insider sources. See Gabriel Schoenfeld, *Necessary Secrets: National Security, the Media, and the Rule of Law* (2010).

<sup>12</sup>In 2010, the Senate Judiciary Committee received a report from the Department of Justice describing in some detail the procedures followed by the FBI when a leak referral is received from the Intelligence Community. *Answers to Questions from Senate Judiciary Committee*, U.S. Department of Justice, April 8, 2010, [www.fas.org/irp/agency/doj/intel-leak.pdf](http://www.fas.org/irp/agency/doj/intel-leak.pdf). The DOJ report concluded that criminal prosecutions are rare because of anonymity and suggested that agencies should seek to pursue administrative remedies. *Id.* No advice was offered as to how to overcome the problem of anonymity.

<sup>13</sup>See *In re Grand Jury Subpoena (Judith Miller)*, 397 F.3d 964, 968-973 (D.C. Cir. 2005), *cert. denied*, 545 U.S. 1150 (2005) (leak of intelligence operative's name overcomes common law reporter's privilege).

<sup>14</sup>The government does have the option of seeking a John Doe indictment, which can later be amended to state the name of the actual defendant when that person is identified. To be an effective deterrent, this tool requires identification of the offender so that the Doe defendant may be named in an amended indictment. See *United States v. John Doe, aka Hagla*, 661 F.3d 550 n.1 (11th Cir. 2011) *cert. denied*, 132 S.Ct. 1648 (2012) (describing reason for use of John Doe indictment in criminal proceeding).

<sup>15</sup>The 2013 Rand report to the USD(I) identified the inability to identify the source of a leak as one of the three primary reasons for a perception in DoD that leaks are tolerated. Bruce & Jameson, *Fixing Leaks, supra*, n. 4 at 35-36.

<sup>16</sup>David E. Pozen, *The Leaky Leviathan, supra* n. 2 at 536 (describing historic indictment rate of classified leaks as below 0.3% and "probably far closer to zero.").

<sup>17</sup>One author concluded that only four federal employees have been indicted for leaks to media publishers in 94 years following the enactment of the Espionage Act. Ross, Gary, *Who Watches*

*the Watchmen?* 17 (NI Press, 2011, Washington, D.C.). The ODNI announced on June 25, 2012, that it will assign an inspector general to follow up on leak cases that the FBI and the DOJ are unable to prosecute. It is unclear what investigative tools an inspector general will employ that are not available to the FBI. See Jack Goldsmith, *DNI Clapper Announces New Steps to Deter Leaks*, Lawfare Blog (June 25, 2012), [www.lawfareblog.com/2012/06/dni-clapper-announces-new-steps-to-deter-leaks/](http://www.lawfareblog.com/2012/06/dni-clapper-announces-new-steps-to-deter-leaks/).

<sup>18</sup>See CHARLIE SAVAGE, *Former F.B.I. Agent to Plead Guilty in Press Leak*, THE NEW YORK TIMES, A1, Sept. 23, 2013, available at [www.nytimes.com/2013/09/24/us/fbi-ex-agent-pleads-guilty-in-leak-to-ap.html?\\_r=0](http://www.nytimes.com/2013/09/24/us/fbi-ex-agent-pleads-guilty-in-leak-to-ap.html?_r=0); EVAN PEREZ AND BRENT KENDALL, *Holder Defends AP Phone-Records Seizure*, WALL STREET JOURNAL, May 14, 2013, online.wsj.com/news/articles/SB10001424127887324216004578483292722253924.

<sup>19</sup>Reporters and publishers complain vociferously when their privacy and confidential communications are invaded. See *International News Service v. Associated Press*, 248 U.S. 215 (1918) (seeking remedy under federal common law for piracy of news stories); *Reporters Committee for Freedom of the Press v. AT&T*, 593 F.2d 1030 (D.C. Cir. 1978), *cert denied* 99 S. Ct. 1431 (1979) (unsuccessful privacy suit against telephone carrier for releasing calling records to government).

<sup>20</sup>28 C.F.R. § 50.10 (2011). The further revised guidelines were released in January 2015 and are available at [www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/01/14/revised\\_media\\_guidelines\\_0.pdf](http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/01/14/revised_media_guidelines_0.pdf).

<sup>21</sup>See, e.g., *Int'l News Serv. v. Associated Press*, 248 U.S. 215 (1918) (seeking remedy under federal common law for piracy of news stories); *Viacom Int'l Inc. v. YouTube Inc.*, 676 F.3d 19 (2d Cir. 2012) (dispute over control of intellectual property on Internet); *Entm't Software Ass'n v. Swanson, Attorney General*, 519 F.3d 768 (8th Cir. 2008) (constitutional challenge to restrictions on videos); *Associated Press v. Meltwater U.S. Holdings Inc.*, 931 F. Supp. 2d 537, 551 (S.D.N.Y. 2013) (finding media monitoring service's use of Associated Press articles and headlines violated Copyright Act); *Sony Music Entm't Inc. v. Does 1-40*, 326 F. Supp. 2d 556 (S.D. N.Y. 2004) (successful use of Doe subpoena in Copyright Act case). News organizations have long insisted on their own right to create, protect, and maintain exclusive control over information and have aggressively used federal laws to protect those rights and the right to determine who, when, and how information will be shared. For example, many wealthy media interests have used the Copyright Act to enforce the exclusive right to access and make copies of items of information. See, e.g., *Harper & Row Publishers Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (deciding whether publication of excerpts from presidential autobiography was fair use or violation of exclusive right to license publication); *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242 (2d Cir. 2011) (copyright dispute involving dozens of media companies); *Columbia Pictures Indus. v. Krypton Broad. of Birmingham Inc.*, 259 F.3d 1186 (9th Cir. 2001), *cert denied* 534 U.S. 1127 (2002) (affirming verdict of \$ 31,680,000 for infringement of exclusive copyright); *Nat'l Broad. Co. v. Satellite Broad. Networks*, 940 F.2d 1467 (11th Cir. 1991) (determining exclusive copyright in television broadcasts by satellite signals); *Cable News Network LP v. GOSMS.com Inc.*

*et al.*, 2000 U.S. Dist. LEXIS 16156 (S.D.N.Y. 2000) (Copyright Act suit by group of large media interests); *L. A. Times v. Free Republic*, 2000 U.S. Dist. LEXIS 5669, 54 U.S.P.Q.2D (BNA) 1453 (C.D. Cal. 2000) (Copyright Act enforcement suit to prevent violation of exclusive right to control text created by plaintiffs). Contracts and common law rights protecting competitively sensitive information are also the subjects of federal civil litigation when a media organization sees fit. *See, e.g., Video Pipeline Inc. v. Buena Vista Home Entm't Inc.*, 342 F.3d 191 (3d Cir. 2003) (deciding issue of copyright control over movie trailer); *Sunshine Media Grp. Inc. v. Goldberg*, 2010 U.S. Dist. LEXIS 74181 (D.N.J. 2010) (granting injunction to protect publisher's business interests); *Globe Int'l Inc. v. Nat'l Enquirer*, 1999 U.S. Dist. LEXIS 23346 (C.D. Cal. 1999) (considering injunction against publication of confidential news account); *Inflight Newspapers v. Magazines In-Flight LLC*, 990 F. Supp. 119 (E.D.N.Y. 1997) (granting injunction to protect competitive secrets of newspaper); *Cobb Publ'g Inc. v. Hearst Corp. and Dow Jones & Co.*, 891 F. Supp. 388 (E.D. Mich. 1995) (breach of contract and copyright suit); *Woodbury Daily Times Co. v. L. A. Times-Washington Post News Service*, 616 F. Supp. 502 (D.N.J. 1985) (exclusive subscription dispute between publishers). Other federal statutes and rules are frequently relied on to determine who has exclusive control over information and signals. *See, e.g., CBS Broad. Inc. v. Echostar Commc'ns Corp.*, 532 F.3d 1294 (11th Cir. 2008) (suit to determine rights to satellite transponder signal); *Helferich Patent Licensing LLC v. The New York Times Co.*, 2012 U.S. Dist. LEXIS 64789 (N.D. Ill. 2012) (patent dispute involving various media companies).

<sup>22</sup>*See, e.g., Carpenter v. United States*, 484 U.S. 19 (1987) (affirming journalist's conviction for mail fraud based on his use of newspaper's confidential information to conduct insider trading); *Scranton Gillette Commc'ns Inc. v. Dannhausen*, 1999 WL 558134 (N.D. Ill. July 27, 1999) (upholding jury's finding that magazine employee breached fiduciary duty by removing or destroying the magazine's contact list and files of information); *Inflight Newspapers*, 990 F. Supp. at 119 (granting injunction to protect competitive secrets of newspaper).

<sup>23</sup>*Inflight Newspapers*, 990 F. Supp. at 131.

<sup>24</sup>*See supra* n. 20.

<sup>25</sup>*Associated Press*, 931 F. Supp.2d at 546.

<sup>26</sup>*Id.* at 561, 572.

<sup>27</sup>A First Amendment defense was raised in *Harper & Row Publishers Inc. v. Nation Enterprises*, 471 U.S. 539, 560 (1985) (refusing to allow First Amendment defense to copyright violation of publishing lengthy quotations from a yet unpublished presidential memoir).

<sup>28</sup>*In re Charter Commc'ns*, 393 F.3d 771, 776-778 (8th Cir. 2005) (denying John Doe subpoena enforcement); *Recording Indus. Ass'n of America v. Verizon*, 351 F.3d 1229, 1233-1236 (D.C. Cir. 2003), *cert denied* 543 U.S. 924 (2004) (upholding subpoena enforcement); *John Wiley & Sons Inc. v. Does 1-127*, 2012 WL 364048, 11 CIV 7627 (S.D.N.Y. 2012); *Next Phase Distribution Inc. v. Does 1-138*, 2012 U.S. Dist. LEXIS 27260 (S.D.N.Y. 2012); *Nu Image Inc. v. Does 1-3,932*, 2012 U.S. Dist. LEXIS 72432 (M.D. Fla. 2012); *VPR Internationale v. Does 1-1017*, 2011 US Dist. LEXIS 64656 (C.D. Ill 2011) (Copyright Act); *Millennium TGA Inc. v. Does 1-800*, 2011

US Dist. LEXIS 35406 (N.D. Ill. 2011); *Call of the Wild Movie LLC v. Does 1-1062*, 770 F. Supp. 2d 332 (D.D.C. 2011) (Copyright Act case); *Donkeyball Movie LLC v Does 1-171*, 2011 WL 1807452 (DDC 2011) (Copyright Act); *USA Techs. Inc. v. Doe*, 713 F. Supp. 2d 901 (N.D. Cal. 2010); *Maverick Entm't Grp. Inc. v. Does 1-4,350*, No. 1:10-cv-00569 (D.D.C. 2010) (use of subpoena power in Copyright Act infringement case); *Subpoena to Univ. of N.C.*, 367 F. Supp. 2d 945, 950-956 (M.D.N.C. 2005) (upholding subpoena); *Sony Music Entm't Inc. v. Does 1-40*, 326 F. Supp. 2d 556 (S.D. N.Y. 2004) (successful use of Doe subpoena in Copyright Act case); *Malibu Media LLC v. Doe*, 2014 WL 25195 (D.D.C. 2014) (allowing third-party subpoena in Copyright Act case); *TCYK LLC v. Does 1-98*, 2013 WL 6834637 (E.D. Tenn. 2013) (Media copyright suit against unknown defendants); *Purzel Video GmbH v. Does 1-108*, 2013 WL 6797364 (N.D. Ill. 2013) (same); *Voltage Pictures LLC v. Doe*, 2013 WL 6827927 (D. OR 2013) (same); *Safety Point Products LLC v. Does*, 2013 WL 1367078 (N.D. Ohio 2013) (same).

<sup>29</sup>*USA Techs. v. John Doe*, 713 F. Supp. 2d 901 (N.D. Cal. 2010).

<sup>30</sup>*Qixtar Inc. v. Signature Team Mgt. LLC*, 566 F. Supp. 2d 1205, 1206 (D. Nev. 2008) (Lanham Act) *reversed*, *Anonymous Online Speakers v. United States Dist. Court (In re Anonymous Online Speakers)*, *rev'd* 661 F.3d 1168 (9th Cir. 2011).

<sup>31</sup>*Alvis Coatings Inc. v. John Does 1-10*, 2004 U.S. Dist. LEXIS 30099, 2004 WL 2904405 (W.D. N.C. 2004) (defamation, etc.).

<sup>32</sup>*Doe I et al. v. Individuals Unknown (Autoadmit.com)*, 561 F. Supp. 2d 249, 252 (D. Conn. 2008) (libel, invasion of privacy, emotional distress, copyright); *Best Western Int'l v. Doe*, 2006 US Dist. LEXIS 56014 (D. Ariz. 2006) (defamation, breach of contract, breach of fiduciary duty, trademark infringement, unfair competition).

<sup>33</sup>See the following articles for descriptions of the use of John Doe suits by private sector parties. Robert Larson and Paul Godfread, *Contemporary Issues in Cyberlaw: Bringing John Doe to Court, etc.*, 38 WM. MITCHELL L. REV. 328 (2011); Matthew Mazzota, Note, *Balancing Act: Finding Consensus on Standards for Unmasking Anonymous Internet Speakers*, 51 B.C. L. REV. 833 (2010); Jessica L. Chilson, Note, *Unmasking John Doe: Setting a Standard for Discovery in Anonymous Internet Defamation Cases*, 95 VA. L. REV. 389 (2009); Nathaniel Gleicher, Note, *John Doe Subpoenas, Toward a Consistent Standard*, 118 YALE L.J. 320 (2008); Carol M. Rice, *Meet John Doe: It is Time for Federal Civil Procedure to Recognize John Doe Parties*, 57 U. PITT. L. REV. 883 (1996).

<sup>34</sup>*See, e.g., John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 148 n.1 (1989), *reh'g denied* 493 U.S. 1064 (approving use of pseudonyms by parties in confidential FOIA case); *Tenet v. Doe*, 544 U.S. 1, 10 n.5 (2005) (use of pseudonym approved to prevent disclosure of name of CIA employee); *Doe v. Casey*, 796 F.2d 1508, 1512 n.2 (D.C. Cir. 1986), *rev'd in part* 486 U.S. 592 (use of Doe name to protect CIA employee identity); *In the Matter of Tax Liabilities of John Does*, No 2:10-mc-00130 (E.D. Cal. December 15, 2011) (Mem. Opinion granting ex parte discovery order under specific statutory authority for ex parte discovery by IRS); *United States v. John Doe*,

No. 3:11-CV-00561-VLB (D. Conn 2011) (civil complaint seeking order permitting the government to take over control of a Botnet). See also *Doe v. Doe Corporation*, 709 F.2d 1043, 1044 n. 1 (5th Cir. 1983) (approving use of pseudonyms for both parties in suit by in-house counsel to prevent disclosure of confidential communications and facts, and other measures). The U.S. Attorneys' Manual published by DOJ deals with John Doe subpoenas in the Tax Manual. See *United States Attorneys' Manual*, Section 6-5.240, U.S. Department of Justice (1997), available at [www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title6/5mtax.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title6/5mtax.htm) (last visited Jan. 17, 2014). The SEC has also issued John Doe subpoenas when conducting investigations under its statutory authorities. See, e.g., *John Doe v. United States S.E.C.*, 2011 U.S. Dist. LEXIS 133005 (N.D. Cal. 2011) (denying motion to quash John Doe administrative subpoena issued to Google during investigation of suspected securities law violation). In July 2014, a high-ranking DOJ official testified before the Senate Judiciary Committee regarding the creative, combined use of criminal and civil litigation options to combat international cybercrime. [www.judiciary.senate.gov/imo/media/doc/07-15-14CaldwellTestimony.pdf](http://www.judiciary.senate.gov/imo/media/doc/07-15-14CaldwellTestimony.pdf).

<sup>35</sup>*United States v. Ishmael Jones, a pen name*, No. 10-cv-765 (E.D. Va. Mem. Op. and Order April 18, 2012).

<sup>36</sup>n. 21, *supra*.

<sup>37</sup>Multiple sources of federal substantive law create a duty of confidentiality for federal employees entrusted with confidential information. These include federal common law, *Snepp v. United States*, 444 U.S. 507, 515 (1980); See *United States v. Aguilar*, 515 U.S. 593, 605-606 (1995) (a federal judge, who obtained information about an investigative wiretap from another judge, violated federal statutory law when he leaked information about a wiretap order); *Haig v. Agee*, 453 U.S. 280, 309 (1981) (concluding that publication of intelligence identities is constitutionally unprotected); Exec. Order No. 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009). Executive Order 13526; written contracts; and numerous statutes; 5 U.S.C. § 301 (housekeeping statute); 18 U.S.C. § 641 (theft of government property in the form of documents); 42 U.S.C. § 2277 (criminal penalties for release of restricted data); 50 U.S.C. § 3121 (covert agent identities protection) 50 U.S.C. § 783 (criminal penalties for government employees who disclose classified information to foreign governments). 5 U.S.C. § 301. Every federal agency has regulations that implement the record-keeping and record release obligations of federal employees. See, e.g., 28 C.F.R. § 16.22 (2010) (DOJ regulations prohibit employees from complying with subpoenas in proceedings in which the government is not a party without the approval of designated department officials).

<sup>38</sup>*Snepp, supra*, 444 U.S. at 515.

<sup>39</sup>*Snepp, supra*, 444 U.S. at 514-515; *United States v. Snepp*, 595 F.2d 926, 934-935 (4th Cir. 1979), *rev'd, in part on other grounds*, 444 U.S. 507 (1980).

<sup>40</sup>*Pfeiffer v. CIA and United States*, 1994 US Dist. LEXIS 2650 \*\*22-23 (D.D.C. 1994), *aff'd* 60 F.3d 861 (D.C. Cir. 1995).

<sup>41</sup>The government need only prove nominal damages to be entitled to punitive damages in a case requiring enforcement of a secrecy agreement. *United States v. Snepp*, 595 F.2d at 936-938.

<sup>42</sup>The government is entitled to recover out-of-pocket costs as measured by traditional measures of breach of contract damages in

a case where an intelligence officer breaches his pledge of secrecy. In *Snepp*, the Supreme Court said that such a remedy is available but inadequate to remedy the breach because the damages may be unquantifiable. *Snepp, supra*, 444 U.S. at 514.

<sup>43</sup>Bruce and Jameson, *Fixing Leaks, supra* n. 4 at 17, 40.

<sup>44</sup>*United States v. Kordel*, 397 U.S. 1, 9 (1970).

<sup>45</sup>See *Answers to Questions from Senate Judiciary Committee*, U.S. Department of Justice, April 8, 2010, [www.fas.org/irp/agency/doj/intel-leak.pdf](http://www.fas.org/irp/agency/doj/intel-leak.pdf).

<sup>46</sup>See *United States v. Stringer*, 535 F.3d 929, 939-40 (9th Cir.), *cert denied*, 555 U.S. 1049 (2008) (finding SEC did not act in bad faith because it did not share information with U.S. Attorney until the civil proceeding was well underway and did not involve "trickery or deceit" because an SEC form indicated that civil investigations could lead to criminal charges); *United States v. Posada Carriles*, 541 F.3d 344, 356 (5th Cir. 2008), *cert denied*, 556 U.S. 1130 (2009) (finding USCIS did not make material misrepresentations at naturalization interview when defendant was informed he could exercise right against self-incrimination and lying could lead to criminal penalties); *Securities and Exchange Commission v. Dresser Industries Inc.*, 628 F.2d 1368, 1377 (D.C. Cir.), *cert denied*, 449 U.S. 993 (1980) (refusing to block parallel criminal and civil investigations by DOJ and SEC absent a showing of prejudice to substantial rights of defendant or government).

<sup>47</sup>See *United States Attorneys' Manual*, Section 1-12.000, U.S. Department of Justice (1997), available at [www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title1/12mdoj.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title1/12mdoj.htm). Given that DOJ policies allow for maximum use of evidence within criminal, civil, and administrative proceedings, information obtained during a civil Doe suit could also be used in administrative proceedings revoking an individual's security clearance and/or terminating his employment with the DOD. *Id.* The challenges raised in *Kordel* would not apply when evidence obtained in a civil suit is used in an administrative proceeding because the privilege against self-incrimination only applies to criminal prosecutions and the employee would still receive the benefit of due process protection during the civil and administrative proceedings. *Kordel*, 397 U.S. at 9-13.

<sup>48</sup>*Memorandum on Coordination of Parallel Criminal, Civil, Regulatory, and Administrative Proceedings*, Attorney General, Jan. 30, 2012, available at [www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title1/doj00027.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title1/doj00027.htm).

<sup>49</sup>28 C.F.R. § 50.10(f) provides: In requesting the attorney general's authorization for a subpoena to a member of the news media, the following principles will apply:

(1) In criminal cases there should be reasonable grounds to believe, based on information obtained from nonmedia sources, that a crime has occurred and that the information sought is essential to a successful investigation, particularly with reference to directly establishing guilt or innocence. The subpoena should not be used to obtain peripheral, nonessential, or speculative information. (2) In civil cases there should be reasonable grounds, based on nonmedia sources, to believe that the information sought is essential to the successful completion of the litigation in a case of substantial importance. The subpoena should not be used to obtain peripheral, nonessential, or speculative information. (3) The government should have unsuccessfully attempted to obtain the information from alternative nonmedia sources. (4) The use of subpoenas to members of the news media should,



except under exigent circumstances, be limited to the verification of published information and to such surrounding circumstances as relate to the accuracy of the published information. (5) Even subpoena authorization requests for publicly disclosed information should be treated with care to avoid claims of harassment. (6) Subpoenas should, wherever possible, be directed at material information regarding a limited subject matter, should cover a reasonably limited period of time, and should avoid requiring production of a large volume of unpublished material. They should give reasonable and timely notice of the demand for documents.

The US Attorney's Manual primarily deals with 28 C.F.R. § 50.10 in the Criminal Section of the Manual. See *United States Attorneys' Manual*, Section 9-13.400, U.S. Department of Justice (1997), available at [www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/13mcrm.htm#9-13.400](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/13mcrm.htm#9-13.400) (describing how Criminal Division of DOJ requests media subpoenas).

<sup>50</sup>*Department of Justice Report on Review of New Media Policies*, U.S. DEPARTMENT OF JUSTICE, July 12, 2013, [www.justice.gov/iso/opa/resources/2202013712162851796893.pdf](http://www.justice.gov/iso/opa/resources/2202013712162851796893.pdf). This requirement is further reinforced by a January 2015 tightening of the policy. See [www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/01/14/revise\\_media\\_guidelines\\_0.pdf](http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/01/14/revise_media_guidelines_0.pdf).

<sup>51</sup>*Id.*

<sup>52</sup>*Id.*

<sup>53</sup>*Id.*

<sup>54</sup>*Id.* It should be noted that as of the writing of this note, DOJ policies including 28 C.F.R. § 50.10(f) have not been formally amended to reflect the DOJ's new stated policy on seeking information and evidence from news media.

<sup>55</sup>*Bartnicki v. Vopper*, 532 U.S. 514 (2001). On the issue of exhaustion of sources, the lack of a civil or criminal legal remedy against the publishers of government confidences may strongly suggest that the government has no choice but to go after the original source of the leaks. In other words, the publisher who aids and abets a leak is protected, so the source of the leak is the only person who may be deterred.

The media may not be prevented from publishing truthful information even when the information is leaked to the media in a knowing breach of trust. *Butterworth v. Smith*, 494 U.S. 624, 629-35 (1990) (grand jury evidence); *Landmark Commc'ns v. Virginia*, 435 U.S. 829, 842 (1979) (publication of confidential document from state proceeding); *Oklahoma Publ'g v. District Court*, 430 U.S. 308, 311-12 (1977) (publication of identity of juvenile defendant from closed hearing). See *Reuber v. Food Chemical News Inc.*, 925 F.2d 703, 719 (4th Cir.), *cert denied* 501 U.S. 1212 (1991) (there can be no liability for intrusion where the media defendant "played no role in leaking the letter" that formed the basis of its story and which had been provided by a source "in violation of government policy."); *Sheetz v. Morning Call Inc.*, 747 F. Supp. 1515, 1526 (E.D. Pa. 1990), *aff'd* 946 F.2d 202 (3d Cir. 1991) (rejecting claim that press unlawfully received confidential police report through a conspiracy with unnamed police sources).

<sup>56</sup>*Department of Justice Report on Review of News Media*, *supra* n. 52.

<sup>57</sup>The reporters were Vanessa Legget, Judith Miller, and Joshua Wolf. Ross, Gary, *Who Watches the Watchmen?* 160-161 (NI Press, 2011, Washington, D.C.).

<sup>58</sup>*In re Seper*, 705 F.2d 1499, 1501 (9th Cir. 1983) (citing

*Manness v. Meyers*, 419 U.S. 449, 464 (1975).

<sup>59</sup>*Lee v. DOJ*, 413 F.3d 53 (D.C. Cir. 2005) (rejecting claim of reporter's privilege in civil leak case); *Lee v. DOJ*, 401 F. Supp. 2d 123 D.D.C. 2005) (holding reporter in contempt for refusing to answer deposition questions in civil leak case); see also *Convertino v. United States DOJ*, 2008 U.S. Dist. LEXIS 66889 (E.D. Mich. 2008) (considering motion to compel reporter to testify in civil leak case); *Hatfill v. Mukasey*, 539 F. Supp. 2d 96 (D.D.C. 2008); *Hatfill v. Gonzales*, 505 F. Supp. 2d 33, 35-36 (D.D.C. 2007); *Hatfill v. Ashcroft*, 404 F.Supp.2d 104, 106-108 (D.D.C. 2005) (Dr. Steven Hatfill, a former government scientist, was publicly described as a "person of interest" in the investigation of the 2001 anthrax attacks. He sued DOJ and sought to enforce subpoenas for the sources of the defamatory comments. When the reporter refused to reveal the identity of her government sources, she was found to be in contempt and fines escalating to \$ 5,000 per day were imposed upon her.)

<sup>60</sup>See, e.g., *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965) (the right to publish does not carry with it an unrestrained right to gather information).

<sup>61</sup>*Burdick v. United States*, 236 U.S. 79, 94 (1915) (under the Fifth Amendment, government may not use pardon granted by president and contempt to force editor of newspaper to identify confidential sources to criminal grand jury if editor did not accept pardon); but see *Kastigar v. United States*, 406 U.S. 441, 462 (1972) (holding grant of derivative or derivative use immunity under 18 U.S.C. § 6002 is sufficient to supplant Fifth Amendment right against self-incrimination).

<sup>62</sup>*Hatfill v. New York Times Co.*, 459 F. Supp. 2d 462, 468 (E.D. Va. 2006) (ordering news corporation under Rule 30(b)(6) to provide representative who knows identity of confidential sources).

<sup>63</sup>*Convertino v. United States DOJ*, 684 F.3d 93, 101 (D.C. Cir. 2012); see also *Convertino v. United States DOJ*, 2013 WL 153311 (E.D. Mich. 2013) (requiring the *Detroit Free Press* to prepare a corporate representative to testify despite reporter invoking Fifth Amendment right against self-incrimination); *United States v. White*, 322 U.S. 694, 698 (1944) ("The constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals."); *In re Grand Jury Proceedings*, 576 F.2d 703, 705 (6th Cir. 1978), *cert. denied in Shiffman v. United States*, 439 U.S. 830 (1978) ("Since the privilege against self-incrimination is a purely personal one, it cannot be utilized by or on behalf of any organization, such as a corporation."); *Eller Media Co. v. Serrano*, 761 So.2d 464, 466-467 (Fla. Dist. Ct. App. 2000) (denying motion for stay of discovery and finding "Eller Media, as a corporation, has no Fifth Amendment right, and it cannot vicariously assert that right on behalf of its employees ..."). But see *Convertino v. United States DOJ*, 2008 U.S. Dist. LEXIS 66889 (E.D. Mich. 2008) (denying motion to compel corporate publisher deposition without prejudice while plaintiff seeks other discovery); *Volmar Distrib. Co. v. New York Post Co.*, 152 F.R.D. 36 (S.D. N. Y. 1993) (court has discretion to stay corporate 30(b)(6) depositions in civil case when crucial individual witnesses invoke Fifth Amendment privilege).

<sup>64</sup>*Convertino v. United States DOJ*, 2013 WL 153311 (E.D. Mich. 2013).

<sup>65</sup>*Id.*

<sup>66</sup>The recipient of a subpoena sought by the government may make an allegation that the government has a motive to suppress

protected speech. See Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414, 425-426 (1996) (First Amendment doctrine in general can be understood as the courts' search for impermissible government motive in regulating speech).

<sup>67</sup>See *Reporters Committee for Freedom of the Press v. AT&T*, 593 F.2d 1030, 1059 (D.C. Cir. 1981), *cert. denied* 440 U.S. 949 (1979) (rejecting claim under First and Fourth amendments that federal government may not subpoena business records relating to journalist activities).

<sup>68</sup>In one recent case, the court received more than 30 *amicus* filings from such groups.

<sup>69</sup>*Lee v. DOJ*, 413 F.3d 53 (D.C. Cir. 2005) (rejecting claim of reporter's privilege in civil leak case where reporter is not a party); *Zerilli v. Smith*, 656 F.2d 705, 715 (D.C. Cir. 1981) (declining to order testimony under reporter's "privilege" to decline to answer questions about a source in a civil deposition where the reporter is not a party; ruling depended on weighing of three factors, including how central the reporter's information is to the plaintiff's case); *Lee v. DOJ*, 401 F. Supp. 2d 123 (D.D.C. 2005) (holding reporter in contempt for refusing to answer deposition questions in civil leak case).

<sup>70</sup>*Doe v. Omaha World Herald*, No. 4:04CV3306 (D. Neb. Sept. 20, 2004) (motion by the ACLU of Nebraska asking a court to enjoin a newspaper from revealing the name of a John Doe plaintiff in a case challenging the posting of the Ten Commandments, because the plaintiff had received death threats); *Doe v. Omaha World Herald*, No. 4:04CV3306 (D. Neb. Sept. 21, 2004) (Order denying the motion).

<sup>71</sup>See, e.g., *Associated Press v. Meltwater U.S. Holdings Inc.*, 931 F. Supp. 2d 537, 546 (S.D.N.Y. 2013) (discovery not contested on First Amendment or journalistic privilege grounds).

<sup>72</sup>See *Harper & Row Publishers Inc. v. Nation Enterprises*, 471 U.S. 539, 560 (1985) (refusing to allow First Amendment defense to copyright violation of publishing lengthy quotations from a yet unpublished presidential memoir).

<sup>73</sup>*United States v. Golden Valley Elec. Ass'n*, 689 F.3d 1108, 1115 (9th Cir. 2012) (upholding administrative John Doe subpoena against Fourth amendment challenge).

<sup>74</sup>Government issuance of civil subpoenas seeking information regarding anonymous individuals may raise First Amendment concerns. For example, in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958), the Supreme Court held that a discovery order requiring the NAACP to disclose its membership list interfered with the First Amendment freedom of assembly. Similarly, in *NLRB v. Midland Daily News*, 151 F.3d 472, 475 (6th Cir. 1998), the Sixth Circuit declined on First Amendment grounds to enforce a subpoena *duces tecum* issued by the National Labor Relations Board seeking to require a newspaper publisher to disclose the identity of an anonymous advertiser. See also *Los Angeles Memorial Coliseum Comm. v. Nat'l Football League*, 89 F.R.D. 489, 494-95 (C.D. Cal. 1981) (granting motion to quash civil subpoena seeking disclosure of confidential journalistic sources).

<sup>75</sup>*Branzburg v. Hayes*, 408 U.S. 665 (1972). See *McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003) (collecting cases). The Fourth Circuit has adopted a three-part test to determine when a reporter has a privilege to refuse to testify in a case where the reporter is not a party. *Ashcraft v. Conoco Inc.*, 218 F.3d 282, 287 (4th Cir. 2000). The test is "(1) whether the information is relevant,

(2) whether the information can be obtained by alternative means, and (3) whether there is a compelling interest in the information." (citing *LaRouche v. National Broadcasting Company*, 780 F.2d 1134 (4th Cir.), *cert denied* 479 U.S. 818 (1986)).

<sup>76</sup>*New York Times Co. v. Gonzalez*, 459 F.3d 160, 170-171 (2d Cir.), *stay denied*, 549 U.S. 1049 (2006) (upholding grand jury subpoenas for reporter telephone records in criminal leak investigation); *CFTC v. Whitney*, 441 F. Supp. 2d 61, 65 (D.D.C. 2006) (holding that a reporter privilege does not overcome the public interest in a CFTC enforcement action that concerns information provided by a regulated entity to the publisher).

<sup>77</sup>*In re Special Proceedings*, 373 F.3d 37 (1st Cir. 2004) (enforcing grand jury subpoena by contempt power against reporter where the evidence was central to the investigation); *Doe v. Kohn, Nast & Graf, P.C.*, 853 F. Supp 150 (E. D. Pa. 1994) (denying production of TV interview outtakes after *in camera* review); *CFTC v. Whitney*, 441 F. Supp. 2d 61, 65 (D.D.C. 2006) (holding that a qualified reporter privilege does not overcome the government's need for discovery when the government proves that the discovery is central to proof of essential elements of its case, other sources have been exhausted, and the publisher received the information for use in its publication).

<sup>78</sup>See, e.g., *Herbert v. Lando*, 441 U.S. 153, 170 (1979) (editorial processes and news methods are not privileged from discovery when malice of publisher is at issue); *Desai v. Hersh*, 954 F.2d 1408, 1412 (7th Cir.), *cert denied* 506 U.S.865 (1992) (reporter does not have absolute privilege to withhold identity of sources in libel case based on leaked intelligence information); *LaRouche v. Nat'l Broad. Co. Inc.*, 780 F.2d 1134, 1139 (4th Cir. 1986) (NBC not required to reveal anonymous sources when plaintiff failed to exhaust other avenues); *In re Selcraig*, 705 F.2d 789 (5th Cir. 1983) (reversing contempt finding for reporter as premature when merits of defamation claim not yet demonstrated); *Zerilli v. Smith*, 656 F.2d 705, 710-11 (D.C. Cir. 1981) (declining to order journalist testimony despite essential nature of testimony); *Bruno & Stillman Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 595-99 (1st Cir. 1980) (variety of factors must be considered before compelling disclosure of confidential sources under Rule 26); *Miller v. Transamerican Press Inc.*, 621 F.2d 721, 725 (5th Cir. 1980), *cert denied* 450 U.S. 1041 (1981) (affirming order to disclose journalistic source); *Riley v. City of Chester*, 612 F.2d 708, 715 (3d Cir. 1979) (reversing order compelling disclosure because party failed to exhaust other sources first); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 438 (10th Cir. 1977) (reversing trial court disclosure order on ground of failure to require exhaustion of other sources); *Farr v. Pitchess*, 522 F.2d 464, 467-68 (9th Cir. 1975), *cert. denied* 427 U.S. 912 (1976) (denying habeas corpus relief to reporter jailed for declining to reveal sources of information about witness in criminal trial); *Baker v. F & F Inv.*, 470 F.2d 778, 779-80 (2d Cir. 1972), *cert denied* 411 U.S. 996 (1973) (civil suit over race discrimination in housing does not present compelling need for overriding claim of journalistic privilege); *Cervantes v. Time Inc.*, 464 F.2d 986, 992-93 (8th Cir. 1972), *cert. denied* 409 U.S. 1125 (1973) (denying order to reveal news sources when case on merits is extraordinarily weak); *Carey v. Hume*, 492 F.2d 631 (D.C. Cir.) *petition for writ of certiorari dismissed pursuant to Rule 60*, 417 U.S. 938 (1974) (ordering disclosure of reporter sources when central to the case.).

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### **KING V. BURWELL (14-114)**

Court Below: Court of Appeals for the Fourth Circuit

Oral argument: Mar. 4, 2015

#### **Issue**

Can the IRS give tax credits to participants of federally-run health insurance marketplaces established under the Patient Protection and Affordable Care Act?

In 2010, Congress passed the Patient Protection and Affordable Care Act (ACA). The ACA, in part, provides tax credits for insurance premiums paid by eligible citizens who obtain insurance through exchanges, which are health-insurance marketplaces. The Internal Revenue Service (IRS) interpreted the ACA to permit tax credits to all eligible citizens regardless of whether the exchange they used is federally or state-run. In this case, the Supreme Court will have the opportunity to resolve whether the ACA extends tax credits to those who bought insurance through federally established exchanges. Several Virginia residents contend that the ACA's plain text shows that Congress only intended tax credits for insurance purchased from state-established exchanges and that deference to the IRS's interpretation under the Supreme Court's *Chevron U.S.A Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984) decision is inapplicable because of the unambiguous meaning of the statutory text. The government counters that tax credits are available to "applicable taxpayers"—a status determined independent of the type of exchange within a citizen's state—and, also, that *Chevron* deference applies because the government's interpretation avoids creating conflicts within the ACA. This case will impact the balance of federalism, the separation of power between the legislative and executive branches, and the American health-care marketplace.

#### **Questions as Framed for the Court by the Parties**

Section 36B of the Internal Revenue Code, which was enacted as part of the ACA, authorizes federal tax-credit subsidies for health insurance coverage that is purchased through an "Exchange established by the State under section 1311" of the ACA.

The question presented is whether the IRS may permissibly promulgate regulations to extend tax-credit subsidies to coverage purchased through exchanges established by the federal government under section 1321 of the ACA.

#### **Facts**

In 2010 Congress passed the ACA. Facilitating insurance-plan purchases, ACA § 1311 requires each state to establish a health-insurance marketplace, called an exchange, no later than Jan. 1, 2014. If a state "elects" not to create an exchange or creates an exchange that does not satisfy federal requirements, then ACA § 1321 requires the secretary of Health and Human Services (HHS) to "establish and operate such Exchange within the state." By the ACA's deadline, 16 states and the District of Columbia had created state-run exchanges, leaving the other 34 states with federally run exchanges.

In addition to creating exchanges, the ACA grants prospective lower-income purchasers a tax credit that reduces the cost of insurance plans on the exchange. The value of that tax credit is calculated by adding the insurance assistance for a taxable year that a participant would receive for each "coverage month." Critically, the ACA (in § 36B of the Internal Revenue Code) defines "coverage month" as each month that a purchaser would have insurance that he or she obtained "through an Exchange

established by the State." The IRS promulgated regulations that, in part, grant these tax credits to qualifying citizens regardless of whether they obtained the insurance through a federally or state-run exchange.

Petitioners, including David King (collectively, Petitioners or King), are residents of Virginia, which has a federally run exchange, "who do not want to purchase comprehensive health insurance." The ACA exempts citizens who cannot purchase the cheapest insurance plan without exceeding eight percent of their expected annual household incomes from a tax penalty. In this case, without the tax credits, the least expensive insurance plan available to petitioners would exceed eight percent of their expected annual household incomes, exempting them from the tax penalty. But when the IRS adds the tax credits to petitioners' plans, their insurance costs no longer exceed eight percent of their household incomes. This causes their exemption status to dissipate, subjecting them to the tax penalty. Respondents, including HHS Secretary Sylvia Burwell, are government officials being sued in their official capacities, or government departments and agencies (government).

Facing the prospect of paying the tax penalty, petitioners brought a suit alleging that the IRS' regulation granting tax credits to citizens in federally run exchanges exceeded the agency's statutory authority, was "arbitrary and capricious," violated the Administrative Procedure Act (APA), and was thus void. The district court granted the government's motion to dismiss petitioners' claims. They appealed to the Fourth Circuit Court of Appeals, which affirmed the dismissal. They subsequently petitioned the Supreme Court for a writ of certiorari, which the Court granted on Nov. 7, 2014.

## Discussion

This case presents the Supreme Court with the opportunity to determine whether the ACA extends tax credits to citizens of states that have federally run health care exchanges. King maintains that Congress authorized the IRS to provide tax credits only for participants in state-run exchanges. The government counters that Congress authorized the IRS to provide tax credits to participants in both federally and state-run exchanges. The Supreme Court's resolution of this case will impact the balance of federalism, the proper allocation of power between the legislative and executive branches, and the American health care system.

## FEDERALISM CONCERNS

King and supporting amici argue that if the Court permits the IRS to offer tax credits to potential participants in federally run exchanges, the federalism balance between state and federal governments will be improperly altered. The Galen Institute maintains that states have traditionally regulated health insurance and that tax credits place a forced tax burden on the states and eliminates their power to choose how to regulate health care. Furthermore, the Missouri Liberty Project claims that some states elected to create an exchange to gain the tax credits, while many states consciously declined to create a state exchange to forgo the tax credits, a forbearance which will dissolve if the IRS can offer tax credits to federally run exchanges.

The government and its amici argue that if the Court determines that the IRS cannot provide tax credits for federally run exchanges, the ACA transforms into a coercive statute that also inappropriately alters the federalism balance. A group of health-care workers contend that King's interpretation would result in an unconstitutionally coercive statute that ties severe fiscal injury to noncompliance with the ACA's exchange mandate. A coalition of states echoes this worry and asserts that King's argument raises 10th Amendment concerns because the ACA, under King's interpretation, would force states to choose between either having a state-run health care exchange or depriving its citizens of billions of tax-credit dollars—a choice the states contend is untenably coercive.

## SEPARATION OF POWERS

King and supporting amici allege that the government's interpretation will reallocate power from the legislative to the executive branch. For example, the Citizens' Council for Health Freedom contends that the ACA does not authorize the IRS to provide tax credits to federally run exchanges—and thus, the executive branch, through the IRS, has usurped Congress's power to create law.

The government and its amici counter that Congress did, in fact, authorize the IRS to provide tax credits to citizens obtaining insurance through federally run exchanges, and, accordingly, the executive followed Congress' command and did not usurp power.

## Analysis

The U.S. Supreme Court has the opportunity to determine whether the IRS can interpret § 36B of the Internal Revenue Code to extend tax credits for exchanges established by the federal government through HHS under ACA § 1321. King asserts that the ACA's plain text establishes that tax credits are available only for state exchanges, that federal exchanges cannot be considered the same as state exchanges, and that judicial deference under *Chevron*, is inapplicable since the ACA's plain text communicates Congress's intent. The government counters that the ACA allows tax-credit subsidies to an "applicable taxpayer," that the ACA's text clarifies that a federal exchange is a state-established exchange, and that its reading of § 36B warrants *Chevron* deference.

## THE ACA'S TEXT

King contends that the ACA's plain text clearly establishes that tax-credit subsidies are only available for state-run exchanges and that the IRS's regulation granting tax-credit subsidies for both state and federal exchanges runs contrary to this plain meaning. He points out that three sections (§§ 1311, 1321, and 36B) limit the availability of tax-credit subsidies to state-run exchanges only. For instance, King notes that § 36B authorizes tax credits only for taxpayers enrolled "through an Exchange established by the State under [§] 1311," in contrast to the federal exchanges under § 1321. The IRS's interpretation applying the tax credit to all exchanges, King argues, would disregard

this clear language chosen by Congress.

The government counters that § 36B authorizes tax-credits to any "applicable taxpayer" whose household income is a certain percentage above the federal poverty level, and, thus, tax-credit eligibility is not determined based on whether they obtained insurance through a state or federal exchange. The government further asserts that the language King seizes upon is contained in two § 36B sub-clauses describing the formula to be used, and that this language "cannot be read in isolation." Contrary to King's position, the government argues that the phrase "an Exchange established by the State [under § 1311]" is a term of art that includes both state-run and federally run exchanges.

## CHEVRON DEFERENCE

King argues that *Chevron* deference is inapplicable because the ACA's text unambiguously authorizes tax credits only for taxpayers who obtained insurance through state exchanges. He asserts that even if the ACA's text is ambiguous, *Chevron* deference is inapplicable for three reasons. First, it is implausible that Congress gave the IRS authority to decide whether to make an enormous expenditure by extending tax credits to federal exchanges. Second, *Chevron* deference only applies after the "traditional tools of statutory construction have been exhausted," and here, the clear-statement rule for tax credits, deductions, and exemptions means that Congress must express its approval of any of these in "clear and unambiguous terms," which is not the case with the ACA. Finally, because § 36B is the only ACA section within the IRS's domain, the IRS lacks authority to administer or interpret §§ 1311 and 1321, which are solely within the HHS's domain.

The government counters that because § 36B authorizes the IRS to "prescribe such regulations as may be necessary" "to implement the [ACA's] tax credits," the IRS's interpretation pursuant to that authority makes *Chevron* applicable. The government points out that King's interpretation of the phrase "established by the State" would create many conflicts within the ACA and, thus, it cannot be argued that "established by the State" unambiguously means that tax credits are available only for state exchanges.

## Conclusion

The Supreme Court will determine whether the IRS can extend tax credits to participants of federal exchanges established by HHS despite language that allegedly authorizes tax credits only for exchanges established by states. To resolve this issue, the Court will have to examine the ACA's text and purpose and decide whether state and federal exchanges are the same for the purpose of receiving tax credits. Furthermore, the Court will have to decide whether *Chevron* deference is applicable. The Court's ruling will potentially alter the allocation of power between the state and federal governments as well as between the executive and legislative branches, and it will have a profound effect on the American health-care system. ☺

*Written by Michael Duke and Edward Flores. Edited by Jacob Brandler.*

## OHIO V. CLARK (13-1352)

Court below: Ohio Supreme Court

Oral argument: Mar. 2, 2015

### Issues

Is someone who must report suspected child abuse considered an agent of law enforcement under the Confrontation Clause?

Are a child's statements to a teacher about child abuse "testimonial" statements for purposes of the Confrontation Clause?

The U.S. Supreme Court will determine whether teachers who must report suspected child abuse are agents of law enforcement and whether a child's out-of-court statements are testimonial for purposes of the Confrontation Clause. Ohio asserts that they are not testimonial, because their primary purpose is not intended to further investigation but rather to protect children. Darius Clark, an alleged abuser, contends that teachers intend to report the potential child abuse when they question children and are agents of the state in doing so and that the children's statements are testimonial because they are meant to further prosecution of the suspected abuser. The Court's ruling will affect the admissibility of children's statements about potential child abuse under the Confrontation Clause when the statements are made to teachers obligated to

report suspected child abuse to state authorities.

### Questions as Framed for the Court by the Parties

Does an individual's obligation to report suspected child abuse make that individual an agent of law enforcement for purposes of the Confrontation Clause?

Do a child's out-of-court statements to a teacher in response to the teacher's concerns about potential child abuse qualify as "testimonial" statements subject to the Confrontation Clause?

### Facts

T.T. had two children, L.P. and A.T., and lived with her boyfriend, Clark. While L.P., T.T.'s 3-year-old son, was at the William Patrick Day Head Start Center in Cleveland, Ohio, on March 17, 2010, one of his teachers noticed that his eye was bloodshot. In response to the teacher's questions, L.P. stated that he fell. Later in the day, the same teacher observed that L.P. had what appeared to be red whip-type marks on his face. Another teacher asked L.P. who made the marks, and L.P. stated that "Dee" did it, referring to Darius Clark. The teacher who first observed L.P.'s eye and the red marks on his face called the Ohio state hotline to report suspected child abuse, as she is required to do under Ohio R.C. 2151.421.

Prosecutors charged Clark with felonious assault, endangering children, and domestic violence. At trial, Clark motioned to exclude L.P.'s statements to his day-care teachers identifying Clark as the person who hurt him. Although the trial court allowed the statements into evidence, it ruled that L.P. was not competent to testify at trial. In total, seven witnesses, including police officers, social workers, and teachers, recounted L.P.'s statements in question. The trial court found Clark guilty of eight of the nine charges, and sentenced him to 28 years in prison.

On appeal, Clark asserted that the trial court violated his Sixth Amendment Confrontation Clause rights when it allowed L.P.'s statements into evidence. The Supreme Court of Ohio ruled that the statements should not have been admitted because they were testimonial and because L.P.'s teachers acted as agents of law enforcement when they questioned him to gather information for future prosecution.

The Supreme Court of the United States will determine whether an individual's obligation to report suspected child abuse to authorities makes that person an agent of law enforcement and whether a child's out-of-court statements to teachers about potential child abuse are testimonial for Confrontation Clause purposes.

### Discussion

The state of Ohio argues that statements made to private parties are not the equivalent of trial testimony and are therefore not testimonial and that teachers are not agents of the state when they are obligated to report child abuse because their intent is to protect children, not to investigate the abuse in anticipation of prosecution. Clark asserts that the purpose of teachers' questioning L.P. was to discover who had been hurting him and that, because L.P.'s statements were meant to further the investigation into the suspected child abuse, the statements were testimonial.

The Court's ruling will affect the admissibility of children's statements about potential child abuse under the Confrontation Clause when the statements are made to teachers who must report suspected child abuse to state authorities.

### RELIABILITY AND PROBATIVENESS OF CHILDREN'S STATEMENTS

Amicus for Ohio, American Professional Society on the Abuse of Children, argues that children are less likely to lie in child-abuse cases because they often have close relationships with the alleged abuser. Additionally, Domestic Violence Legal Empowerment and Appeals Project (DV LEAP), amicus for Ohio, asserts that children's statements in child abuse cases should not be considered testimonial, because those who are closest with children abuse them. As a result, DV LEAP contends that children face a "continuing threat of harm" and report abuse with the primary purpose of protecting themselves.

Arizona Attorneys for Criminal Justice and other organizations argue that even though children are often the sole witnesses to child abuse, a ruling in favor of Ohio would allow states to conduct child-abuse trials without testimony from, or an opportunity to cross-examine, the victim. Amici for Clark, Family Defense Center, and other organizations contend that this

is problematic, because children in particular are subject to suggestion of adult authority figures and do not have extensive vocabularies or strong memories. Thus, if a child's unreliable out-of-court statements made to his teachers are admissible, law enforcement officers may make no further investigation into the case, because prosecutors may have enough information to get a conviction.

#### **EFFECTS ON OTHER PROCEEDINGS AND TEACHERS**

The National Education Association and other organizations, writing as amici for Ohio, contend that teachers will have more difficulty in fulfilling their duties as mandatory reporters if they are expected to be investigators. As a result, these amici contend, teachers will require significantly more training due to increased complexity in their duties. In addition, the amici argue that teachers and other private parties would be considered law enforcement agents in other contexts, such as for custodial interrogation and search-and-seizure purposes if the Court rules for Clark. Accordingly, this distinction would require teachers to keep in mind that routine disciplinary situations could lead to serious constitutional violations, considerations for which teachers lack knowledge to understand.

In contrast, the National Association of Criminal Defense Lawyers, amicus for Clark, asserts that if the Court were to rule in favor of Ohio, states would attempt to use nonpolice parties in the investigation process, because statements made to them would not be testimonial and possibly admissible evidence at trial. This would mean that some defendants would essentially lose their right to confront the witnesses against them. Family Defense Center and other organizations contend that investigations in civil custody and divorce proceedings would also be affected, thereby allowing statements of children who are allegedly abused into trials without an opportunity for cross-examination. Despite the potential for false accusations due to children's susceptibility, these amici argue that parental relationships and families would be damaged in civil trials, which would rely heavily on hearsay evidence as a result of a ruling in favor of Ohio.

#### **Analysis**

The parties disagree over whether a child's out-of-court responses to his teachers on suspected child abuse qualify as testimonial statements under the Confrontation Clause. Statements are testimonial if they are formally given during questioning to prove facts or evidence possibly applicable to later criminal prosecution and if these statements qualify as an out-of-court replacement for testimony.

#### **ARE A CHILD'S STATEMENTS TO PRIVATE PARTIES TESTIMONIAL UNDER THE CONFRONTATION CLAUSE?**

Ohio maintains that L.P.'s statements to his teachers are not testimonial under the Confrontation Clause, because they were not given to the police in an official setting, such as a courtroom or police station. The state adds that the statements are not testimonial, because L.P. was only answering his teachers' vague questions on his injuries and retelling alleged events. Rather, Ohio argues that L.P. spoke to two private individuals that fit under the category of friends and neighbors—two day-care teachers—and it was impulsively done in the informal setting of a classroom. The state argues that allowing statements to private parties to be testimonial frustrates the Clause's purpose of upholding confronting witnesses through cross-examination to find the truth rather than relying on affidavits and depositions.

Clark counters that L.P.'s statements to his teachers are testimonial evidence, because, at 3 years old, he perceived them as authority figures, not friends and neighbors. Additionally, Clark argues that L.P.'s statements were testimonial for a number of reasons. First, the teachers questioned L.P. to investigate who his abuser was. Second, they were required to do so under Ohio law. Third, they contacted authorities to aid in finding the alleged abuser. These actions are relevant to provide evidence for criminal prosecution and are thus testimonial in nature, says Clark.

#### **DOES A CHILD'S STATEMENTS TO PRIVATE PARTIES APPLY UNDER THE PRIMARY PURPOSE TEST?**

Ohio contends that under the primary purpose test, L.P.'s statements to his teachers were testimonial if he intended them to be used as trial testimony but nontestimonial if he did not intend such use. Ohio also asserts that because L.P. is 3 years old, his

purpose during the exchange with his teachers was not to reveal criminal action, and due to his young age, his responses were automatic and influenced by his teachers' leading questions. The state further argues that the teachers' questions were based on their roles as educators and that neither of them called the police; their supervisor did.

Clark counters that the primary purpose test applies to L.P.'s teachers, because the Confrontation Clause implicates whether they were conducting investigative tasks related to police work and not police conduct itself. Specifically, Clark states that the teachers questioned L.P. to find out who his abuser was, and while they did want to protect him and maintain safety in the classroom, their main purpose was to perform an investigative function similar to law enforcement. Clark further argues that the focus should not only be on protecting children but on criminal prosecution for those who commit child abuse. Clark also asserts that it does not matter whether the individual making the statements meant to generate evidence for trial.

#### **Conclusion**

The Supreme Court will determine whether a child's out-of-court statements to his teachers about suspected child abuse qualify as testimonial statements under the Confrontation Clause. Ohio asserts that such statements are not testimonial, because the child in question, L.P., is too young to testify, and because his statements were made informally to his teachers in a classroom rather than to the police and thus fail the primary purpose test. He adds that the statements did not have the purpose of providing evidence for criminal proceedings. Clark counters that L.P.'s statements are testimonial, because he made them to two authoritative figures in furtherance of criminal proceedings, and because he is mature enough to testify. A ruling that the statements are testimonial will maintain the adversarial process, says Clark. The Court's ruling will implicate the status of teachers as mandatory reporters and the admissibility of children's statements about suspected child abuse under the Confrontation Clause. ©

*Written by Carolina Morales and Shaun Martinez. Edited by Daniel Rosales. The authors would like to thank Professor Valerie Hans of Cornell Law School for her insights into this case.*

## ARIZONA STATE LEGISLATURE V. ARIZONA INDEP. REDISTRICTING (13-1314)

Court Below: U.S. District Court, District of Arizona

Oral Argument: Mar. 2, 2015

In 2000, Arizona passed Proposition 106, which formed the Arizona Independent Redistricting Commission (AIRC). The AIRC's purpose is to manage congressional districts. Prior to the referendum, the Arizona State Legislature (Legislature) had the power to determine congressional districts through the traditional legislative process. In 2012, the Legislature filed suit in the U.S. District Court of Arizona to challenge the legitimacy of the AIRC. The three-judge district court dismissed the suit, holding that the AIRC could remain in charge of redrawing congressional districts. The Legislature appealed to the U.S. Supreme Court to determine whether the Elections Clause and 2 U.S.C. § 2a(c) permit Arizona to use the AIRC to redraw congressional districts. Full text available at [www.law.cornell.edu/supct/cert/13-1314](http://www.law.cornell.edu/supct/cert/13-1314). ☉

*Written by Chris Milazzo and Carolyn Wald. Edited by Rose Nimkiins Petoskey.*

## BAKER BOTTS V. ASARCO LLC (14-103)

Court Below: U.S. Court of Appeals for the Fifth Circuit

Oral Argument: Feb. 25, 2015

This case presents the Supreme Court with the opportunity to decide whether courts have the authority to grant defense-fee awards when a law firm defends itself against its bankruptcy client's objections to legal fees. Brief for respondent ASARCO argues that § 330 of the Bankruptcy Code (Code) does not permit awards for compensation to bankruptcy practitioners for successfully defending fee applications. In opposition, petitioner Baker Botts contends that § 330 gives courts broad discretion to award compensation for services that are necessary to the administration of bankruptcy cases, including successfully defending fee applications. The Supreme Court's decision in this case will impact the compensation of bankruptcy lawyers and the rights of bankruptcy clients. Full text available at: [www.law.cornell.edu/supct/cert/14-103](http://www.law.cornell.edu/supct/cert/14-103). ☉

*Written by Nathan Koskella and Ellen Taylor. Edited by Paul Kang.*

## CHAPPELL V. AYALA (13-1428)

Court Below: U.S. Court of Appeals for the Ninth Circuit

Oral Argument: Mar. 3, 2015

The Supreme Court will determine to what extent federal courts can evaluate state court determinations of federal error regarding a federal question. Kevin Chappell, warden of the state of California, contends that federal courts must grant significant deference to state court determinations denying federal habeas relief for convicted defendants based on a finding that any error that occurred during a trial was a harmless error. Hector Ayala, a prisoner, counters that federal courts should have the opportunity to independently review federal habeas petitions for error and determine how much prejudice the defendant suffered when state courts determined an error was harmless. The Supreme Court's decision will impact the level of deference afforded to state courts in determinations of harmless error and will affect the jury selection process. Full text available at [www.law.cornell.edu/supct/cert/13-1428](http://www.law.cornell.edu/supct/cert/13-1428). ☉

*Written by Andrew Huynh and Mary Beth Picarella. Edited by Oscar Lopez.*

## COLEMAN-BEY V. TOLLEFSON (13-1333)

Court Below: U.S. Court of Appeals for the Sixth Circuit

Oral Argument: Feb. 23, 2015

The Supreme Court will decide whether, under the three-strikes provision of the Prison Litigation Reform Act (§ 1915), a district court's dismissal of a suit counts as a strike while it is still pending on appeal or before the time for seeking appellate review has passed. Andre Lee Coleman, a prisoner in Michigan, was barred under § 1915 from proceeding on a fourth action in forma pauperis while the decision from a previous action was on appeal in district court. Coleman argues that the district court improperly dismissed his action when it counted the pending appeal of his action as a third strike in accordance with § 1915(g). However, Tollefson counters that the strike should be in effect after the

district court dismissal due to the § 1915 text and Congress's desire to ban meritless claims. This decision has the potential to affect how the statute is interpreted in the lower courts and the caseload volume of court dockets. Full text available at [www.law.cornell.edu/supct/cert/13-3333](http://www.law.cornell.edu/supct/cert/13-3333). ☉

*Written by Cesie Alvarez and Njeri Chasseau. Edited by Rose Nimkiins Petoskey.*

## EEOC V. ABERCROMBIE & FITCH STORES (14-86)

Court Below: U.S. Court of Appeals, Tenth Circuit

Oral Argument: Feb. 25, 2015

The Supreme Court will determine whether an employer can be liable under Title VII for refusing to hire a candidate or dismissing an employee only if the employer had actual knowledge, gained by the candidate's or employee's explicit notification, that the candidate or employee required a religious accommodation. The EEOC argues that an employer violates Title VII when the employer refuses to hire an applicant or dismisses an employee based on "a religious observance and practice" that could be reasonably accommodated. Abercrombie & Fitch counters that its denial of an exception to a religion-neutral store policy—a look policy considered crucial to the vitality of its business—is not intentional discrimination under Title VII. The Supreme Court's decision will implicate Title VII's role in religion-neutral work policies as well as who bears the burden of raising the need for religious accommodations in the workplace. Full text available at [www.law.cornell.edu/supct/cert/14-86](http://www.law.cornell.edu/supct/cert/14-86). ☉

*Written by Alice Chung and Allison Eitman. Edited by Oscar Lopez.*

## HENDERSON V. UNITED STATES (13-1487)

Court Below: U.S. Court of Appeals for the Eleventh Circuit

Oral Argument: Feb. 24, 2015

In this case, the Supreme Court will have the opportunity to resolve a circuit split and determine whether a convicted felon may request that the government transfer possession of a felon's noncontra-



band firearms to a third party. Henderson, a convicted felon, requested that the FBI transfer possession of the firearms to a third party interested in purchasing the firearms. The FBI denied his request, asserting that convicted felons may not possess firearms and that a transfer to a third party would give Henderson constructive possession in violation of federal law. Henderson, however, argues that his inability to possess firearms under federal law does not terminate his entire ownership interest in noncontraband firearms. The Supreme Court's ruling will implicate ownership rights of convicted felons' non-contraband firearms. Full text available at [www.law.cornell.edu/supct/cert/13-1487](http://www.law.cornell.edu/supct/cert/13-1487). ☉

*Written by Allison Hoppe and Johnny Kuang. Edited by Gabriella Bensur.*

### **KERRY, SEC. OF STATE V. DIN (13-1402)**

*Court Below: U.S. Court of Appeals for the Ninth Circuit*

**Oral Argument: Feb. 23, 2015**

The Supreme Court will decide whether refusing the visa application of a U.S. citizen's alien-spouse triggers the citizen's constitutionally protected interests and whether the citizen may challenge this refusal. Secretary of State John Kerry argues that a citizen's liberty interests are not implicated, because neither the Immigration and Nationality Act (INA) nor the Due Process Clause confer upon the citizen a legally cognizable interest in the consular officer's determination, and consular officers' determinations should not be challenged in court, because judicial review would conflict with the consular nonreviewability doctrine and congressional intent in establishing the INA. In opposition, Din, a U.S. citizen, argues

that the consular officer's determination conflicts with the Court's jurisprudence, which establishes a fundamental right to marry and to benefit from the associational interests in marriage, and that the consular officer's determination should be subjected to judicial review in order to protect citizens' liberty interests from arbitrary restrictions. The Court's ruling in this case implicates the ability of the government to prevent disclosure of confidential information related to national security concerns and the ability of citizens to live with their alien-spouse in the United States. Full text available at [www.law.cornell.edu/supct/cert/13-1402](http://www.law.cornell.edu/supct/cert/13-1402). ☉

*Written by Aida Nieto and Cesar Sanchez. Edited by Paul Kang.*

### **LOS ANGELES V. PATEL (13-1175)**

*Court Below: U.S. Court of Appeals for the Ninth Circuit*

**Oral Argument: Mar. 3, 2015**

Patel, with other Los Angeles motel and hotel owners, challenged Los Angeles Municipal Code 41.49 (Section 41.49) alleging that it violated the Fourth Amendment on its face. Asserting that it had a compelling interest in fighting crimes such as human trafficking and prostitution, which frequently involve hotels and motels in their operation, the city of Los Angeles responded that inspections under Section 41.49 are reasonable, and constitutional applications of Section 41.49 exist. The Supreme Court's decision in this case will determine whether similar laws and ordinances not only in California but also in other states, as well as in other industries, can continue to operate and whether a compelling government interest in crime deterrence can justify consent-

less police searches free of judicial review. Full text available at [www.law.cornell.edu/supct/cert/13-1175](http://www.law.cornell.edu/supct/cert/13-1175). ☉

*Written by Mateo de la Torre and Jee Kim. Edited by Gabriella Bensur.*

### **TIBBLE V. EDISON INT'L (13-550)**

*Court Below: U.S. Court of Appeals for the Ninth Circuit*

**Oral Argument: Feb. 24, 2015**

In this case, the Supreme Court will determine whether the ERISA's six-year filing window prohibits a claim that 401(k) plan fiduciaries breached their duty of prudence by offering higher-cost mutual funds to plan participants despite identical lower-cost mutual funds being available, when fiduciaries initially chose the higher-cost mutual funds more than six years before the claim was filed. A group of employee-beneficiaries argue that plan fiduciaries have an "ongoing" duty of prudence under ERISA and that the failure to remove an imprudent investment gives rise to a new six-year period. Edison International, the employer, counters that case should be dismissed, because the record does not reflect the question that the Court granted certiorari for, or, in the alternative, that the judgment below should be affirmed because there is no reversible error. The resolution of this case could have implications concerning the future cost of ERISA-governed benefits plan and the scope of fiduciary duties. Full text available at [www.law.cornell.edu/supct/cert/13-550](http://www.law.cornell.edu/supct/cert/13-550). ☉

*Written by Neil O'Donnell and Agbeko Petty. Edited by Jacob Brandler.*

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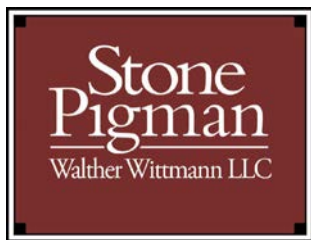
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### WHY TOLERATE RELIGION?

BY BRIAN LEITER

Princeton University Press, Princeton, N.J., 2013.  
187 pages, \$24.95 (cloth), \$17.95 (paper).

Reviewed by Bentley J. Anderson

Brian Leiter, a professor of law and philosophy at the University of Chicago, opens *Why Tolerate Religion?* by contrasting a litigated case with a hypothetical case, each involving a claim of conscientious objection to a law banning knives and other weapons from schools. In the actual case, the plaintiff, a teenage Sikh boy, sought an exemption from the law on the grounds that his religion obliged him to carry a traditional knife, or “kirpan,” at all times. In Leiter’s hypothetical case, a teenage boy living in a rural area of the United States receives at a certain age, as part of a multigenerational family tradition, a knife from his father marking his passage to adulthood. The boy seeks to carry the knife to school, consistent with his duty to maintain “the family knife.” In the former case, the Canadian Supreme Court ruled that the boy had a right to carry the knife to school, finding that “his personal and subjective belief in the significance of the kirpan [was] sincere,” and citing the relatively low risk of harm to other students from his carrying the knife at school and the “special value multiculturalism is assigned” in the Canadian Charter of Rights and Freedoms. In contrast, Leiter concludes, no Western democracy would rule for the boy in the hypothetical case based on his sincerely held nonreligious objection to the application of the law banning knives at school. Yet, Leiter states, in the United States, as in Canada, the boy would stand a good chance of winning if he were a Sikh.

*Why Tolerate Religion?* concerns the question of whether a community should permit religious-based exemptions to laws of general applicability. Leiter juxtaposes the profiles of these two teens to highlight the longstanding deference to religious-based exemptions in the jurisprudence of Western societies, including the United States. He argues that religious-based

exemptions are not morally defensible. This conclusion has generated extensive and, in some cases, hostile responses to the book from religious groups as well as from prominent American scholars of law and religion.

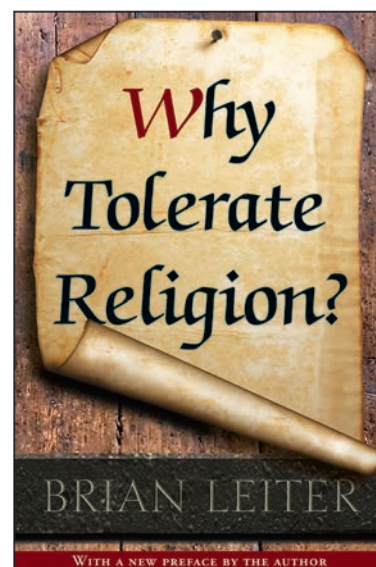
Leiter begins by summarizing several legal and philosophical positions for supporting tolerance of religious-based claims of conscience. He considers, for example, the constitutions of several Western nations, as well as the Universal Declaration of Human Rights, each of which refers not just to protecting the practice of religion, but to a broader “freedom of faith *and conscience*” (as stated in the German constitution; emphasis added). Leiter also cites the U.S. Constitution, which, though not referring to freedom of conscience, precludes the government from prohibiting the free exercise of religion.

Leiter also briefly surveys the views of Hobbes, Kant, Locke, Mill, and Nietzsche, as well as those of more contemporary philosophers, such as John Rawls, all of whom argued in favor of toleration, although on different bases. Mill’s philosophy, utilitarianism, for example, holds that toleration is a good because it maximizes human well-being by allowing people to choose what to believe and how to live, thereby making for a better life. Locke’s views, Leiter writes, can be interpreted to mean that states should tolerate conscientious objections for a practical reason: Governments do not have coercive mechanisms to change people’s beliefs, which “can’t be inculcated at gunpoint.” Leiter concludes on the basis of such philosophical arguments that a state would be justified in “suspend[ing] its pursuit of the general welfare in order to tolerate (i.e., ‘put up with’) a conscientious practice of a minority of its citizens that is incompatible with it.”

Importantly, however, Leiter explains that the net gain to a community from allowing religious exemptions from generally applicable laws derives from the legal protection it provides *on the basis of conscientiously held beliefs generally*, not on the basis of religious beliefs in

particular. He argues that religious-based claims of exemption are a subset of the broader claim of freedom of conscience, which, in the Western tradition, deserves toleration whether or not it is based on religious beliefs.

At this point, Leiter considers whether a community should “accord special legal and moral treatment to religious practices”—whether there is “any special reason” for tolerating religion. He concludes that there is no “principled reason” for doing so. Leiter points out that the benefits of religion, including making “intelligible and tolerable the basic existential facts about human life, such as suffering and death,” are outweighed by the “special potential for harm” created by other attributes common to religions. These include the imposition of “categorical demands” on believers, demands that compel certain attitudes and conduct, where the nature of those demands and their historical foundations are not subject to “the standards of evidence and reasoning we everywhere else expect to constitute constraints on judgment and action. ...” Thus, enshrining religious toleration as a basis for exemptions from laws of general applicability “is tantamount to thinking we ought to encourage ... categorical fervor.” It is on these bases that Leiter concludes that, although the Rawlsian and Millian arguments for toleration support claims of liberty of conscience, they do not neces-



sarily imply special solicitude for religious beliefs specifically; on the contrary, the latter are subsumed into the former.

After setting out his arguments for tolerating views based on sincerely held matters of conscience generally, Leiter explores the precise question posed at the beginning of the book: whether those who assert sincerely held religious beliefs as the basis for objecting to obligations imposed by a law of general applicability should be excused from compliance with that law. He starts by observing that claims of conscience “present hard evidential issues for courts,” which must distinguish between claims based on sincerely held principles and claims based on “crass self-interest.” Leiter states that, for a court, “the great practical advantage of a regime that privileges liberty of religious conscience” is that it provides a strong evidential basis—made up of “texts, doctrines, and commands, either written or passed down orally among many adherents”—on which the judge may assess the claimant’s petition. Indeed, these sources obviate the need for the court “to peer into the depth of a man’s soul” to determine the sincerity of his claim.

According to Leiter, however, to base exemptions on the degree to which the claimant adheres to the beliefs of a particular religious group poses several problems. For one, if a court is to decide the legitimacy of a claim by reference to the “communal or group traditions and practices,” then on what basis can the court distinguish between the claim of a religious group and the claim of a non-religious group, such as an animal rights group whose beliefs are also rooted in communal or group traditions and practices? Should the size of a group that subscribes to a view, or the length of time that the group has held its views, or the absence or nature of dissenting views within the group, be taken into account? In Leiter’s view, to attempt to distinguish between a religious group’s claim and that of a group that others might characterize as a movement or a fad, because its views are not mainstream, would raise practical difficulties for a court and would not provide a principled reason for a distinction.

And what about genuine claims of conscience that are individualistic? If vegan prisoners, for example, claim an exemption from a dietary regimen, should only

“[o]rganized vegans ... have legal standing, but not Henry David Thoreau or his twenty-first century analogue”?

Another difficulty that Leiter cites is what he refers to as the “Rousseauian worry about exemptions.” Some exemptions from laws of general applicability, “such as the right to wear certain religious garb, or to use certain otherwise illegal narcotics in religious rituals,” do not burden others. Some exemptions, however, shift the burden to others. For example, “if those with claims of conscience against military duty are exempted from service, then the burden (and all the very serious risks) will fall upon those who either have no conscientious objection or cannot successfully establish their conscientious claim.” Other examples that Leiter considers include exemptions from mandatory vaccinations and from zoning regulations that have the effect of restricting the location of religious institutions. Assuming, as Leiter does, that laws of general applicability advance the general welfare or the common good, then an exemption from the application of those laws results in a “morally objectionable injury to the general welfare.”

Consequently, Leiter advocates a no-exemption principle to laws of general applicability. “[I]t is not obvious,” he writes, “why the state should subordinate its other morally important objectives—safety, health, well-being, equal treatment before the law—to claims of religious conscience.” This is particularly true, according to Leiter, because “religious claims of conscience have no greater entitlement to exemptions than nonreligious claims of conscience.” But beyond the logic of that point (if not the historical or cultural support for it), the no-exemption approach would be a practical solution both to the difficulty that courts have in selecting which groups’ beliefs qualify as the basis for exemptions and to the unfairness of shifting burdens to those whose beliefs do not qualify. As Leiter concludes, it would be appropriate for a government “to say, the law is the law, and there will be no exemptions for claims of conscience, religious or otherwise.”

At the same time, Leiter acknowledges that a no-exemption policy has risks. Consider a facially neutral law whose enactment was motivated by anti-religious animus. Leiter examines France’s law

prohibiting students and teachers from wearing sectarian head-coverings, such as hijabs and yarmulkes, in public schools. The French justified this prohibition on the basis of their longstanding tradition of “laïcité,” or encouraging people meeting in a public space to interact as persons and not on the basis of religious identities. Yet, he observes, the French have “an obvious antipathy toward Muslims” and a history of anti-Semitism. For these reasons, Leiter believes that it is legitimate to question whether the prohibition on head-coverings was adopted to advance the laïcité policy or as a “subterfuge” for “not tolerating a particular religion, namely Islam.” Therefore, Leiter’s no-exemption policy would prohibit exemptions only from laws of general applicability that were enacted “with neutral objectives” and not from those whose enactment was motivated by religious intolerance.

The last major point that Leiter makes is somewhat surprising from a First Amendment standpoint. He considers whether a state’s establishment of a religion (for example, as the official religion of the nation) necessarily results in the coercion of nonbelievers into adhering to the precepts of that religion. Leiter observes that, just as a government may place its imprimatur on particular values, such as by committing financial resources to support scientific research rather than research into “intelligent design” theories, a government could also establish a religion. Furthermore, Leiter asserts that there is “nothing in the principle of toleration [that] is incompatible with state establishment of religion”; that is, establishment of a religion need not result in the coercion of nonbelievers, so long as the state ensures that nonreligious claims of conscience are not burdened. Leiter considers the legal regimes of several Western democracies that have established religions but that also have “robust regimes of liberty of conscience in which a range of moral and political views find expression in the public sphere that are unknown in countries like the United States, which do not establish any religion.” In the United Kingdom, for example, the Anglican Church is the official religion of the nation, yet “there are no religious tests for the holding of public office; sectarian religious schools in non-Anglican traditions actually receive public funding; other religious traditions are guaranteed

the right to practice their religions; and no non-Anglican practices are criminalized or otherwise suppressed.” In principle, therefore, there should be “no incompatibility between state endorsement of a Vision of the Good—religious or irreligious—and the demands of principled toleration.”

Apart from its discussion of the Canadian kirpan case, *Why Tolerate Religion?* does not offer any substantive analyses of the statutes, regulations, or cases of the United States or foreign nations. Moreover, Leiter’s approach is broadly ahistorical, as it does not consider the religious experiences or traditions of those who drafted, debated, and voted to adopt the U.S. Constitution or the First Amendment. Nor does Leiter consider the cultural context in which specific religious beliefs have developed or how adherents of those beliefs have interpreted their obligations. Instead, he presents an original and compelling argument from logic, with copious references to political and moral philosophers, questioning several important and longstanding assumptions regarding religious liberty. These assumptions include that religious beliefs deserve special legal or judicial solicitude, beyond the solicitude that claims based on freedom of conscience generally merit. In other words, the substance of his argument—what he asks readers to think about—does not generally rely on legal, historical, or cultural premises, which means that those premises do not distract from his argument. Perhaps Leiter’s approach, based on logic, could undermine the constitutional and statutory arguments that have been successfully asserted in the United States and elsewhere to favor religious-based beliefs over other sincerely held claims of conscience. This might help explain why *Why Tolerate Religion?* has generated such an extensive critical response. ©

*Bentley Anderson, the principal of Anderson PLC (www.anderson-plc.com), represents companies and investors in connection with domestic and international corporate, transactional, regulatory, and commercial matters, with a particular focus on the operation, governance, and regulation of investment advisers, broker-dealers, and private and registered funds. You may contact him at ben@anderson-plc.com.*

## **NOT FOR TURNING: THE LIFE OF MARGARET THATCHER**

BY ROBIN HARRIS

St. Martin’s Press, New York, NY, 2013.

454 pages, \$35.00.

**Reviewed by John C. Holmes**

Margaret Thatcher (née Roberts) was born and raised in a flat above her father’s modest grocery store in Grantham, a small town in England that she seldom visited in later life. But her father, Alf, who had been raised poor, was successful enough to buy a second shop and then expand his first, and he also dabbled in local politics. Her mother, Beatie, established a successful seamstress business that did not interfere with her cooking meals and keeping house. Unlike her four-year-older and plainer sister, Muriel, Margaret was close to her father and admired his hard work, integrity, thriftiness, and interest in politics. Along with a Methodist upbringing, these values would mold Margaret’s life in politics.

### **Upbringing**

Born in 1925, the future prime minister engaged in her first political activity at age 10, folding leaflets for the local Conservative Party’s candidate for Parliament. Margaret was an avid reader, including of polemical attacks on the appeasement of Hitler. During World War II, she was intensely patriotic and detested Hitler and other dictators. Her admiration for Churchill was unwavering, yet, Robin Harris writes in *Not For Turning: The Life of Margaret Thatcher*, “during the Falklands War, she never tried to adopt a Churchillian manner,” and “[i]n her speeches as prime minister, she refrained from quoting him, for fear that she might be thought to be bracketing herself with her hero.” She enrolled in Oxford University in 1943, majoring in chemistry, which, Harris writes, was an unusual choice for a girl, “[b]ut Margaret already knew that she wanted to pursue a career and chemistry offered the prospect of a future job in industry.” Soon she became much more interested in law, “[b]ut even law was only a means to an end and that end was a parliamentary seat.”

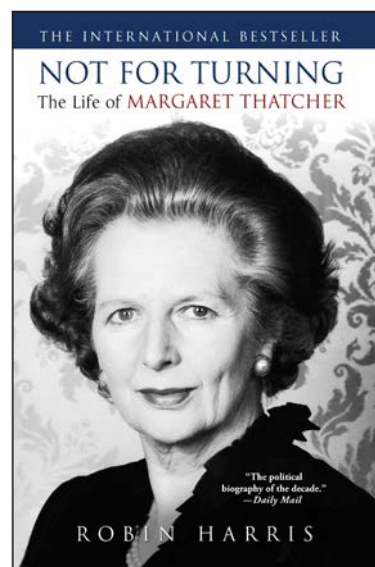
At age 24, Margaret sought to run for Parliament, and the press focused on her sex, youth, and good looks. The

Conservative Party did not easily embrace her candidacy, but many were soon impressed by her forceful, outspoken, and persuasive arguments, and she was selected to run. Meanwhile, however, Churchill and the Conservatives, having triumphed over Hitler, were thrown out of office by the socialist Labour Party government, and Dartford, in which Thatcher ran, was heavily Labour. The Conservative Party knew that Thatcher’s loss was a foregone conclusion but believed that she might be a future asset. She proceeded to demonstrate her energy, coolness, pluck, and ingenuity in a relentless though losing campaign.

Shortly afterward she met Denis Thatcher, who would become her husband, having suffered a painful divorce almost four years earlier. The match was a good one, because Denis, 10 years older and a millionaire, was a good provider, protector, and supporter, easily permitting Margaret to take center stage in their comfortably loving relationship. There was never any question that she was the tough, forceful, sometimes bullying, and always resilient person, while he was more withdrawn and sometimes fragile. She demonstrated her driving force, when, in addition to raising twins, she mastered law school while keeping her hand in politics.

### **Parliament**

In 1959, the Conservative Party won the election, and Thatcher became a member of Parliament. The party’s success was short-lived, however, as Prime Minister Harold Macmillan not only suf-



ferred from ill health but advanced some ill-conceived proposals that eventually lost him his seat in Parliament. Thatcher, however, prospered in obtaining significant positions in the Conservative Party, and she flourished by giving hard-hitting speeches that, while not Churchillian in eloquence, were persuasive and attention-getting. They made her many friends and supporters but also enemies.

Great Britain, meanwhile, was increasingly being subjected to the socialist policies of the Labour Party and supported by strong union efforts that brought about the nationalization of many industries, disruption in the economy through strikes, and increased government spending on welfare programs. Members of the Conservative Party sought to limit Labour programs and to argue against England's participation in the European Union. By 1974, through her diligent attention to and grasp of details, as well as her strong work ethic, Thatcher might have become the leader of her party but for the not-so-subtle opposition of Edward Heath, who, during most of the previous 20 years, had been either the prime minister or opposition leader.

Although Harris does little to hide his own disdain for Heath's brand of politics, Heath was a formidable figure. Harris praises Thatcher's skill in taking command of the party after the 1974 elections. Moreover, despite Thatcher's clear statements as to her intentions, few at the time saw how far-reaching the changes she proposed after her election as leader would be. "But a revolution, in all but the bloodiest sense, it certainly was. It represented a complete up-ending of prevailing assumptions. It marked a total defeat for the existing party hierarchy. It was the work of a very few bold men—and one bold woman—who risked all, and won."

### Prime Minister

Upon becoming prime minister, Thatcher made it perfectly clear that her policies would be intended to promote individual responsibility, free enterprise, fiscal integrity, and economic reform. Concerning her resolve, she "announced with cold defiance: 'To those waiting with bated breath for that favourite media catchphrase, the "U-turn", I have only one thing to say: You turn if you want to. The lady's not for turning. I say that not only

to you, but to our friends overseas and also to those who are not our friends.'"

Thatcher had done only limited foreign travel and had little intimate knowledge of other countries and international politics. Her admiration for Churchill as well as her distaste for appeasement led her increasingly to collaborate with the English-speaking world, particularly with the United States. This partnership was enhanced by her admiration for Ronald Reagan, with whose views on the Soviet Union she increasingly agreed.

Her first venture into foreign affairs was her reluctant approval, after much negotiation and pressure from outside forces, of independence for Rhodesia. Despite Thatcher's strong desire that England's former influence be restored to the extent possible, she initially considered the matter a success, given that independence seemed unavoidable. Later events would prove her wrong, as the newly named Zimbabwe would descend into a cruel dictatorship.

Her next foreign policy crisis ended more successfully. In 1982, Argentina invaded the close-by Falkland Islands, long a British colony. Having gained confidence in her own abilities, she refused to agree to Argentinian demands but instead sent an armed naval fleet along with combat troops that, in well-planned maneuvers, recaptured the islands. Although of little strategic importance, the area allowed for deep-sea oil extraction. More important to Thatcher, British pride, power, and competence had been restored with little loss of life. She was, however, disappointed in President Reagan's lukewarm and late support. Thatcher probably underestimated the importance of the longstanding American policy of support and protection of South American countries. Her obtaining even limited support from Reagan was to her credit.

Thatcher is best known, particularly in the United States, for her strong opposition to communism and closeness to Reagan in her views on foreign as well as on economic policy. Harris indicates that, not only were their views similar, but they admired each other's strong personalities and character. Thatcher was crucial in persuading Reagan and his advisers that Soviet leader Mikhail Gorbachev was a man with whom the West "could do business," as she put it. With this and other

actions, she played an important role in the eventual demise of the Soviet empire. Though she found both President Carter and President George H.W. Bush less easy to deal with than Reagan, she did her best to cement the special relationship between Britain and the United States with them.

In domestic policy, despite numerous often-bitter labor strikes and political opposition, causing frequent defeat and disappointment, Thatcher prevailed in eventually steering Britain toward less government ownership of businesses, fewer strikes, and a stronger economy with lower taxes and less inflation. Her success in these endeavors was far from guaranteed and was striking given the fact that she was the sole woman among strong-willed men, many of whom opposed her views. Harris concludes that Thatcher's policies have been subsequently fully adopted into the British system, and, in his view, for the better.

### Retirement

"Anyone who can yield great power easily and painlessly," Harris writes, "is probably ill-suited to exercise it." Thatcher did not go gentle into that good night. After a disappointing, unsuccessful, final campaign to remain as prime minister, she was ridiculed by her opposition and abandoned by many of her own party who said good riddance after her 11 years in office and during a minor recession. She sought, nevertheless, to continue to express her views and counteract what she considered backsliding. She took pleasure in foreign travel and in giving speeches, particularly in the United States where she felt welcomed; she took special pleasure being appointed trustee of the College of William & Mary. However, her years in office as well as raising two children and still doing much of the cooking had taken its toll. With a tendency to put on weight, she frequently dieted, causing her to become tipsy from small amounts of liquor, often to her embarrassment. Dementia crept in, and she had trouble remembering names of even old acquaintances. She would too frequently quarrel with Denis; fortunately, they reacquired their fondness for each other before he passed away.

### Conclusion

Harris was a speechwriter and confi-

dant of Thatcher when she was in office. Because he wrote this book after her death, he had no need to pull punches, and he doesn't. He is comprehensive and honest in describing the life of Thatcher who, in the opinion of many, stands in importance only behind Winston Churchill and Ronald Reagan in the fight against totalitarianism and for democracy and freedom in the 20th century. Harris' writing is appealing: in turn dry, witty, precise, and frank. Although American readers may not be acquainted with many members of Parliament and other British notables that Harris mentions, *Not For Turning* is a must-read for anyone interested in recent world affairs. ☺

*John C. Holmes was an administrative law judge (ALJ) with the U.S. Department of Labor for more than 25 years, and he retired as chief ALJ at the Department of Interior in 2004. He currently works part-time as an arbitrator and consultant; enjoys golf, travel, and bridge; and can be reached at jholmesalj@aol.com.*

## **THE KILLING COMPARTMENTS: THE MENTALITY OF MASS MURDER**

BY ABRAM DE SWAAN

Yale University Press, New Haven, CT, 2015.  
344 pages, \$35.00.

### **Reviewed by Christopher Faille**

Dr. Abram de Swaan, emeritus university professor of social science at the University of Amsterdam, identifies four different types of genocide. Sometimes, aware that some of his examples might fail to meet narrow understandings of the term "genocide," he uses instead the phrase "modes of mass annihilation." By any name, the activity in question has four modes, and all of them involve the targeting of a civilian group defined as alien by the dominant group, and an asymmetric, close-range murder of large numbers of people within that target group.

Note two adjectives in the last sentence of the previous paragraph. Crimes of this sort are *asymmetric* in that the targeted group is unorganized and unarmed, so

this isn't combat of any sort recognized by common language use or international law. Also, the crimes de Swaan has in mind are *close-range*. He excludes the act of dropping an atomic bomb on Hiroshima, for example. Asymmetric though it was, that action doesn't come within the scope of this study because de Swaan is interested in the psychology of someone who kills another helpless human being *whose face he can see at the time*.

Those preliminaries out of the way, it's time for a list. The four modes of mass annihilation are as follows: conquerors' frenzy, rule by terror, losers' triumph, and megapogroms.

### **Conquerors and Settlers**

For the most part, the terms explain themselves. A conquerors' frenzy, for example, is an annihilation set off or carried out by victorious troops at the expense of their defeated enemies and their now-defenseless population. De Swaan tells us, in this context, that "[t]he extermination of the aboriginal inhabitants of South America by the Spanish conquistadores even now, more than five centuries later, remains a prime example of wanton and wholesale destruction of human lives by a conquering army that encountered beings whom it considered wholly alien."

As a variant of this conquerors' frenzy, de Swaan considers "settlers' massacres." This was the more typical *North* American pattern—a situation in which settlers in a place far from the imperial center, who identify with that center, clash over land with the native inhabitants of the settled region, a clash that turns, under the right circumstances, into mass slaughter.

The contrast between a true conquerors' frenzy and the settlers' massacre variant is historically significant for a reason indicated by the very title of de Swaan's book: the "compartment" of the killing. Massacres committed by conquering troops who have come from, and who expect to return to, a foreign country are often largely ignored back home in their country, and the killers may tell themselves that they will be able to put all this behind them when they return there. These are easily compartmentalized killings.

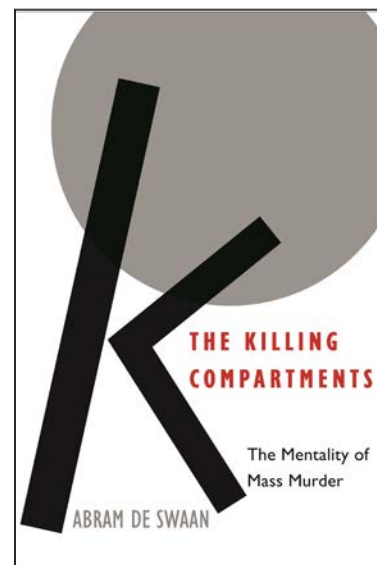
But the killers acting on behalf of a settler society against the natives cannot

compartmentalize so easily. The settlers in North America, or in Australia or other analogous places, didn't necessarily see their victims as utter aliens. In such cases, settlers quite often trade and live side by side with natives during peaceful periods, and this results both in friendships and intermarriage. The psychology by which compartmentalization occurs despite this requires explanation, and de Swaan attempts to provide it, though inconclusively.

### **Policy, Politics, and Pogroms**

Rule by terror, the second major mode of mass annihilation, is an instrument of policy. The Stalinist campaigns against "class enemies," where the enemies were characterized in a way that often had an ethnic component, is an example. The famine engineered by the Stalinist regime in the Ukraine in 1932–34, for example, killed three million people. It was a matter of policy *and* one of nationalist supremacy. "Apart from pure malice," de Swaan writes, "Stalin's intention was most likely to eliminate the peasants who still worked their own land instead of joining the collective farms, as well as to fatally weaken any nationalist strivings among Ukrainians, who, he feared, might make common cause with Poland on the other side of the border."

Three out of four of de Swaan's modes typically involve violence ordered and organized by government. The governments involved differ: the hereditary monarchy of Imperial Spain, the colonial governments (with varying degrees of effective autonomy from London in such



affairs) of the western shore of the North Atlantic in the years between 1607 and 1775, and the military dictatorship of the Third Reich. These three examples are but part of the range of difference, but they are all examples of state structures used to single out and kill targets.

The megapogrom as a mode of annihilation is a bit different. One of de Swaan's examples consists of the communal massacres in India and Pakistan after independence and partition in 1947. These massacres were neither ordered nor organized by the governments of the two new nations. The governments are not blameless, though. De Swaan says that "implicitly, and more explicitly at the lower levels, there were signals that violence might at the very least be condoned."

This example seems to defy de Swaan's original definition, for this megapogrom was in a sense symmetric. What Muslims were doing to Hindus on one side of the artificial line of demarcation, Hindus were doing to Muslims on the other. But it was extremely asymmetric in a local sense. De Swaan points out that any particular riot consisted of the dominant group assaulting defenseless civilians in their midst, burning their homes, "beat[ing] up anyone they happened to lay hands on, and tortur[ing] whomever caught their eye."

### Nazis and Jews

Many readers of this book will be most interested in the annihilation of Jews at the hands of Nazi Germany, a catastrophe that has generated a vast and ongoing body of contentious scholarship. De Swaan shares what seems to be a very general sense that the Holocaust requires and rewards special study. It is remarkable in part because it involved elements of two of de Swaan's four modes—two that seem antithetical.

Though in its final months the Holocaust looked like what de Swaan calls a losers' triumph, he contends that it began as an example of conquerors' frenzy. By the middle of July 1941, after all, the Nazi leadership was in a state of victory-induced euphoria. It controlled the entire west of Europe out to the English Channel and down to the Pyrenees and Alps. On the opposite side of each of those mountain ranges it recognized a

kindred government.

These conquerors of the west had turned their eyes east in June 1941, and the early reports from the eastern campaign were good. The German High Command divided the Wehrmacht's advancing line into three parts, assigned to "Army Groups" North, Center, and South. An anti-Soviet uprising worked in Germany's favor, and Army Group North took advantage of it. In the center of the line, by July 3, German forces had encircled and destroyed three Soviet armies near Minsk, in the middle of Belarus. Meanwhile, Army Group South became enmeshed in a ferocious tank battle: the Battle of Brody. The outcome of this battle was long in doubt, but German air support and superior co-ordination of forces brought them through it successfully. Though with hindsight we see the creation of this broad eastern front as a disastrous move for the Third Reich, it is important to remember that, when these developments were occurring, many of those wearing the uniforms of that Reich thought that the campaign was proving itself a masterpiece.

It was in that euphoric moment of the early victories of this campaign that the SS and execution squads, as de Swaan says, "with much help from the regular Wehrmacht, rounded up all the Jews they could lay their hands on, marched them to a nearby clearing in the woods, made them dig their own graves, forced them to line up at the edge of the trench, and shot them at close range." Roughly 1.5 million eastern European Jews died in this manner between June 1941 and the end of 1942.

The killings continued after the feeling of euphoria had died away, and intensified as the eastern front collapsed and then again as Germany's enemies on all fronts closed in. But de Swaan's typology helps us understand how the mechanics of the killings changed. Jews were no longer shot in the open air in a convenient clearing. The extermination in its later phases "took place in secluded camps, surrounded by fences, located in inaccessible areas." De Swaan ties this shift in with his notion of killing "compartments." Compartmentalization comes easy to conquerors, but it requires a good deal of

effort from the rank and file, and from the policymakers, within an army facing defeat.

De Swaan hopes to make a contribution to the old debate over "situation" versus "disposition." Are the front-line murderers in genocidal campaigns acting as anyone might do in an analogous situation? Or are some people more disposed to commit such crimes than others, and selected or self-selected for their front-line status on the basis of that disposition? He leaves us with no pat answers, but then his theme is that no pat answer is warranted. ☺

*Christopher C. Faille graduated from Western New England College School of Law in 1982 and became a member of the Connecticut Bar soon thereafter. He is at work on a book that will make the quants of Wall Street intelligible to sociology majors.*

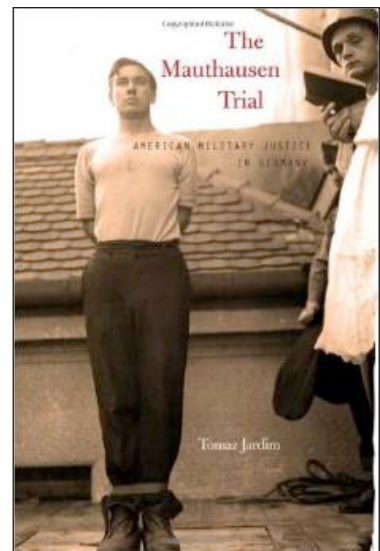
## ADDITIONAL BOOK REVIEW

In addition to the book reviews in the paper copy of this issue of *The Federal Lawyer*, a bonus review is included in the online version of the magazine. The following review is available at [www.fedbar.org/magazine](http://www.fedbar.org/magazine). ☺

### THE MAUTHAUSEN TRIAL: AMERICAN MILITARY JUSTICE IN GERMANY

BY TOMAZ JARDIM

Reviewed by Jon Sands





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## FIRST CIRCUIT

### Massachusetts Chapter

*Massachusetts Chapter Honors Magistrate Judge Kenneth Neiman*

On Friday, Jan. 16, 2015, the Springfield Division of the Massachusetts Chapter of the Federal Bar Association held an event in honor of Magistrate Judge Kenneth Neiman's retirement after 20 years of service. The event was held in Springfield, Mass., at the beautiful federal courthouse and was extremely well attended by federal court practitioners, staff, and judges.

A fellow alumnus of Tufts University,

Massachusetts Chapter President Lisa Tittlemore presented Judge Neiman with a Tufts banner during her opening remarks. Clerk of Court for USDCMA Robert Farrell presented Judge Neiman with a U.S. flag that had been flown over the U.S. Capitol building on Jan. 5, 2015, which was the 20th anniversary of his first day as a judge. ☺

off event on Jan. 28, 2015, at Joe Buck's restaurant in downtown St. Louis. More than 50 people attended the event, including three federal judges and two former U.S. Attorneys from the Eastern District of Missouri. In its inaugural year, the St. Louis Chapter will host networking and philanthropic events, CLE programs, and a quarterly speaker series. ☺

## EIGHTH CIRCUIT

### St. Louis Chapter

*St. Louis Chapter Hosts Successful Kickoff Event*

The St. Louis Chapter hosted its kick-



**Massachusetts Chapter:** Judge Neiman providing remarks at the event.



**St. Louis Chapter:** At the January event (l-r): Chapter Treasurer, Drey Cooley, attorney at Capes Sokol Goodman & Sarachan, PC; chapter president, Mark Milton, attorney at Husch Blackwell LLP; and chapter vice president, Tom Albus, assistant U.S. attorney for the Eastern District of Missouri.



**Massachusetts Chapter:** At the January event (l-r): Massachusetts Chapter President Lisa Tittlemore and Judge Neiman.



**Middle District of Pennsylvania Chapter:** Chapter leadership at the 2014 Annual Meeting of the Middle District of Pennsylvania Chapter (l-r): Jennifer Menichini, Jonathan Koltash, Rob Tribbeck, Steve Greecher, Micheal O'Donnell, Sean Roman, EJ Rymcza, Sarah Yerger, Hon. Karoline Mehalchick, and Bridget Montgomery.



**Mississippi Chapter:** At the Jan. 19, 2015, investiture of John Garguilo as U.S. magistrate judge for the Southern District of Mississippi, the Mississippi Chapter of the Federal Bar Association presented Judge Garguilo with a judicial robe. Jim Rosenblatt, executive director of the Mississippi Chapter, attended the investiture in Gulfport, Miss., and presented Judge Garguilo with his robe.



## Sections and Divisions

### IMMIGRATION LAW SECTION

On Jan. 14, 2015, the Immigration Law Section and the District of Columbia Chapter presented their monthly Immigration Leadership Luncheon Series in Washington, D.C. The event featured speaker L. Keith Fowler II, special agent and national program manager, Transnational Crime and Public Safety Division, Identity and Benefit Fraud Unit, ICE-Homeland Security Investigations, U.S. Department of Homeland Security. Special Agent Fowler currently focuses on identity theft and public corruption issues. Prior to his current assignment, he was assigned to the Special Agent in Charge Office in Baltimore, Maryland, where he conducted criminal investigations in areas ranging from international narcotics smuggling to public corruption. He has been a special agent since 2002. The immigration

Leadership luncheons are generally held on the second Wednesday of every month at La Tasca Restaurant. The series is coordinated by Prakash Khatri, an attorney in Washington, D.C. ☉

### YOUNGER LAWYERS DIVISION

On Dec. 15, 2014, the Young Lawyers Division presented their annual Supreme Court Admission Ceremony in Washington, D.C., at the U.S. Supreme Court. The event featured seven attorneys who joined the bar of the U.S. Supreme Court. The FBA Young Lawyers Division will hold their next U.S. Supreme Court Admission Ceremony on May 26. ☉

### FEDERAL CAREER SERVICE DIVISION

On Jan. 23, 2015, the Federal Career Service Division co-sponsored the Baltimore/Washington, D.C., Public Service Career Fair along with American University Washington College of Law, Catholic University Columbus School of Law, George Mason University School of Law, Howard University School of Law, University of the District of Columbia—David A. Clarke School of Law, and University of Maryland Francis King Carey School of Law. The event featured over 60 employers as well as individual interviews, table-talk opportunities and resumé collections for all attendees. ☉



**Immigration Law Section:** At the January event (l to r): L.Keith Fowler II, National Program Manager Transnational Crime and Public Safety Division, Identity and Benefit Fraud Unit, ICE-Homeland Security Investigations, US Department of Homeland Security and Prakash Khatri, FBA ILS Board & Luncheons Chair.



**Immigration Law Section:** At the January event (l to r): Prakash Khatri, FBA ILS Board & Luncheons Chair, L. Keith Fowler II, national program manager Transnational Crime and Public Safety Division, Identity and Benefit Fraud Unit, ICE-Homeland Security Investigations, U.S. Department of Homeland Security, and Carey Devorsetz, FBA D.C. Chapter president.



**Younger Lawyers Division:** At the December event (l to r): Hunter Ridgway; Matthew Zumstein; Matthew Moreland, FBA President; James Van Lowen DeBergh III; Matthew Binford; Dustin Price Rowe.



**Younger Lawyers Division:** At the December event (l to r) : James Van Lowen DeBergh III; Matthew D. Zumstein; Associate Justice Ruth Bader Ginsburg; Dustin Price Rowe; Matthew Binford and Hunter Ridgway.

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# Member Spotlight: January/February 2015

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# Federal Bar Association Application for Membership

The Federal Bar Association offers an unmatched array of opportunities and services to enhance your connections to the judiciary, the legal profession, and your peers within the legal community. Our mission is to strengthen the federal legal system and administration of justice by serving the interests and the needs of the federal practitioner, both public and private, the federal judiciary, and the public they serve.

## Advocacy

The opportunity to make a change and improve the federal legal system through grassroots work in over 90 FBA chapters and a strong national advocacy.

## Networking

Connect with a network of federal practitioners extending across all 50 states, the District of Columbia, Puerto Rico, and the Virgin Islands.

## Leadership

Governance positions within the association help shape the FBA's future and make an impact on the growth of the federal legal community.

## Learning

Explore best practices and new ideas at the many Continuing Legal Education programs offered throughout the year—at both the national and chapter levels.

## Expand your connections, advance your career

**THREE WAYS TO APPLY TODAY:** Join online at [www.fedbar.org](http://www.fedbar.org); Fax application to (571) 481-9090; or Mail application to FBA, PO Box 79395, Baltimore, MD 21279-0395. For more information, contact the FBA membership department at (571) 481-9100 or [membership@fedbar.org](mailto:membership@fedbar.org).

### Applicant Information

First Name \_\_\_\_\_ M.I. \_\_\_\_\_ Last Name \_\_\_\_\_ Suffix (e.g. Jr.) \_\_\_\_\_ Title (e.g. Attorney At Law, Partner, Assistant U.S. Attorney) \_\_\_\_\_  
 Male  Female Have you been an FBA member in the past?  yes  no Which do you prefer as your primary address?  business  home

Firm/Company/Agency _____		Number of Attorneys _____		Address _____		Apt. # _____	
Address _____		Suite/Floor _____		City _____	State _____	Zip _____	Country _____
City _____	State _____	Zip _____	Country _____	( ) _____	Phone _____	Date of Birth _____	
( ) _____		Phone _____		Email Address _____		Email Address _____	

### Bar Admission and Law School Information (required)

**U.S.** Court of Record: \_\_\_\_\_  
State/District: \_\_\_\_\_ Original Admission: / /

**Tribal** Court of Record: \_\_\_\_\_  
State: \_\_\_\_\_ Original Admission: / /

**Foreign** Court/Tribunal of Record: \_\_\_\_\_  
Country: \_\_\_\_\_ Original Admission: / /

**Students** Law School: \_\_\_\_\_  
State/District: \_\_\_\_\_ Expected Graduation: / /

## Authorization Statement

*By signing this application, I hereby apply for membership in the Federal Bar Association and agree to conform to its Constitution and Bylaws and to the rules and regulations prescribed by its Board of Directors. I declare that the information contained herein is true and complete. I understand that any false statements made on this application will lead to rejection of my application or the immediate termination of my membership. I also understand that by providing my fax number and e-mail address, I hereby consent to receive faxes and e-mail messages sent by or on behalf of the Federal Bar Association, the Foundation of the Federal Bar Association, and the Federal Bar Building Corporation.*

Signature of Applicant \_\_\_\_\_ Date \_\_\_\_\_  
(Signature must be included for membership to be activated)

\*Contributions and dues to the FBA may be deductible by members under provisions of the IRS Code, such as an ordinary and necessary business expense, except 4.5 percent which is used for congressional lobbying and is not deductible. Your FBA dues include \$14 for a yearly subscription to the FBA's professional magazine.

Application continued on the back



**Federal Bar Association**

# Membership Categories and Optional Section, Division, and Chapter Affiliations

## Membership Levels

### Sustaining Membership

Members of the association distinguish themselves when becoming sustaining members of the FBA. Sixty dollars of the sustaining dues are used to support educational programs and publications of the FBA. Sustaining members receive a 5 percent discount on the registration fees for all national meetings and national CLE events. They are also eligible to receive one *free CLE webinar* per year.

	Private Sector	Public Sector
Member Admitted to Practice 0-5 Years.....	○ \$165	○ \$145
Member Admitted to Practice 6-10 Years .....	○ \$230	○ \$205
Member Admitted to Practice 11+ Years .....	○ \$275	○ \$235
Retired (Fully Retired from the Practice of Law) .....	○ \$165	○ \$165

### Active Membership

Open to any person admitted to the practice of law before a federal court or a court of record in any of the several states, commonwealths, territories, or possessions of the United States or in the District of Columbia.

	Private Sector	Public Sector
Member Admitted to Practice 0-5 Years.....	○ \$105	○ \$80
Member Admitted to Practice 6-10 Years .....	○ \$165	○ \$140
Member Admitted to Practice 11+ Years .....	○ \$210	○ \$170
Retired (Fully Retired from the Practice of Law) .....	○ \$105	○ \$105

### Associate Membership

#### Foreign Associate

Admitted to practice law outside the U.S. .... ○ \$210

#### Law Student Associate

First year student (includes four years of membership) .....	○ \$50
Second year student (includes three years of membership) .....	○ \$30
Third year student (includes two years of membership) .....	○ \$20
One year only option .....	○ \$20

All first, second and third year student memberships include an additional free year of membership starting from your date of graduation.

**Dues Total:** \_\_\_\_\_

### Practice Area Sections

○ Admiralty Law .....	\$25	○ Indian Law .....	\$15
○ Alternative Dispute Resolution .....	\$15	○ Intellectual Property Law.....	\$10
○ Antitrust and Trade Regulation...	\$15	○ International Law .....	\$10
○ Banking Law .....	\$20	○ Labor and Employment Law .....	\$15
○ Bankruptcy Law.....	\$15	○ Qui Tam Section.....	\$15
○ Civil Rights Law .....	\$10	○ Securities Law Section .....	\$0
○ Criminal Law.....	\$10	○ Social Security.....	\$10
○ Environment, Energy, and Natural Resources .....	\$15	○ State and Local Government Relations.....	\$15
○ Federal Litigation .....	\$10	○ Taxation .....	\$15
○ Government Contracts.....	\$20	○ Transportation and Transportation Security Law .....	\$20
○ Health Law.....	\$15	○ Veterans and Military Law.....	\$20
○ Immigration Law .....	\$10		

### Career Divisions

○ Corporate & Association Counsel (in-house counsel and/or corporate law practice) .....	\$20
○ Federal Career Service (past/present employee of federal government) .....	N/C
○ Judiciary (past/present member or staff of a judiciary) .....	N/C
○ Senior Lawyers* (age 55 or over) .....	\$10
○ Younger Lawyers* (age 36 or younger or admitted less than 3 years) .....	N/C
○ Law Student Division .....	N/C

*\*For eligibility, date of birth must be provided.*

**Sections and Divisions Total:** \_\_\_\_\_

## Chapter Affiliation

Your FBA membership entitles you to a chapter membership. Local chapter dues are indicated next to the chapter name (if applicable). If no chapter is selected, you will be assigned a chapter based on geographic location. \*No chapter currently located in this state or location.

<b>Alabama</b> ○ Birmingham ○ Montgomery ○ North Alabama	<b>Idaho</b> ○ Idaho <b>Illinois</b> ○ Central District of Illinois ○ Chicago ○ P. Michael Mahoney (Rockford, Illinois) <b>Indiana</b> ○ Indianapolis ○ Northern District of Indiana <b>Arkansas</b> ○ Arkansas <b>California</b> ○ Inland Empire ○ Los Angeles ○ Northern District of California ○ Orange County ○ Sacramento ○ San Diego ○ San Joaquin Valley <b>Colorado</b> ○ Colorado <b>Connecticut</b> ○ District of Connecticut <b>Delaware</b> ○ Delaware <b>District of Columbia</b> ○ Capitol Hill ○ D.C. ○ Pentagon <b>Florida</b> ○ Broward County ○ Jacksonville ○ North Central Florida-\$25 ○ Orlando ○ Palm Beach County ○ South Florida ○ Southwest Florida ○ Tallahassee ○ Tampa Bay <b>Georgia</b> ○ Atlanta-\$10 <b>Hawaii</b> ○ Hawaii	<b>New Hampshire</b> ○ New Hampshire <b>New Jersey</b> ○ New Jersey <b>New Mexico</b> ○ New Mexico <b>New York</b> ○ Eastern District of New York ○ Southern District of New York ○ Western District of New York <b>North Carolina</b> ○ Eastern District of North Carolina ○ Middle District of North Carolina ○ Western District of North Carolina <b>North Dakota</b> ○ North Dakota <b>Ohio</b> ○ John W. Peck/ Cincinnati/ Northern Kentucky ○ Columbus ○ Dayton ○ Northern District of Ohio-\$10 <b>Oklahoma</b> ○ Oklahoma City ○ Northern/ Eastern Oklahoma <b>Oregon</b> ○ Oregon <b>Pennsylvania</b> ○ Eastern District of Pennsylvania ○ Middle District of Pennsylvania ○ Western District of Pennsylvania	<b>Puerto Rico</b> ○ Hon. Raymond L. Acosta/ Puerto Rico-\$10 <b>Rhode Island</b> ○ Rhode Island <b>South Carolina</b> ○ South Carolina <b>South Dakota*</b> ○ At Large <b>Tennessee</b> ○ Chattanooga ○ Memphis Mid-South ○ Nashville ○ Northeast Tennessee <b>Texas</b> ○ Austin ○ Dallas-\$10 ○ El Paso ○ Fort Worth ○ San Antonio ○ Southern District of Texas-\$25 ○ Waco <b>Utah</b> ○ Utah <b>Vermont*</b> ○ At Large <b>Virgin Islands</b> ○ Virgin Islands <b>Virginia</b> ○ Northern Virginia ○ Richmond ○ Hampton Roads <b>Washington*</b> ○ At Large <b>West Virginia</b> ○ Northern District of West Virginia <b>Wisconsin*</b> ○ At Large <b>Wyoming</b> ○ Wyoming
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**Chapter Total:** \_\_\_\_\_

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### TOTAL DUES TO BE CHARGED

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○ Check enclosed, payable to Federal Bar Association

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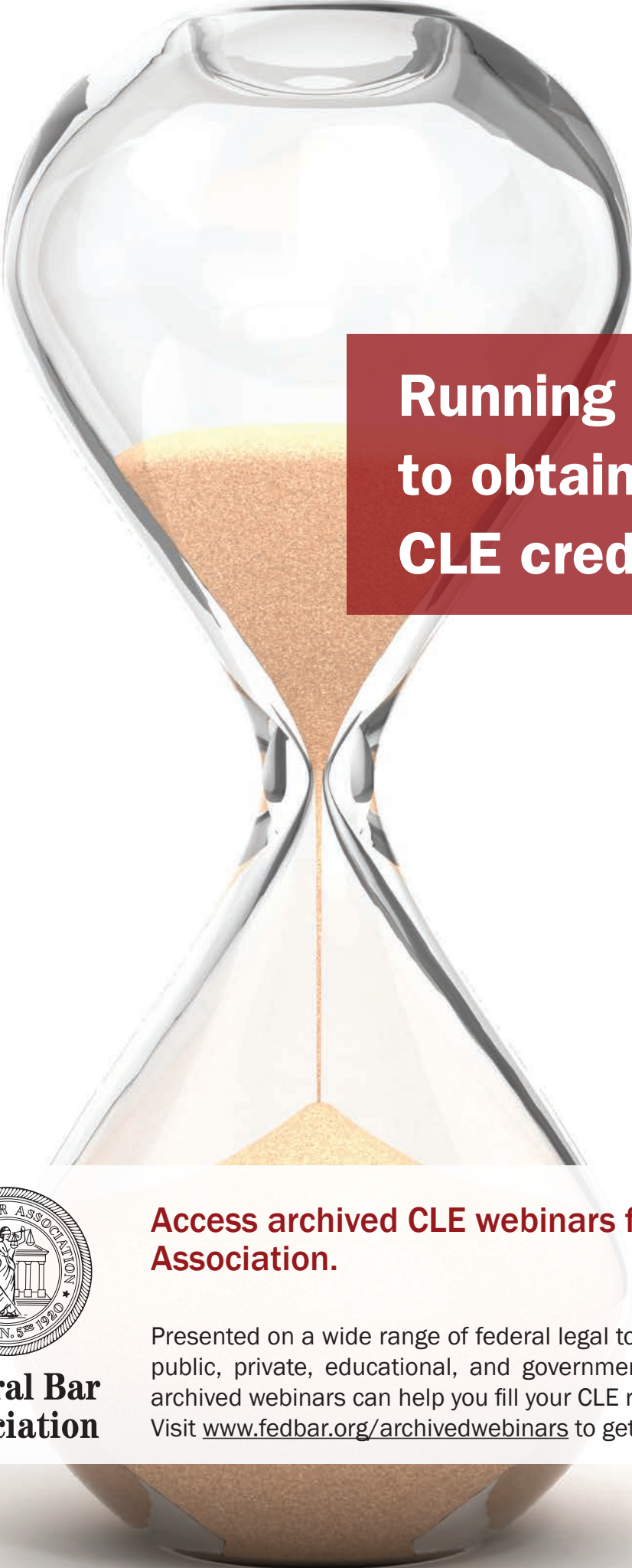
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**"You call it 'lying'. I call it 'perfecting the truth!'!"**



**"LOOK HUMBLE, JENKINS, THE ARROGANT LOOK IS OKAY WITH THE STAFF, BUT THESE ARE SENIOR PARTNERS."**



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