Volume 63, Issue 7

THE FEDERAL LAWYER

The Magazine of the Federal Bar Association

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The Federal Lawyer (ISSN: 1080-675X) is published 10 times per year, monthly, except for Jan./Feb. and Oct./Nov. when it is bimonthly, by the Federal Bar Association, 1220 N. Fillmore St., Ste. 444, Arlington, VA 22201 Tel. (571) 481-9100, Fax (571) 481-9090, Email: tfl@fedbar.org. Editorial Policy: The views published in *The Federal Lawyer* do not necessarily imply approval by the FBA or any agency or firm with which the authors are associated. All copyrights are held by the FBA unless otherwise noted by the author. The appearance of advertisements and new product or service information in *The Federal Lawyer* does not constitute an endorsement of such products or services by the FBA. Manuscripts: *The Federal Lawyer* accepts unsolicited manuscripts, which, if accepted for publication, are subject to editing. Manuscripts must be original and should appeal to a diverse audience. Visit www.fedbar.org/TFLwritersguidelines for writer's guidelines. Subscription Rates: $14 of each member's dues is applied toward a subscription. Nonmember domestic subscriptions are $50 each per year; foreign subscriptions are $60 each per year. All subscription prices include postage. Single copies are $5. Periodical postage paid in Arlington, Va., and at additional mailing offices. POSTMASTER, send changes of address to: *The Federal Lawyer,* The Federal Bar Association, 1220 N. Fillmore St., Ste. 444, Arlington, VA 22201.

August 2016: Annual Meeting & Convention in Cleveland

COLUMNS

DEPARTMENTS

JUDICIAL PROFILES

JUDICIAL PROFILES CONT'D

BOOK REVIEWS

FBA MEMBER NEWS

My Top 10 List of Things To Do When I Visit Cleveland This September

by Mark K. Vincent

Mark K. Vincent is a 24-year veteran of the U.S. Attorney's Office, District of Utah.

10. Visit all the sights and sounds that Cleveland has to offer, including: "A Christmas Story" House from the popular 1983 comedy film (3159 West 11th Street); Cleveland Museum of Art (11150 East Blvd.); Cleveland Metroparks Zoo (3900 Wildlife Way); Heinen's Downtown (900 Euclid Avenue); West Side Market (West 25th and Lorain); and so many other attractions.
9. Attend the FBA Younger Lawyers Division Awards Luncheon at 12:30 p.m. on Thursday, Sept. 15.
8. Attend the FBA's Northern District of Ohio hosted Reception on Thursday, Sept. 15.
7. Attend the Sixth Circuit Court of Appeals Swearing-In Ceremony at 8:00 a.m. on Wednesday, Sep. 14.
6. Attend the Foundation of the FBA Fellows Luncheon at 12:30 p.m. on Friday, Sept. 16, and hear from Ovie Carroll, Director—USDOJ Cybercrime Lab.
5. Attend The Rock and Roll Hall of Fame and Museum complimentary reception on Friday, Sept. 16, at 6:00 p.m. (1100 East 9th Street, Cleveland, OH.)
4. Bid on items at the FBA Foundation's Silent Auction (8:00 a.m.-2:00 p.m.) on Saturday, Sept. 17.
3. Attend the Federal Bar Association Awards Luncheon at noon on Saturday, Sept. 17, featuring U.S. Sen. Sherrod Brown's (D-Ohio) keynote address.
2. Attend Hon. Michael Newman's FBA Presidential Installation Cocktail Reception & Banquet at 6:00 p.m. on Saturday, Sept. 17.
1. Attend the FEDERAL BAR ASSOCIATION ANNUAL MEETING & CONVENTION, Sept. 15-17 at The Westin Cleveland, 777 St. Clair Avenue, Cleveland, OH.

I invite you to plan now and come to "C-Town" this September for our Annual FBA Convention and enjoy all that Clevelanders have planned and the convention has to offer!! ☉

FBA Convention and Ohio Spotlight

by Elizabeth A. Fegan

Elizabeth Fegan is managing partner of the Chicago office of Hagens Berman Sobol Shapiro LLP, a consumer-rights class-action law firm.

With the FBA Annual Meeting and Convention scheduled for Sept. 15-17, in Cleveland, the Northern District of Ohio and Dayton Chapters of the FBA are ready to host and make sure convention attendees have a great time.

In fact, while the convention is slated to start on Thursday, Sept. 15, Tim L. Collins of Collins & Scanlon and the current president of the Northern District of Ohio Chapter says that the convention actually starts on Wednesday, Sept. 14, as far as the local chapter is concerned.

Rather than hold its typical State of the Court luncheon in September, the Northern District of Ohio Chapter invited the Sixth Circuit Court of Appeals to hold oral arguments in Cleveland on Sept. 14 in conjunction with the FBA Convention. One panel of the Sixth Circuit will hold oral arguments on Wednesday at the Carl B. Stokes U.S. Court House with a simulcast to local law schools. Also on Wednesday, a State of the Circuit luncheon will include addresses by Chief Judge for the Sixth Circuit R. Guy Cole Jr.,[1] Chief Judge of the United States District Court for the Northern District of Ohio Solomon Oliver Jr.,[2] and Chief Judge of the United States Bankruptcy Court of the Northern District of Ohio Russ Kendig.

And if that is not enough to entice you to arrive early for the FBA Convention, all convention attendees are invited to attend a party Wednesday night at the Cleveland office of Calfee, Halter & Griswold LLP,[3] located just one block from the convention's host hotel. The party is an opportunity to not only connect with convention attendees and the judiciary from the Sixth Circuit and Northern District of Ohio, but also to get an inside look at the Calfee Building, which is on the National Register of Historic Places.[4] Designed by architect William Bunker Tubby in the Beaux-Arts Classicism style, the Calfee Building boasts a beautiful two-story cathedral ceiling in the lobby and marble and stone features throughout.

Collins encourages all conference attendees to take advantage of the revitalization that has occurred in downtown Cleveland, where "billions of dollars" have been spent on construction and investment. Explaining that a "definite uptick in the population downtown in the last five to seven years has occurred among young professionals," Collins said that Cleveland is "perfectly positioned to have a great RNC convention in July and FBA convention in September" with many new restaurants, clubs, and social venues outside of the traditional sports venues.[5]

Other social events convention attendees will not want to miss include a special Thursday evening event at Alley Cat Oyster Bar, overlooking the Cleveland Flast East Bank District and the scenic riverfront. On Friday night, head to Rock Hall, home of the Rock and Roll Hall of Fame for a complimentary reception hosted by the Northern District of Ohio Chapter. You will be able to tour the galleries while eating, drinking, and listening to the No Name Band, a band of Cleveland lawyers who play music from the '60s, '70s, and beyond.[6]

To cap off a great event, the Dayton Chapter is hosting the Presidential Installation after-dinner party at The Westin Cleveland for Hon. Michael J. Newman, who will be sworn in as the next FBA president.

Even if you are not able to attend the convention, Collins encourages FBA members to participate in their local chapters. He said that he has found value participating in and leading the Northern District of Ohio Chapter because of its excellent relationship with the federal judiciary. Explaining that he does not "know any other association that has as good a relationship with the judiciary" as the FBA, Collins is particularly proud that the local judiciary initiates ideas for programming and reaches out to the Northern District of Ohio Chapter to implement the programs. For example, last year, the chief judge of the Bankruptcy Court for the Northern District of Ohio called regarding a major crisis in the country concerning student loan debt. That call resulted in a well attended program in November 2015 entitled "The Problem—OUR Problem of Student Loan Debt Seen Through The Eyes of Judges, Lawyers, and Debtors."[7]

Having the judiciary initiate ideas and rely on the local FBA chapter to develop the idea into a successful program is "the kind of interaction with the judiciary that is informal and well received on both sides," according to Collins. "We want to foster that relationship."

To register for the convention and for more infor-

mation, visit www.fedbar.org/FBACon16. To find out about events being hosted by your local chapter, visit www.fedbar.org/chapters.aspx to identify your chapter and link to its local website.[8] ⊙

Endnotes

[1]*Court of Appeals—Judges*, U.S. Court of Appeals for the Sixth Circuit, http://www.ca6.uscourts.gov/internet/court_of_appeals/courtappeals_judges.htm (last visited May 15, 2016).
[2]*Judges*, U.S. Dist. Court N. Dist. of Ohio, http://www.ohnd.uscourts.gov/home/judges (last visited May 15, 2016).
[3]Calfee, Halter & Griswold LLP, http://calfee.com (last visited May 15, 2016).
[4]*An Historic Building*, Calfee, Halter & Griswold LLP, http://calfee.com/our-firm/the-calfee-building/an-historic-building (last visited May 15, 2016).
[5]2016 GOP Convention—Cleveland, Ohio, http://convention.gop (last visited May 15, 2016).
[6]Rock and Roll Hall of Fame, http://rockhall.com/visit-the-museum/plan (last visited May 15, 2016); *The No Name Band*, Facebook, https://www.facebook.com/tnnbCLE (last visited May 15, 2016).
[7] *Events*, U.S. Dist. Court N. Dist. of Ohio, http://www.ohnd.uscourts.gov/home/information-about-the-court/events (last visited May 15, 2016).
[8]If none of the nearly 100 chapters—which are located across the country, in Puerto Rico, and the U.S. Virgin Islands—is near you, Section 1, Article X of the FBA's Constitution provides: "Any 10 or more members of the Association in good standing, who reside, practice, or are employed in the same geographical area, may—upon application to and with the consent of the Board of Directors—organize a local Chapter of the Association for such purposes, upon such conditions, and embracing such geographical area as the Board of Directors shall prescribe." *See, e.g., The Constitution of the Federal Bar Association*, Fed. Bar Assoc., http://www.fedbar.org/About-Us/Organizational-Structure/FBA-Constitution.aspx#X (last visited May 15, 2016).

FROM THE BOARD OF DIRECTORS

The Importance of an Independent Judiciary

An independent judiciary is central to our democracy and the preservation of public trust in the rule of law. At the same time, litigants in our courts must have the right to challenge a judge's ruling for reasons based in fact, law or policy. Indeed, we affirm and embrace the right of litigants to assert claims of judicial bias under applicable laws, as well as every person's right of free speech. But we exhort all people to refrain from attacks on our judiciary based solely on ethnic, racial, religious, gender or sexual-orientation grounds. We urge all to accord the judiciary the respect and dignity necessary for judges to conduct their constitutional responsibilities.

A message from the FBA Board of Directors

Judicial Vacancies Move Toward Historic Levels

by Bruce Moyer

Bruce Moyer is government relations counsel for the FBA. He also serves as counsel to the National Association of Assistant U.S. Attorneys.

While election year politics and a Supreme Court vacancy garner headline attention, the steadily increasing number of federal judicial vacancies at the federal district court level is generating mounting concern. Historically, the Senate has permitted confirmations of district court nominees to continue during a Presidential election year, despite the slowdown in appeals court confirmations. But that trend is not holding this year and likely will push federal judicial vacancies toward all-time highs by the end of the year.

As of late June, there were 89 federal judicial vacancies. Sixty-seven of them existed at the district court level, or 10 percent of the nation's 673 district court judgeships. That number stands at nearly twice the number of vacancies that existed at the same point in the presidency of George W. Bush and 50 percent more than existed under Bill Clinton or George H.W. Bush. Vacancies constituting "judicial emergencies"—where caseloads are particularly heavy or have existed for an extended period—are roughly double what they were at comparable times in 2000 and 2008.

And vacancy numbers are likely to increase, given the announced slowdown in judicial confirmations for the remainder of this Congress. Senate Judiciary Committee Chairman Chuck Grassley (R-IA) in May invoked the so-called "Leahy-Thurmond" rule, which posits that in the summer of a presidential-election year the Senate will, cease its confirmation of judicial nominees, with limited exceptions. Grassley indicated the rule would kick in when Congress departs for its summer recess in mid-July.

Why Are Vacancies Rising?

How Senate Republicans and Democrats explain the current state of affairs is like listening to parallel universes. Senate Republican leaders point out that President Obama has now secured the confirmation of more judicial nominees than George W. Bush did (304) during his two terms in office. And the Senate Judiciary Committee, under the gavel of Republican Chairman Charles Grassley (R-IA), has held roughly the same number of hearings this election year as Sen. Patrick Leahy (D-VT) convened while chairman in 2008, a comparable point in time. Senate Democrats point to the doubling of judicial vacancies that has occurred since Republicans took over control of the Senate last year. Since that time, the Senate has confirmed 16 Obama nominees, while the Democratic-led Senate confirmed 58 district court judges during Bush's last two years in office (2006-80).

But there's also more at work. A substantial rise in the district court judge retirements and elevations to senior status have fed the vacancy count. Almost 50 percent more judges (239) have risen to senior status under Obama than did under George W. Bush, according to judicial records.

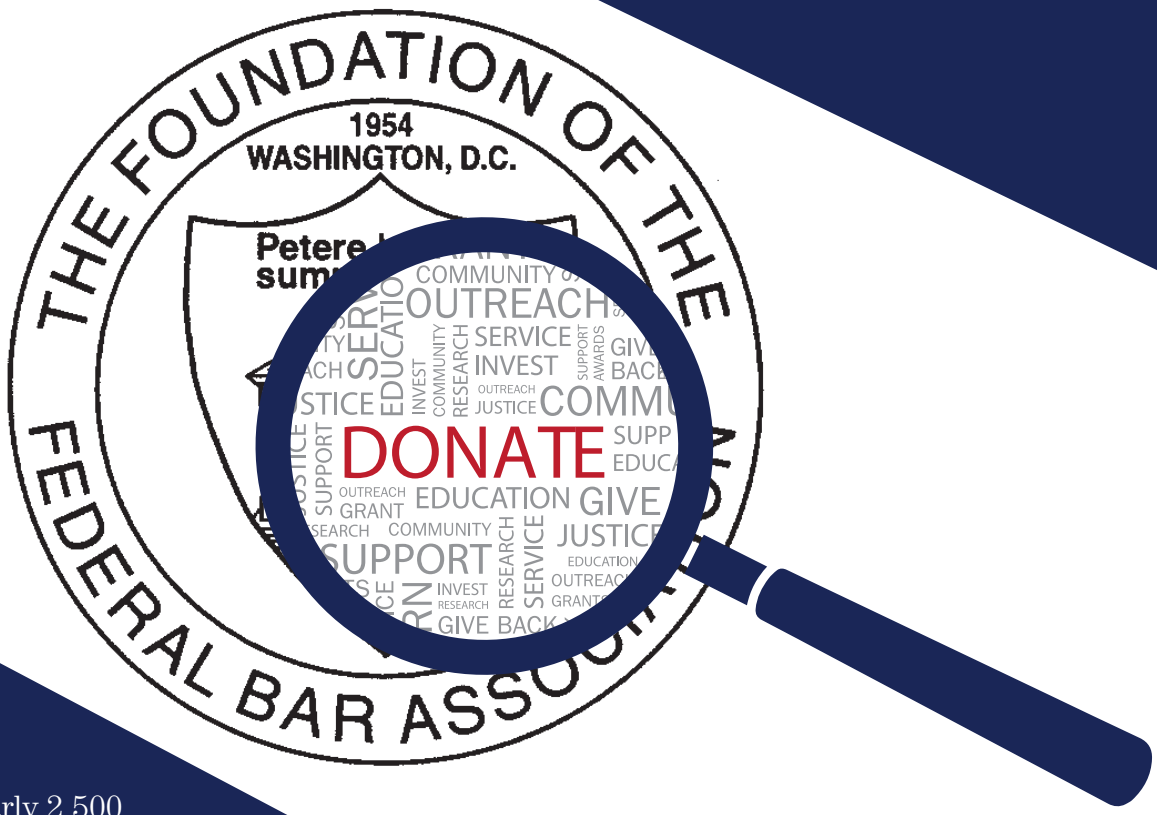
The Consequences of Vacancies

What's clear is that vacancies can have an impact, and that impact is growing. When FBA members visited with their lawmakers during Capitol Hill Day in May, they explained how high numbers of vacancies on the federal bench harm the delivery of justice and the economic interests of litigants. That impact is worsened further by increased filings of lawsuits, without comparable increases in judgeships.

Civil and criminal filings in the federal district courts are substantially higher than they were 20 years ago—rising 28 percent since FY 1993. But the number of federal judgeships created by Congress to handle these filings has barely changed, growing by only 4 percent in the same two-decade period. During that same time, the time required for handling both civil and criminal cases in the federal courts increased, according to the Transactional Records Access Clearinghouse at Syracuse University. In fact he Syracuse University court data shows that the average time to trial in federal court civil lawsuits increased by a whopping 63 percent over a ten-year period ending in 2013.

Texas, a state with four judicial districts, some with the highest caseloads in the country due to immigration and drug prosecutions, illustrates the problem. Ten of the state's 52 federal district judgeships have remained vacant for more most of the last two years, largely due to delay by their home state Senators in forwarding potential nominees to the White House. Meanwhile, three of those four Texas judicial districts rank among the top ten judicial districts in the nation with the highest civil and criminal workloads. The vacancy situation is worsening, and our district courts, the workhorses of the federal judicial system, can ill afford to pay the price. ⊙

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



To the nearly 2,500 FBA members who donated to the Foundation over the past year, thank you. Your support has helped us fund scholarships, community outreach programs, awards, and more. With your support, we are working toward the mission of the Foundation: to promote and support legal research and education; to advance the science of jurisprudence; to facilitate the administration of justice; and to foster improvements in the practice of Federal law.

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Matter of *A-R-C-G-* and Domestic Violence as Persecution: Assessing the First Two Years After a Landmark Decision

by Alicia Triche

Alicia Triche, D.Phil., is sole proprietor at Triche Immigration Law, a Memphis, Tenn.-based private practice that focuses on research support for other attorneys, appellate work, and refugee cases. In 2013, Dr. Triche obtained her D.Phil. in international refugee law from Lady Margaret Hall at Oxford University. She is also an active member of the Immigration Law Section of the FBA.

[T]he legal holding in the case is narrow and fact-specific, leaving immigration judges a great deal of discretion. This latitude … has led to a hodgepodge of jurisprudence that undermines confidence in the fairness and efficiency of the U.S. asylum system.

—Blaine Bookey, Co-Legal Director, UC Hastings Center for Gender & Refugee Studies[1]

If possession is nine-tenths of the law, application might be nine-tenths of jurisprudence. In August 2014, the Board of Immigration Appeals (BIA) published a landmark decision, *Matter of A-R-C-G-,* holding for the first time that survivors of domestic violence could be considered members of a "particular social group" under U.S. asylum law.[2] The ruling did not mean that other legal requirements were excluded—issues such as credibility, burden of proof, and a government "unwilling or unable to protect" the applicant remained important prerequisites for a grant of asylum. However, the BIA did hold that "[d]epending on the facts and evidence … 'married women in Guatemala who are unable to leave their relationship' can constitute a cognizable particular social group."[3]

If the purpose of *A-R-C-G-* is to require legal protection for domestic violence survivors who meet the refugee definition, it is falling far short of the goal line. In application, the decision is leading to substantially divergent results. Conducting "the initial study of *A-R-C-G-*'s jurisprudence," Blaine Bookey at the UC Hastings Center for Gender & Refugee Studies (CGRS) found widespread "inconsistent and arbitrary decision-making" among adjudicators.[4] This situation was already well-documented in general in U.S. refugee law;[5] but in the context of domestic violence, it rings particularly acute. Too-extensive inconsistency in refugee law will generally raise concerns of fairness and due process, but in the case of *A-R-C-G-,* it flies in the face of the acknowledgment so long sought by the advocacy community: that severe domestic violence is a cultural atrocity worthy of inclusion in the refugee definition.

The phrase "particular social group" originated in the United Nations (U.N.) Convention Relating to the Status of Refugees,[6] which is commonly referred to as the "CSR" or "Refugee Convention." The CSR was drafted in the aftermath of the atrocities of World War II, as part of the initial birth of international human rights law. The moral assertions contained in the CSR were the result of a collective, long-term effort—an "expression of conviction by the comity of nations."[7] The first paragraph of the CSR's preamble expresses the intent to affirm "the principle that human beings shall enjoy fundamental rights and freedoms without discrimination."

It is well known among CSR scholars that the phrase "particular social group" is not meaningfully explained in the drafting history of the U.N. Convention. The definition of "refugee" passed through numerous U.N. structures and international committees before reaching its final form, ending ultimately with unanimous approval at a Conference of Plenipotentiaries in Geneva in July 1951.[8] It was not until the final drafting phase at the Geneva Conference that the Swedish delegate, Sture Petrén, proposed (without further explanation) that "membership of a particular social group" should be added to the definition of refugee.[9] The amendment did pass, but the transcript of the summary records indicates no discussion whatsoever regarding what "particular social group" meant to the delegate who approved its addition.[10] Top CSR commentators have posited that "contemporary examples … may have been in the minds of the drafters, such as resulted from the 'restructuring' of society then being undertaken in the socialist states and the special attention reserved for landowners, capitalist class members, independent business people, the middle class and their families."[11] Another commentator believes the Swedish delegate was "more likely" referencing persecution of groups "as had happened

in Nazi Germany," Roma ("Gipsies"), "asocial persons," and "homosexuals."[12] At the time, posits Terje Einarsen, it would have been a delicate matter to mention these groups explicitly, but it was well-known that Nazi Germany had particularly targeted such vulnerable groups.[13]

It is precisely in this spirit of combatting recognized atrocity—in other words, state-sanctioned behaviors unacceptable to the international community—that CGRS and other groups fought for inclusion of domestic violence as a legal aspect of the refugee definition. However, as Bookey well documents, the application of *A-R-C-G-* has been erratic and unpredictable. One particular problem has been whether a survivor must be technically married to assert a viable particular social group—after all, the decision itself references "married women in Guatemala."[14] Bookey reports that a "split in jurisprudence" has surfaced on this issue—reflected not only in decisions of immigration judges, but even unpublished decisions of the BIA.[15] An even bigger problem is that the central holding of the case is still being "distinguished." In *A-R-C-G-,* the immigration judge found that the abuse was "the result of 'criminal acts, not persecution' … perpetuated 'arbitrarily' and 'without reason.'"[16] The BIA specifically overruled that decision, accepting both nexus and "particular social group" had been established.[17] Yet, Bookey reports at least one case in which "the judge found that the [domestic] abuse was related to [the perpetrator's] *own criminal tendencies and jealousy.*"[18]

Is *A-R-C-G-* really so unclear that even its central theme is up for debate? In application, it would certainly seem so. The open-ended, fact-specific nature of the decision, especially the enduring requirements of "particularity" and "social distinction," have left in place a "protector" without any teeth. If the intent of *A-R-C-G-* is to effectively protect domestic violence survivors who meet the refugee definition, its guidance will need to be strengthened through forceful and consistent clarification. ⊙

Endnotes

[1]Blaine Bookey, *Gender-Based Asylum Post-Matter of A-R-C-G-: Evolving Standards and Fair Application of the Law,* 22 Sw. J. Intl. L 1, 4 (2016).

[2]*Matter of A-R-C-G-,* 26 I&N Dec. 388 (BIA 2014). The U.S. refugee definition includes persons who experience and/or fear persecution "on account of…race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(B); I.N.A. § 101(a)(42)(B) (Westlaw 2016).

[3]26 I&N Dec. at 388.

[4]Bookey, *supra* note 1, at 19.

[5]*See, e.g.,* Jaya Ramji-Nogales et al., Lives in the Balance: Asylum Adjudication by the Department of Homeland Security (2014).

[6]July 28, 1951, 189 U.N.T.S. 150. The United States is bound by Articles 2 through 34 as a party to the 1967 Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6224, 606 U.N.T.S. 267 ('Protocol'). A Convention refugee is a person who, "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion…is unable or…owing to such fear, is unwilling to return" home. CSR Art. 1A(2).

[7]Nehemiah Robinson, Convention Relating to the Status of Refugees: Its History, Contents and Interpretation 6 (1953).

[8]Alicia Triche Naumik, *International Law and Detention of US Asylum Seekers,* 19(4) Int. J. Refugee L. 661, 662 (2007).

[9]Terje Einarsen, *Drafting History of the 1951 Convention and the 1967 Protocol,* in The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary 37, 52 (Andreas Zimmermann ed., 2011), *citing* UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Twenty-second Meeting,* A/CONF.2/SR.22, (Nov. 26, 1981) *available at* www.refworld.org/docid/3ae68cde10.html (last visited Apr. 11, 2016).

[10]*See id.* at 52-54. 11 Guy S. Goodwin-Gill & Jane McAdam, The Refugee in International law 74 (3d ed. 2007).

[12]Einarsen, *supra* note 9, 55-56.

[13]*Id.*

[14]26 I&N Dec. at 388; *see* Bookey, *supra* note 1, at 13-14.

[15]*Id.*

[16]26 I&N Dec. at 390.

[17]*Id.*

[18]Bookey, *supra* note 1, at 17. Unfortunately, Bookey's data is not comprehensive because neither unpublished BIA decisions nor decisions of immigration judges are made available in the public context. Her account is based on 67 cases provided privately to CGRS by attorneys. *Id.* at 11. The Immigrant Legal Resource Center also maintains an "Index of Unpublished Decisions of the Board of Immigration Appeals," which includes asylum cases provided to ILRC by private parties. As of April 10, 2016, Westlaw reported two federal "citing references" for *A-R-C-G-,* neither of which examined the case in the domestic violence context. *See Aguilar-Aguilar v. Lynch*, 620 Fed. Appx. 528 n.3 (6th Cir. 2015) (ruling *A-R-C-G-* did not overrule two previous BIA cases regarding particular social group); *Gonzalez Cano v. Lynch*, 809 F.3d 1056, 1059 (8th Cir. 2016) (under *A-R-C-G-,* "Mexican child laborers who have escaped their captors" are not a particular social group).

Succeeding in Successor in Interest Determinations Under USERRA

by Capt. Bradley E. Richardson

Capt. Bradley E. Richardson is the chief of legal assistance at the Office of the Staff Judge Advocate, 23 WG/JA, Moody Air Force Base, Ga. He has been an active member of the FBA since 2010.

A lot can happen at home while a servicemember is deployed. For the deployer, each additional state-side stress adds to the already stressful reality of combat operations, only serving to distract them from their mission. A short list is that children grow up, cars breakdown, and home projects pile up. Legal issues also arise. Typical issues involve family law, consumer finance, landlord/tenant disputes, and estate planning. Most of these problems are resolved, or at least delayed, by the Servicemembers Civil Relief Act. However, reservists and National Guard members on active duty orders have an additional legal concern—their civilian jobs.

Again, a lot can happen while a servicemember is deployed. Companies can merge, be bought out, restructure, go through bankruptcy, or go out of business. When one of those situations occurs, what happens to the part-time warrior's civilian job? What happens when the deployed reservist or National Guard member's civilian job gets lost in a merger?

To protect reservists and veterans, Congress enacted the Uniform Services Employment and Reemployment Rights Act (USERRA) of 1994.[1] This law protects reservists, National Guard members on active duty orders, and veterans from employment discrimination based on their military status.[2] States have also passed additional protections for National Guard members, often providing the same protections to guard members on state orders that USERRA provides for federal orders. Specific to this article, USERRA's protections continue even when an employer has gone through some sort of restructuring or merger. This is known as the "successor in interest" provision, codified at 38 U.S.C. § 4303(4)(A)(iv).

This article is a short guide for determining whether a company is a successor in interest, thereby requiring the extension of USERRA protections to servicemembers to the new business entity. It will first provide a brief overview of USERRA as well as the successor-in-interest rule. It will also provide a process to assist reservists or guard members (hereinafter "servicemember(s)") to assert their USERRA rights against a successor in interest, both prior to deployment and upon returning home.

USERRA, Generally

USERRA provides three basic rights: (1) reemployment following a term of federal military service; (2) freedom from discrimination and retaliation based on status as a reservist or National Guard member; and (3) the right to continue an employer-based health plan while on active duty orders.[3] For reemployment, the servicemember needs to provide the employer written or verbal notice prior to deployment. Following deployment, the servicemember needs to either report to work or apply for reemployment in a timely manner.[4] It should be noted that an application for reemployment does not mean that an employer has to necessarily rehire the servicemember. Rather, a person must be eligible for rehire. A common example of someone not eligible is that the service member lost a required security clearance due to misconduct while deployed. A person eligible for reemployment "shall be promptly reemployed" in the same position or a position in which the servicemember is qualified.[5] If a member has been on active duty orders for more than five years, USERRA may not provide any reemployment protections. However, there are certain exclusions of time in service to the five-year period.[6] Additionally, a punitive or discharge under other than honorable conditions forecloses USERRA rights.[7]

With regard to discrimination protections, an employer cannot discriminate against a person based on past or present uniformed service. This includes initial employment, reemployment, retention, promotion, or any other benefits. An employer may also not retaliate if one of their employees has applied for enlistment.[8]

The lesser known protection of employer-based health insurance coverage allows a servicemember to retain his or her health plan for 24 months while in the military. If the member enrolls in the military health plan (currently TriCare) while on orders, then the civilian employer-based health plan must be reinstated after reemployment without regard to any waiting periods or exclusions. The only exception is that the employer-based health plan does not cover service-connected illnesses or injuries arising while on orders.[9]

Enforcement and investigation of USERRA violations falls under the Department of Labor's (DOL) Veterans Employment and Training Service (VETS). If VETS does not resolve the claim, the Department of Justice (DOJ) or the Office of Special Counsel (OSC) may also enforce USERRA violations, depending on the situation. USERRA also provides a private cause of action. Regardless, the reality is that judge advocates general (JAGs) at base legal offices, nonprofit law firms, and private attorneys tend to become the first place reservists and National Guard members turn to when a USERRA issue arises. Hopefully, the issue can be resolved without involving VETS, DOJ, or OSC.[10]

Generally, the servicemember needs to demonstrate a prima facia case that his or her military status was at least a motivational factor in the employment decision of the employer.[11] Upon establishing prima facia, the burden shifts to the employer to prove by a preponderance of the evidence "that the [employment] action would have been taken despite the protected status."[12]

USERRA, Successor in Interest Rule

An employer is "any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities."[13] A definition of "successor in interest" is included in the definition of employer.[14] Prior to 2010, Congress did not define "successor in interest" under USERRA.[15] Although the term is now defined in 38 U.S.C. 4303(4)(A)(D), the history of the definition's codification is relevant.

The legislative history of USERRA indicates that Congress' intent was for courts to apply the multifactor analysis set forth in *Leib v. Georgia-Pacific Corp.*[16] when analyzing whether an employer was a successor interest.[17] The non-exhaustive factors considered by the *Leib* Court were the "substantial continuity of the same business operations" and the totality of the circumstances, including: (1) the use of the same plant; (2) continuity of workforce; (3) similarity of jobs and working conditions; (4) use of the same supervisors; (5) use of the same machinery, equipment, and production methods; and (6) similarity of the products and services. Although often ignored, the *Leib* court added an additional analysis of whether there was any change of circumstances that would make it impossible or unreasonable to rehire the employee.[18] When compared to the current statutory definition, servicemembers had a harder fight to prove whether an employer was successor in interest.

In 2005, the Eleventh Circuit added a threshold requirement to the *Leib* factors in *Coffman v. Chugach Support Services Inc.* The court required a claimant to demonstrate privity in the form of a merger or transfer of assets prior to reaching the *Leib* factors.[19] However, shortly thereafter, the DOL Office of the Assistant Secretary for Veterans' Employment and Training promulgated 20 C.F.R. § 1002.35, which provides a more lenient test for successor in interest.

First, the regulation generally defines a "successor in interest" as a new employer that has "a substantial continuity of operations, facilities, and workforce from the former employer."[20] The regulation then states that whether an employer is a "successor in interest" is determined by:

> [A] case by case analysis using a multi-factor test that considers the following:
> (a) Whether there has been a substantial continuity of business operations from the former to the current employer;
> (b) Whether the current employer uses the same or similar facilities, machinery, equipment, and methods of production;
> (c) Whether there has been a substantial continuity of employees;
> (d) Whether there is a similarity of jobs and working conditions;
> (e) Whether there is a similarity of supervisors or managers; and,
> (f) Whether there is a similarity of products or services.[21]

The importance of this regulation is that it rejects not only the Eleventh Circuit's threshold requirements, but also eliminates the final and ignored *Leib* factor considering the "change of circumstances that would make it impossible or unreasonable to rehire the employee." In other words, the regulation was far friendlier to the servicemember.

In 2010, Congress finally codified the definition of successor in interest in the Veterans Benefits Act of 2010.[22] The definition mirrors the DOL's definition from 20 C.F.R. § 1002.35. Currently, the definition of a successor in interest is as follows:

> (i) Whether the term "successor in interest" applies with respect to an entity described in subparagraph (A) for purposes of clause (iv) of such subparagraph shall be determined on a case-by-case basis using a multi-factor test that considers the following factors:
>
> (I) Substantial continuity of business operations.
> (II) Use of the same or similar facilities.
> (III) Continuity of workforce.
> (IV) Similarity of jobs and working conditions.
> (V) Similarity of supervisory personnel.
> (VI) Similarity of machinery, equipment, and production methods.
> (VII) Similarity of products or services.
>
> (ii) The entity's lack of notice or awareness of a potential or pending claim under this chapter at the time of a merger, acquisition, or other form of succession shall not be considered when applying the multi-factor test[.][23]

Therefore, the Eleventh Circuit's requirements of a transfer of assets of merger are no longer required and a servicemember has an easier test to prove successor in interest liability.

There are also two noteworthy opinions that apply to typical employers that commonly employ reservists and guard members, namely: (1) an elected official should be considered a successor in interest,[24] and (2) a military contractor should be considered a successor in interest. [25]

Assisting a Servicemember When a Successor in Interest Issue Arises

Hopefully, a reservists or guard member on active duty orders will contact a base legal office prior to deployment. The obvious first step is to do your own analysis using the statutory definition. If the employer is a successor in interest based on those factors, the general standard operating procedure is to write a letter asserting USERRA

continued on page 45

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WELCOME TO Cleveland!

OHIO CONVENTION CO-CHAIRS KIP BOLLIN, NORTHERN DISTRICT OF OHIO CHAPTER, AND GLEN MCMURRY, DAYTON CHAPTER

On behalf of the Dayton and Northern District of Ohio Chapters of the FBA, we invite you to attend the FBA's 2016 Annual Meeting and Convention in Cleveland on Sept. 14 to 17. We are excited to have you as our guests and look forward to providing you with a fun and rewarding Annual Meeting.

The 2016 Annual Meeting boasts an impressive lineup of speakers and special guests, including Dean Erwin Chemerinsky and U.S. Sens. Sherrod Brown and Rob Portman (invited).

For those who can come in a day early, we'll get things started on Wednesday afternoon with a special sitting of the Sixth Circuit Court of Appeals, which normally sits in Cincinnati, followed by a welcome reception just across the street from the Westin Cleveland Downtown hotel. Attendees can meet up at the reception and then launch into downtown Cleveland to experience one of the scores of restaurants and bars that have made Cleveland a destination for foodies. During your downtime (if you can find any), Cleveland has so much for you and your family to enjoy, including:

- The East 4th Street restaurants
- The West Side Market
- The Cleveland Botanical Garden
- Holden Arboretum
- The Cleveland Museum of Art
- The Crawford Auto Museum
- The Museum of Natural History
- The West 25th microbreweries and pubs
- The Great Lakes Science Center
- The USS Cod Submarine Memorial
- The Cleveland Metroparks Zoo
- The JACK Casino
- Playhouse Square (the country's largest performing arts complex outside of New York City)
- The Flats and Warehouse Entertainment Districts
- The Christmas Story House
- Mitchell's Ice Cream
- The Tremont Art Walk
- Gordon Square Arts District
- Severance Hall (home of the Cleveland Orchestra)
- Little Italy
- The Cleveland Browns
- The Cleveland Indians (Homestand vs. Tigers, Friday to Sunday)
- The Superman museum
- And a lot more!

Without a doubt, Cleveland has enough to keep you and your family entertained throughout your stay!

We have some truly interesting seminars planned for Thursday and Friday, which will be presented by judges and legal experts from all over the country:

- On Thursday evening, convention attendees will be treated to a private reception at Alley Cat Oyster Bar in the Flats Entertainment District.
- On Friday afternoon, at the Federal Reserve Bank one block from the host hotel, all are invited to attend a naturalization ceremony to be held in conjunction with Constitution Day & Citizenship Day. Judges from all over the country will be participating in this once-a-lifetime event.
- On Friday night, you will be shuttled to the Rock and Roll Hall of Fame for another action- and music-packed evening. What better way to end a Friday!
- A luncheon on Saturday will feature Sen. Sherrod Brown as our guest speaker.
- The Convention will conclude Saturday night with the Presidential Installation Banquet where our very own Magistrate Judge Michael J. Newman will be sworn in as National President of the FBA. The dinner will be followed by an after-party celebration with live music.

So, come join us for the 2016 Annual Meeting in Cleveland. The only thing this Convention is missing is you! ☉

Sincerely,

Glen R. McMurry
Partner
Dungan & LeFevre Co., LPA
Troy, Ohio

Kip Bollin
Partner
Thompson Hine LLP
Cleveland, Ohio

Federal Bar Association
2016 Annual Meeting and Convention

CLEVELAND

SCHEDULE AT A GLANCE ★ SEPT. 14-17

WEDNESDAY, SEPTEMBER 14

2:00 p.m.–4:00 p.m.	Special Argument Session with Sixth Circuit Swearing-In Ceremony, U.S. Court of Appeals for the Sixth Circuit
3:00 p.m.–5:00 p.m.	Registration Open
5:00 p.m.–7:00 p.m.	Offsite Welcome Reception Calfee, Halter & Griswold LLP *Hosted by the Northern District of Ohio Chapter* *Sponsored by Calfee, Halter & Griswold LLP*

THURSDAY, SEPTEMBER 15

7:00 a.m.–5:00 p.m.	Registration Open
7:30 a.m.–8:30 a.m.	Breakfast for Younger Lawyers
8:00 a.m.–5:30 p.m.	FBA Board of Directors Meeting
7:30 a.m.–8:30 a.m.	CLE Sessions
8:30 a.m.–8:45 a.m.	Welcome Remarks
9:00 a.m.–5:00 p.m.	Silent Auction Open
9:00 a.m.–12:30 p.m.	CLE Sessions
12:30 p.m.–2:00 p.m.	Younger Lawyers Division Awards Luncheon *Sponsored by Baker & Hostetler*
Keynote:	*Paul S. Grewal, Facebook Vice President and Deputy General Counsel for Worldwide Litigation, former U.S. Magistrate Judge, CAND*
2:15 p.m.–4:30 p.m.	CLE Sessions
TBD	Offsite Networking Reception at Alley Cat Oyster Bar *Hosted by the Northern District of Ohio Chapter* *Bar sponsored by FBA Federal Litigation Section*

FRIDAY, SEPTEMBER 16

7:00 a.m.–5:00 p.m.	Registration Open
7:30 a.m.–12:15 p.m.	CLE Sessions
9:00 a.m.–2:30 p.m.	Silent Auction Open
11:15 a.m.–12:15 p.m.	Legislative Update with Bruce Moyer
12:30 p.m.–2:00 p.m.	Fellows of the Foundation of the FBA Luncheon *Sponsored by FBA Labor & Employment Law Section*
Keynote:	*Ovie Carroll, Director, Department of Justice Cybercrime Lab (CCIPS)*
2:00 p.m.	Naturalization Proceeding Federal Reserve Bank
2:15 p.m.–4:30 p.m.	Business Meetings
7:00 p.m.–11:00 p.m.	Offsite Reception Rock and Roll Hall of Fame and Museum *Hosted by the Northern District of Ohio Chapter* *Sponsored by Thompson Hine*

SATURDAY, SEPTEMBER 17

7:30 a.m.–5:00 p.m.	Registration Desk Open
8:00 a.m.–2:00 p.m.	Silent Auction Open
8:30 a.m.–11:30 a.m.	National Council Meeting
12:00 p.m.–2:00 p.m.	FBA Awards Luncheon *Sponsored by FBA Sections and Divisions*
Keynote:	*U.S. Sen. Sherrod Brown (D-Ohio)*
2:15 p.m.–5:00 p.m.	FBA Business Meetings

Presidential Installation Banquet Activities
Hosted by the Dayton Chapter and Sponsored by LexisNexis

6:00 p.m.–7:00 p.m.	Cocktail Reception
7:00 p.m.–9:00 p.m.	Installation Dinner
9:00 p.m.	Post-Banquet Celebration

Follow the FBA:

www.fedbar.org/FBACon16

CLE SESSIONS ★ THURSDAY, SEPT. 15

7:30 A.M.–8:30 A.M.

SESSION 1A ★ THE CLEAN POWER PLAN: THE FUTURE OF ENERGY POLICY AND AGENCY AUTHORITY IN AMERICA

Speakers: Kevin Desharnais, Mayer Brown LLP; Roger R. Martella Jr., Sidley Austin LLP; Vickie Patton, Environmental Defense Fund; Sheila Slocum Hollis, Duane Morris LLP

Learn about the Clean Power Plan, including the court challenges, the impact of the Supreme Court's recent decision in *West Virginia et al. v. EPA et al.* and the scope of agency rulemaking authority, as well as the impacts on the national power industry of this massive rulemaking proposal.

SESSION 1B ★ THE FREEDOM OF INFORMATION ACT AT 50

Speakers: Jonathan L. Entin, Case Western Reserve University; William Holzerland, Food and Drug Administration (invited); Adam A. Marshall, The Reporters Committee for Freedom of the Press; Erin E. Rhinehart, Faruki Ireland & Cox P.L.L.

Passed in 1966, the Freedom of Information Act has generated a large body of litigation and jurisprudence. Hear an overview of FOIA after 50 years from a variety of perspectives, including federal agency information request policy, promotion of openness and accountability in government, and commercial litigation regarding media and First Amendment law.

SESSION 1C ★ THE IMPACT OF RECENT SUPREME COURT, FEDERAL CIRCUIT, AND PTAB DECISIONS AND PATENT LAW REFORM EFFORTS ON PATENT LITIGATORS, IN-HOUSE GENERAL AND PATENT COUNSEL, AND THE JUDICIARY

Speakers: Coby Nixon, Taylor English Duma LLP; Robert Rando, The Rando Law Firm PC

These are exciting times in patent law: the Supreme Court continues to show interest in patent cases, the number of new patent case filings has stayed consistent, post-grant proceedings in the USPTO have seen a surge in popularity, and patent reform legislation remains a topic of discussion in Congress. This dynamic session will address recent rulings on several patent law doctrines and give a preview of potential developments including intersecting administrative and constitutional law issues just around the corner.

9:00 A.M.–10:00 A.M.

SESSION 2A ★ DISCOVERING MADOFF: MANAGING THE EVIDENCE OF THE LARGEST FINANCIAL FRAUD IN U.S. HISTORY

Speakers: Edward "Ted" Jacobs, BakerHostetler; Karin Scholz Jenson, BakerHostetler; Nicole Schnarre, BakerHostetler

Join the BakerHostetler attorneys who lead the discovery aspects of the ongoing liquidation of Bernard Madoff's defunct firm and the firm's professional technology manager, who oversees both litigation technology and proprietary systems required to manage the SIPA Trustee's Madoff Recovery Initiative—recovering more than $11 billion to date on behalf of Madoff's fraud victims.

SESSION 2B ★ "CRIMMIGRATION": THE INTERSECTION OF CRIMINAL LAW AND IMMIGRATION LAW

Speakers: Erin Brown, Robert Brown LLC; Robert Brown, Robert Brown LLC; Aleksandar Cuic, Robert Brown LLC

When criminal defense and immigration practitioners speak a common language, the noncitizen is effectively represented, ensuring intelligent and knowledgeable pleas and finality to a prosecution.

SESSION 2C ★ HOW TO INFLUENCE JUDGES AND WIN APPEALS

Speaker: Conor A. McLaughlin, Thompson Hine

A panel of judges from the U.S. Court of Appeals for the Sixth Circuit and highly-regarded appellate litigators will engage the audience in an interactive discussion regarding effective appellate advocacy and common mistakes in brief writing and at oral argument that prevent effective appellate advocacy in both civil and criminal appeals. The panel members will take your questions and provide insight that will be invaluable to your next appeal.

10:15 A.M.–11:15 A.M.

SESSION 3A ★ TRADE SECRETS, ECONOMIC ESPIONAGE, UNAUTHORIZED COMPUTER ACCESS, CONSPIRACY, AND THE OREO COOKIE

Speakers: Hon. Dan Aaron Polster, U.S. District Court for the Northern District of Ohio; Virginia Davidson, Calfee, Halter & Griswold LLP; Jim Robenalt, Thompson Hine; Mathew Wilson, The University of Akron School of Law

Developments in the area of economic espionage are reflected in the recent conviction of an individual who stole the recipe for the cream in the Oreo Cookie. Learn why trade secret theft, unlike computer hacking, is almost always an "inside job;" how to defend or to negotiate an advantageous plea agreement if necessary; and whether you should engage in civil litigation, refer the case to the authorities for investigation, or both, and how to navigate each path.

SESSION 3B ★ ON BEING A CATALYST FOR REFORM: A CONVERSATION WITH THE MONITOR OF THE CLEVELAND POLICE CONSENT DECREE

Speakers: Matthew Barge, Police Assessment Resource Center; Ayesha Bell Hardaway, Case Western Reserve University School of Law; Sanford Watson, Tucker Ellis LLP

Hear a timely discussion on the use of a monitor with court-enforced consent decrees—designed to reform law enforcement agencies

10:15 A.M.–11:15 A.M. CONT.

with a pattern of excessive force in violation of the U.S. Constitution, federal law, and state law. As the monitor in Cleveland and other major cities, PARC (Police Assessment Resource Center) has insights that will benefit any judge or practitioner who handles justice department investigations or use of deadly force cases.

SESSION 3C ★ THE PRESENT AND FUTURE OF FEDERAL APPELLATE LITIGATION

Speaker: David E. Mills, The Mills Law Office LLC

A panel of judges from the U.S. Court of Appeals for the Sixth Circuit and other federal circuits will provide insight into the present and future of appellate litigation, including trends in how appellate courts deal with expert issues 20 years after Daubert, the rise of appeals based on dispositive motions, appeals of criminal sentences, appeals from administrative agencies, and the future of oral argument.

11:30 A.M.–12:30 P.M.

SESSION 4A ★ WHAT YOUR CLIENT NEEDS

Speakers: Nancy Berardinelli-Krantz, The Goodyear Tire & Rubber Co.; Mark T. Freeman, KeyCorp; Helen Jarem, The Sherwin-Williams Company; Bobby C. Psaropoulos, Eaton Corporation

Hear in-house counsel from four Ohio-based national corporations—Eaton, KeyBank, Sherwin-Williams, and Goodyear—discuss the internal pressures they face and the corresponding needs and preferences from their outside counsel. Specifically, they will share the greatest challenges each company and its in-house counsel are currently facing, including the role of diversity and inclusion in selection of outside counsel, cybersecurity, internal policies, and e-discovery.

SESSION 4B ★ E-DISCOVERY ETHICS: EMERGING STANDARDS OF TECHNOLOGICAL COMPETENCE

Speaker: Hon. Joy Flowers Conti, U.S. District Court for the Western District of Pennsylvania; Richard N. Lettieri, Lettieri Law Firm, LLC

Review the 9 basic skills recently articulated by the California Standing Committee on Professional Responsibility and Conduct to define e-discovery competence—in accordance with the new ABA Model Rule 1.1 calling for lawyers to "keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology"—and gain practical advice outlining how each of these skills can be developed and/or acquired.

2:15 P.M.–3:15 P.M.

SESSION 5A ★ STATE OF THE PROFESSION: SUPPLY, DEMAND, AND THE FUTURE OF LAWYERS

Speakers: Craig M. Boise, Syracuse University College of Law; Toby Brown, Akin Gump Strauss Hauer & Feld LLP; William Henderson, Indiana University Maurer School of Law

Learn about changes to the practice of law affecting all lawyers—from big firms to solo practitioners—in the wake of the Great Recession, how law schools are responding, and what the practice of law will look like in the coming years.

SESSION 5B ★ CREATIVE SOLUTIONS IN GOVERNMENT ENTITY BANKRUPTCIES: INSIDE THE DETROIT BANKRUPTCY AND EMERGING ISSUES IN PUERTO RICO

Speakers: Hon. Gustavo A. Gelpi, U.S. District Court for the District of Puerto Rico; David G. Heiman, Jones Day; Andrea Marconi, Thorpe Shwer, P.C.; Kevyn D. Orr, Jones Day; Hon. Steven W. Rhodes, U.S. Bankruptcy Court for the Eastern District of Michigan (ret.); Hon. Gerald E. Rosen, U.S. District Court for the Eastern District of Michigan

It's in the news every day: government entities ranging from hospitals to municipalities and territories have faced financial problems. The constituents, assets, infrastructure, and political implications differ when the government cannot afford to pay for public services. Hear a discussion on the challenges of resolving these issues in the context of the highly-publicized financial crises in Puerto Rico and Detroit.

3:30 P.M.–4:30 P.M.

SESSION 6A ★ THE ROLE OF FEDERAL COURTS IN POLICE REFORM

Speakers: Hon. Gustavo A. Gelpi, U.S. District Court for the District of Puerto Rico ; Alfredo Castellanos Bayouth, Castellanos Group P.S.C

The attorney general of the United States has instituted numerous civil rights actions against states, territories, counties, and municipalities as a result of constitutional and civil rights violations by police departments. The federal court, in turn, is called upon to monitor compliance of consent decrees issued in response. Learn about such federal actions, the court's and parties' roles in the process, and the problems that arise during implementation.

3:30 P.M.–4:30 P.M. CONT.

SESSION 6B ★ THE NEW FEDERAL CIVIL RULES PACKAGE—"BIG DEAL" CHANGES TO DISCOVERY, CASE MANAGEMENT, CULTURE, AND E-DISCOVERY – COMING TO A COURTHOUSE NEAR YOU!

Speakers: R. Eric Kennedy, Weisman, Kennedy & Berris Co., L.P.A.; Rita A. Maimbourg, Tucker Ellis LLP; Hon. Jack Zouhary, U.S. District Court for the Northern District of Ohio

Hear about the practical impact of the Amended Federal Civil Rules from the triad of perspectives in trial practice—plaintiff counsel, defense counsel, and the bench. The panel is composed of Fellows of the American College of Trial Lawyers who will discuss how the Civil Rules Package is intended to change the way judges and lawyers handle cases to reduce cost and delay, rein in discovery guided by proportionality and cooperation, and increase a judge's role "to achieve prompt and efficient resolutions of disputes.

SESSION 6C ★ DRONES—THE PERFECT STORM: THE INTERSECTION OF SECURITY, PRIVACY, AND FIRST AMENDMENT ISSUES IN THE AGE OF UNMANNED AERIAL VEHICLES

Speakers: Jeffrey T. Cox, Faruki Ireland & Cox P.L.L; Scot Ganow, Faruki Ireland & Cox P.L.L; Dean Griffith, Federal Aviation Administration; Dr. Andrew D. Shepherd, Sinclair College

Explore the current legal framework (or lack thereof) impacting unmanned aerial vehicles, or drones, at both the federal and state level; non-legal issues that can have a significant impact on the future of the technology; speculation on the future of drones; and best practices to be followed in the absence of established law. As with many emerging issues, the law may be the forum where myths are dispelled, real harms identified, and remedies provided.

CLE SESSIONS ★ FRIDAY, SEPT. 16

7:30 A.M.–8:30 A.M.

SESSION 7A ★ PROTECTING THOSE WHO PROTECT US: FINANCIAL AND CIVIL PROTECTIONS UNDER THE SERVICEMEMBERS CIVIL RELIEF ACT (SCRA)

Speakers: Lt. Col. Lyndsey M.D. Olson, Minnesota National Guard; Vildan Teske, Teske Micko Katz Kitzer & Rochel PLLP

Although the SCRA—which provides financial and civil protections for members of the military—has been in place for many years, a number of entities that do business with servicemembers are not in full compliance with its provisions. Learn about the most often used protections, how they are applied, who is covered and when, as well as exceptions to the rules and gain a working knowledge of the protections to properly advise your clients and represent their interests.

SESSION 7B ★ RACE AND RELIGION IN THE WORKPLACE: A LOOK AT THE LAST 25 YEARS

Speakers: Roula Allouch, Council on American-Islamic Relations; Danielle Brewer Jones, The Brewer Law Office, PLLC; Craig Cowart, Jackson Lewis PC; Phillip Kitzer, Teske Micko Katz Kitzer & Rochel PLLP

Explore how claims of race and religious discrimination in the workplace have changed over the years, shifting to more covert discrimination—including failure to hire and failure to promote. Learn about procedural challenges for proving discrimination without direct evidence, the effects of *Abercrombie* and other accommodation cases, and how workplace harassment against Muslim Americans trend with major terrorist events.

SESSION 7C ★ THE ETHICAL PERILS OF SOCIAL MEDIA

Speakers: Glen McMurry, Dungan & LeFevre Co LPA; Michael Zussman, Cowan DeBaets Abrahams & Sheppard LLP

For all of the utility social media brings our profession, it is important that we take steps to educate ourselves that the novelty of this technology comes at a price—ethical violations associated with social media use are on the rise. Join this interactive discussion on ethical considerations associated with the use of social media and explore the ethical evaluation process, including evaluating which rules apply and when.

8:45 A.M.–9:45 A.M.

SESSION 8A ★ RE-ENTRY COURTS: OHIO

Speakers: Hon. Michael J. Newman, U.S. District Court for the Southern District of Ohio; Hon. Walter H. Rice, U.S. District Court for the Southern District of Ohio; Hon. Edmund A. Sargus, Jr., U.S. District Court for the Southern District of Ohio; Hon. Dan Polster, U.S. District Court for the Northern District of Ohio

Specialized re-entry courts have been scrutinized over the last decade and found to produce better results than traditional approaches.

8:45 A.M.–9:45 A.M. CONT.

Learn about the successful federal re-entry court efforts in Ohio—where prisons are at 133 percent of capacity and hold more than 51,000 inmates—how the numbers of reoffenders have been reduced, and how other jurisdictions may implement similar programs for the betterment of their communities.

SESSION 8B ★ THE "LEGAL FRAUD OF THE CENTURY"

Speaker: Jose Luis Martin, Chevron Corporation

Hear about the use of 28 U.S.C. § 1782 in connection with issuance of a multi-billion foreign judgment and the subsequent 7-week RICO trial in the Southern District of New York. As a result of that trial, the court issued a 500-page opinion in March 2014.

SESSION 8C ★ PROTECTING THE VOTE: THE IMPACT OF VOTER ID REQUIREMENTS, TECHNOLOGY AND REDISTRICTING ON THE RIGHT TO VOTE IN AMERICA

Speakers: Inajo Davis Chappell, Ulmer & Berne LLP; Edward B. Foley, Moritz College of Law, The Ohio State University; Robert S. Frost, Tucker Ellis LLP; David J. Carney, Case Western Reserve University School of Law

The FBA convention will take place in the midst of a presidential election and in a very competitive swing state. This program will focus on a variety of issues in election law, including matters that can arise before election day and those that can arise after voting. Among these are voter registration requirements, voter ID rules, early voting rules, absentee voting requirements, provisional votes, ballot counting, and voting technology.

10:00 A.M.–11:00 A.M.

SESSION 9A ★ STATE OF IMMIGRATION: PRESIDENTIAL POWERS, STATE SERVICES, EFFECTS ON EMPLOYERS, AND HUMANITARIAN RELIEF

Speakers: Hon. Robin Feder, EOIR, U.S. Department of Justice; Eileen Scofield, Alston & Bird LLP; Mark Shmueli, Law Office of Mark Shmueli

Explore these dynamic areas of immigration law: Executive action/power to regulate immigration (*U.S. v. Texas*, priority enforcement, and administrative closure); Impact of state and local action and state and local jurisdiction over enforcement and benefits (e.g., drivers licenses), Employment law hot topics (e.g., Tesla/Infosys and B-1 workers, Agriculture and Farm Labor Contracts, and the "Brown Bear:" 17+ government agencies sharing information); and Current trends and emerging issues in asylum law, with an emphasis on particular social groups.

SESSION 9B ★ THE PROBLEM WITH EXONEREES

Speakers: Terry Gilbert, Friedman & Gilbert; Mark Godsey, Ohio Innocence Project

Join lawyers and recently released exonerees to examine legal strategies in freeing the innocent, the role of Innocence Projects, available state and federal remedies for compensation, and the various issues involving re-entry into the community. Presenters will discuss current cases and the need for legal reform to minimize wrongful imprisonment.

SESSION 9C ★ SUPREME COURT UPDATE WITH DEAN CHEMERINSKY

Speaker: Erwin Chemerinsky, University of California, Irvine School of Law

Dean Chemerinksy will present an update on significant recent U.S. Supreme Court cases.

11:15 A.M.–12:15 P.M.

SESSION 10A ★ WHAT THE BUSY TRIAL LAWYER NEEDS TO KNOW ABOUT THE FEDERAL RULES OF EVIDENCE

Speakers: Charles N. Curlett, Jr., Levin & Curlett LLC; Hon. Benson Everett Legg, JAMS

Learn what trial lawyers need to know about the Federal Rules of Evidence—especially the rules that the litigators should know but often do not and the rules that frequently flummox even the most seasoned attorneys. Because trials are so infrequent take advantage of this timely refresher.

SESSION 10B ★ NATIONAL VETERANS COURT INITIATIVE

Speakers: Hon. Michael J. Newman, U.S. District Court for the Southern District of Ohio; Michael Rhinehart, U.S. District Court for the Southern District of Ohio; Mark Vincent, U.S. Attorney's Office for the District of Utah; Hon. Paul M. Warner, U.S. District Court for the District of Utah

Hear about Veterans Courts—a specialized court system created to ensure that eligible veterans involved in the criminal justice system have access to benefits, services, and treatment they deserve—from one of the system's founders. Judge Paul Warner started the first federal veterans court after personally observing the plight of veterans in the legal system. Explore the motivations behind and need for these courts and learn how to start a Veterans Court in your jurisdiction.

SOCIAL AND NETWORKING EVENTS

WEDNESDAY, SEPTEMBER 14

2:00 P.M.–4:00 P.M.

SPECIAL ARGUMENT SESSION WITH SIXTH CIRCUIT SWEARING-IN CEREMONY, U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT

Sit in on a special argument session of the Sixth Circuit, scheduled to coincide with the FBA Annual Meeting and Convention.

5:00 P.M.–7:00 P.M.

COMPLIMENTARY WELCOME RECEPTION

HOSTED BY THE NORTHERN DISTRICT OF OHIO CHAPTER

SPONSORED BY CALFEE, HALTER & GRISWOLD LLP

The Ohio chapters of the FBA look forward to welcoming all conference attendees at the prestigious Calfee, Halter & Griswold law firm.

Credit: ThisisCleveland.com

THURSDAY, SEPTEMBER 15

7:30 A.M.–8:30 A.M.

BREAKFAST FOR YOUNGER LAWYERS WITH HON. ALICE M. BATCHELDER, U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT

12:30 P.M.–2:00 P.M.

YOUNGER LAWYERS DIVISION AWARDS LUNCHEON

SPONSORED BY BAKER & HOSTETLER

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. Keynote address will be presented by Paul S. Grewal, Facebook Vice President and Deputy General Counsel for World Litigation, former U.S. Magistrate Judge, CAND.

5:00 P.M.–11:00 P.M.

COMPLIMENTARY OFFSITE RECEPTION

HOSTED BY THE NORTHERN DISTRICT OF OHIO CHAPTER

BAR SPONSORED BY FBA FEDERAL LITIGATION SECTION

Offsite Networking Reception at Alley Cat Oyster Bar 1056 Old River Rd; Cleveland, OH 44113

FRIDAY, SEPTEMBER 16

12:30 P.M.–2:00 P.M.

FELLOWS OF THE FOUNDATION OF THE FBA LUNCHEON

SPONSORED BY FBA LABOR & EMPLOYMENT LAW SECTION

Join the Foundation of the Federal Bar Association as its 2016 Fellows are inducted. U.S. Department of Justice Cybercrimes Lab Director Ovie Carroll will present a keynote address.

2:00 P.M.

NATURALIZATION PROCEEDING

Join the FBA at the Federal Reserve Bank in the commemoration of Constitution Day and Citizenship Day.

7:00 P.M.–11:00 P.M.

COMPLIMENTARY RECEPTION AT THE ROCK N' ROLL HALL OF FAME AND MUSEUM

HOSTED BY THE NORTHERN DISTRICT OF OHIO CHAPTER

SPONSORED BY THOMPSON HINE

Enjoy an evening exploring the history of great rock while enjoying the music of a live band.

SATURDAY, SEPTEMBER 17

12:00–2:00 P.M.

FBA AWARDS LUNCHEON

SPONSORED BY FBA SECTIONS AND DIVISIONS

This event recognizes the outstanding service of members, sections, divisions, and chapters. U.S. Senator Sherrod Brown (D-Ohio) will present a keynote address.

6:00 P.M. / 7:00 P.M. / 9:00 P.M.

COCKTAIL RECEPTION / PRESIDENTIAL INSTALLATION BANQUET / POST-BANQUET CELEBRATION

SPONSORED BY LEXISNEXIS

Join us for a black-tie optional banquet to formally install Hon. Michael J. Newman as the FBA national president for FY 2017. 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. Also scheduled to speak are U.S. Senator Rob Portman (R-Ohio) (invited), Gen. William K. Suter, Retired Clerk of the U.S. Supreme Court, U.S. Army JAG Corps (ret.) and R. Guy Cole Jr., Chief Judge, U.S. Court of Appeals for the Sixth Circuit. Immediately following the installation, all dinner guests are invited and encouraged to continue the celebration with dancing to one of Cleveland's most popular live bands.

FBA BUSINESS MEETINGS

THURSDAY, SEPTEMBER 15

8:00 A.M.–5:30 P.M.

FBA BOARD OF DIRECTORS MEETING

FRIDAY, SEPTEMBER 16

11:15 A.M.–12:15 P.M.

LEGISLATIVE UPDATE FROM BRUCE MOYER

2:15–4:15 P.M.

VICE PRESIDENTS FOR THE CIRCUITS MEETING

FEDERAL BAR BUILDING CORPORATION BOARD OF DIRECTORS MEETING

EDITORIAL BOARD MEETING

FOUNDATION OF THE FBA BOARD OF DIRECTORS MEETING

FEDERAL LITIGATION SECTION MEETING (ENDS AT 3:15 P.M.)

BANKRUPTCY LAW SECTION MEETING

3:30–5:00 P.M.

LABOR AND EMPLOYMENT LAW SECTION MEETING

INTERNATIONAL LAW SECTION MEETING

SATURDAY, SEPTEMBER 17

NEW TIME!

8:30–11:30 A.M.

NATIONAL COUNCIL MEETING

2:15–5:00 P.M.

VICE PRESIDENTS FOR THE CIRCUITS, SECTIONS, DIVISIONS, AND CHAPTER LEADERS MEETING

VICE PRESIDENTS FOR THE CIRCUITS, AND CHAPTER LEADERS MEETING

SECTION AND DIVISION LEADERS MEETING

Credit: Larry E. Highbaugh, Jr. for ThisisCleveland.com

10 Hours of CLE Credit (Including up to 2 Hours of Ethics) Pending!*

*For 60-minute CLE credit hour states.

The Dayton Chapter of the Federal Bar Association

requests the pleasure of your company

at the

Presidential Installation Banquet

during which the

Honorable Michael J. Newman

United States Magistrate Judge,
U.S. District Court for the
Southern District of Ohio,
will be installed as the National President
of the Federal Bar Association

Saturday, September 17, 2016

at the

Westin Cleveland Downtown

777 Saint Clair Ave, N.E.
Cleveland, Ohio 44114

6:00–7:00 p.m. Cocktail Reception
7:00–9:00 p.m. Installation Dinner
9:00 p.m. Post-Dinner Celebration

Black Tie Optional

Sponsored by LexisNexis

2016 FEDERAL BAR ASSOCIATION ANNUAL MEETING AND CONVENTION

SEPTEMBER 14–17 ★ WESTIN CLEVELAND DOWNTOWN ★ WWW.FEDBAR.ORG/FBACON16

Mail registration to: Federal Bar Association, Attn: 2016 Convention Registration, P.O. Box 79395, Baltimore, MD 21279-0395
or fax to: (571) 481-9090. Payment must accompany your registration; forms received without payment will not be processed.

REGISTRANT INFORMATION

Registrant Badge Name

Organization

Guest Badge Name

Street Address

City State

Zip Code Phone

Email

Dietary Restrictions

METHOD OF PAYMENT

❍ Check made payable to the FBA: #_____

❍ Visa ❍ MasterCard ❍ American Express

Cardholder's Name

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Credit Card number Exp. Date

Signature

EARLY BIRD DEADLINE IS AUGUST 5		Fee	Qty	Total
FULL CONVENTION REGISTRATION *(Includes all CLE Session and Social Events)*				
Sustaining Member	Early Bird	$630		
	Regular	$675		
Member	Early Bird	$660		
	Regular	$710		
Nonmember	-	$850		
CLE ONLY REGISTRATION				
THU+FRI Sustaining Member	Early Bird	$440		
	Regular	$485		
THU+FRI Member	Early Bird	$460		
	Regular	$510		
THU+FRI Nonmember	-	$535		
THU ONLY Sustaining Member	Early Bird	$295		
	Regular	$345		
THU ONLY Early Bird Regular Member	Early Bird	$310		
	Regular	$360		
THU ONLY Nonmember	-	$385		
FRI ONLY Sustaining Member	Early Bird	$200		
	Regular	$245		
FRI ONLY Member	Early Bird	$210		
	Regular	$260		
FRI ONLY Nonmember	-	$285		
SOCIAL EVENT REGISTRATION				
Complimentary Events *(Open to all Registered Attendees)*				
(WED) Special Argument Session		$0		$0
(WED) Sixth Circuit Swearing in Ceremony		$0		$0
(WED) Welcome Reception		$0		$0
(THU) Breakfast for Younger Lawyers		$0		$0
(THU) Chapter Reception		$0		$0
(FRI) Chapter Reception at Rock n' Roll Hall of Fame		$0		$0
Ticketed Events *(All ticked events are included in Full Convention Registrations)*				
Younger Lawyers Division Luncheon		$65		
Fellows of the Foundation Luncheon		$65		
FBA Awards Luncheon		$65		
Presidential Installation Banquet		$95		
Meal Choice: Filet ☐ *Salmon* ☐ *Veg* ☐				
Presidential Installation Banquet (Guest)**		$75		
Meal Choice: Filet ☐ *Salmon* ☐ *Veg* ☐				
		GRAND TOTAL		

***One (1) presidential installation banquet guest ticket permitted per one (1) regular ticket purchase.*

Cancellation Policy. All cancellations must be received in writing; we will not accept any cancellations over the phone. No cancellations will be accepted or refunds issued after Aug. 26, 2016. No-shows will be billed. **Continuing Legal Education Credit.** If you would like your attendance at the convention's CLE programs to be reported to a state agency with mandatory CLE requirements, please bring your state bar identification numbers with you to the convention. The appropriate paperwork will be available at the FBA registration desk. **Photography Release:** Registrants, instructors, exhibitors, and guests attending FBA meetings agree they may be photographed during the event. Photographs are the sole property of the FBA, which reserves the right to use attendees' names and likenesses in promotional materials without providing monetary compensation. **Email Communication Policy:** By registering for this event, you agree to receive email communication from the Federal Bar Association concerning event details, Continuing Legal Education certification, programming changes, and upcoming events.

Congratulations to

The Hon. Michael J. Newman

89th President of the Federal Bar Association

and Thompson Hine partner

Kip T. Bollin

President-Elect

The Hon. Michael J. Newman

Kip T. Bollin
Product Liability Litigation
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Hon. R. Guy Cole Jr.

Chief Judge, U.S. Court of Appeals for the Sixth Circuit

by Ben Cooper and Noah Litton

Ben Cooper is a trial and appellate lawyer with Cooper & Elliott, a plaintiff-side litigation boutique firm based in Columbus, Ohio. He clerked for Chief Judge Cole from 2013 to 2014.

Noah Litton also clerked for Chief Judge Cole from 2013 to 2014. After serving as a trial lawyer at Jones Day in Columbus, Litton returned to the federal courthouse on special assignment to clerk for the Hon. Algenon L. Marbley of the Southern District of Ohio.

"Part of me getting into the law is tied to Birmingham's tortured history," Chief Judge R. Guy Cole Jr. said over sandwiches from a Columbus coffee shop. "I rode segregated buses, sat in segregated sections of movie theaters, went to a segregated school. As a kid, you knew that's the way it was. You had to live within that system. But you knew it could be better."

We sat in the judge's chambers, reflecting on the journey that led him to serve as Chief Judge of the Sixth Circuit Court of Appeals. For his professional successes, Judge Cole is remarkably unassuming. He'd rather talk about your family or favorite TV show than himself, so it's no surprise that he doesn't dwell on his past. But the judge's childhood in Birmingham, Ala., in the 1950s and '60s offers a glimpse into his deep belief in public service and the importance of a just legal system, as well as insight into the leader he is today.

Dynamite Hill

In the 1940s, Center Street divided Birmingham. To the west lived only white people. That began to change with determined effort in the late 1940s. Judge Cole's family joined other black professionals in building homes on or very close to the formerly all-white side, and it was on Center Street that the future judge encountered a who's who of inspiring lawyers and community leaders.

There was Arthur Shores, Alabama's "drum major for justice," a prominent civil rights lawyer who successfully argued before the U.S. Supreme Court to prevent the University of Alabama from denying admission based solely on race. Oscar Adams Jr., the first black Alabama Supreme Court justice. Angela Davis, who would become a well-known civil rights activist and leader. U.W. Clemon, who would later serve as a federal district court judge for 30 years. And, of course, Martin Luther King Jr., who regularly stayed with the family of Judge Cole's best friend to avoid detection by the Ku Klux Klan.

It was hard in this setting, surrounded by smart and passionate people, not to appreciate the law's power and potential to achieve justice. Young Guy Cole was no exception.

Center Street, however, was a dangerous place for black residents and civil rights activists. Blessed by Birmingham's Commissioner of Public Safety Bull Connor and the local police, the Ku Klux Klan burned, shot into, and bombed the homes of many black families. Houses in the area were built to limit damage from bullets or blasts, but even then the walls of Judge Cole's house developed cracks caused by nearby explosions. The bombings happened so frequently that Center Street became known as Dynamite Hill.

"I appreciate the sacrifice made by many to obtain civil rights guaranteed by the Constitution," the judge has written. He understands that sacrifice on a deeply personal level. The year after he and his family moved away from Birmingham, Cynthia Wesley and Carole Robertson, two of Judge Cole's friends, were killed in the 16th Street Baptist Church bombing.

New Haven, Tufts, and Yale

In search of a safer life and better educational opportunities for their three children, Judge Cole's parents moved the family to New Haven, Conn., when he was 11 years old. Judge Cole's mother, Sarah, had been shocked by Birmingham's systemic and entrenched segregation despite growing up in northwest Alabama.

Judge Cole appears with Ohio's senior Senator, John Glenn, and former bankruptcy court law clerk (and now-Judge), John Hoffman, shortly after his Senate confirmation hearing.

She was the driving force for the move.

The North, of course, was not without segregation, but it was subtler. New Haven had few integrated neighborhoods. Judge Cole's family was again one of the first black families in a predominantly white area. And though the schools were more integrated in New Haven than in Birmingham, many schools quietly but routinely placed black students from the South in grades below those of their peers. Sarah Cole, however, was determined to ensure that her children had the same opportunities as her neighbors' children.

"Education was a huge priority for my mother," Judge Cole said. Sarah Cole herself earned a master's degree and demanded the best of her kids, but she also made sure the public school system provided *its* best—fighting for Judge Cole's admission into an accelerated junior high school program, where he was the only black student. Judge Cole and his brothers took her lessons to heart, eventually earning advanced degrees in law, medicine, and dentistry—facts Mrs. Cole remains very proud of today.

By the time Judge Cole graduated high school, "everything was changing on college campuses," the judge explained. Martin Luther King Jr. and Bobby Kennedy had been assassinated. Protests over the Vietnam War were growing. The women's liberation movement was taking off. And predominantly white schools like Tufts University began opening their doors to diverse applicants in record numbers. Judge Cole enrolled there in 1968. In his first year on campus, Tufts admitted 49 black students—the largest number in school history at the time.

The classroom experience was transforming, too. Course curriculums expanded to include classes on political, social, environmental, and economic change. "A dominant theme of classroom discussion was how to be the best instrument for change," Judge Cole recalled.

It's a theme that has resonated throughout his professional life. Chief Judge Cole has served on the boards or leadership committees of the Buckeye Boys Ranch, the Columbus Children's Hospital, the March of Dimes, the YMCA, the Columbus Area International Program, I KNOW I CAN (a college-bound program for Columbus City Schools), the Neighborhood House, the University Club, the Worthington Schools Education Foundation, and as the vice chair of The Arthur G. James Cancer Hospital Board at The Ohio State University. Particularly in the areas of health, education, and youth service, the judge continues to help the community progress—and all with his characteristic modesty.

The law has always marked one path for those concerned with change and motivated by a broad sense of purpose, and Chief Judge Cole felt drawn to it. He began at Yale Law School in 1972, treasuring his time there, where he had the chance to think deeply about diverse aspects of the legal system and put his studies to use working for the NAACP's research arm.

During his second summer, he took a job at a leading law firm in Columbus, Ohio. His friends at Yale, many of whom considered Chicago to be a backwater, didn't understand the decision. But Chief Judge Cole knew he could make a greater impact in Columbus than he could in places like New York or Philadelphia.

"Columbus was growing, and I thought I could grow with it," the judge remarked. "And George Corey," who recruited him to Vorys, Sater, Seymour and Pease LLP, "was a great cheerleader for Columbus." (Past law clerks now say the same of Judge Cole.) Despite not knowing a soul in the city and eating "the worst fish I've ever had" during his first visit, Judge Cole felt a bond with Columbus. In 1975, as his parents had done years before, Judge Cole moved to a new city rich with opportunity and the potential for change.

Columbus

Chief Judge Cole enjoyed his days as an associate at Vorys, focusing on corporate and SEC compliance work. Still, he felt a pull to public service. He got involved in community boards and philanthropic organizations. But soon, even that wasn't enough. After nearly four years in Columbus, Judge Cole uprooted himself once more to join the U.S. Department of Justice as a commercial litigator—to him, an ideal blend of trial work and public-service law.

Two years later, Vorys made a hard sell for Judge Cole to return to Columbus to join its partnership ranks. Vorys valued his unique combination of corporate work and litigation experience and reasoned that he would be a true asset to the leadership of the firm. "Leaving DOJ was the toughest professional decision of my career," the judge said. "I loved my time there. But ultimately it's a decision I never regretted." Relatively soon after returning, he became a partner—the firm's first black partner—and continued building his practice and making his mark on the Columbus community.

The Art of Judging (Part I)

"My brothers and I often say it was my dad's qualities

that had some of the biggest impact on us," Chief Judge Cole observed. His father, Ransey Guy Cole Sr., grew up in Birmingham, graduated from medical school at age 21, and kept a successful family medicine practice until he passed away in 1995. "Quiet, focused, modest, likeable, dedicated to his patients. The way he interacted with people. We tried to emulate that."

People who meet Chief Judge Cole find the same qualities in him. He's good-natured and unpretentious; conversation is easy. He's dedicated to quality work. He's others-oriented. And after just a short time with him, you realize he has a strong moral compass and a true sense of obligation to the community. These traits, which he gleaned from his father, helped create meaningful and lasting professional opportunities for the judge.

One of those opportunities came in 1986, when, again feeling the pull of public service, Chief Judge Cole applied for, and was appointed to, a seat on the U.S. Bankruptcy Court for the Southern District of Ohio. The timing proved ideal. Across the country, bankruptcy judges were coming to terms with the newly enacted Bankruptcy Reform Act, issuing opinions of first impression on a regular basis. Judge Cole dove into the work with the help of John Hoffman, his first law clerk, who himself is now a bankruptcy judge. Judge Cole enjoyed putting flesh on the bones of the new Bankruptcy Code, and he made a name for himself in bankruptcy circles (and beyond) for authoring leading opinions on several complex areas of the law.

Still, to Judge Cole, the individual litigants mattered most. Judge Hoffman echoed the sentiment when recalling his time clerking for Judge Cole: "The challenge for any bankruptcy judge is handling that volume of work without ever losing sight of the fact that each case you're dealing with involves a real person or business that may be profoundly impacted by your decision." Judge Cole, he noted "never lost sight of this." Indeed, he was "deeply concerned that everyone who came into his courtroom left with the conviction that he had carefully considered their arguments, that he had given them a full opportunity to be heard, and that he had treated them fairly."

It was on the bankruptcy bench that Judge Cole first realized how much he loved the "art of judging." He explained that while "a lot of my colleagues from law school or the firm might not enjoy giving up their role as advocates or 'players' in the game, for me, serving as a 'referee' proved far more enjoyable." In keeping with his father's influence, however, he never took the work, or himself, too seriously: "Of course, most lawyers who practice before you will tell you that you are the wisest, most able judge they have ever practiced before. You know, for the most part, that is a bunch of baloney."

A Call to Service

After six years on the bankruptcy bench, and with another stint as a bankruptcy partner at Vorys underway, the judge felt he had his life in order. Life had other plans. On a spring day in 1995, Judge Cole received an unexpected call from Nathaniel Jones, a judge on the Sixth Circuit who was thinking of taking senior status. Judge Cole's name "kept coming up" from Sen. John Glenn and others, and Judge Jones wanted to know if Judge Cole had any interest in replacing him on the court.

Top: In addition to his duties on the court, Judge Cole gives back to the community by teaching classes at The Ohio State University Moritz College of Law. Here he is leading an advanced seminar on habeas corpus law and the death penalty. Bottom: Judge Cole keeps a tight-knit 'clerk family,' and routinely hosts reunions, like this one, for his former law clerks and their families.

It's worth noting that Judge Cole is the antithesis of a self-promoter, but his easygoing personality and reputation for solid legal work had a way of attracting opportunities like this.

After leaving and rejoining Vorys on two separate occasions, Judge Cole felt he "couldn't leave" so soon after returning. By then, he noted, "they already had taken me back twice, and I was actively building my bankruptcy practice." But life, and particularly the call to public service, has a funny way of refusing to take "no" for an answer. After several months of encouragement—including a "no notice" visit from Judge Jones and then-Chief Judge Gilbert Merritt—Judge Cole relented and agreed to be considered for the position.

President Clinton nominated him to the Sixth Circuit on June 29, 1995, and, in stark contrast to today's highly politicized confirmation battles, he was confirmed by unanimous voice vote on Dec. 22, 1995. Judge Cole took the bench several weeks after his confirmation, driving

to Cincinnati through the first of several near blizzards to take the oath of office.

The Art of Judging (Part II)

You might think a judge's first days on the Court of Appeals would be glamorous. You'd be wrong. Chief Judge Cole recalls that when he first moved into his chambers, he and his first law clerk, John Haseley, stared blankly at each other over nothing more than "a desk and a half-dozen banker's boxes of appellate briefs." Neither of them knew quite what to do. Over time, however, and with the help of a second law clerk, Michelle Warner-Wallace, they learned. They even acquired some office furniture before too long. Chief Judge Cole explained that nothing compares to getting up to speed as an appellate judge. Learning the criminal docket—which was all new to him—was particularly challenging and rewarding work.

The judge credits becoming chief as his "crowning professional achievement"—not for its notoriety, but because it lets him serve an institution he cares about deeply. It was a milestone for the court, too: Judge Cole is the first black chief judge in the Sixth Circuit's nearly 150-year history.

Chief Judge Cole often describes his tenure on the Sixth Circuit as a set of three loose chapters. He spent the first chapter learning the job, putting strong hiring practices into place, and focusing almost exclusively on the cases and the hard work of opinion writing. The second chapter built on the first but included more time establishing relationships on the court (and beyond), including focusing on court administration and serving on court-wide and national legal committees, serving as an adjunct lecturer of law at The Ohio State University Moritz College of Law, and speaking around the country at bankruptcy and appellate seminars and symposiums. The third chapter, in which he only recently embarked, is his service as chief judge.

"Serving as chief judge is a real honor," he noted, "but more importantly, it's a tremendous responsibility." More than anything, Chief Judge Cole wants the judges on the court to work together professionally and collegially. "It's important to me that everyone have respect for one another. I also want to ensure that the other 22 judges feel empowered to live up to their fullest potential."

The Sixth Circuit covers a diverse cross-section of America—two northern states (Michigan and Ohio) and two southern (Kentucky and Tennessee)—with a broad mix of people, geography, industry, and customs. Its bench reflects this diversity, as do the cases the court hears. Because of this diversity, defined in its truest and broadest sense, the court sometimes issues sharply worded and sharply divided opinions. But Chief Judge Cole cautions court-watchers not to read too much into any perceived divisions. "At the end of the day, we're all trying to do our best to get it right and to root out any differences we may have in the law."

To encourage that comity and cooperation, Judge Cole met individually with each of his colleagues shortly after assuming the role of chief, to sound out the temperature of the court and to see what, if anything, he could do to improve it as an institution. Those one-on-one meetings left him with a greater appreciation for the court and its chief stakeholders, and the meetings emphasized how much his new role requires continued patience, listening, and understanding. Judge Cole's centralized location in Columbus allows him to meet frequently with court staff in Cincinnati, as well as with the other judges—including district court, bankruptcy, and magistrate judges—who live in nearly every corner of the Sixth Circuit. "We have to understand each other not just as judges, but as people," he stressed, mentioning, among other areas of common ground, things as simple as "doting over our grandchildren" or sharing similar interests in sports teams.

"I am learning that the best thing for facilitating good relationships and respect among the judges on the court is simply getting together in person." It's a key point, and one our hyper-connected society can overlook. "If we've all had dinner together the night before, the *en banc* the next day just works better," the judge explained.

The judge credits becoming chief as his "crowning professional achievement"—not for its notoriety, but because it lets him serve an institution he cares about deeply. It was a milestone for the court, too: Judge Cole is the first black chief judge in the Sixth Circuit's nearly 150-year history. Hosting the court's biennial judicial conference last year in Detroit marked another highlight in his journey, and he looks forward to future events that will showcase other cities from around the circuit and bring people together. Because the third chapter in Judge Cole's judicial career is still in its early pages, we'll leave the discussion there for now. But looking ahead, the judge likened the position of chief to an old adage about owning a home or boat: "The happiest two days of your life," he noted wryly, "are when you buy it and sell it."

Family and Community

Underlying Judge Cole's professional successes is a firm anchor in family and community. He and his wife Kathie, a Columbus native with a successful career of her own, made that conscious choice early on. "She and I work as a partnership," the judge said. "We've had the same commitment to our kids from day one. And there's no way I could have had the successes I've had without her."

When Judge Cole first joined the Sixth Circuit, the court had a demanding caseload and sitting schedule. The judge balanced that workload against his family responsibilities—including returning to Columbus for nearly every school play, sporting event, and extracurricular activity for his three children, who were 10, 8, and 5 at the time.

"Back then," he recalled, "I did what only a young judge could do—I made a lot of late-night drives back

and forth between Columbus and Cincinnati." Family always came first, just as it had to his own parents. Still, Judge Cole admitted to sneaking the occasional peek at bench memos and briefs in between wrestling matches, hockey games, and tennis matches for his kids. At one point, Judge Cole and Kathie even considered moving to Cincinnati to make things easier on the family, but their love of Columbus proved too strong: "We had lived in Columbus since 1975, and by then, my wife and I felt we were part of the fabric of the community."

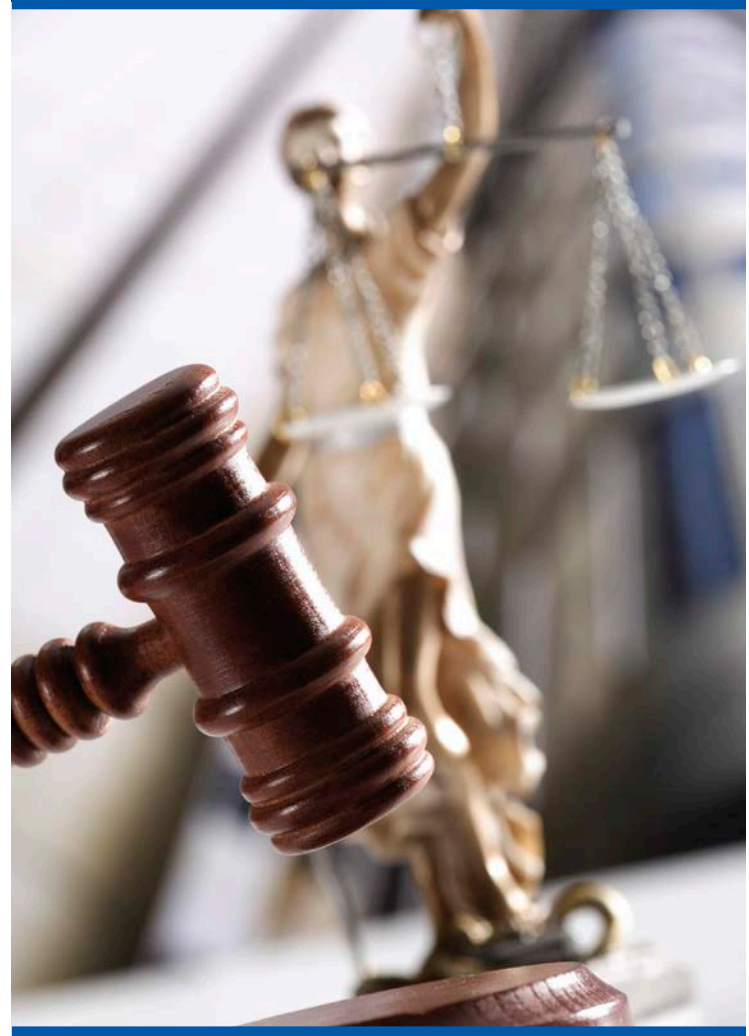
Beyond his work on the court and in the community, Judge Cole takes great joy in seeing his former law clerks succeed in their own rights. Dozens of former clerks have gone on to serve as assistant U.S. attorneys, assistant public defenders, law professors, public interest lawyers, and partners and associates at prestigious law firms. He has even formed a growing "judging-tree" of former law clerks: Judge John Hoffman of the U.S. Bankruptcy Court for the Southern District of Ohio; Magistrate Judge Kim Jolson of the U.S. District Court for the Southern District of Ohio; and Judge Trevor Jefferson of the U.S. Patent and Trademark Office. The judge's influence has taken root in these new branches, too. As Judge Hoffman observed, "The reason that my clerkship inspired me to pursue a career in public service is that Judge Cole provided me with a shining example of how a committed and hardworking judge can make a difference in the lives of the people who come before a federal court."

"I'm incredibly proud of the excellence of my law clerks and their diversity in every respect," Chief Judge Cole reflects. More than anything, though, the judge simply enjoys seeing his former clerks find love, happiness, and their own path in life. "I love my three Cole kids," he remarked, "but I also love my 80-plus clerk-children, too."

Looking Forward, Looking Back

At a recent celebration to mark his 20th anniversary on the bench, family, friends, former coworkers, and past law clerks feted Chief Judge Cole the only way they knew how: with a little food, a little drink, a little laughter, and a lot of fondness for the man from Dynamite Hill. That evening, we saw his portrait in full. There were traces of his 88-year-old mother, who was in attendance—the pride and satisfaction for what her son achieved. There were traces of his father, long-since departed—the quiet focus and modesty of an affable family doctor who dedicated everything to his patients. Most of all, there was the lasting image of Chief Judge Cole himself—a strong sense of public service, humility, and sacrifice. ⊙

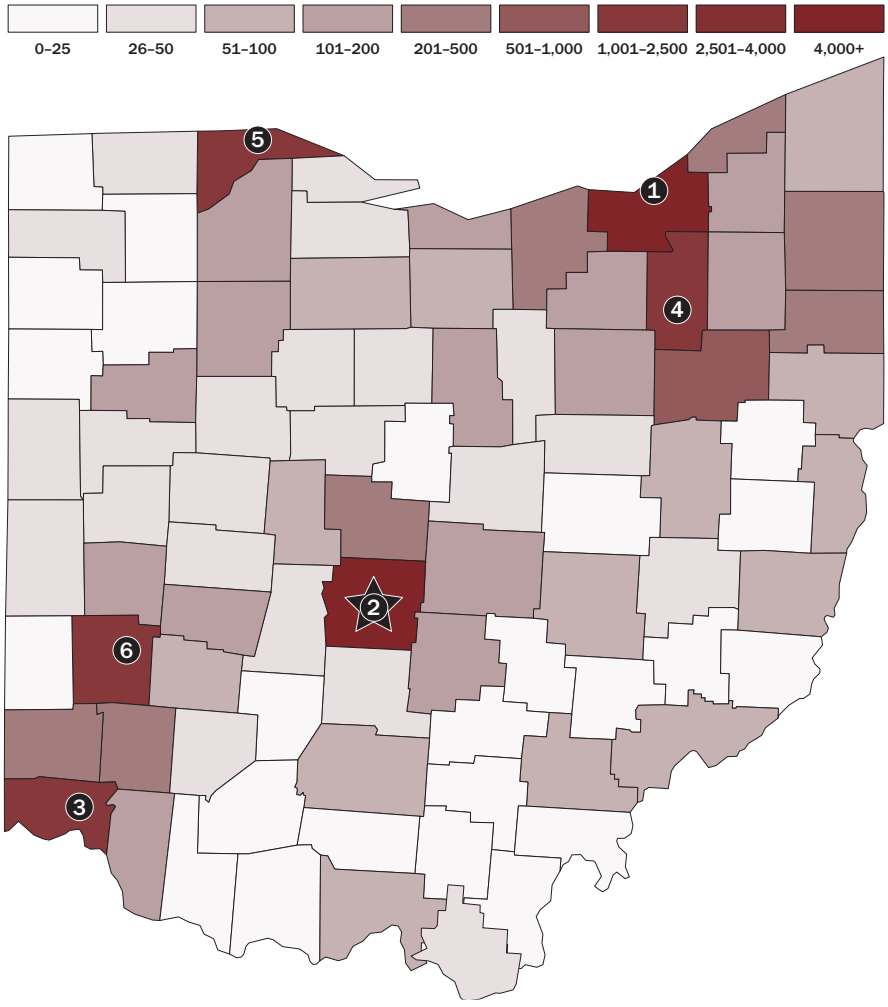
Judicial Profile Writers Wanted



The Federal Lawyer is looking to recruit current law clerks, former law clerks, and other attorneys who would be interested in writing a judicial profile of a federal judicial officer in your jurisdiction. A judicial profile is approximately 1,500–2,000 words and is usually accompanied by a formal portrait and, when possible, personal photographs of the judge. Judicial profiles do not follow a standard formula, but each profile usually addresses personal topics such as the judge's reasons for becoming a lawyer, his/her commitment to justice, how he/she has mentored lawyers and law clerks, etc. If you are interested in writing a judicial profile, we would like to hear from you. Please send an e-mail to Sarah Perlman, managing editor, at sperlman@fedbar.org.

Ohio Attorneys By the Numbers

Total Number of Ohio Attorneys by County



53% counties with fewer than 25 attorneys

Ohio attorneys living within six counties **70%**

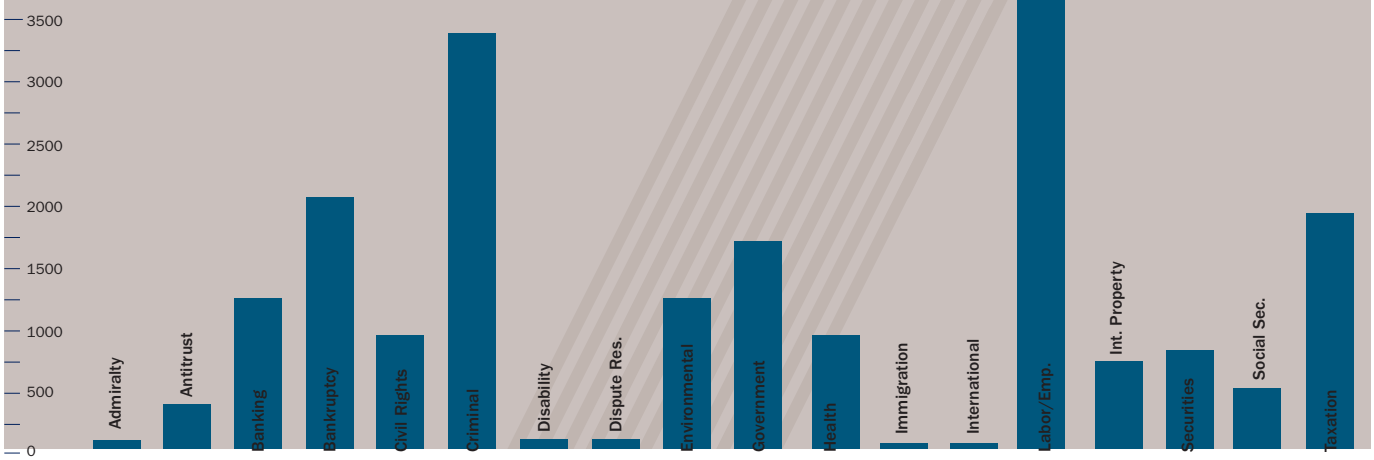
9 law schools in the state of Ohio

Ohio Counties with the Most Attorneys

6. Montgomery (Dayton) • 1,186
5. Lucas (Toledo) • 1,218
4. Summit (Akron) • 1,265
3. Hamilton (Cincinnati) • 2,400
2. Franklin (Columbus) • 4,201
1. Cuyahoga (Cleveland) • 4,843

All statistics this page courtesy of the Ohio State Bar Association, 2016.

Number of Ohio Attorneys Who Practice in Areas Related to Federal Law



Ohio Chapters of the FBA By Year Chartered

Federal Bar Association

- **1945** — Northern District of Ohio Chapter
- **1951** — Dayton Chapter
- **1957** — John W. Peck Cincinnati-Northern Kentucky Chapter
- **1960** — Columbus Chapter

5% of **total** FBA national **members** are in Ohio chapters

9% of FBA national **law student associates** are in Ohio chapters

5% of FBA national **honorary members** are in Ohio chapters

Law Schools in Ohio

1. Capital University Law School (Columbus)
2. Case Western Reserve University School of Law (Cleveland)
3. Cleveland State University Cleveland–Marshall College of Law (Cleveland)
4. Ohio Northern University Pettit College of Law (Ada)
5. Ohio State University Moritz College of Law (Columbus)
6. University of Akron School of Law (Akron)
7. University of Cincinnati College of Law (Cincinnati)
8. University of Dayton School of Law (Dayton)
9. University of Toledo College of Law (Toledo)

Judge Newman, his wife Rachel, and triplets Anna, Brigid and Clare in 2011 when he was sworn in as a United States Magistrate Judge.

Hon. Michael J. Newman

U.S. Magistrate Judge for the Southern District of Ohio

A Federal Judge Dedicated to Fairness and Justice, His Family, the FBA, and the Community

JADE K. SMARDA

All of us who practice in the U.S. District Court for the Southern District of Ohio know the Hon. Michael J. Newman as an emminently fair and reasonable judge who is smart, cares deeply about his cases and his docket, and makes sound rulings. When asked to describe his judicial philosophy, Judge Newman—who will be sworn in as the national president of the FBA on Sept. 17—explains his views on a judge's role in the courtroom with haltingly simple wisdom: "Be fair. Let lawyers speak. Follow the law. Strive every day to use good judgment and common sense." To Judge Newman, though, a good judge is one who is also always mindful that there is a world outside of the courtroom:

Triplets Brigid, Clare, and Anna Newman—now age nine.

> Realize that, as a federal judge, your decisions impact real people's lives, and you must be cognizant of that fact. Also recognize that, out of the courtroom, you are at all times a representative of the federal courts and the important, stabilizing role they play in our society. Know that, as a judge, you have an obligation to give back—via volunteer work, dedication to the work of the bar association, and mentoring of those that follow. Finally, be inclusive in everything you do, sensitive to diversity concerns, and always mindful of the less fortunate.

As shown by Judge Newman's record of service, including more than 20 years of service to the FBA, the above is more than a judicial philosophy. It is a lifestyle.

Judge Newman's contributions to the FBA alone speak volumes about his long-standing dedication to service. In fact, when Hon. Susan Dlott, then the chief judge of the U.S. District Court for the Southern District of Ohio, spoke at Judge Newman's investiture in 2011, she quipped that, "at times, it seems like there are at least five [Michael Newmans] because [he does] so much for the federal bar, for the practice, and for the court."

Prior to becoming national FBA president, Judge Newman, while in private practice at the Cincinnati office of Dinsmore & Shohl LLP, served as president of the Cincinnati/Northern Kentucky Chapter from 2004 to 2005. After taking the federal bench in Dayton in 2011, Judge Newman and his family relocated to Cincinnati's northern neighbor, but he stayed as active in the FBA as ever and served as president of the Dayton Chapter from 2013 to 2014. Additionally, Judge Newman served two terms as a Sixth Circuit vice president, as FBA treasurer, and on the national board of directors. He was appointed, by presidents DeSousa and Gelpi, to chair the FBA's task force on nominations and elections reform for two successive years. For more than 10 years, Judge Newman served on the editorial board of *The Federal Lawyer* magazine, contributing while in private practice to a monthly labor and employment law column and also as judicial profiles editor of the magazine. Judge Newman's other FBA activities include service on the Chapter Activity Fund Committee; co-chair of the Conference Leadership Training & Agenda Committee; and co-chair of the Professional Ethics Committee.

The value of Judge Newman's contributions to the FBA can be objectively measured through the tangible results he has achieved. During his tenure as chapter president, Dayton was named Chapter of the Year. Judge Newman also co-authored *The Bench-Bar Handbook for the Southern District of Ohio,* published by the Cincinnati/Northern Kentucky Chapter, which won the FBA's Shaw Award for public service. Judge Newman also chaired the FBA's Magistrate Judge Task Force, which was responsible for the special issue of *The Federal Lawyer* devoted to U.S. magistrate judges and the FBA's white paper on the history and role of magistrate judges. He wrote the introductions to both and was recognized thereafter by the Federal Magistrate Judges Association for "valuable and dedicated service to all magistrate judges." In 2014, Judge Newman chaired a national essay contest sponsored by the FBA and the Federal Judges Association.

Needless to say, based on that record, Judge Newman gets things done. He is planning on two significant initiatives as national president: (1) to expand upon the FBA's existing community service efforts by creating a national civics program in conjunction with FBA chapters around the country, and working with the Administrative Office (AO) of the U.S. Courts; and (2) to take the SOLACE program, which helps those in the legal community with dire needs, to a national audience. Regarding the civics initiative, Judge Newman credits Seventh Circuit Vice President Sheri Mecklenburg for her leadership in this area, and he looks forward to working with her along with AO Director Jim Duff and many others. With respect to SOLACE, a program created by U.S. District Judge Jay Zainey in New Orleans, Judge Newman was asked by Judge Zainey to help make this important volunteer effort nationwide in scope. In addition to these two efforts, Judge Newman also plans to create a task force to review ways in which the FBA can assist with access-to-justice concerns in the federal courts.

With a reputation for bringing energy to all new projects, Judge Newman's national initiatives are in good hands. According to Jeff Cox of the Dayton office of Faruki Ireland & Cox P.L.L., who is also

the immediate past-president of the FBA Dayton Chapter, the Dayton Chapter is thriving thanks in no small part to Judge Newman:

> The lifeblood of any professional organization is member engagement, and no one is more engaged and committed to the Federal Bar Association than Judge Michael Newman. I have had the good fortune to work with Judge Newman on FBA projects and we co-moderate Dayton's Bench Bar Media Forum, one of many organizations that benefit from Mike's leadership. Be it in his role as a national officer, a chapter leader, or a dedicated volunteer, Judge Newman is committed to, and passionate about, our profession and the practice of law in our federal courts; he is creative and thoughtful, full of ideas and energy; and no one is a stranger when they are around Mike.

With that kind of dedication and attitude, it is not surprising that Judge Newman has been honored by the FBA on three occasions: in 2007, he was given an Outstanding Service and Recognition Award for leadership within the Sixth Circuit and nationwide; in 2010, he was awarded the Elaine R. "Boots" Fisher National Public Service Award "in recognition of exemplary community, public, and charitable service;" and, in 2014, he received a President's Award for "extraordinary service, commitment, and guidance."

Through the FBA, Judge Newman has been able to work on projects that are near and dear to his heart, such as initiatives promoting diversity and inclusion in the legal profession. In 2015, he co-chaired the FBA's Diversity Task Force charged with drafting the FBA's diversity statement. Judge Newman is also committed to diversity initiatives within his local bar associations. For example, Judge Newman served as secretary of the Roundtable, a joint effort by the Cincinnati Bar Association and the Black Lawyer's Association of Cincinnati. He was honored by the Summer Work Experience in Law, a program that gives minority high school and college students an opportunity to intern with law firms and judges, and he serves on the statewide board of directors of the Law and Leadership Institute, a program that encourages minority high school students to attend college and law school.

While dedicated to initiatives that promote diversity and inclusion in the bar, Judge Newman also recognizes that the longevity of any initiative or organization is dependent upon the willingness of its existing leadership to mentor. Having served as an adjunct professor at the University of Cincinnati College of Law, the University of Dayton School of Law, and the Salmon P. Chase College of Law at Northern Kentucky University, Judge Newman is more than a professor to young and prospective lawyers—he is a true teacher. When describing his dedication to mentorship at Judge Newman's investiture, George Vincent, Dinsmore's managing partner, said that "associates sought him out—[they] loved spending time with him." To this day, it is not unusual for Judge Newman to meet with law students and young lawyers to discuss their goals and professional development. According to former law clerk Liz Favret, now with the San Diego office of Duane Morris LLP, Judge Newman's mentorship was key to her development as a lawyer: "Judge Newman has been my mentor since the first day of my clerkship. He has never hesitated to carve time out of his busy schedule to advise and guide me." Ultimately, Judge Newman was always there to help her navigate significant transitions in her life, including a transition that took her from Ohio to California three years ago with her husband. "Judge Newman was traveling to San Diego for the FBA Annual Convention," she said. "As I did not know anyone in San Diego, he graciously offered to connect me with any San Diego attorneys whom he met during this trip." Favret expected to receive perhaps a few business cards, at most, but was overwhelmed when she received much, much more:

> Judge Newman returned with a long, detailed list of contacts for me, including a U.S. district judge and several prominent local attorneys. I later learned that he had devoted a significant part of his trip establishing connections on my behalf. Every single one of those contacts was eager to meet with me and guide me in my transition to San Diego. Because of Judge Newman, I moved to California with a better network in the legal community than many local law school graduates. Not surprisingly, my first job in San Diego was a direct result of those contacts. It is impossible to fully express my gratitude to Judge Newman for all of his kindness over the past five years. I am very grateful that Judge Newman continues to be a mentor to this day.

Mentorship, of course, takes time, but Judge Newman knows that investment in individuals pays dividends to the bar and to the greater community. He learned this lesson early in life, from his parents. His father, Jay, grew up poor during the Great Depression and had assumed that higher education was out of reach until a teacher at school pulled him aside and told him that he should consider going to college. Through that teacher, Jay learned about a program at the University of Cincinnati that allowed students to work their way through school. Ultimately, Jay's engineering degree made it possible, after his World War II service in the Navy, to attend law school on the GI Bill. Jay graduated from Harvard Law School with honors in 1951. Judge Newman often reflects on the much different trajectory his father's life would have taken, absent mentorship: "Had a teacher not made that comment to my father, and taken an interest in him as an individual, my father's entire life would have been different. That's a simple and practical example of the importance of mentoring and caring for other people."

In addition to learning the value of mentorship from his family, Judge Newman also learned the value of pursuing academic and professional endeavors that are personally meaningful. A graduate of New York University's Film School, Judge Newman made numerous short films while in college and co-hosted a popular radio program on the campus radio station—which was broadcast all over New York City—while completing his studies. The films and radio show were successful and helped him secure a writing agent at the ICM talent agency in Los Angeles. However, despite being drawn to creative endeavors, Judge Newman was also passionate about social justice and fairness. He found those interests—creativity, justice, fairness—all intersected in the law. Rather than pursue a career writing for the movies, Judge Newman followed in his father's footsteps and enrolled in law school.

After graduating with honors from the Washington College of Law at American University in 1989, Judge Newman accepted a clerkship with Magistrate Judge Jack Sherman Jr. of the U.S. District Court for the Southern District of Ohio. It was Judge Sherman, along with former FBA national president Tom Schuck, who introduced Judge Newman to the FBA, which Judge Newman credits as being the organization that has most influenced his career. Judge Sherman himself was also a major influence on Judge Newman:

> He kindly took me under his wing and trained me. It was an honor to work with him and for him. I was very moved by his dedication to his civil and criminal docket and the care with which he made every decision—in hundreds of cases, for example, he was never appealed. He told me he hoped I would be a judge someday, and that meant a great deal to me. We share the same passion for justice and for getting a decision right the first time.

After working side-by-side with Judge Sherman for years, Judge Newman was given the opportunity to clerk for Judge Nathaniel R. Jones of the Sixth Circuit Court of Appeals. Judge Newman considers both Judge Sherman and Judge Jones two of his greatest mentors, teaching him valuable lessons that he would carry into private practice and later to the bench. In fact, when Judge Newman entered private practice at Dinsmore in 2003, he became a partner within three years—a feat matched by few in the 100-year history of the firm. While at Dinsmore, he was named both an "Ohio Super Lawyer" and one of the "Best Lawyers in America in Labor & Employment Law." He also created and ran a *pro bono* program for firm attorneys who handled habeas corpus, § 1983, and criminal cases in the Sixth Circuit Court of Appeals. According to George Vincent, Judge Newman "brought a work ethic and intensity to every matter and project, no matter how large or small, that was unparalleled." It was no surprise to Vincent when Judge Newman joined the federal bench: "His passion for justice, inclusion, and results made him a difference maker at Dinsmore and in our community. Those attributes made him a natural to serve in the judiciary."

Judge Newman's colleagues on the federal bench could not agree more. U.S. District Judge Thomas M. Rose says that, "to describe Judge Newman as 'tireless' is a gross understatement." According to Judge Rose, Judge Newman brings energy to every new challenge:

> Judge Michael Newman is an individual that does not know the meaning of the words 'tired,' 'hopeless,' or 'defeat.' During his tenure here at the Dayton seat of court, Judge Newman, whether it is a project for the FBA, an outreach program for the Dayton community, or a complex legal issue in a case before him, runs at it—not away from it. He does not shy from a challenge, no matter how difficult.

That he does not shy from difficult issues makes Judge Newman highly regarded by members of the federal bench and bar. For example, Charlie Faruki, the founding partner of the Dayton-based Faruki Ireland & Cox, which is known for its active practice in federal courts in Ohio and throughout the country, observes that "Judge Newman loves the law, likes lawyers, and appreciates good lawyering. He is analytical, thorough, and fair." Carter Stewart, who served as the U.S. attorney for the Southern District of Ohio during the bulk of the Obama administration, could not agree more: "Judge Newman is the ultimate jurist: extremely knowledgeable of the law [and] unflinchingly fair in how he treats everyone who appears in front of him."

Judge Newman's approach to community service is also highly regarded by members of the federal bench and bar. "Regardless of how busy he may be, he always has time for those in need, the legal community, the FBA, litigants and the citizens of the Miami Valley," observes Judge Rose, describing Judge Newman's volunteer efforts throughout Southwestern Ohio. For example, Judge Newman is actively involved with the Southern District of Ohio's Re-Entry Court, a program that aims to minimize barriers to effective reentry, and to promote reduction in recidivism. According to U.S. District Judge Walter H. Rice, Judge Newman's colleague in the Dayton federal courthouse, Judge Newman's role in Re-Entry Court is key: "Judge Newman is active in its preparation and execution. [H]e firmly believes that we have a responsibility to help people coming home from prison, who many would say have paid their debt to society." Judge Rice also lauds Judge Newman's efforts in establishing and presiding over the first Federal Veterans Court in the Southern District of Ohio:

> With the Dayton VA in our jurisdiction, we see a lot of veterans with addiction problems here. Many of the addiction problems, quite frankly, are caused by an attempt to self-medicate pain and mental illness as a result of service. Veterans Court is the same concept as Re-Entry Court, and is nonpunitive and devoted to misdemeanants. Judge Newman helps these veterans and tries to get them treatment.

As demonstrated by his involvement in these programs, Judge Newman believes that the judiciary should be accessible. This belief is further evidenced by his commitment to offering alternative dispute resolution (ADR) services to litigants in federal court. Indeed, Judge Newman has gained a reputation as a skilled mediator of cases filed in the Southern District of Ohio, having attended the Advanced Mediation Program at Harvard Law School and served as a neutral mediator and arbitrator for the American Arbitration Association while in private practice. Judge Newman takes great pride in helping litigants achieve results through ADR, recognizing that parties are frequently desperate for closure and are grateful when a neutral third-party can help get them there by agreement.

Ultimately, to use the words of Judge Rice, "Judge Newman is a superstar." He has worn a lot of hats in his day: law firm partner; judge; mediator; arbitrator; mentor; adjunct professor; bar leader; and, yes, legal superstar. However, his yet-to-be-mentioned but most important hat renders his long-standing commitment to the FBA and the legal community even more impressive: father of triplets. Judge Newman and his wife, Rachel, are the proud parents of three 9-year-old daughters now in the third grade—Anna, Brigid, and Clare (affectionately known as "A, B, and C"). So, when Judge Rose said that describing Judge Newman as tireless would be a "gross understatement," we know he was not kidding!

Despite all of his distinguished accomplishments, Judge Newman remains quite modest and humble. When asked about being national president of the FBA, he responds simply that he is honored to have been selected as FBA president and grateful for the opportunity to serve. ⊙

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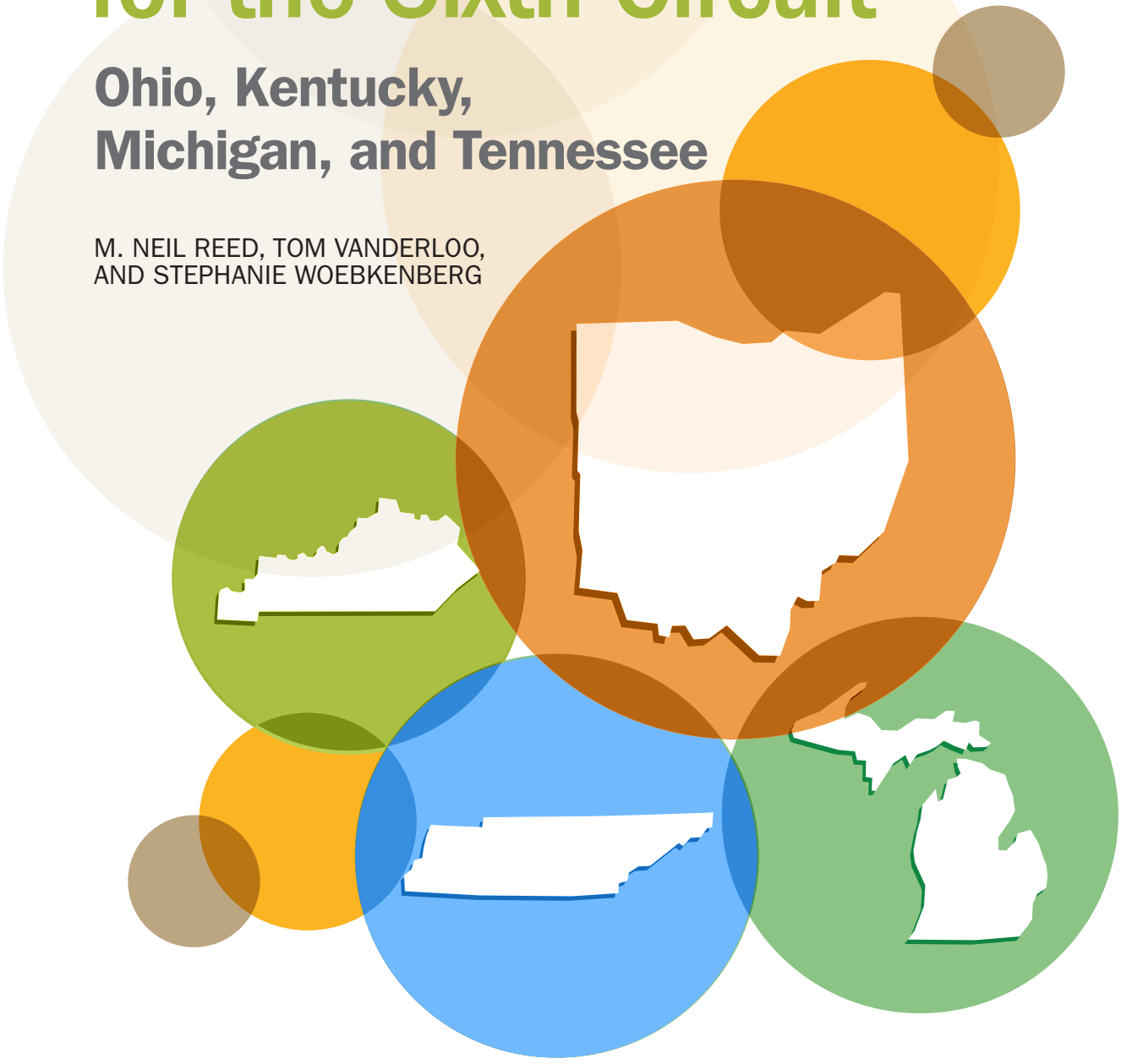
A History of the United States Court of Appeals for the Sixth Circuit

Ohio, Kentucky, Michigan, and Tennessee

M. NEIL REED, TOM VANDERLOO, AND STEPHANIE WOEBKENBERG



Supreme Court Justice Potter Stewart may have best explained the importance of the Sixth Circuit when he wrote, "The Sixth Federal Judicial Circuit is a cross section of the nation. Extending from the tip of Michigan's Upper Peninsula to the Mississippi border, it spans the heartland of our country. So it is that the United States Court of Appeals for the Sixth Circuit is not a regional court but in every sense a national one. Its workload reflects the pluralism and diversity of our national life."[1]

Congress first implemented the constitutional provision that "[t]he judicial power of the United States, shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish,"[2] with the Judiciary Act of 1789.[3] "Although subsequent legislation altered many of the 1789 Act's specific provisions," Russell Wheeler and Cynthia Harrison wrote in *Creating the Federal Judicial System*, "[t]he basic design established by the 1789 Act has endured: a supreme appellate court to interpret the federal Constitution and laws; a system of lower federal courts, separated geographically by state boundaries and exercising basically the same jurisdiction; and reliance on state courts to handle the bulk of adjudication in the nation."[4]

The Judiciary Act created 13 district courts that served mainly as courts for admiralty cases, forfeitures and penalties, petty federal crimes, and minor civil suits initiated by the United States. Each district was placed into one of three circuits. These circuit courts served as trial courts for most federal criminal cases, suits between citizens of different states, and major civil suits initiated by the United States. The circuit courts were also courts of appeal for some of the larger civil and admiralty cases in the district courts, but most of the appellate duties lay with the Supreme Court. Rather than creating separate judgeships, Congress stipulated that each circuit court panel would consist of the two Supreme Court justices assigned to the circuit and the local district court judge.

To lessen the burden of an ever-expanding backlog of cases, the Federalist-controlled Congress passed the Judiciary Act of 1801,[5] establishing six numbered judicial circuits and creating new circuit judgeships, thereby relieving the Supreme Court justices of circuit court responsibility. A single circuit judge, Hon. William McClung, and the district judges for Kentucky and Tennessee, Hon. Harry Innes and Hon. John McNairy, respectively, formed the first panel for the U.S. Circuit Court for the Sixth Circuit. The Democratic-Republican-controlled Congress again reorganized the federal court system with the Judiciary Act of 1802,[6] which preserved the six numbered circuits but abolished the separate judgeships, thereby returning circuit court responsibility to the Supreme Court justices.

As the nation grew and new states entered the union, Congress periodically realigned some of the circuits. The boundaries of the Sixth Circuit underwent some shifting changes before their final realignment after the Civil War. With the Judiciary Act of 1866,[7] Congress reorganized the states into nine circuits and established the geographical outline that has remained unchanged except for the inclusion of new states within existing circuits and the division of two circuits.[8] The Judiciary Act of 1869[9] created a judgeship for each of the nine circuits, thus lessening the demands of circuit riding among the Supreme Court justices as they were required to attend each circuit court within their assigned circuit only once every two years. Congress approved the appointment of circuit judges, who exercised the same authority as the justices in all matters related to the circuit courts.[10] Court could be held by "the justice of the Supreme Court allotted to the circuit, or by the circuit judge of the circuit, or by the district judge sitting alone, or by the justice of the Supreme Court and circuit judge sitting together, … or in the absence of either of them by the other, … and the district judge."[11] The Act authorized the circuit courts to sit simultaneously in different districts of the same circuit. In 1870, President Ulysses S. Grant appointed Halmor Hull Emmons to the office of circuit court judge for the Sixth Circuit.

As part of the continuing effort to ease the caseload burden on the Supreme Court while dealing with a dramatic increase in federal filings, Congress passed the Circuit Court of Appeals Act of 1891.[12] The "Evarts Act," as it was popularly known, established nine intermediate courts of appeals for the existing circuits, including the U.S. Circuit Court of Appeals for the Sixth Circuit, thus creating the first federal courts designed exclusively to hear cases on appeal from trial courts. The existing circuit judges and a newly authorized judge in each circuit sat on the courts of appeals. The circuit justice and district judges within the circuit were also authorized to sit on the three-judge panels.

The U.S. Circuit Court of Appeals for the Sixth Circuit, designated to sit in Cincinnati, reviewed federal district court and circuit court decisions from Kentucky, Michigan, Ohio, and Tennessee. Circuit Judge Howell Edmunds Jackson, previously appointed as circuit judge by President Grover Cleveland, was reassigned to the U.S. Circuit Court of Appeals for the Sixth Circuit by the "Evarts Act," thus becoming the first judge of the newly created court. The organizational session for the Court was held in Cincinnati on June 16, 1891.[13] In attendance were Circuit Justice Henry Billings Brown of Michigan, Circuit Judge Jackson, and District Judge George R. Sage of the Southern District of Ohio, sitting by designation. As its first order of business, the new Court adopted 34 rules of procedure. Walter S. Harsha of Detroit was appointed Clerk of the Court and Thomas Claiborne of Tennessee was appointed Marshal. On June 16,

1891, John W. Herron, the United States Attorney for the Southern District of Ohio and father-in-law of William Howard Taft of Cincinnati, became the first attorney admitted to practice before the Sixth Circuit Court of Appeals.[14]

As the caseload of the U.S. Circuit Court of Appeals for the Sixth Circuit expanded, so did its number of judges. On March 17, 1892, a second circuit judge, Taft, was appointed by President Benjamin Harrison; and in 1893, President Grover Cleveland appointed Horace H. Lurton to the Court. With President William McKinley's appointment of William R. Day in 1899, the U.S. Circuit Court of Appeals for the Sixth Circuit no longer had to wait for the Circuit's assigned Supreme Court justice to travel to Cincinnati, or call on district judges, in order to make up a full panel. As a result, the court was able to schedule its cases more efficiently.

The court continued with three judges for nearly three decades. But as federal criminal and civil case filings increased over time, additional judgeships were authorized by Congress. In 1928, in 1938, and again in 1940, new judgeships were added to the court, doubling the number of active judges assigned to the Sixth Circuit.[15] The court continued with six judges until the 1960s, when Congress added three more judgeships.[16] The rapid increase in federal criminal offenses led to Congress creating two judgeships in the 1970s[17] and four in the 1980s.[18] One additional judgeship, authorized by Congress in 1990, brought the circuit's authorized judgeships to the current total of 16.[19]

The Judiciary Act of 1948[20] changed the official name of the court to the United States Court of Appeals for the Sixth Circuit.[21] The act also created the position of chief judge for the courts of appeals. As the U.S. Code currently states, "The chief judge of the circuit shall be the circuit judge in regular active service who is senior in commission of those judges who are 64 years of age or under; have served for one year or more as a circuit judge; and have not served previously as chief judge."[22] Hon. Xenophon Hicks was the circuit's first chief judge, serving in the position from 1948 until he assumed senior status in 1952. Hon. Florence E. Allen, the first Article III female judge to serve on a U.S. Court of Appeals, was appointed chief judge of the Sixth Circuit in 1958, making her the first woman to assume this position. Judge Allen served as chief judge for four months before she took senior status. In 2014, Hon. R. Guy Cole Jr. became the 17th chief judge and first African-American chief judge of the Sixth Circuit.

Throughout its 125 years of existence, the U.S. Court of Appeals for the Sixth Circuit has been called upon to decide cases of great significance, and that tradition continues today. In recent years, the court's caseload has dealt with issues of national importance such as same-sex marriage, the Affordable Care Act, and the Clean Water Act, to name just a few. Justice Stewart's vision of the national influence of the Sixth Circuit has continued to the present and will presumably extend far into the future. ⊙

Sixth Circuit Notable Cases

United States v. Addyston Pipe & Steel Co.

Six cast-iron pipe manufacturers were charged with unlawfully restraining interstate commerce through entering into an agreement to artificially raise the price of pipe. Tennessee district court Judge Charles D. Clark dismissed the complaint, only to have the Sixth Circuit reverse the decision. In the court's opinion of Feb. 8, 1898,[1] Chief Judge William Howard Taft wrote that an agreement with the sole purpose to artificially set prices violated the Sherman Act, and the combination of pipe manufacturers was ordered dissolved. Taft's reasoning, which applied the common law of restraints to the Sherman Act, was later affirmed as modified by the Supreme Court. Credited with laying the foundation for the "trust busting" policies of the early 20th century, *Addyston Pipe* is considered one of the landmark decisions in America's antitrust jurisprudence.

Detroit Housing Commission v. Lewis

A class action was brought against the Detroit Housing Commission, claiming the agency's practices of maintaining separate white-only and black-only public housing projects, as well as maintaining separate lists of eligible white and black applicants for public housing, were unlawful discrimination on the basis of race and color in violation of the Constitution. The U.S. District Court for the Eastern District of Michigan ruled in favor of the class and issued a permanent injunction, finding that the agency's practices violated the Constitution and deprived plaintiffs of the equal protection of the laws as guaranteed by the 14th Amendment. The Detroit Housing Commission appealed. Judge Florence Allen authored the Sixth Circuit's Oct. 5, 1955, opinion[2] affirming the district court's judgment.

United States v. Hoffa

Jimmy Hoffa, president of the International Brotherhood of Teamsters, and three other defendants, filed an appeal of their conviction for jury tampering. In *U.S. v. Hoffa*,[3] decided July 29, 1965, the Sixth Circuit affirmed the lower court's decision, finding "no error which affected the substantial rights of the Appellants."[4] The U.S. Supreme Court subsequently upheld the conviction. Hoffa, who was found guilty of fraud in another case, ultimately spent four years in prison before being pardoned by President Richard M. Nixon in 1971. Hoffa disappeared in July 1975 and is believed to have been murdered. He was declared legally dead in 1982, although his body has never been found.

M. Neil Reed, Tom Vanderloo, and Stephanie Woebkenberg all work for the Sixth Circuit Court of Appeals Library. Reed is court historian; Vanderloo is a digital services librarian; and Woebkenberg is a reference librarian. (Pictured left to right: Tom Vanderloo, Neil Reed, Stephanie Woebkenberg)

Endnotes

[1]Potter Stewart, *The Sixth Circuit Review*, *1968-69: Preface*, 2 *U.* Tol. L. Rev. 49 (1970).

[2]U.S. Const. art. III, § 2 (1789), *available at* http://www.archives.gov/exhibits/charters/constitution_transcript.html (last visited May 11, 2016).

[3]Act of Sept. 24, 1789, 1 Stat. 73.

[4]Russell Wheeler & Cynthia Harrison, Creating the Federal Judicial Sys. (Federal Judicial Center, 3d ed. 2005), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/creat3ed.pdf/$file/creat3ed.pdf (last visited May 11, 2016).

[5]Act of Feb. 13, 1801, 2 Stat. 89.

[6]Act of Apr. 29, 1802, 2 Stat. 156.

[7]Act of July 23, 1866, 14 Stat. 209.

[8]"Reorganization of the Judicial Circuits: 'An Act to fix the Number of Judges of the Supreme Court of the United States, and to change certain Judicial Circuits,' July 23, 1866," *History of the Federal Judiciary*, Federal Judicial Center, *available at* http://www.fjc.gov/history/home.nsf/page/landmark_09.html (last visited May 11, 2016).

[9]Act of Apr. 10, 1869, 16 Stat. 44.

[10]*Id.*, § 2, 16 Stat. 44.

[11]"The Judiciary Act of 1869: 'An Act to amend the Judicial System of the United States,'" *History of the Federal Judiciary*, Federal Judicial Center, *available at* http://www.fjc.gov/history/home.nsf/page/landmark_10.html (last visited May 11, 2016).

[12]Act of Mar. 3, 1891, 26 Stat. 826.

[13]Journal of the U.S. Court of Appeals for the Sixth Circuit, vol. A, 1 (1891).

[14]*Id.* at 3.

[15]Act of May 8, 1928, 45 Stat. 492; Act of May 31, 1938, 52 Stat. 584; Act of May 24, 1940, 54 Stat. 219.

[16]Act of Mar. 18, 1966, 80 Stat.75; Act of June 18, 1968, 82 Stat. 184.

[17]Act of Oct. 20, 1978, 92 Stat. 1629.

[18]Act of July 10, 1984, 98 Stat. 333.

[19]Act of Dec. 1, 1990, 104 Stat. 5089.

[20]Act of June 25, 1948, 62 Stat. 871.

[21]28 U.S.C. § 43(a).

[22]28 U.S.C. § 45(a) (internal formatting omitted).

Thomas More Law Center v. Obama

Thomas More Law Center and four individual plaintiffs challenged the constitutionality of the Patient Protection and Affordable Care Act's (PPACA) minimum coverage provision. Citing Congress's authority under the Commerce Clause, the U.S. District Court for the Eastern District of Michigan upheld the constitutionality of the provision and denied the plaintiffs' motion for a preliminary injunction. On June 29, 2011, the Sixth Circuit affirmed the lower court's decision,[5] becoming the first appellate court to issue an opinion on PPACA. When the Supreme Court subsequently upheld the health care law, Chief Justice John Roberts largely followed the rationale outlined in Judge Jeffrey Sutton's concurring opinion.[6]

DeBoer v. Snyder

The consolidated case *DeBoer v. Snyder* challenged the constitutionality of same-sex marriage bans in Michigan and Kentucky, and same-sex marriage recognition bans in Ohio and Tennessee. With its decision of Nov. 6, 2014,[7] the Sixth Circuit became the first federal appeals court to declare such bans constitutional. The court's break from previously unanimous appellate rulings created a division among the circuits. In 2015, the U.S. Supreme Court agreed to hear the issue, granting *certiorari* in four cases originating in the Sixth Circuit, consolidating them as *Obergefell v. Hodges*. On June 26, 2015, the Supreme Court reversed the Sixth Circuit's decision, effectively making same-sex marriage legal nationwide. ⊙

Endnotes

[1]85 F. 271 (6th Cir. 1898) *aff'd as modified*, 175 U.S. 211, 20 S. Ct. 96, 44 L. Ed. 136 (1899).

[2]226 F.2d 180 (6th Cir. 1955).

[3]349 F.2d 20 (6th Cir. 1965) *aff'd*, 385 U.S. 293, 87 S. Ct. 408, 17 L. Ed. 2d 374 (1966).

[4]349 F.2d 20, 53.

[5]651 F.3d 529 (6th Cir. 2011) *abrogated by Nat'l Fed'n of Indep. Bus. v. Sebelius,* 132 S. Ct. 2566, 183 L. Ed. 2d 450 (2012).

[6]*Thomas More L. Ctr. v . Obama,* 651 F.3d 529 (6th Cir. 2011) (Sutton, J., concurring).

[7]772 F.3d 388 (6th Cir. 2014), *cert. granted sub nom., Obergefell v. Hodges,* 135 S. Ct. 1039, 190 L. Ed. 2d 908 (2015), and *cert. granted sub nom., Tanco v. Haslam,* 135 S. Ct. 1040, 190 L. Ed. 2d 908 (2015), and *cert. granted,* 135 S. Ct. 1040, 190 L. Ed. 2d 908 (2015), and *cert. granted sub nom., Bourke v. Beshear,* 135 S. Ct. 1041, 190 L. Ed. 2d 908 (2015), and *rev'd sub nom., Obergefell v. Hodges,* 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015).

Sixth Circuit Notable Judges

The Sixth Circuit has a long and storied past that includes many notable judges, as well as several important federal judiciary "firsts," including:

Hon. William Howard Taft

Appointed to the court by President Benjamin Harrison at the age of 34, Taft was the youngest judge ever appointed to a federal appeals court. Eight years later, Taft resigned his seat on the Sixth Circuit upon his appointment by President William McKinley to serve as president of the U.S. Philippine Commission and, later, as governor-general of the Philippines. In addition to his service to the federal judiciary, Taft served as solicitor general (1890-92), as secretary of war (1904-08), and as the 27th president of the United States (1909-13). He then served as professor of law at Yale until President Warren G. Harding appointed him chief justice of the United States in 1921. He is the only person to have served as both president and chief justice of the United States.

Hon. Florence E. Allen

In 1922, Florence E. Allen was elected justice of the Supreme Court of Ohio, the first woman elected to the highest court in any state. She became the first woman to serve on an Article III federal court when she was appointed to the Sixth Circuit by President Franklin D. Roosevelt in 1934. Judge Allen then became the first woman to serve as chief judge of the Sixth Circuit in 1958. She assumed senior status in 1959, continuing to serve the court until her death in 1966. At the time of Judge Allen's appointment, the federal courthouse did not have a private restroom for a female judge, and it took several weeks for Washington to grant special permission to convert a men's restroom for her use. Allen knew that none of the judges of the Sixth Circuit had favored her appointment to the court, but she gradually won them over with her conscientious work ethic, eventually leading a colleague to call one of her decisions "a damn fine opinion." Her male colleagues' acceptance never extended to lunch, however, as the other judges typically ate at the University Club of Cincinnati or some other establishment where women were not admitted.

Hon. Potter Stewart

Although a Cincinnati native, Potter Stewart was born in 1915 in Jackson, Mich., while his family was on vacation. After naval service during World War II, he practiced law in Cincinnati and was active in local politics until President Dwight D. Eisenhower appointed him to the U.S. Court of Appeals for the Sixth Circuit at the age of 39. In 1959, Eisenhower nominated Stewart to the U.S. Supreme Court, where he served for nearly 23 years, retiring in 1981. Justice Stewart famously used the phrase "I know it when I see it" in 1964 to describe his threshold test for obscenity in *Jacobellis v. Ohio*. He wrote, "[C]riminal laws in this area are constitutionally limited to hard core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description, and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that."[1]

Hon. Wade Hampton McCree Jr.

Wade McCree was born in 1920 in Des Moines, Iowa. After serving in the U.S. Army during World War II, McCree earned his law degree and practiced law in Detroit from 1948 to 1952. McCree became the first African-American to be appointed to the Circuit Court for Wayne County, Mich., and served on that court from 1954 to 1961, when he was appointed to the U.S. District Court for the Eastern District of Michigan by President John F. Kennedy.

In 1966, President Lyndon B. Johnson appointed McCree to the U.S. Court of Appeals for the Sixth Circuit, where he served as a Circuit Judge until his resignation in 1977 to assume the position of solicitor general of the United States under President Jimmy Carter. During his tenure, McCree argued 25 cases before the Supreme Court. After stepping down as solicitor general in 1981, McCree joined the University of Michigan Law School faculty. He died in 1987. McCree was the first African-American appointed to the federal bench in the Eastern District of Michigan and the first African-American appointed to the Sixth Circuit. He was the second African-American to serve as solicitor general of the United States.

Hon. Damon Jerome Keith

Judge Keith, a Detroit native, was appointed in 1967 to the U.S. District Court for the Eastern District of Michigan by President Lyndon B. Johnson, becoming the first African-American chief judge of that court in 1975. Two years later, President Jimmy Carter appointed Judge Keith to the U.S. Court of Appeals for the Sixth Circuit.

In 1985, Chief Justice Warren E. Burger appointed Judge Keith as chairman of the Bicentennial of the Constitution Committee for the Sixth Circuit. Then, in 1987, Judge Keith was appointed by Chief Justice William Rehnquist to serve as the national chairman of the Judicial Conference Committee on the Bicentennial of the Constitution. Bill of Rights plaques bearing his name are in federal courthouses and government buildings across the United States and in Guam, including the Thurgood Marshall Federal Judiciary Building and the J. Edgar Hoover Building, headquarters of the FBI.

Judge Keith assumed senior status in 1995, and continues to serve the court today. He holds the distinction of being the longest serving judge in the history of the Sixth Circuit. Judge Keith earned a J.D. from Howard University School of Law and an L.L.M. from Wayne State University Law School. He has received more than 40 honorary degrees, including one from Harvard University, and he is the recipient of countless awards and distinctions, including the Spingarn Medal from the NAACP (the association's highest honor) and the Edward J. Devitt Distinguished Service to Justice Award—the highest award that can be bestowed on a member of the federal judiciary. ⊙

Endnote

[1] *Jacobellis v. Ohio,* 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (footnote omitted).

DID YOU KNOW?

CLEVELAND *is a prime location* ***FOR MAJOR*** *motion pictures.*

Several movies filmed in Cleveland:

- A Christmas Story
- Air Force One
- Alex Cross
- American Splendor
- Antwone Fisher
- The Avengers I
- Captain America: The Winter Soldier
- The Deer Hunter
- Major League
- Men In Black
- Planes, Trains & Automobiles
- The Shawshank Redemption
- Spiderman 3
- Welcome to Collinwood

SOURCE: THISISCLEVELAND.COM

THE CITY IS HOME TO THE **CLEVELAND CLINIC,** *the nation's top* **HEART PROGRAM FOR** *straight* **19 YEARS.**

IT WAS ALSO RATED ONE OF THE **TOP 4 HOSPITALS** *IN THE U.S. IN 2013.*

SOURCE: POLITICO.COM

FAMOUS CLEVELANDERS

Alan Freed, *D.J. who coined the phrase "Rock n' Roll"* • Arsenio Hall, *Comedian/ Actor* • Bob Hope, *Actor/ Comedian* • Don King, *Boxing promoter* • Dorothy Dandridge, *Actress* • Drew Carey, *host of "The Price is Right"* • Halle Berry, *Actress/producer* • James A Garfield, *20th U.S. President* • Jesse Owens, *Olympic track star* • John D. Rockefeller, *standard oil founder* • Langston Hughes, *Poet* • Michael Symon, *famed restaurateur, Iron Chef on Food Network, and host of ABC's "The Chew"* • Molly Shannon, *Actress and cast alumni of SNL Saturday Night Live* • Patricia Heaton, *Actress* • Paul Newman, *Actor/ Director, race car driver, winner for Best Actor*

SOURCE: THISISCLEVELAND.COM

CLEVELAND **WAS THE FIRST** city in the world to be fully lit by **electricity.**

SOURCE: MOVOTO.COM

AUG. 5, 1914: The **first traffic signal system** installed on the street corner of East 105th St. & Euclid Avenue.

CLEVELAND also had the country's **first pedestrian button** to control traffic lights.

SOURCE: OHIOFUN.FACTS.CO & MOVOTO.COM

Cleveland was founded by and named after **GENERAL MOSES CLEAVELAND.**

Why the misspelling? The name was changed after a local newspaper discovered that the name was ***one character too long*** for the masthead.

SOURCE: MOVOTO.COM

Hon. Solomon Oliver Jr.

Chief Judge, U.S. District Court for the Northern District of Ohio

by Angela Onwuachi-Willig

Angela Onwuachi-Willig is the Charles and Marion Kierscht Professor of Law at the University of Iowa. She clerked for Chief Judge Oliver from 1997 to 1999 and is author of the book, According to Our Hearts: Rhinelander v. Rhinelander and the Law of the Multiracial Family *(Yale University Press 2013).* *The author thanks Hope Lu, current law clerk to Chief Judge Oliver, and Jennifer Cupar, former law clerk to Chief Judge Oliver, for their assistance.*

Ask any individual what word comes to mind upon hearing the name Solomon, and he or she is certain to declare "wisdom." Inquire of any persons—lawyers and non-lawyers alike—what word comes to mind upon hearing the name Solomon Oliver Jr., and one is also certain to hear the term "wisdom," plus a whole other set of adjectives and nouns that describe the current chief judge of the U.S. District Court for the Northern District of Ohio in exceptionally glowing terms. A small sampling of these praising and admiring descriptors include words such as "impartial," "fair," "respectful," "highly intelligent," "good-hearted," "hard-working," "guardian of the Constitution," "excellent role model," "the consummate mentor," "a trailblazer," "a thoughtful but no-nonsense judge," and "an inspirational figure."

That Chief Judge Oliver is so highly regarded and revered by those who encounter him is no surprise at all. His life story is remarkable, revealing a man who defied all odds to become a highly skilled attorney; an excellent scholar, teacher, and administrator; a fair, impartial, and widely respected judge; and, as important, a wonderful husband, father, and citizen of the world.

On Realizing Dreams and Becoming a Lawyer

Born in the racially segregated town of Bessemer, Ala., in 1947, Chief Judge Oliver spent his childhood years in an era and region in which African-Americans had their lives routinely devalued and their dreams regularly trampled upon and in which his future as a federal district court judge seemed unimaginable. In fact, Chief Judge Oliver vividly recalled how one of his uncles often spoke about his own quashed dream of becoming an attorney, a dream that had been dashed purely due to racism. Chief Judge Oliver explained, "One of my uncles on my mother's side wanted to be a lawyer. He talked about that desire but [as an African-American man in the South during his time] he didn't have the opportunity to fulfill that dream."[1]

The son of a steelworker-turned-minister father and a homemaker mother, both of whom taught him to always believe in himself, a young Oliver pushed back against the forces that had placed severe limitations on the dreams of his ancestors. He excelled at the racially segregated public schools that he attended in Bessemer. During his childhood, a number of landmark decisions and statutes began to signal the potential for future changes that could slowly chip away at the discrimination that had long plagued the lives of African-Americans. For instance, seven years after Chief Judge Oliver was born, the U.S. Supreme Court issued its decision in *Brown v. Board of Education*, declaring that state-mandated segregation in public schools violated the Equal Protection Clause of the Constitution—a decision that did not directly have an impact on Oliver's primary and secondary education but that shaped the education of students in later generations. In 1963, the same year that a life-altering event in the teenage Oliver's life occurred, President John F. Kennedy introduced into Congress comprehensive legislation that would eventually be passed as the Civil Rights Act of 1964.

Oliver's own motivations to become a lawyer grew out of his personal observations of the law's demonstrated power, or rather the enormous influence that lawyers could have on society. One such observation

On June 25, 2010, U.S. District Judge David Dowd swore in his colleague and fellow College of Wooster alumnus, Solomon Oliver Jr., as the 11th chief judge of the U.S. District Court for the Northern District of Ohio at the Carl B. Stokes U.S. Courthouse in Cleveland. Chief Judge Oliver is only the second African-American to serve in this role. The late U.S. District Judge George W. White was the first.

occurred when Oliver, then 16, was traveling by car to a church convention in 1963. That day, Oliver and his two adult traveling companions—deacons at his church—stopped at a gas station where he was physically attacked by a white gas station attendant for using the only bathroom at the business. The attendant accused Oliver of being part of Attorney General Robert Kennedy's conspiracy to integrate the South. Fortunately, the teenage Oliver was not seriously harmed, but the terrifying incident has remained imprinted in his mind, serving as a reminder of the dangerous reactions that individuals may have to legal and social changes. More so, the incident deeply influenced the young Oliver's career plans, setting the teenager on a path to achieving what legal restrictions had prevented his uncle from accomplishing due to race—becoming an attorney. "My thinking at that time was if Robert Kennedy, the attorney general of the United States, could strike that much fear or emotion in that attendant, then being a lawyer like him would be a desirable profession for me,"[2] Chief Judge Oliver said.

As a high school student, Oliver shined. He then began his college education at an important historically black college, Miles College, before earning admission to and enrolling at one of the nation's best liberal arts colleges, The College of Wooster, in Ohio. At The College of Wooster, he met his wife Louisa, with whom he would eventually have two sons. Oliver also confirmed his love of law and government. After graduating from The College of Wooster in 1969, he earned his juris doctor from New York University (NYU) School of Law in 1972.

Following law school, he earned a master's in political science from Case Western Reserve University and returned to his alma mater, The College of Wooster, as a political science professor for three years. In 1975, Oliver received the chance of a lifetime and began clerking for Hon. William H. Hastie, U.S. circuit judge for the Third Circuit Court of Appeals. Judge Hastie was not only one of the attorneys who had helped to formulate the strategy that led to *Brown v. Board of Education*, but he was also the first African-American Article III judge. Chief Judge Oliver's experiences as a law clerk for Judge Hastie had a lasting impact on his career as well as his outlook on the respect that lawyers, clients, and courthouse workers must be granted within the judicial system.

Following his clerkship, Oliver then worked as an assistant U.S. attorney in Cleveland. Eventually, he became the chief of the civil section in the Cleveland office and then the founding chief of the appellate litigation section. Just prior to his appointment as a federal judge, he served as a tenured faculty member at Cleveland-Marshall College of Law at Cleveland State University and then as associate dean of the faculty and administration.

Breaking Barriers, Forging a New Path, and Exemplifying What it Means to be Fair and Impartial

On May 9, 1994, President Bill Clinton appointed then-Associate Dean Oliver to the position of U.S. district court judge for the Northern District of Ohio. As a federal judge, he has earned a reputation for treating all those who appear before him with the utmost dignity, respect, and fairness. Chief Judge Oliver's insistence on respectful treatment for all individuals in his courtroom and chambers reflects his deep commitment to upholding the ideals of professionalism for lawyers. His insistence upon respect and fair treatment for all can also be traced to the lessons he learned from his parents,

After his swearing-in ceremony, Chief Judge Oliver stands with (left to right) his former law clerk Chaka Patterson, now a partner at Jones Day in Chicago; his brother Paul Oliver, a Harvard Law School graduate and principal at Wimberly, Lawson, Steckel, Schneider, and Stine; and United States Magistrate Judge Kenneth McHargh, also a classmate from The College of Wooster.

Rev. Solomon Oliver and Willie Lee—two humble and hard-working African-American citizens who raised 10 children, all of whom went to college and many of whom obtained graduate degrees. As Chief Judge Oliver remarked in a speech to students at the New England School of Law, "Growing up in the racist South of my day, my brothers and sisters and I could have learned lessons of hate, meanness, revenge, and inferiority. Instead, our parents taught us lessons of hope, love, self-esteem, fairness, and equality."[3] On another occasion and for a different audience, Chief Judge Oliver expressed similar sentiments as he spoke about the gas station attendant whose attack later inspired him to become a lawyer. The Chief Judge explained, "The question is, 'What is your response?' Do you grow to hate your oppressors? Or grow to hate yourself? For me, the answer was 'neither.' My parents taught me that people like [the gas station attendant] aren't monsters, or less than human beings, but simply people who are misguided. And this lesson I've carried with me for life. When I look at the people I have to sentence, it is my responsibility not to condemn them as human beings."[4]

The races, personalities, quirks, and careers of Chief Judge Oliver's clerks run the full range of possibilities. As the Chief Judge proclaims, "They have been a diverse lot—African-American, white American, Asian-American, vegetarian, Christian, and Jew, from Cleveland State, Case, Ohio State, Harvard, Columbia, Georgetown, Duke, and Michigan."

Chief Judge Oliver has also played a vital role in developing rules and policies for the courts and the profession. For example, he was one of two representatives from the Sixth Circuit on the Judicial Conference of the United States. He serves on the Advisory Committee on Civil Rules and the Advisory Committee on Evidence Rules for the Judicial Conference of the United States. Additionally, Chief Judge Oliver co-chaired the American Bar Association's (ABA) Minority Trial Lawyer Committee for the Litigation Section and served as a member of its Jury Initiatives Task Force.

As a jurist, Chief Judge Oliver has presided over a number of high profile matters, including the Cleveland voucher case, *Simmons-Harris v. Zelman*, in 1999. Currently, Chief Judge Oliver is presiding over the consent decree between the city of Cleveland and the U.S. Department of Justice to create reform and changes within the Cleveland Division of Police. Lawyers in Cleveland have widely praised the chief judge as well-equipped to oversee this significant decree. One attorney, Avery Friedman, declared, "In terms of overseeing [the decree], I don't know that you could have a better district judge."[5] Geoffrey Mearns, president of Northern Kentucky University, former provost of Cleveland State University, and former dean of Cleveland-Marshall College of Law, also offered praise for Chief Judge Oliver, asserting: "He carries himself with a great deal of humility both on and off the bench.… He's a very deliberative judge. He's also very thorough.… He listens very carefully to the presentations by all of the lawyers."[6]

Chief Judge Oliver has also exhibited a commitment to public and community service that is as strong as his commitment to the law, fairness, and equality. During his legal career, he has served on the executive committee of the Cleveland Chapter of the NAACP and as a trustee of the Cuyahoga Plan, to name just a few contributions. He currently serves on the Board of Trustees for The College of Wooster.

For his hard work and contributions as a practicing attorney, professor, administrator, judge, and citizen, Chief Judge Oliver has received numerous honors. As a faculty member, he was selected to be a visiting scholar for the National Endowment for the Humanities Seminar for Law Professors at Stanford University as well as a visiting professor at Comenius University in Bratislava, Slovakia, and Charles University in Prague. As a jurist, he received the honor of being chosen to travel to Arusha, Tanzania, to address a conference of East African judges. He also has served as distinguished jurist-in-residence at both the University of Cincinnati College of Law and Touro College of Law. Other awards include the Department of Justice Special Achievement Award, the Distinguished Alumni Award from The College of Wooster, and the NYU School of Law Distinguished Service Recognition and Scholarship Award from the Black, Latino, Asian Pacific American Alumni Association. Finally, Chief Judge Oliver is a member of the American Law Institute and the American Bar Foundation, and he has received honorary doctor of laws degrees from the University of Akron and New England School of Law.

Strengthening Family and Nurturing the Pipeline

As Chief Judge Oliver stated during his swearing-in ceremony as the 11th chief judge of the U.S. District Court for the Northern District of Ohio (and only the second African-American to serve in this role), "no one can do well without some help along the way."[7] As numerous speeches reveal, the chief judge is always the first to note how the support of his family—particularly that of his parents; siblings; his wife of 45 years, Louisa S. Oliver; and his two sons, Solomon Michael and Jonathan Douglass Oliver—have enabled him to achieve the successes in his life.

Just as Judge William Hastie assisted and mentored a young Oliver early in his career, Chief Judge Oliver has consistently engaged in efforts to assist budding attorneys and promising students, particularly those of color, in their careers. Judge Oliver took to heart an inscription that Judge Hastie wrote to him on the front page of a book Judge Hastie gave to Judge Oliver during his clerkship, Richard Kluger's *Simple Justice,* "For Solomon Oliver[,] May he and his generation, and those they teach, build well on the foundation, the laying of which is the subject of this remarkably good account." Referring to this inscription, Chief Judge Oliver once said:

> [Judge Hastie] knew that much remained to be done in regard to civil rights.... I think he was banking on [my generation] to carry the torch forward.... My clerkship with him served as the predicate for everything that I may have achieved during my legal career. As a judge on the district court for almost 20 years, I have sought to carry that torch forward in judicial decisions I have made and in the choices I have made in the hiring of law clerks, a substantial number of whom are African-American.[8]

Like Judge Hastie, Chief Judge Oliver's legacy—and in so many ways, his extended family—consists of a diverse group of former and current law clerks and externs as well as a diverse staff. All of these individuals have benefitted greatly from the judge's wisdom, kindness, and fine example. Bettye Rhinehart, Chief Judge Oliver's judicial assistant for more than 20 years, states, "I have seen the judge nurture, mentor, and make a family of nearly 30 law clerks, approximately 100 externs, and so many other individuals who have come to him for advice and counsel."[9]

The races, personalities, quirks, and careers of Chief Judge Oliver's clerks run the full range of possibilities. As the Chief Judge proclaims, "They have been a diverse lot—African-American, white American, Asian-American, vegetarian, Christian, and Jew, from Cleveland State, Case, Ohio State, Harvard, Columbia, Georgetown, Duke, and Michigan."[10] Chief Judge Oliver, who has frequently spoken about the need to increase the number of racial minority attorneys and increase the representation of such attorneys across all segments of the legal profession, is proud of the diversity, particularly the racial diversity, of his law clerks.

Today, his clerks work as assistant U.S. attorneys, tenured law professors, associates and partners in law firms, Department of Justice attorneys, Internal Revenue Service attorneys, entrepreneurs, and civil rights attorneys.

Chief Judge Oliver's deliberate and thoughtful mentoring, role modeling, and teaching of law clerks and staff have not been lost on them, as they all offer him praise in this regard. Each one of them has noted that their lives and careers would not be the same without the Chief Judge's guidance and mentorship. For example, former law clerk, former assistant U.S. attorney, and now criminal defense partner Tanya Miller explained how chief judge Oliver's purposeful efforts in providing clerkship jobs for budding minority attorneys opened up innumerable opportunities for her. She reflected:

> The fact that I was an African-American female made my chances of obtaining the fiercely coveted position of a federal judicial clerkship a near statistical impossibility. Yet, with the odds ever against me, Judge Oliver changed the course of my professional life with one stroke of the pen. He hired me, and in so doing gave me admission to one of the most elite and respected categories of lawyers in our profession. The gift that Judge Oliver gave to me served to open many doors and has presented me with professional opportunities beyond my wildest dreams.
>
> If that were not enough, he also taught me a lesson or two during my time as his law clerk…. I learned that outside the courtroom good lawyers are generous with their time and talents and endeavor to provide a service to their communities…. Judge Oliver taught me to understand and honor my place in history, not by lecturing me about it, but by modeling it every day. He is the ultimate mentor, a living, breathing example of what it means to excel in the law and a tribute to those great lawyers in history who were his predecessors, including Charles Hamilton Houston, Thurgood Marshall, and his beloved William H. Hastie.[11]

Similarly, former law clerk Von DuBose, previously a partner at Bondurant Mixson & Elmore LLP in Atlanta and now founding partner at DuBose Miller, LLC, remarked:

> Judge Oliver's titles are many and varied—jurist, lawyer, father, husband, mentor, professor, public servant. Of the folks who have influenced my life, Judge Oliver has been the standard-bearer for all of these things. It is rare that one encounters a single person with all of the traits so critical to a meaningful professional and personal life….

My personal witness to his integrity, character, humility, determination, and perseverance served as a solid foundation for my approach to the practice of law. To this day, I draw on the wisdom gained during my clerkship. Without question, my time with "Judge" has been the single most influential experience in my legal career.[12]

Other former clerks have focused on the lessons that the chief judge taught them about how to live balanced and meaningful personal lives. As Utah State University professor Shannon Browne explained, "The judge modeled for me how to live a life of quiet dignity, the importance of generosity of time and effort, and the value of public service."[13]

On top of that, Chief Judge Oliver has made a point of taking every possible opportunity to offer uplifting words to students, budding attorneys, and even seasoned attorneys when he can, reminding them that they have "a special responsibility for the quality of justice."

Just as Chief Judge Oliver followed the footsteps of his mentor, Judge Hastie, in mentoring the next generation of lawyers, so too have the chief judge's former clerks. For instance, one of his early clerks, Chaka Patterson, now a law partner at Jones Day in Chicago, stated:

> Judge Oliver left the academy for the bench, but he has never stopped teaching, and he has never stopped inspiring. He inspired me by teaching me to work hard, strive for excellence in everything I do, and pursue my goals confidently, yet humbly. The lessons learned in Judge Oliver's chambers have served me well throughout my professional career. And I am now at a place in my career, where I have the opportunity to pass along those lessons to the next generation of lawyers.[14]

Finally, the individuals Chief Judge Oliver has educated and influenced are not limited to his judicial law clerks and externs. He has also taught and mentored countless former students at The College of Wooster, Case Western Reserve University School of Law, and Cleveland-Marshall College of Law during his more than 20 years as an educator before his appointment to the bench. Many of his students are distinguished members of the bench and bar. One now serves with him as a federal judge for the Northern District of Ohio, U.S. District Judge Benita Pearson.

Today, Chief Judge Oliver remains committed to ensuring continued pathways for students of all races, sexes, sexual orientations, abilities, and socioeconomic classes through his professional and volunteer work with the ABA. He has performed this role in part by serving as a member of the Council of the ABA Section of Legal Education and Admissions to the Bar for nearly a decade and, later, he took on the immense responsibility of serving as chairperson of the Council. He is also on the Evidence Drafting Committee for the Multi-State Bar Examination.

On top of that, Chief Judge Oliver has made a point of taking every possible opportunity to offer uplifting words to students, budding attorneys, and even seasoned attorneys when he can, reminding them that they have "a special responsibility for the quality of justice"[15] and telling them not to assume that any position is out of their reach. If nothing more, the chief judge's life—and his mountain of accomplishments—are a strong testament to those words. ⊙

Endnotes

[1]Marqueta Tyson, *Up Close and Personal with Judge Oliver*, Fed. Bar Ass'n—N. Dist. Ohio, Summer 2001, at 4.
[2]*Id.*
[3]Judge Solomon Oliver Jr., Address at New England School of Law Minority Students/Alumni Banquet 5 (Oct. 30, 2009).
[4]*Solomon Oliver Jr. '69*, Wooster, Winter 2010, at 13.
[5]Robert Higgs, *Judge Oliver Jr. Described as Ideal Judge to Oversee Cleveland Consent Decree*, Cleveland.com (May 28, 2015), *available at* http://www.cleveland.com/metro/index.ssf/2015/05/judge_solomon_oliver_who_will.html.
[6]*Id.*
[7]Chief Judge Solomon Oliver Jr., Remarks at Swearing-In Ceremony Upon Becoming the 11th Chief Judge of the U.S. District Court for the Northern District of Ohio (June 25, 2010).
[8]Email from Chief Judge Solomon Oliver Jr., U.S. Dist. Court for the N. Dist. of Ohio, to Chief Judge Theodore McKee, U.S. Circuit Court for the 3d Circuit Court of Appeals (Apr. 15, 2015, 12:17 PM EST) (on file with author).
[9]Bettye Rhinehart, Remarks from 20th Anniversary Celebration of Chief Judge Solomon Oliver Jr.'s Appointment and Reunion of Law Clerks (June 14, 2014) (on file with author).
[10]*Supra* note 7 at 3.
[11]Tanya Miller, Remarks from 20th Anniversary Celebration of Chief Judge Solomon Oliver Jr.'s Appointment and Reunion of Law Clerks (June 14, 2014) (on file with author).
[12]Von DuBose, Remarks from 20th Anniversary Celebration of Chief Judge Solomon Oliver Jr.'s Appointment and Reunion of Law Clerks (June 14, 2014) (on file with author).
[13]Shannon Browne, Remarks from 20th Anniversary Celebration of Chief Judge Solomon Oliver Jr.'s Appointment and Reunion of Law Clerks (June 14, 2014) (on file with author).
[14]Chaka Patterson, Remarks from 20th Anniversary Celebration of Chief Judge Solomon Oliver Jr.'s Appointment and Reunion of Law Clerks (June 14, 2014) (on file with author).
[15]Chief Judge Solomon Oliver Jr., "Much More Than a Hired Gun," Commencement Address at the University of Akron College of Law 8 (May 13, 2012).

rights and explaining why the employer must honor them. Writing letters at the front end of a deployment or significant term of federal military service reduces the potential for issues to arise at the end of the deployment. However, if a merger or buyout is expected, then several entities need written notice.[26]

The first letter should be sent to the client's immediate supervisor. However, in the context of a merger or buyout, there is very real possibility that a supervisor could be transferred or laid off. Therefore, letters need to be sent to higher levels of the company. For medium-sized companies, it is prudent to send a letter to a regional manager or vice president. If a general counsel's office exists, send one to them along with a follow-up phone call. Finally, VETS should receive a letter—but it should not assert a claim, as one has not arisen. Rather, it is more of a "situational awareness" letter.

But sending a letter is not enough. Your client needs peace of mind. In fact, the whole policy behind military legal assistance programs is to prevent legal issues from distracting servicemembers from their missions. Explain to the company's representative that your client is serving her country and does not need to be thinking about whether her job will be there when she gets back. It sounds cliché, but legal assistance attorneys should never downplay the realities of any mission, regardless of whether that mission is fought from a desk (like mine) or on patrol (like my clients).

If the issue arises on the backend of federal military service, the attorney should assist the client in filing a claim with VETS. This will give the attorney some leverage against the employer. Further, most legal assistance attorneys cannot represent the client in a civilian court, so any leverage is gold in context of legal assistance. Simultaneously, the attorney should contact the employer with both a letter emailed to the employer and a phone call. Generally speaking, many supervisors and business executives are simply not aware of USERRA's protections. This is especially the case with smaller businesses. It is always acceptable to appeal to the employer's patriotism. In today's world of "I support the troops," rarely do you find an employer that wants to be pegged as unfriendly to servicemembers. Moreover, many of these types of issues are basic misunderstandings between the employer and employee. Therefore, the combination of the claim, explanation of USERRA, and clarification of any misunderstandings may resolve the issue. If the issue is not resolved, then VETS may take the claim. Referral to other pro bono assistance organizations, such as the ABA Military Pro Bono program, may also be necessary.[27]

Conclusion

The current military conflicts are likely to continue to require substantial support from the National Guard and Reserve components. Their members not only provide the backfill for the combined forces, but also serve in forward deployed combat areas. The stresses of combat and being away from home are matters that legal assistance attorneys cannot help. However, resolution of legal issues can provide the member with at least some relief, thereby allowing them to complete their mission and come home. The "successor in interest" is but one of many issues that only pertain to reservists and guard members on federal orders. Legal assistance attorneys need to have broad understanding of the protections under USERRA, as well as the state protections provided to guard members. Legal assistance is part of the mission and for JAGs, it should be considered among the most important job they do.

Endnotes

[1]38 U.S.C. §§ 4301-4335.

[2]*Coffman v. Chugach Support Servs.,* 411 F.3d 1231 (11th Cir. 2005).

[3]*See* 38 U.S.C. § 4301-4335, generally; *see also* "Know Your Rights," *About USERRA,* U.S. Dep't of Labor, www.dol.gov/vets/programs/userra/aboutuserra.htm#yourrights (last visited on July 27, 2016).

[4]20 C.F.R. § 1002.15 (2016). If the servicemember's period of service is less than 31 days, then he or she must report to work no later than the next full regularly scheduled work period. *Id.* § 1002.15(a). For a period of service between 30 and 180 days, the servicemember must submit an application for reemployment not later than 14 days. *Id.* § 1002.15(b). For a period of service more than 180 days, the servicemember must submit an application for reemployment not later than 90 days.

[5]38 U.S.C. § 4313.

[6]For the exceptions, *see* 38 U.S.C. 4312(c).

[7]"Know Your Rights," *supra* n.3.

[8]38 U.S.C. § 4311.

[9]38 U.S.C. § 4317.

[10]38 U.S.C. §§ 4322-23; *see also* "Know Your Rights," *supra* n.3.

[11]38 U.S.C. § 4311(c); *see also Croft v. Vill of Newark,* 35 F. Supp. 3d 359, 366-67 (2d Cir. 2014); *Valezquez-Garcia v. Horizon Lines of P.R. Inc.,* 473 F.3d 11, 17 (1st Cir 2007).

[12]*Id.*

[13]38 U.S.C. § 4303(4)(A).

[14]*Id.*

[15]Veterans Benefits Act of 2010; Veterans Small Business Verification Act; Corey Shea Act, 111 P.L. 275, 124 Stat. 2864, 2888, 111 P.L. 275, 2010 Enacted H.R. 3219, 111 Enacted H.R. 3219. *See also Coffman, supra* n.2.

[16]*Leib v. Georgia-Pacific Corp.,* 925 F.2d 240 (8th Cir. 1991).

[17]H.R. Rep. No. 103-65, *reprinted in* 1994 U.S.C.C.A.N. 2449 at 2454. For an exhaustive history of how courts have viewed "successor in interest" in the veterans and military context since 1948, *see Hamovitz v. Santa Barbara Applied Research Inc.*, 2010 WL 1337713 (W.D. Penn. 2010) (unpublished).

[18]*Leib*, 925 F.2d at 245.

[19]411 F.3d. 1231, 1237 (11th Cir. 2005).

[20]20 C.F.R. § 1002.35 (2016).

[21]*Id.*

[22]*Supra* n.15.

[23]38 U.S.C. § 4303(4)(D).

[24]*United States v. Nevada*, 817 F. Supp. 2d 1230, 1243 (D. Nev. 2011).

[25]*Murphee v. Communications Tech., Inc.,* 460 F. Supp. 2d 702 (C.D. La. 2006).

[26]Although the statute allows for verbal notice, verbal notice is rarely sufficient for much of anything. A good legal assistance attorney understands the benefit of leaving a paper trail.

[27]Military Pro Bono Project, www.militaryprobono.org (last visited on July 27, 2016).

Hon. Edmund A. Sargus Jr.

Chief Judge, U.S. District Court for the Southern District of Ohio

by Penny Barrick, Jonathan Olivito, and Nina Tandon

Penny Barrick is career law clerk, and Jonathan Olivito and Nina Tandon are term law clerks to Chief Judge Sargus.

A warm smile, a greeting by name, a firm handshake, and sometimes even a pat on the back: you won't encounter a tepid reception when you enter the chambers of the Hon. Edmund A. Sargus Jr., chief judge of the U.S. District Court for the Southern District of Ohio. Without skipping a beat, Sargus directs the conversation toward his guests, ushering them into his office. The judge's office is spacious but somehow always feels cozy—it's the Southern District of Ohio variant of the family den, minus the fireplace. The conversation, interspersed with the judge's characteristic humor, flows smoothly from Civil War history to constitutional law trivia to the latest Sixth Circuit opinion. The farewell is no less cordial. Sargus holds the door and wishes everyone goodbye by name. Then his chambers gets back to work. "It's back to the salt mines," the judge quips. Sadly, the Joseph P. Kinneary United States Courthouse has, in its more than 80 years of operation, never quite lived up to its anticipated salt output.

A warm salutation and goodbye might seem minor, but it's indicative of the traits that define Sargus both on and off the bench. Setting aside his legal acumen and formidable memory, the judge has a gift for empathy. He is humble, and he cares profoundly about those around him. As noted by John Dierna, the judge's colleague of more than 20 years as well as the chief U.S. probation officer for the Southern District of Ohio, Judge Sargus "is a man of integrity, wisdom, patience, and fairness." According to Clerk of Court Richard Nagel, "Chief Judge Sargus is an incredibly considerate, approachable leader and based on these qualities, you want to do your absolute best to serve him and the court."

St. Clairsville, Ohio, and Family Roots

Nestled in the hills of Eastern Ohio, and situated along the paths of Interstate 70 and U.S. Route 40, sits St. Clairsville, the seat of Belmont County. Sargus grew up in St. Clairsville and continued living there until 2014—long after his career had brought him to Columbus. But leaving wasn't easy—Sargus and his family have a deep connection to St. Clairsville. Sargus' father was born just east of the city, in Bellaire, Ohio. The son of Lebanese immigrants, the elder Sargus became a lawyer at age 40, then served as a state senator and, for only four weeks, a juvenile and probate judge. On the day he died from a sudden heart attack in 1967, he announced to county officials that he would no longer send any juveniles to the county jail, where children were housed with adults. In the wake of his death, his friends began a long, successful campaign to erect in St. Clairsville the first separate multi-county juvenile detention center in Ohio named the Sargus Center, which continues to this day.

The elder Sargus served as a U.S. Navy Officer in World War II. While stationed at the Newport Naval Base, he met Anne Elizabeth Kearney, an Irish-American schoolteacher from Providence, R.I. After the war, the two married and raised three children in St. Clairsville. The judge's mother taught all three of her children during their elementary years. Not long after the sudden death of her husband, Anne Elizabeth died from a stroke at the age of only 52. Judge Sargus was 16 years old. Both parents left behind large, supportive families, and Sargus went to live with his uncle A.J. "Mel" Sargus, who served for 20 years as a Belmont County commissioner.

Sargus enjoys recalling the warmth and education given him by his legendary uncle. "My uncle spent the next 20 years sharing his life and wisdom with me. I could tell many stories to illustrate his understanding of people and public policy. My favorite involved his hiring of a new county dog warden, who proceeded to cite a large number of dog owners for failing to register their pets. Several long-time friends called my uncle demanding that he take care of the matter. He responded that, sure you are a great friend, I will go pay the fine for you. This was not what the friend wanted. My uncle would never have fixed a ticket, but he would pay the fine—which no one ever let him do. But the friend got the point."

Returning to his mother's hometown, Sargus graduated from Brown University with a degree in American history. He then attended and graduated from Case Western School of Law in 1978. In the summer of 1977, while working in the Ohio attorney general's office, Sargus met Jennifer Smart, a law student at Vanderbilt University, whom he later married. They are the proud parents of two sons, Edmund and Christopher.

In the spring of 1978, while still in law school, Sargus ran for state representative in his Eastern Ohio district. As Sargus recalls the election, "All looked well. There were five candidates whom I thought could be handled. At the last minute, Wayne Hays, a 28-year veteran of Congress ejected two years earlier over a sex scandal, decided to make a comeback. I ran second, made many lifetime friends, and never ran again."

Sargus and his wife began practicing in Belmont County shortly after law school. Sargus had a typical small-town litigation practice—personal injury matters, commercial disputes, disability claims, and black lung cases. He also occasionally handled estate and family law matters. Sargus represented four local municipalities and served on the St. Clairsville City Council. He was also a special assistant Ohio attorney general for 13 years. In 1990, Jennifer Smart Sargus ("the greatest judge I know," according to Sargus) began 24 years as a Belmont County Court of Common Pleas judge.

In 1993, Sens. Howard Metzenbaum and John Glenn recommended Sargus for the position of U.S. attorney. For the next three and a half years, Sargus was in charge of the office that prosecuted almost all federal crimes in the southern half of Ohio. According to Sargus, "This was a dream job. The staff was extremely professional. Every day was a great challenge." As U.S. attorney, Sargus was determined to be a lawyer and not just an administrator. He regularly tried cases and argued cases in the Sixth Circuit Court of Appeals.

In late 1995, a judicial position opened on the District Court. Although Sargus was reluctant to leave the U.S. attorney position, he has thoroughly enjoyed his time on the bench. Sargus notes, "I miss being in the fray. I have to learn to sit still again. But there is nothing more rewarding than trying to dispense justice."

Life as a District Judge

Now, in his 20th year on the bench, Sargus has no doubt that he made the right decision. For Sargus, the most fulfilling aspect of the job is the relationships that he developed over the years. He describes the Southern District of Ohio district court community as a family. This way of thinking now permeates the Southern District, in large part due to his influence. When interviewed for this article, he remained true to form, placing the focus away from himself and on all aspects of the court. "It's a treat to work with everyone here: the probation and pre-trial services officers, the marshals, the clerks, the attorneys, the judges," he remarked.

Chambers staff, in particular, has always been a close-knit group. This core group, Sargus acknowledges, "makes my job possible." The judge's judicial assistant, Debra Hepler, first started working with Sargus in 1993 when he was still the U.S. attorney. At the time, Hepler "felt very fortunate" to be chosen to accompany the judge to the court; she feels "even more fortunate" 20 years later. Soon after arriving at the courthouse, Sargus started working with Laura Samuels and Andy Quisumbing. Samuels has served as Sargus' court reporter since 1996. Quisumbing, the judge's deputy clerk, also joined chambers staff that first year. Penny Barrick, Sargus' career law clerk, started with the judge as a term clerk in her first year out of law school and "was blessed" to return to chambers to become the career clerk "for her mentor and friend, and certainly the best boss a lawyer could possibly hope for." Rounding out the group are the term law clerks, Jonathan Olivito, Nina Tandon, and Pamela Barron. For Sargus, working with these bright attorneys is "a major perk of the job."

For the judge and his staff, working in chambers is enjoyable and professionally fulfilling. As Quisumbing aptly summarizes: "With Judge Sargus, what you see is what you get. He's such a kind and sincere person. He really loves his staff. He treasures them as colleagues and as friends." A former career clerk, Elizabeth Preston Deavers—now a magistrate judge for the U.S. District Court for the Southern District of Ohio—echoes those remarks. To her, Judge Sargus "is the model of humility and loyalty. He inspired and continues to inspire me to learn more, do more, and become more." Another prior career law clerk, Lisa Bolen, who is currently a CaseSmart attorney with Littler Mendelson P.C. in Washington, D.C., adds that the judge's "legal intellect and ability to recall cases is unmatched," noting that "he has the unique ability to take a complex issue and analyze it clearly and concisely, keeping in mind the duty to be fair and promote justice." She counts her time with Judge Sargus as "the highlight of her career."

Working in chambers is an especially meaningful experience for the judge's term clerks. It often shapes their careers. Jessica Kim, now assistant U.S. attorney for the Southern District of Ohio, says: "During my time with Judge Sargus, I learned not only a great deal about federal practice, but the type of attorney and person I wished

to emulate. I have never known a more fair, effective, or kind individual." Former clerks keep in regular contact with the judge and, as Kim relates, are "grateful to have the judge as a lifelong mentor" and are "fortunate to call him [a] confidante and friend." This sentiment is repeated by the judge's first law clerk, J.B. Hadden, a partner at Murray Murphy Moul & Basil LLP, who suggests that Judge Sargus' "commitment and passion for jurisprudence are demonstrated by the loyalty and admiration of his law clerks." Hadden recalls the judge's "respect for the majesty of the federal court and his appreciation for its importance to those seeking its justice and mercy," which has had a lasting effect on him.

Kevin Snell, a term clerk who moved on to the Federal Honors Program as a trial attorney in the Federal Programs branch of the Justice Department, reflects a similar sentiment. Snell describes the judge as "not only a jurist of the highest caliber, but also an incredible mentor and friend." And Courter Shimeall, who moved on to a career at Bricker & Eckler LLP, adds: "I feel so lucky to be able to call Judge Sargus a friend and to have him as a mentor. He's taught—and continues to teach me—so much about law and the practice of law, and also about how to treat those around you. I really do think 'How would Judge Sargus handle this?' on a daily basis."

According to Sargus, "I have been blessed to have so many outstanding lawyers and genuinely good people as law clerks over the last 20 years." He can easily recite the names of each one. In addition to those quoted in this article, Sargus fondly mentions Jennifer Henderson, Alan Dorhoffer, David Faure, Anne Vogel, Michelle Pfefferle, Kimberly Breedon, Anthony Molnar, Zachary Keller, and Allison Stechschulte.

Sargus also builds relationships with soon-to-be lawyers. He and Judge Jennifer Sargus are adjunct professors at The Ohio State University Moritz College of Law. His students appreciate the judge's depth of knowledge and seemingly endless supply of courtroom anecdotes.

In addition to forging relationships within the Southern District of Ohio, Sargus, over the years, has had the opportunity to host various judicial delegations from abroad. Lawyers, scholars, judges, and other professionals have come to the Southern District from all across the world to learn more about the American judicial system. Sargus always enjoys these interactions. "We've had groups come from Turkey, Estonia, Azerbaijan, Uzbekistan, Ukraine, and Pakistan," he recounts. Conversely, Sargus has traveled to Chile, Brazil, the Republic of Georgia, and, most recently, Thailand, to speak with members of the legal profession in those countries. "The trips give you a sense of perspective; I've also made some great friends."

Multidistrict Litigation & Other Cases

"I might be partial on this issue," Sargus admits, "but I prefer my courtroom to any of the others in the building." Courtroom 2 in the Joseph P. Kinneary U.S. Courthouse has seen its share of criminal proceedings, civil trials, naturalization ceremonies, and all other variety of hearings since Sargus inherited the room in 1996. Two of the judge's most complex cases, however, went to trial in different courtrooms.

In 2014, Sargus tried *Patricia Harris v. R.J. Reynolds Tobacco Co.* in the Middle District of Florida. The judge was recruited as a trial judge to hear one of the numerous *Engle*-progeny tobacco litigation cases winding their way through the Florida federal courts. Teaching moments regularly occur during Sargus' trials (perhaps it's the evidence professor in him). Barrick, the judge's career clerk, relates that one of those moments occurred during a sidebar in *Harris*: While hearing objections to proffered evidence, Sargus explained the application of Federal Rule of Evidence 404(b) in the context of the civil litigation before him. The trial attorneys, who admitted that they had not had occasion to use the rule in civil cases, tongue-in-cheek maligned their misfortune, "What are the chances that we pull a trial judge who is an evidence professor?"

A large multidistrict litigation (MDL), MDL 2433: *In re E.I. du Pont de Nemours and Company C-8 Personal Injury Litigation* is unfolding closer to home. Currently, over 3,500 cases are pending before Sargus as part of this MDL. The first of these cases went to trial in September 2015. On the eve of trial, the parties advised Sargus that, despite previous representations that few objections would be raised, there were over 11,300 objections to voluminous exhibits. Viewing the shortest distance between two points, Sargus advised counsel he could not adequately resolve each objection in the numbered days before trial. As a result, the case would proceed "the old fashioned way"—with each exhibit offered but not admitted or viewed by the jury until deliberations unless the parties expressly agreed otherwise. Shortly thereafter, counsel resolved all but a few disagreements.

Regardless of the case, Sargus always brings to the bench a calm demeanor, a sharp intellect, and a passion for fairness. As Quisumbing explains, the judge "possesses an ideal judicial temperament. He's a gentleman on the bench, just as he is outside of the courtroom." Sargus is respectful of the parties and their counsel. His respect extends to jurors as well. In particular, he has a keen appreciation for the time that they commit to hearing a case. Samuels notes: "Judge Sargus gives the parties the time that they need to try their cases and make their arguments. But he carefully monitors that time. He doesn't want trial to intrude into the jurors' normal lives more than necessary." At the conclusion of each jury trial, Sargus and some chambers staff speak with the jurors. His first question, Samuels relates, is always "What can we do to make this a better experience for you?"

Sargus' character on the bench has another dimension: humorous peacekeeping. In litigation involving high stakes and lengthy, complicated legal and medical matters, litigants become testy. The word "testy" can be euphemistic. In the midst of one such encounter involving

raised voices speaking over raised voices, Sargus called the attorneys to the bench. ("White noise" shielded the jury from the conversation.) The judge leaned over to the attorneys and advised them in a flat voice that "these repeated motions to limit opposing counsel's selection of loud and flamboyant ties has got to stop." The attorneys relaxed and the real objection was resolved without acrimony.

In another example of the judge using humor to defuse a tense situation, Barrick recalls attorneys zealously arguing about a topic. Sargus, in his customary cool-under-pressure demeanor, interjected to one set of attorneys, "you call it a four-legged animal," and looking to the other side stated, "and you call it a quadruped; I think we can come to some agreement here that we are really talking about the same animal." After laughter erupted on both sides, the counsels' advocacy became much less heated, and the issue was resolved.

Many of the cases assigned to Sargus do not go to trial, though. Of those cases that settle before trial, the judge has often had a hand in helping to resolve the matter. When parties come in for a settlement conference, they typically take part in a Southern District of Ohio version of shuttle diplomacy, with the parties shuffling back and forth from their separate rooms to converse privately with Sargus. "The judge is a genius for compromise," Samuels observes. "There have been more cases than I can count where the parties came in to the conference worlds apart but left the courthouse with their dispute settled," she reflects.

Life Outside the Court & Restored Citizens

Sargus' experiences on the bench have become a part of his life outside the Court. One such experience began in 2010 when he sentenced 29 members of Maurice "Papa Joe" Williams' cocaine-trafficking empire in central Ohio. At many of the sentencings, the gang-members' former pastor, Donald Fitzgerald, made statement after statement on his parishioners' behalf, pleading with the judge not to punish them too severely. The pastor indicated that, while he certainly did not condone their criminal behavior, he wanted Sargus to know that the men were good people who made some serious mistakes. The pastor and the judge agreed to have coffee and have been close friends ever since. The friendship that Pastor Fitzgerald and Sargus started blossomed into the Restored Citizens Project. The program is designed to help people re-entering society after federal imprisonment overcome the myriad of obstacles in the way of successful rehabilitation.

Restored Citizens was born of meetings in the basement of the pastor's Christian Valley Missionary Baptist Church, attended by Sargus, Pastor Fitzgerald, and Chief Probation Officer John Dierna. "We come into the church, grab a plate of food, and we sit together," Dierna said. "We intermingle and leave all the labels at the door. When we walk in, it's basically men and women there to help one another. The judges aren't judges. I'm not just a probation officer. We begin to break down commonly held stereotypes that exist. When we're in that basement, we all come together as one." Restored Citizens currently has several judges, lawyers, and other public servants who volunteer to make the monthly programs successful. Sargus explains that "[a] lot of these folks have a hard time navigating the system, so we're trying to untie the knots for them." Some of the subjects addressed each month include how to find a job after a conviction, including resume and interview workshops; how to maneuver challenges such as restoring a driver's license or finding housing; and how to obtain health insurance. Volunteers from local agencies and potential employers set up information booths and give hands-on help.

Former Ohio State football star Maurice Clarett, who spent three and a half years in prison on robbery and weapons convictions, is now a success story. He recently spoke at a Restored Citizens meeting, describing how he took the right track after his incarceration. "When I was released, I had no idea how to make my life happen again," Clarett said. "You need assistance and help … to give yourself a fighting chance." Another success story is Albert McCall, 51, who has been imprisoned twice. McCall was unable to secure a job until he attended a Restored Citizens session and was connected to a city program for ex-prisoners. He currently works full time as a travel consultant and part time as a shuttle driver. "Now, I can give back to the community," McCall said. "I pay my taxes. I'm paying on my house and my car. It wouldn't have happened without the program." He has since brought several other ex-offenders to the program in hopes that they'll find help, too.

Restored Citizens also builds relationships in the community of federal probationers by holding Christmas and holiday parties and yearly back-to-school events that provide the probationers' children with school supplies and their families with winter coats and clothing. Sargus' iPhone is filled with pictures of happy children from the Christmas parties featuring a "professional Santa," played by Assistant U.S. Attorney Doug Squires. The judge has also joined in a neighborhood litter collection sponsored by Pastor Fitzgerald's church. Sargus has truly become a fundamental part of the bricks-and-mortar of rebuilding the lives of the men and women he has sentenced.

When Sargus isn't busy teaching, trying cases, writing opinions, working with Restored Citizens, or serving on the boards of Ohio Lawyers Assistance Program, Star House, House of Hope, and Belmont College Foundation, he's often outside running. One of his prouder running moments came in Washington, D.C., when he competed against fellow members of the judiciary and finished with the fastest time of all of the Article III judges in the race. Sargus usually mentions that the runner up Article III judge was using a cane.

Sargus is also a student of the American Civil War. This interest actually has its roots in St. Clairsville. The

Sargus family home sat next to an old cemetery. As a boy, and then later as a lawyer, the judge would walk his dogs through the cemetery. One gravestone grabbed his attention: the marker for a captain in the Fifth U.S. Cavalry. Captain Thomas Drummond—who, tragically, died in the Battle of Five Forks just days before the end of the Civil War—captured Sargus' imagination. Drummond is, in the judge's words, "the most interesting person from Belmont County that you never heard of." Sargus and his son, Edmund, have since written an article about Drummond that was published in the *New York Times*. The father-son team is currently finishing a book about Drummond that highlights his abolitionist views and heroic battlefield performances. The book also describes the captain's lifelong struggle with alcohol addiction. In addition to his scholarship on Drummond, Sargus spearheaded an effort to have a historical marker placed in the St. Clairsville cemetery to commemorate the captain's life. This past December, the judge and his chambers staff made the trek east to see the marker unveiled by the Ohio History Connection.

Becoming Chief Judge

Judge Sargus assumed the role of chief judge of the Southern District of Ohio in January 2015. His term ends in 2019. The title has not gone to his head: "I'd like to think that I was elected, but really, I just happened to be alive when my turn to be chief came up," Sargus jokes self-deprecatingly. He views his position much more modestly: "The position of chief judge is ill defined. The chief doesn't wield much statutory authority, so garnering consensus is my most important tool. I'm first among equals." To facilitate thoughtful decision-making, Sargus empowers colleagues and builds relationships. As Melanie Furry, chief U.S. pre-trial services officer for the Southern District of Ohio, attests: "Regardless of position or influence, he has the ability to make you feel a partnership is in place, one where you can be heard and your voice is valued."

As chief, Sargus hopes to continue strengthening the collegiality that has made the Southern District of Ohio such a special place to work. One smile at a time, one handshake at a time, and one joke at a time, Chief Judge Sargus guides the diverse Southern District of Ohio family toward consensus. He values the relationships that he's made along the way, and he looks forward to developing many more. As Sargus reiterates, "[t]his is a team effort." ⊙

Hon. Florence Ellinwood Allen

U.S. Court of Appeals for the Sixth Circuit · A Judge of Many Firsts

by Michael J. Gabrail

Michael Gabrail is a member of the FBA Northern District of Ohio Chapter and chief legal counsel of the Crossroads Group in Richfield, Ohio.

The life and career of Judge Florence Ellinwood Allen is inspiring on many fronts.

Born in Salt Lake City, Utah, on March 23, 1884, Judge Allen showed a high level of intellect at an early age.[1] Her father served as a congressman after Utah became a state in 1896; and her mother served in a number of organizations, including the Congress of Mothers and the State Federation of Women's Clubs.[2]

After graduating from Western Reserve University (now Case Western Reserve University) in 1904 in Cleveland, Judge Allen spent two years in Germany studying piano with the hope of becoming a professional pianist. That dream was dashed after a nerve injury.[3] Undaunted, Judge Allen chose a different path in life.

After returning to Cleveland, Judge Allen began teaching at the Laurel School while also attending classes at Western Reserve, graduating with a master's degree in political science and constitutional law.[4] Because of Western Reserve's refusal to admit women into its law program, Judge Allen chose to attend the University of Chicago Law Department in 1909.[5] Although she entered as the only woman in her class, by the end of the 1909 school term, Judge Allen was second academically out of all the students in her class.[6]

Ultimately, Judge Allen graduated from New York University School of Law in 1913.[7] Having returned to Cleveland to begin a law practice, Judge Allen found her new goal challenged by, once again, her status as a female in early 20th century America: law firms would not hire her because she was a woman.[8] Judge Allen persisted and fought discrimination. After starting her own solo legal practice, Judge Allen ultimately earned enough respect to be appointed as an assistant prosecutor of Cuyahoga County in 1919.[9]

At that time, women did not have the right to vote.[10] That changed in 1920, when the 19th Amendment to the Constitution was ratified.[11] The same year, Judge Allen achieved a stunning victory with her election to her first judicial position, judge of the Cuyahoga County Court of Common Pleas.[12]

By 1921, Judge Allen had, in the span of seven years: (1) graduated from law school before women were guaranteed the right to vote in America, (2) opened her own law practice in Cleveland, (3) been appointed as an assistant Cuyahoga County prosecutor, and (4) been elected as a judge.[13] But Judge Allen's rise to prominence as a female jurist would not end there: in 1922, she was elected to the Ohio Supreme Court, becoming not only the first woman to serve on the High Court, but also the first woman to serve on any state supreme court in the United States.[14]

Photograph provided by the Library & Archives of the U.S. Court of Appeals for the Sixth Circuit.

While these accomplishments would make any lawyer feel as if his or her life had been a success, Judge Allen's life's work remained unfinished.[15] In 1934, President Franklin D. Roosevelt nominated Judge Allen to serve as a judge on the U.S. Court of Appeals for the Sixth Circuit, making her the first female Article III judge in American history.[16] Many judges on the Sixth Circuit were not quick to congratulate Judge Allen, let alone accept her as a fellow circuit judge. Judge Allen often ate lunch alone while her male colleagues had lunch at a local restaurant that did not permit women.[17]

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RIGHT
TURN

A Brief History of the Creation of the Federal District Courts of Ohio

M. NEIL REED, TOM VANDERLOO, AND STEPHANIE WOEBKENBERG

Roberta Alexander, author of a comprehensive history of the United States District Court for the Southern District of Ohio, described the role of the district courts this way:

> The district courts have evolved from local tribunals dealing with minor infractions and land disputes into courts of tremendous significance dealing with essentially every major issue confronting society: equal rights and equal opportunities in the political and economic arenas; the scope of individual rights under the Constitution, including free speech, the free exercise of religion, and the rights of privacy; the enforcement of federal laws, ranging from environmental regulations to conflicts between labor and management; the enforcement of federal criminal law, especially in the areas of racketeering and the war against drugs; and the relationship between national and state power.[1]

Establishment of the District Court of Ohio

The Judiciary Act of 1789 divided the nation into judicial districts and created federal courts for each district.[2] The act established "a system of lower federal courts, separated geographically by state boundaries and exercising basically the same jurisdiction; and reliance on state courts to handle the bulk of adjudication in the nation."[3] On Feb. 19, 1803, Congress passed an act organizing Ohio as a single judicial district (the District of Ohio) and authorized one judgeship for the U.S. District Court.[4] Not being assigned to a judicial circuit, the district court in Ohio was granted the same jurisdiction as U.S. circuit courts, except in appeals and writs of error, which fell within the jurisdiction of the Supreme Court.

The new court was to have a single presiding district judge paid the salary of $1,000 per year. The judge was required to be a resident of the district and was to hold three sessions annually in Chillicothe, which Congress had previously designated as the seat of state government.[5] As then-current congressional practice did not include passage of a resolution of statehood for new states,[6] Congress did not formally admit Ohio as the 17th state. It was not until 1953 that President Dwight D. Eisenhower signed a congressional joint resolution officially declaring March 1, 1803—the date on which the Ohio General Assembly first convened[7]—as the date of Ohio's admission into the union.[8]

To preside over the newly created district court, President Thomas Jefferson nominated, and the Senate later confirmed, Charles Willing Byrd as the district's first judge.[9] On June 6, 1803, the first meeting of the district court convened in Chillicothe. The District Court for the District of Ohio sat in a courtroom shared with both the local court of common pleas and the Ohio Supreme Court until 1820, when a new courthouse was built in the recently relocated state capital, Columbus.[10] District court sessions were held there until the district was divided in 1855.

Originally, the U.S. District Court for the District of Ohio acted as both district court and circuit court for the state. In 1807,

Cincinnati Federal Courthouse: The Sixth Circuit's Seat of Court

Throughout its history, the Sixth Circuit has sat in Cincinnati, which is conveniently accessible from all parts of the circuit. The original federal courthouse in Cincinnati, which stood at the southwest corner of Fourth and Vine streets, was completed in 1857.

In 1885, Cincinnati's second federal courthouse was built on Fifth Street between Main and Walnut streets. The act authorizing the building's construction was signed by President Ulysses S. Grant in 1872, and the demolition of existing structures was completed in 1874. Excavating the foundation by hand took another year. Without modern power tools, the total construction time was just over 11 years, and the project's total cost exceeded $5 million. The building housed 27 government departments, including the U.S. District Court and the U.S. Circuit Court of Appeals.

In the 1930s, growth of the federal government required another building to house the newly created offices providing services to the public. A decision was made to build the new courthouse on the site of the old one. Due to the robustness of the hand-built courthouse, it took workers over a year to demolish the old structure. Completed in 1939, the new Potter Stewart U.S. Courthouse was designed by Treasury Department architects to house the post office as well as the courts and other federal agencies. Upon completion, the building was occupied by 51 federal agencies. Again, in the 1950s, the need for more federal office space resulted in plans for another federal building to be built. The new federal building was completed on the northeast corner of Fifth and Main streets in 1964. Nonjudicial federal agencies also migrated to that building, now named the John Weld Peck Federal Building.

Today, the Potter Stewart U.S. Courthouse is occupied almost entirely by federal court offices. When the post office left in 1992, the major tenants became the U.S. Court of Appeals for the Sixth Circuit and the U.S. District Court for the Southern District of Ohio.[1]

Endnote

[1]"Potter Stewart U.S. Courthouse, Cincinnati, OH," *Historic Buildings,* U.S. Gen. Servs. Agency, http://www.gsa.gov/portal/ext/html/site/hb/category/25431/actionParameter/exploreByBuilding/buildingId/067 (last visited May 15, 2016).

Congress realized that growing populations in Ohio, Kentucky, and Tennessee necessitated the creation of a new circuit court. Congress created the Seventh Circuit, the first circuit west of the Appalachian Mountains, consisting of these three states.[11] Not until 1866, when Congress passed an act reorganizing the judicial circuits, was Ohio assigned to the Sixth Circuit.[12]

Establishment of the Northern and Southern Districts of Ohio

With population growth came increasing immigration, commerce, and industry. Lawyers, newspaper editors, and members of the Ohio bench and bar began to demand the creation of regional district courts.[13] Legal professionals in Cincinnati and Cleveland, Ohio's two most populous cities in the 1850s, became resentful of Columbus' domination of the judicial landscape. Critics noted that lawyers and petitioners had to travel great distances to reach the center of the state, only to resolve legal disputes originating in either the Lake Erie region or from the Ohio River Valley.[14] In December 1853, Sen. Salmon P. Chase of Cincinnati introduced a bill to Congress that would divide Ohio into two federal districts.[15] Through politics and infighting, it took 14 months for Congress to pass the bill and for President Franklin Pierce to sign it.[16]

The new law created the Northern District of Ohio, consisting of the northern 47 counties, and the Southern District of Ohio, composed of the remaining 41 counties. (In 1915 Congress realigned the districts, leading to the current configuration of 40 counties in the Northern District and 48 in the Southern District.) The line of demarcation ran from Jefferson County in the east to Darke County in the west. President Pierce nominated Hiram V. Willson to be the new judge of the Northern District.[17] Willson was well known in the northern legal arena as creator of one of the most successful law firms in Cleveland. He also ran for Congress in 1852, only to lose to his law partner, Edward Wade. Willson, who was also president of the Cleveland Bar Association, had traveled on many occasions to Washington, D.C., with other commissioners of Cleveland to lobby Congress for the division of the District Court of Ohio.[18] Willson served the Northern District until his death from tuberculosis in 1866.

At the same time, President Pierce reassigned Judge Humphrey H. Leavitt, judge of the former District of Ohio, to be the judge for the Southern District. Judge Leavitt might best be known for denying a writ of habeas corpus for the release of Clement L. Vallandigham, who had been convicted by a military court for treasonable utterances attacking the Civil War effort in a speech given in 1863.[19] Judge Leavitt upheld Vallandigham's arrest and military trial as a valid exercise of the president's war powers, which had been granted by Congress on March 3, 1863.[20] The case was upheld by the Supreme Court in 1864.[21] Leavitt, who had originally been appointed to the former district court in 1834, presided over the newly created Southern District until resigning in 1871.[22]

In 1878, the Northern District was divided into eastern and western divisions. The terms of court for the Western Division were to be held in Toledo and the Eastern Division in Cleveland.[23] Currently, the Northern District of Ohio's Eastern Division is authorized to hold court in Cleveland, Youngstown, and Akron, while the Western Division is authorized to hold court in Lima and Toledo.[24] In 1880, the Southern District of Ohio was divided into eastern and western divisions with an additional court location added in Columbus.[25] Currently, the Southern District of Ohio's Eastern Division is authorized to hold court in Columbus, St. Clairsville, and Steubenville, while the Western Division is authorized to hold court in Cincinnati and Dayton.[26]

As the state grew and additional district court locations were established, Congress authorized additional district judgeships. There are currently 11 authorized judgeships for the Northern District of Ohio, and eight authorized judgeships for the Southern District.[27] In addition to the active judges, a number of senior judges carry active caseloads, assisting the courts to effectively and efficiently administer justice in Ohio.

The district courts are ably led by their chief judges, the Hon. Solomon Oliver Jr. of the Northern District and the Hon. Edmund A. Sargus Jr. of the Southern District, who are assisted by their respective clerks of court, Geri M. Smith in Cleveland and Richard W. Nagel in Columbus.

In the 212-year span since a single federal judge sat in a small stone building in Chillicothe, the district courts of Ohio have grown to encompass 19 active judges, nine senior judges, and 15 magistrate judges sitting in 10 locations around the state.

> [T]his docket of 100 years and more, these documents and events that tell the story and parallel the growth of Ohio from primitive backwoods—first diminutive and homely litigation, disputes over vast tracts of unsettled lands, doctrines of state-rights and judicial supremacy in the formative period of our government, a small criminal docket reflecting the local nature of people's activities and lives; next a period of financial

> growth and expansion when admiralty, bankruptcy, banking comes to the fore and the docket is replete with civil and criminal actions by government to collect constantly increasing and diversified taxes, cases reflecting the social upheaval and stresses of the Civil War; next the expansion of railroads with their claims on life and adjustment of capital, the growth and demands of labor organizations, the benefits and ills of industrial aggregates posing problems of government restraint and control; the calm before the storm of World War I with its seething mobilization, heightened loyalty, national integration, and injection of problems of another continent; the aftermath of thrust and turmoil in the Prohibition era; the repercussions of the Great Depression; the cataclysm of a second world conflict followed by the present colossal growth and spread of national governmental intervention into the most intimate phases of the economy and the life of the individual, and the attendant posing of new problems to the federal courts.[28]

The U.S. District Courts of Ohio have provided a forum for citizens to resolve their disputes for more than 200 years. The district courts have been and continue to be an integral part of the federal judiciary, serving to counterbalance the executive and legislative branches of the federal government of the United States. ☉

M. Neil Reed, Tom Vanderloo, and Stephanie Woebkenberg all work in The Library & Archives of the U.S. Court of Appeals for the Sixth Circuit where Reed is court historian, Vanderloo is a digital services librarian, and Woebkenberg is a reference librarian.

Endnotes

[1]Roberta Sue Alexander, A Place of Recourse: A History of the U.S. District Court for the Southern District of Ohio, 1803-2003, 3-4 (Ohio University Press, 2005).
[2]Act of Sept. 24, 1789 (1 Stat. 73).
[3]Russell Wheeler & Cynthia Harrison, Creating the Federal Judicial System (Federal Judicial Center, 3d ed. 2005).
[4]Act of Feb. 19, 1803 (2 Stat. 201).
[5]Act of May 7, 1800, § 6 (2 Stat. 59).
[6]The current custom of Congress declaring an official date of statehood did not begin until 1812, with Louisiana's admission as the 18th state.
[7]Joint Resolution for admitting the State of Ohio into the Union (Aug. 7, 1953) (67 Stat. 407).
[8]Frederick J. Blue, *The Date of Ohio Statehood*, Ohio Acad. of History Newsl. 33 (2002), *available at* www.ohioacademyofhistory.org/wp-content/uploads/2009/12/OAH_2002_Aut.pdf (last visited May 11, 2016).
[9]*Journal of the Executive Proceedings of the Senate of the United States*, 7th Cong., 2d Sess., 447 (March 1, 1803).
[10]Irwin S. Rhodes, *The History of the United States District Court for the Southern District of Ohio*, 24 U. Cin. L. Rev. 340 (Summer 1955).
[11]Act of Feb. 24, 1807 (2 Stat. 420).
[12]Act of July 23, 1866 (14 Stat. 209).
[13]Paul Finkelman & Roberta Sue Alexander, Justice and Legal Change on the Shores of Lake Erie: A History of the U.S. District Court for the Northern District of Ohio 15 (Ohio University Press 2005).
[14]*Id.* at 15, citing Cleveland *The Plain Dealer*.
[15]*Journal of the Executive Proceedings of the Senate of the United States*, 33d Cong., 1st Sess., 59 (Dec. 21, 1853).
[16]Act of Feb. 10, 1855 (10 Stat. 604).
[17]Act of Mar. 4, 1915, 63 Stat. 1187.
[18]*Id.* at § 5.
[19]*See* Finkelman & Alexander *supra* n.13, at 16-17.
[20]*See* Rhodes, *supra* n.10, at 347.
[21]Habeas Corpus Suspension Act (Mar. 8, 1863) (12 Stat. 755).
[22]*Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1864).
[23]"Biographical Directory of Federal Judges: Leavitt, Humphrey Howe," *History of the Federal Judiciary*, Federal Judicial Center, http://www.fjc.gov/servlet/nGetInfo?jid=1360 (last visited May 11, 2016).
[24]*Information About the Court*, United States District Court for the Northern District of Ohio, www.ohnd.uscourts.gov/home/information-about-the-court (last visited May 11, 2016).
[25]28 U.S. Code § 115(a).
[26]Act of Feb. 4, 1880 (21 Stat. 63).
[27]28 U.S. Code § 115(b).
[28]"U.S. District Courts for the Districts of Ohio," *History of the Federal Judiciary,* Federal Judicial Center, www.fjc.gov/history/home.nsf/page/courts_district_oh.html (last visited May 11, 2016).
[29]*See* Rhodes, *supra* n.10, at 353-54.

Hon. Karen Nelson Moore

U.S. Circuit Judge for the Sixth Circuit Court of Appeals

by Prof. Jonathan L. Entin

Jonathan L. Entin is David L. Brennan Professor of Law and Professor of Political Science at Case Western Reserve University. He and Judge Moore were faculty colleagues before her appointment to the bench.

In retrospect, it seems natural that Karen Nelson Moore became a federal judge. A brilliant student in college and law school, she held two prestigious clerkships, practiced with a top law firm, and was a distinguished law professor before her appointment to the bench in 1995.

Background

Judge Moore's long connection to Harvard University began with her undergraduate studies. She attended Radcliffe College, where she was president of her class. Elected to Phi Beta Kappa, she graduated *magna cum laude* and wrote her honors thesis in economics on tax incentives for investment in real estate. She stayed on to attend Harvard Law School, again graduating *magna cum laude*. Among her accomplishments were serving as an editor of the *Harvard Law Review* and as an instructor in Harvard's international tax program.

After law school, she clerked first for Judge Malcolm R. Wilkey of the U.S. Court of Appeals for the District of Columbia Circuit and then for Supreme Court Justice Harry A. Blackmun. She was the first woman to clerk for each of them and is grateful to them for the experiences and opportunities they provided. She views them as her professional mentors. After her clerkships, she practiced with Jones Day Reavis & Pogue.

Professor Moore

In 1977, Moore joined the faculty of Case Western Reserve University School of Law. Five years later, she became the school's first tenured female professor. In 1994, she was appointed the inaugural Arthur E. Petersilge Professor of Law, the first woman to hold an endowed chair at the law school.

Professor Moore set an extraordinary standard. She was an inspiring teacher who received the Student Bar Association's first Teacher of the Year Award and subsequently was honored with the law alumni association's Distinguished Teacher Award. She taught a wide range of courses, including civil procedure, federal income tax, complex litigation, conflict of laws,

and international aspects of U.S. income tax. She also created a Supreme Court Seminar in which students analyzed the record and briefs in pending cases, then wrote draft opinions. In addition, she was the first coordinator of the law school's judicial externship program. In that role, she arranged placements and also taught a series of classes to introduce students to the duties and obligations of working with judges.

A productive scholar, Professor Moore wrote about a variety of topics in litigation, procedure, and taxation. Among her articles were pieces on foreign tax credits, sham transactions, judicial disqualification, due process, preclusion, and jurisdictional issues.[1]

Her academic work led to wider professional recognition. She served on the American Bar Association's Standing Committee on Judicial Selection, Tenure, and Compensation for several years and has been a member of the American Law Institute since 1984 as well as a fellow of the American Bar Foundation since 1991. In addition, she held a number of significant positions in the Association of American Law Schools (AALS), chairing the Civil Procedure section and a national workshop on the subject. Professor Moore also chaired the organizing committee for the AALS' annual workshop for new law teachers

and served on its special committee on tenure and the tenuring process.

Junior faculty might at first have been more than a little overwhelmed by her formidable intelligence and remarkable achievements, but she was a wonderful colleague. Always willing to exchange ideas and to read drafts, she consistently had incisive questions and suggestions. Moreover, she had a sharp wit. I can attest personally to both of these points: I gratefully acknowledged her support in several articles and still remember the day, shortly after I had published an op-ed column criticizing the Ohio Supreme Court's reasoning in a high-profile case, that she greeted me by asking whether I was planning to seek admission on motion to the Ohio bar anytime soon.

The Harvard Connection

As noted above, Judge Moore holds two degrees from Harvard University. But her connection to the nation's oldest institution of higher education goes well beyond that. She taught as a visiting professor at Harvard Law School in 1990-91 and has held several significant offices at Harvard. She served as a trustee of Radcliffe College for four years and as a director of the Radcliffe Alumnae Association for three. She also has been a director and later was vice president of the Harvard Alumni Association. Most notably, she is currently completing her term as president of Harvard's Board of Overseers. The overseers play a significant role in the governance of the university. They focus on Harvard's strategic direction and advise the administration on numerous subjects. Much of their work involves oversight of the quality and direction of the university's schools and programs.

Judge Moore

After 18 years as a law professor, Karen Nelson Moore was appointed to the Sixth Circuit in 1995. For her, judicial service offers the intellectual challenges of academic life while having direct practical significance. After all, many cases pose novel and difficult questions. But a judge must resolve those questions in the context of an actual dispute involving real litigants whose lives and fortunes will be affected by the court's decision. As one former law clerk describes her approach, "Judge Moore always [takes] great care to review and understand a case." A second former clerk says that she is "passionate about reaching the right result."

Judge Moore herself refers to *Souter v. Jones*,[2] a habeas corpus case, to illustrate how complex legal issues intersect with the lives of real people. The case involved Larry Pat Souter, a Michigan man who was convicted of second-degree murder in the death of a woman he had met at a bar in August 1979. About an hour after the bar closed, the woman's body was found on the side of a state highway. Souter went to trial more than a dozen years later, although that lengthy delay was not at issue in the federal habeas case. The prosecution relied heavily on expert testimony that the woman's injuries were consistent with having been struck by a whiskey bottle that Souter admittedly had discarded along the highway not too far from where the body was found. A forensic pathologist who initially had advised the police testified for the defense, reiterating his view that the woman had died as a result of being struck by a passing motor vehicle. The state courts upheld Souter's conviction. Several years later, Souter submitted affidavits from two of the medical experts who had testified for the prosecution at trial. Those experts no longer believed that the whiskey bottle could have inflicted the injuries incurred by the woman.

Souter subsequently filed a habeas petition in federal district court, but the filing came outside the one-year statute of limitations in the Antiterrorism and Effective Death Penalty Act (AEDPA).[3] The district court dismissed the petition as untimely. On appeal, the Sixth Circuit had to address two complicated jurisdictional issues: whether the petition was timely and, if not, whether the doctrine of equitable tolling allowed the habeas court to consider the merits of the petition. The timeliness issue encompassed a logically prior question: whether Souter had waived the timeliness issue by not objecting to the magistrate judge's conclusion that the petition was not timely. Souter might not have filed an objection because the magistrate judge went on to find that equitable tolling allowed the district court to address the merits of his actual-innocence claim. Judge Moore's opinion for a unanimous panel concluded that this failure to object was not a jurisdictional bar.[4] Nevertheless, careful analysis of the procedural history of the case showed that Souter's petition was in fact untimely.[5]

This conclusion required the court to consider whether the doctrine of equitable tolling was available for a credible claim of actual innocence based on newly discovered evidence. AEDPA generally prohibits the filing of a second or successive habeas petition,[6] but the law specifically allows a successive habeas petition based on a claim of actual innocence.[7] The provision embodying this exception does not, however, specify whether the actual-innocence claim must be filed within the one-year deadline. Judge Moore concluded that this was "a rare and extraordinary case" in which the newly discovered evidence "does raise sufficient doubt about [Souter's] guilt and … undermine[s] confidence in the result of his trial."[8] Accordingly, the doctrine of equitable tolling was available to allow Souter to assert his otherwise untimely actual-innocence claim.[9]

Recounting the story of this case, Judge Moore notes with considerable satisfaction that, as a result of press reports of this ruling, a local woman came forward to report that her father had been involved in a hit-and-run accident on the state highway where the woman's body was found on the evening in question and that a side mirror on his vehicle had broken off for reasons that her father refused to explain. This evidence confirmed what the original defense expert and the recanting prosecution experts concluded: that the woman had been hit by

a passing car. As a result, the prosecution confessed error, Souter's conviction was vacated, and he was unconditionally released after 13 years of wrongful imprisonment.[10]

In many ways, *Souter v. Jones* captures Judge Moore's essence: careful attention to detail in order to get the correct result. As another of her former clerks explains, the judge is "both intellectually rigorous and incredibly collegial." She "absorbs information in a way that allows her to grasp the issues" and welcomes "frequent back and forth to make sure that she gets to the right conclusion." ⊙

Endnotes

[1]*E.g., Collateral Attack on Subject Matter Jurisdiction: A Critique of the Restatement (Second) of Judgments*, 66 Cornell L. Rev. 534 (1981); *Appellate Review of Judicial Disqualification Decisions in the Federal Courts*, 35 Hastings L.J. 829 (1984); *The Foreign Tax Credit for Foreign Taxes Paid in Lieu of Income Taxes: An Evaluation of the Rationale and a Reform Proposal*, 7 Am. J. Tax Pol'y 207 (1988); *The Sham Transaction Doctrine: An Outmoded and Unnecessary Approach to Combating Tax Avoidance*, 41 Fla. L. Rev. 659 (1989); *The Supplemental Jurisdiction Statute: An Important But Controversial Supplement to Federal Jurisdiction*, 41 Emory L.J. 31 (1992).

[2]395 F.3d 577 (6th Cir. 2005).

[3]28 U.S.C. § 2244(d)(1)(D).

[4]395 F.3d at 585–86.

[5]*Id.*

[6]28 U.S.C. § 2244(b)(1).

[7]28 U.S.C. § 2244(b)(2)(B).

[8]395 F.3d at 590.

[9]*Id.* at 602.

[10]"Larry Pat Souter," National Registry of Exonerations, U. Mich. L. Sch. (June 2012), www.law.umich.edu/special/exoneration/pages/casedetail.aspx?caseid=3656 (last visited Mar. 23, 2016); *see also Souter v. Jones,* No. 1:02-CV-67 (W.D. Mich. Sept. 20, 2005) (magistrate judge's report and recommendation); John Agar, *Murder Suspect Was "Done Wrong"; Attorney General Says Larry Souter Never Should Have Been Brought to Trial*, Grand Rapids Press, July 6, 2005, at A1.

Allen Profile *continued from page 51*

Judge Allen held her circuit judgeship for 25 years, finally retiring in 1959, but not before writing many successful books on the law and gaining attention as a possible nominee for the U.S. Supreme Court numerous times.[18] ⊙

Circuit Judge Florence Ellinwood Allen at the first Sixth Circuit Judicial Conference in 1941. (Photograph provided by the Library & Archives of the U.S. Court of Appeals for the Sixth Circuit.)

Endnotes

[1]National Park Service, *Judge Florence Allen Biography*, www.nps.gov/romo/judge_florence_allen_biography.htm (last visited May 14, 2016).

[2]Utah History to Go, *Florence Ellinwood Allen*, historytogo.utah.gov/people/utahns_of_achievement/florenceellinwoodallen.html (last visited May 14, 2016).

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[4]The Supreme Court of Ohio & The Ohio Judicial System, *Florence Ellinwood Allen*, www.supremecourt.ohio.gov/SCO/formerjustices/bios/allen.asp (last visited May 14, 2016).

[5]*Id.*

[6]*Id.*

[7]Ohio History Central, *Florence E. Allen*, www.ohiohistorycentral.org/w/Florence_E._Allen (last visited May 14, 2016).

[8]*Id.*

[9]*Id.*

[10]*19th Amendment to the U.S. Constitution: Women's Right to Vote (1920)*, www.ourdocuments.gov, www.ourdocuments.gov/doc.php?flash=true&doc=63 (last visited May 14, 2016).

[11]*Id.*

[12]Ohio History Central, *Florence E. Allen*, www.ohiohistorycentral.org/w/Florence_E._Allen (last visited May 14, 2016).

[13]*Id.*

[14]*Id.*

[15]Utah History to Go, *Florence Ellinwood Allen*, historytogo.utah.gov/people/utahns_of_achievement/florenceellinwoodallen.html (last visited May 14, 2016).

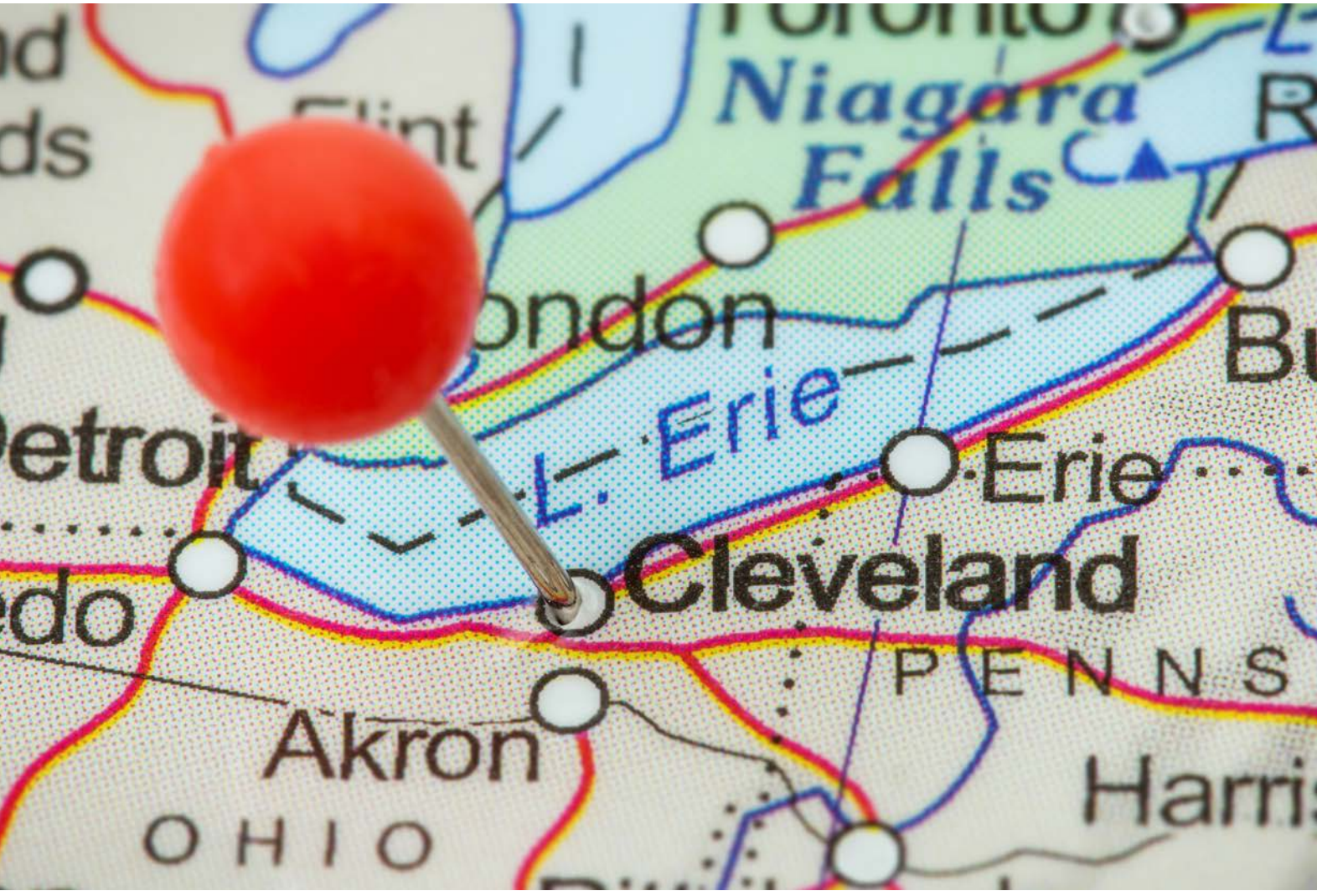
[16]*Id.*

[17]Squire Patton Boggs, *Female Judges of the Sixth Circuit Court of Appeals: The Role of a HotPlate in Sixth Circuit History*, Sixth Circuit Appellate Blog (Mar. 9, 2012), *available at* www.sixthcircuitappellateblog.com/news-and-analysis/the-women-of-the-sixth-circuit-court-of-appeals-at-the-forefront (last visited May 14, 2016).

[18]*Florence Ellinwood Allen*, Utah History to Go, historytogo.utah.gov/people/utahns_of_achievement/florenceellinwoodallen.html (last visited May 14, 2016).

Landmark Supreme Court Cases from Cleveland and Northeast Ohio

PROF. JONATHAN L. ENTIN



Greater Cleveland has generated a surprisingly large number of landmark Supreme Court cases. There are so many that I regularly offer my students a guided tour of the locations where the events occurred that gave rise to those cases. This article provides some details about a few of those cases, which are presented in chronological order.

1. *Village of Euclid v. Ambler Realty Co.*[1]—Upholding the Concept of Zoning

Zoning emerged as a tool of land use regulation in the first quarter of the 20th century. Advocates of zoning were responding to America's increasing urbanization—the 1920 Census revealed that, for the first time, a majority of the population lived in urban areas—along with deplorable housing conditions and chaotic development that too often made city life dangerous and ugly. There was a less noble aspect of the zoning movement: Some of the support for this new form of regulation reflected a desire to enable the relatively better-off classes and whites to avoid having to associate with the poor, immigrants, and African-Americans. Both of these factors can be seen in the *Euclid* case.[2]

Euclid is an eastern suburb of Cleveland, located about a dozen miles from downtown. With development impending as Cleveland's population expanded, local authorities adopted a zoning ordinance in 1922. The measure divided the entire community into a series of use, height, and area classifications that privileged single-family homes of limited height on relatively large lots. Under the cumulative zoning system, only those privileged homes could be built in the highest classification sections of town. Below this highest level were a descending series of permitted uses, heights, and lot sizes. In theory, single-family homes could be built anywhere, but the ordinance clearly sought to protect such residences from less desirable uses.

Ambler Realty Co. owned 68 acres of land that fronted on Euclid Avenue, the main thoroughfare running easterly from Public Square in downtown Cleveland that included a district known as Millionaires Row because John D. Rockefeller and other affluent figures lived there. The company wanted to develop the land for industrial purposes, but the ordinance limited much of the property to residential uses. These restrictions, Ambler alleged, significantly reduced the value of its land. This was the basis of its constitutional challenge to the Euclid zoning ordinance.

From the outset, it was clear that this was no ordinary case. Ambler was represented by Newton D. Baker, a former mayor of Cleveland; he served as secretary of war under President Woodrow Wilson and was a founder of the law firm now known as Baker-Hostetler. Euclid was represented by James Metzenbaum, who had drafted the ordinance and would go on to write a leading treatise on zoning law; he also was a distant cousin of Howard Metzenbaum, who later would serve for nearly two decades as a U.S. senator from Ohio. Judge David Westenhaver, to whom the case was assigned in the U.S. District Court for the Northern District of Ohio, observed practically at the outset of his opinion: "This case is obviously destined to go higher."[3]

Judge Westenhaver ruled that Euclid's zoning ordinance, as applied to Ambler's property, was unconstitutional because it was not a reasonable exercise of police power. Of particular significance, the opinion relied heavily on the Supreme Court's invalidation of a Louisville, Ky., racial zoning ordinance in *Buchanan v. Warley*.[4] That measure forbade anyone from moving into a block where most of the residents were of a different race than the newcomer. Judge Westenhaver reasoned that, if an ordinance restricting the sale or rental of property on the basis of race was invalid, as *Buchanan* had held, it necessarily followed that an ordinance that severely restricted Ambler's use of its property was similarly invalid. He observed that "no candid mind can deny that more and stronger reasons exist, having a real and substantial relation to the public peace, supporting such an ordinance [as the one involved in *Buchanan*] than can be urged under any aspect of the police power to support the [Euclid] ordinance as applied to [Ambler's] property."[5] After all, the judge opined, "The blighting of property values and the congesting of population, whenever the colored or certain foreign races invade a residential section, are so well known as to be within the judicial cognizance."[6]

Judge Westenhaver's prediction proved to be accurate: His decision was appealed to the Supreme Court. There the case was argued twice, first in January and then in October of 1926. After the initial argument, Alfred Bettman, a Cincinnati lawyer and a pioneer of the city planning movement, filed an influential *amicus curiae* brief that focused less on police power than on the local government's authority to combat nuisances. Metzenbaum had emphasized the police power, but Judge Westenhaver rejected that argument. After all, the Supreme Court had shown considerable skepticism toward expansive police-power claims not only in *Buchanan* but also more recently in *Pennsylvania Coal Co. v. Mahon*[7] and *Adkins v. Children's Hospital*.[8] Bettman's approach had a decisive, albeit unacknowledged, impact on the Supreme Court.

Justice George Sutherland's opinion for a six-justice Court majority—Justices Willis Van Devanter, James Clark McReynolds, and Pierce Butler dissented without opinion—explicitly analogized zoning to the law of nuisance, precisely as Bettman had urged. After noting the increasing complexity of urban life, Sutherland famously observed: "A nuisance may be merely a right thing in a wrong place, like a pig in the parlor instead of the barnyard."[9] He immediately added that the standard of review should be more deferential than the district court had used, stating: "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."[10]

Most of the rest of the opinion focused on the exclusion of apartment houses from the highest zoning category, which was reserved for single-family homes. Applying the deferential standard, Justice Sutherland observed that this subject had received widespread attention from experts and blue-ribbon commissions. Without mentioning the racial and ethnic implications of zoning that the district court had explicitly invoked, he characterized an apartment house in a district of private homes as "a mere parasite" that took advantage of "open spaces and attractive surroundings" and warned ominously that one apartment house might well lead to encroachment by others that could "depriv[e] children of the privilege of quiet and open spac-

es for play, enjoyed by those in more favored localities."[11] Apartment houses, in other words, looked like pigs in the parlor.

Having concluded that Euclid's zoning ordinance was not facially invalid, the Court left open the prospect of as-applied challenges to specific zoning rules. Of course, Ambler had launched an as-applied challenge rather than a frontal assault. But the as-applied challenge apparently was premature. Justice Sutherland explained that the company's claim rested on "the broad ground that the mere existence and threatened enforcement of the ordinance … constitute a present and irreparable injury," but this was too thin a reed to support the injunction that was sought.[12] Thus was the principle of zoning upheld against constitutional attack. This was, of course, just the beginning of the story. Many other zoning issues have since reached the Supreme Court, but only because *Euclid* held that zoning in general was permissible even if particular applications might not be.

2. *Mapp v. Ohio*[13]—Applying the Exclusionary Rule to the States

More than 100 years ago, in *Weeks v. United States*,[14] the Supreme Court held that evidence seized in an unlawful search may not be used against a defendant at a criminal trial. But in 1949, at the height of the incorporation debate, a divided Court held in *Wolf v. Colorado*[15] that the exclusionary rule did not apply to the states. Barely a dozen years later, another divided Court overruled *Wolf* and held in the *Mapp* case that the exclusionary rule in fact applies to the states.[16]

Mapp arose out of an investigation into the May 20, 1957, bombing of the Cleveland home of Don King, a small-time local gambling operator who later became a prominent boxing promoter who arranged bouts for Muhammad Ali, Joe Frazier, Larry Holmes, and George Foreman. Three days after the bombing, investigating officers went to the home of Dollree Mapp, who was suspected of being part of the gambling scene and who also had been romantically involved with light-heavyweight champion Archie Moore. On the advice of her lawyer, Mapp refused to allow the officers to enter without a search warrant. The officers notified headquarters and were told that a warrant would be obtained. About three hours later, after several more officers had arrived on the scene, the police claimed to have a search warrant and demanded entry.

When Mapp did not respond quickly enough, the officers broke into a side entrance and waved a piece of paper that they described as a search warrant. Mapp met the officers on the stairs from her second-floor apartment. She grabbed the alleged warrant and stuffed it down the front of her dress; the officers grabbed it back and handcuffed her to an officer while searching both her upstairs apartment and the basement of the house. The search revealed a cache of obscene books and pictures, but no evidence of illegal gambling that was the basis for police interest in Mapp. She claimed that the obscene materials belonged to a man to whom she had rented space in her home and that she had not known anything about them until she packed up his things for storage after he left before his lease expired.

Mapp was convicted of knowingly having in her possession or under control any "obscene, lewd, or lascivious book, … print, [or] picture" in violation of Ohio law. The state supreme court held that the evidence supported the jury's verdict that she knowingly possessed obscene material: Mapp had taken possession and control not only of the space that the tenant had rented but also of his belongings, including the books and pictures, and she knew that those materials were "lewd and lascivious."[17] The court went on to reject both of Mapp's constitutional challenges to her conviction.

First, although there was "considerable doubt as to whether there ever was any warrant for the search"—no warrant was introduced at any stage of the proceedings and any warrant that might have existed almost certainly would have focused on gambling-related materials rather than on obscenity—the long-standing rule in Ohio, consistent with *Wolf*, held that evidence obtained in an unlawful search was admissible.[18]

Having rejected Mapp's evidentiary objection, the court then turned to her fundamental substantive claim: that a law forbidding simple possession of obscenity violates the First Amendment. The U.S. Supreme Court recently had struck down a similar state statute in *Smith v. California*.[19] Although the Ohio law required knowing possession while the California law imposed strict liability, a majority of the Ohio Supreme Court concluded that the two statutes were functionally identical and that the Buckeye State's law also violated the First Amendment.[20]

This would have been the end of the matter except for an unusual provision of the Ohio Constitution that required that at least six of the seven members of the state supreme court agree before finding a law unconstitutional. This provision was part of a large package of progressive constitutional reforms adopted in 1912 in response to a series of decisions striking down consumer- and worker-protection laws.[21] Because only four justices agreed that the Ohio statute under which Mapp had been tried did contravene the First Amendment, her conviction was upheld by a 3-4 vote.[22]

Mapp's lawyer raised the Fourth Amendment issue in the U.S. Supreme Court, but the main argument focused on the validity of the

Ohio obscenity law under the First Amendment. Indeed, this was the principal basis for Justice John Marshall Harlan II's dissent, which was joined by Justices Felix Frankfurter and Charles Evans Whittaker. The dissenters described Mapp's Fourth Amendment argument as "subordinate;" her lawyer never cited *Wolf* in his written submissions and even at oral argument declined to seek that case's overruling.[23] Only the American Civil Liberties Union, appearing as *amicus curiae*, urged the Court to apply the exclusionary rule to the states.[24] Indeed, Justice Potter Stewart agreed with the dissenters on this point, although he concurred in the judgment because he thought that the Ohio statute violated the First Amendment.[25]

Despite these objections, Justice Tom C. Clark wrote a majority opinion that addressed only the Fourth Amendment issue. He reasoned that, because the Fourth Amendment had been incorporated against the states, it necessarily followed that the exclusionary rule also must apply to the states.[26] Not only was the rule constitutionally mandated, but it also makes good sense on policy grounds by encouraging the states to respect the Fourth Amendment and by upholding public respect for the law through making the government at all levels respect individual rights.[27]

3. *Terry v. Ohio*[28]—Upholding Stop and Frisk

Just over two years later, an incident in downtown Cleveland set in motion the litigation that culminated in the Supreme Court's upholding the ability of police officers to stop and frisk individuals without probable cause.[29] In the midafternoon of Halloween 1963, a veteran Cleveland police detective named Martin McFadden observed two African-American men, John Terry and Richard Chilton, repeatedly walking back and forth along a business block; they met periodically to talk, then continued walking separately along the block. A white man, Carl Katz, spoke briefly with them at one end of the block, then went around the corner along an adjoining street. Soon afterward, Terry and Chilton followed Katz down the adjoining street. Detective McFadden approached the three men, identified himself as a police officer, and asked them to identify themselves. Concerned that they might be carrying weapons, McFadden patted them down and found that Terry and Chilton were carrying loaded revolvers; Katz was unarmed. The detective therefore arrested the two African-Americans for unlawful possession of a concealed weapon and let Katz go.

McFadden testified that he suspected Terry and Chilton of casing one of the stores in the area because both of them repeatedly stopped in front of the display window while walking up and down the block. But he also admitted that he had never before arrested anyone for casing the site of a potential robbery. And although nobody explicitly advanced this argument, it is conceivable that part of what made this episode suspicious to the detective was the apparent connection between the two African-Americans and the white man at a time when such interactions might have seemed unusual.

Louis Stokes, whose brother, Carl, would be elected mayor of Cleveland in 1967 and who would himself be elected to Congress in 1968 to start a 30-year tenure, represented both Terry and Chilton. He consistently argued that McFadden's actions violated the Fourth Amendment because the officer lacked probable cause to stop and frisk Terry and Chilton. The common pleas judge denied a motion to suppress and after a bench trial found both men guilty. The Ohio Court of Appeals affirmed the conviction, and the Ohio Supreme Court denied review.[30]

The Supreme Court, in an opinion by Chief Justice Earl Warren with only Justice William O. Douglas dissenting, rejected Stokes' argument that the stop and frisk was unlawful due to lack of probable cause. At the same time, the Court emphasized that the Fourth Amendment did apply. Although a warrant was not required in the circumstances, McFadden had acted reasonably based on his long experience in law enforcement.[31] *Terry* retains continuing relevance because law enforcement officers regularly encounter members of the public in the course of their duties. The Court's analysis of reasonableness therefore helps to frame the legal and political debate about policing and is likely to do so for a long time.

4. *Sheppard v. Maxwell*[32]—Protecting the Right to a Fair Trial

Before the O.J. Simpson case, there was another so-called trial of the century: the one involving Sam Sheppard, a prominent osteopathic physician. In the wee hours of July 4, 1954, Marilyn Sheppard, Sheppard's pregnant wife, was beaten to death in her bed. Sheppard was charged with first-degree murder; the jury convicted him of second-degree murder. The state courts affirmed, and the Supreme Court denied certiorari.[33] As the Ohio Supreme Court observed, the case combined "[m]urder and mystery, sex and suspense" and unfolded in an "atmosphere of a 'Roman holiday' for the news media."[34] Eventually, the atmosphere before and during the trial would make this a landmark case.

Within days of the crime, a steady stream of press reports, including front-page editorials by *Cleveland Press* Editor Louis Seltzer, portrayed Sheppard as the obvious culprit and demanded prompt

Significant Southern District of Ohio Cases

By Hon. Michael R. Merz

Since the founding of the Southern District of Ohio, there have been several significant cases. What follows is a synopsis of the top 10, in no particular order.

- In *Pembaur v. City of Cincinnati*,[1] the Supreme Court reversed the Sixth Circuit's decision dismissing a property owner's claim against respondent county for entering onto his property in violation of the Fourth Amendment because, in authorizing the sheriff to enter onto petitioner's property, the county prosecutor was acting as the final decision-maker for the county and, therefore, the sheriff's action represented respondent's official policy.
- Ohio's ban on recognition of same-sex marriages was held to be unconstitutional as applied by Judge Timothy S. Black.[2] Although the Sixth Circuit reversed, setting up a circuit split on the question, the Supreme Court found a substantive due process right to same-sex marriage.[3]
- A teacher at Dayton Christian Schools was suspended for being pregnant, then fired for consulting a lawyer about the suspension. The Ohio Civil Rights Commission began an investigation that Judge Rice preliminarily enjoined as an interference with the school's Free Exercise rights; they had claimed a Biblical basis for their actions. The Supreme Court reversed, extending *Younger* abstention to this case because of Ohio's interest in enforcing its civil rights laws.[4]
- In *Sheppard v. Maxwell*,[5] the Supreme Court upheld Judge Carl Weinman's issuance of a writ of habeas corpus for Dr. Sam Sheppard because of pervasive and prejudicial pretrial and invasive trial publicity.
- In the capital case of *Bies v. Bobby*, this court held that, in the wake of the *Atkins v. Virginia* prohibition of executing the mentally retarded, a state court finding of fact—that a person is mentally retarded—is entitled to collateral estoppel effect. The Sixth Circuit affirmed, but the Supreme Court unanimously reversed,[6] allowing the issue to be re-tried in the state courts.
- *Brinkman v. Dayton Bd. of Educ.* was Dayton's school desegregation case, presided over by Judge Carl Rubin. The Supreme Court upheld this court's decision that the Dayton Board of Education had intentionally maintained a racially segregated public school system.[7] It was during the pendency of this case that Judge Rubin's expert, Dr. Charles Glatt, was shot to death in the Dayton federal courthouse.
- In the Cincinnati racial profiling case, Judge Susan Dlott consolidated a number of police misconduct cases, including one arising out of a police shooting of an unarmed teenager. She convened a mediation process that sought to provide systemic reform, rather than just settling the individual cases. After a year of community consultation, the City of Cincinnati, the Fraternal Order of Police, the plaintiffs, and the Department of Justice agreed on an omnibus settlement agreement with an outside monitor for five years.[8]
- In *Elder-Beerman Stores Corp. v. Federated Dep't Stores Inc.*,[9] the Sixth Circuit rejected the so-called hub-and-spoke theory of antitrust conspiracy. Arthur Beerman contended that Rike's separate exclusive dealing arrangements with many top name brands was in essence a horizontal conspiracy in restraint of trade. Judge Carl Weinman tried the case, which was the origin of the Southern District's local rule against post-verdict lawyer conversations with jurors.
- *Rose v. Giamatti*[10] was Pete Rose's action to enjoin the commissioner of Major League Baseball from holding disciplinary hearings on the allegation that Rose had bet on games. Judge John Holschuh presided and denied a motion to remand to state court. Judge S. Arthur Spiegel took Rose's guilty plea in the associated tax fraud case.
- *Wickard v. Filburn*[11] is often said to represent the furthest reaches of the Commerce Clause. Roscoe Filburn, a Montgomery County farmer, raised twice his allotment of wheat and sought to enjoin collection of a penalty tax on the theory that the wheat was all consumed on the farm and never entered interstate commerce. The Supreme Court upheld the penalty on the theory that Filburn's home production affected interstate commerce because he did not have to enter the market to buy chicken feed. ⊙

Michael R. Merz is a U.S. Magistrate Judge in the Southern District of Ohio's Dayton seat of court.

Endnotes

[1]*Pembaur v. City of Cincinnati,* 475 U.S. 469 (1986).
[2]*Obergefell v. Wymyslo,* 962 F. Supp. 2d 968 (S.D. Ohio 2013).
[3]*Obergefell v. Hodges,* 576 U.S. ___, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015).
[4]*Ohio Civil Rights Comm'n v. Dayton Christian Schs. Inc.,* 477 U.S. 619 (1986).
[5]*Sheppard v. Maxwell,* 384 U.S. 333 (1966).
[6]*Bobby v. Bies,* 556 U.S. 825 (2009).
[7]*Dayton Bd. of Educ. v. Brinkman,* 443 U.S. 526 (1979).
[8]*Tyehimba v. City of Cincinnati,* No. C-1-99-317, 2001 WL 1842470, at *1 (S.D. Ohio May 3, 2001).
[9]*Elder-Beerman Stores Corp. v. Federated Dep't Stores Inc.,* 459 F.2d 138 (1972).
[10]*Rose v. Giamatti,* 721 F.Supp. 906 (S.D. Ohio 1989).
[11]*Wickard v. Filburn,* 317 U.S. 111 (1942).

action by the authorities. Seltzer accused Samuel Gerber, the county coroner who quickly had concluded that Sheppard was guilty, of dragging his feet on holding an inquest. Gerber promptly convened an inquest that was conducted before a raucous audience in a school gymnasium and broadcast live on local radio and television stations. Numerous reports featured supposedly inculpatory evidence that was never introduced at trial. Meanwhile, Dr. Sheppard lied at the inquest about his lengthy affair with Susan Hayes, a medical technician who worked at the osteopathic hospital owned by his father and where he and his brother were on the staff. His lack of truthfulness on this matter fed suspicion that the philandering husband must have killed his wife. Meanwhile, Seltzer published another front-page editorial demanding that Sheppard be arrested. Authorities took Sheppard into custody that night. The publicity continued through the trial several months later. Not all of the news stories were hostile to Sheppard, but most of them were. And there seemed to be never-ending newspaper and broadcast coverage. As the trial date approached, all three Cleveland newspapers published the names and addresses of the prospective jurors who then received numerous communications from friends and strangers before jury selection began. And both before and during jury selection, newspapers and radio stations published reports that strongly criticized Sheppard and his defense team.

The trial proceedings that began in mid-October attracted massive coverage. To accommodate the media, a long table was set up inside the courtroom bar for about 20 reporters. One end of that table came within three feet of the jury box. And placement of the table required the removal of one of the two counsel tables that were normally used in trials. In addition, three of the four rows of regular seats in the courtroom also were assigned to the press, leaving the remaining 14 seats in the last row to be shared by relatives of Sam Sheppard, relatives of Marilyn Sheppard, and a handful of members of the public who were admitted by special pass.

The media also were allowed to use all the rooms on the courtroom floor; private telephone lines and telegraph equipment were installed to facilitate the reporters' work. One radio station was allowed to set up shop next door to the jury room, which was on another floor of the courthouse but to which jurors retired during trial recesses and in which they deliberated at the end of the trial. Television and newsreel cameras were set up on the steps and sidewalk outside the courthouse and in the hallways outside the courtroom to take pictures of trial participants.

The congested courtroom meant that Sheppard could not easily talk privately with his lawyers without having to go outside. Moreover, when the prosecutor or defense counsel wanted to discuss matters outside the presence of the jury, the lawyers often had to retire to the judge's chambers and had to run a gauntlet of reporters and photographers to return to their seats at the counsel table.

Further, the daily record of the trial was made available to the local newspapers, which printed virtually the entire transcript verbatim, complete with objections by counsel and rulings by the judge. These accounts often were accompanied by photographs of Sheppard, the lawyers, the judge, and jurors. Some national reporters published inflammatory stories, including one account by a woman who had been arrested in New York City and claimed to have had Sam Sheppard's love child.

Finally, although the jury had been sequestered during its delib-

To accommodate the media, a long table was set up inside the courtroom bar for about 20 reporters. One end of that table came within three feet of the jury box. And placement of the table required the removal of one of the two counsel tables that were normally used in trials.

erations, bailiffs allowed jurors to make unmonitored telephone calls to their homes.

Sheppard's lawyers filed numerous motions to delay the proceedings, to change the venue to a location that had not experienced the saturation of pretrial publicity that Cleveland had, and for a mistrial. The trial judge denied all the motions. As noted above, the jury returned a conviction for second-degree murder although the indictment had charged first-degree murder. Sheppard received a life sentence.

In affirming the conviction, the Ohio Supreme Court (echoing the Ohio Court of Appeals for the Eighth District) recognized the extensive publicity that the case had generated. At the same time, the court noted, the legal question did not turn on the extent of publicity but rather on whether "the defendant was accorded a fair constitutional trial by an impartial jury which could decide the issues of fact solely upon the consideration of the evidence in light of the law given it by the [trial] court."[35] And on that question, the state's high court had no difficulty in concluding that Sheppard had indeed received a fair trial. The U.S. Supreme Court denied certiorari, although Justice Frankfurter pointedly remarked that this disposition "in no wise implies that this Court approves the decision of the Supreme Court of Ohio."[36]

Nearly a decade later, a young lawyer named F. Lee Bailey became interested in Sheppard's case and filed a federal habeas corpus petition emphasizing the prejudicial publicity surrounding Marilyn Sheppard's murder and Sam Sheppard's trial. The U.S. District Court for the Southern District of Ohio granted the writ;[37] a divided panel of the U.S. Court of Appeals for the Sixth Circuit reversed;[38] the Supreme Court, with only Justice Hugo Black dissenting (without opinion), reversed and remanded the case to the district court with instructions to grant the writ and order that the state either release Sheppard or retry him within a reasonable time.[39] Justice Clark's opinion strongly criticized the trial judge for allowing a "carnival atmosphere" and listed numerous steps that he could have taken to control the proceedings.[40]

The county prosecutor chose to retry Sheppard. The case, heard by a different judge who scrupulously controlled the proceedings, took less than half the time as the first trial. Bailey did an excellent job of cross-examining the state's leading witnesses, including Dr. Gerber. The coroner had testified at the first trial that Marilyn Sheppard had been beaten to death with a surgical instrument of some sort, but Bailey got him to admit at the second trial that he had never been able to find such an instrument despite having searched long and hard for one. The jury acquitted Sam Sheppard at the second trial. He attempted to return to his medical work, but his skills had deteriorated over the years to such an extent that he had to give up that line of work. He briefly tried his hand at professional wrestling but died, at the age of 46, in 1970.

The Sam Sheppard controversy survived the protagonist. Nearly three decades after his death, representatives of the estate filed suit in the Cuyahoga County Court of Common Pleas seeking a declaration of innocence. This would provide a basis for a claim for compensation for wrongful imprisonment under state law. The moving force behind the litigation was Sam Reese Sheppard, who as a 7-year-old had slept through his mother's murder on that fateful 1954 night. The Ohio Supreme Court allowed the case to go to trial,[41] but a jury ruled against the estate and refused to declare Sam Sheppard innocent. This judgment was affirmed on appeal, not on the merits but rather because the suit was untimely and the claim had expired with Sam Sheppard's death.[42]

5. *Cleveland Board of Education v. LaFleur*[43]— Defining Pregnancy Discrimination

Jo Carol LaFleur and Ann Nelson began teaching in the Cleveland public schools in the fall of 1970. Both were married (one to a law student) and both became pregnant partway through the school year. At the time, the Cleveland school board required a pregnant teacher to take an unpaid leave of absence by the end of her fourth month; she could apply to return to work at the beginning of the first school term after the baby reached the age of 3 months. Both women objected to their forced removal from the classroom and sought legal help. LaFleur eventually spoke with Jane Picker, a cooperating attorney with the Women's Equity Action League and a professor at Cleveland-Marshall College of Law at Cleveland State University; Nelson talked with Lewis Katz, a professor at Case Western Reserve University and a close friend and colleague of Sidney Picker, the husband of Jane Picker. Katz and Carol Agin Kipperman, a young lawyer who later moved to Chicago and became a state judge, agreed to represent the pregnant teachers in their challenge to the fourth-month rule.

LaFleur certainly was a victory for the pregnant teachers, but the Court's avoidance of the equal protection argument made it a less significant win than it might have been. The focus on due process reflected the justices' more general discomfort with treating pregnancy-based rules as sex-based.

This case eventually made its way to the Supreme Court, but the doctrinal landscape at the outset was bleak. When the teachers filed their lawsuit, the Court had never found a sex-based classification unconstitutional. Some of the cases refused to take such claims seriously, while others upheld sex-based policies on the basis of patronizing or stereotypical notions of women's roles.[44] Relying heavily on *Muller v. Oregon*,[45] which had upheld a maximum-hour law for women at a time when maximum-hour laws for men were

viewed as infringing on liberty of contract, the district court upheld Cleveland's fourth-month rule as reasonable. The rule afforded students continuity of instruction and prevented educational disruption by removing pregnant teachers from the classroom at a relatively early stage.[46] A divided panel of the Sixth Circuit reversed, holding that the school board's stated concern that pregnant teachers might be embarrassed by giggling and harassment by students was insubstantial and that the medical testimony did not support the board's blanket rule. Because the rule affected only women and the board had no analogous policy applicable to male-only conditions, the pregnancy policy was an impermissible form of gender discrimination.[47]

The Sixth Circuit based its decision in part on *Reed v. Reed*,[48] a Supreme Court ruling handed down several months after the district court issued its opinion and that for the first time invalidated an explicitly sex-based classification. *Reed* struck down an Idaho law that gave males preference over females in the administration of estates, so it did not address pregnancy rules.

Jane Picker, who argued the case in the Supreme Court, based her arguments on the Equal Protection Clause: requiring pregnant teachers to leave the classroom by the end of their fourth month treated women differently than men. The justices, however, hesitated to rely on equal protection and instead focused on the Due Process Clause. The Court concluded that the fourth-month rule could not advance the board's claimed interest in continuity of instruction because the end of the fourth month will come at widely varying times for individual teachers; allowing more flexibility actually would promote greater continuity at least if the teacher has to provide adequate notice.[49] Nor could the rule be justified as a means of keeping physically incapacitated pregnant teachers out of the classroom: the fourth-month rule established a conclusive presumption of physical incapacity at a relatively early stage of pregnancy, but due process required individualized determinations of fitness at least until very late stages of pregnancy.[50] Finally, the return-to-work provision of the pregnancy policy also established an unconstitutional conclusive presumption because it required a teacher who had given birth to wait until the beginning of the first school term after her child reached 3 months of age even if the teacher had medical certification that she was fully capable of starting back to work sooner.[51]

LaFleur certainly was a victory for the pregnant teachers, but the Court's avoidance of the equal protection argument made it a less significant win than it might have been. The focus on due process reflected the justices' more general discomfort with treating pregnancy-based rules as sex-based. Later in the same term that *LaFleur* was decided, the Court rejected a constitutional challenge to a California disability insurance program that excluded coverage for "normal" pregnancy; the opinion explained that the program was not sex-based but instead distinguished between "pregnant women and nonpregnant persons."[52] And two years after that, the Court held that pregnancy discrimination was not a form of prohibited sex discrimination under Title VII of the Civil Rights Act of 1964.[53] Congress responded by adopting the Pregnancy Discrimination Act.[54] Moreover, constitutional challenges to pregnancy rules have become increasingly rare since Congress expanded Title VII to cover most state and local governments. Nevertheless, *LaFleur* remains a landmark in that it was the first Supreme Court case to invalidate a pregnancy rule as unconstitutional. ⊙

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Endnotes

[1]272 U.S. 365 (1926).

[2]For more details on the case and its significance, *see, e.g., Symposium on the Seventy-Fifth Anniversary of Village of Euclid v. Ambler Realty Co.,* 51 Case W. Res. L. Rev. 593 (2001).

[3]*Ambler Realty Co. v. Village of Euclid,* 297 F. 307, 308 (N.D. Ohio 1924), *rev'd*, 272 U.S. 365 (1926).

[4]245 U.S. 60 (1917).

[5]*See Euclid,* 297 F. at 312–13.

[6]*Id.* at 313.

[7]260 U.S. 393 (1922).

[8]261 U.S. 525 (1923), *overruled by West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

[9]272 U.S. at 388.

[10]*Id.*

[11]*Id.* at 394.

[12]*Id.* at 395.

[13]367 U.S. 643 (1961).

[14]232 U.S. 383 (1914).

[15]338 U.S. 25 (1949).

[16]For more details about *Mapp*, *see, e.g.*, Priscilla H. Machado Zotti, Injustice for All: *Mapp v. Ohio* and the Fourth Amendment (2005); *Symposium on the Fortieth Anniversary of Mapp v. Ohio,* 52 Case W. Res. L. Rev. 371 (2001).

[17]*State v. Mapp,* 166 N.E.2d 387, 389 (Ohio 1960), *rev'd sub nom. Mapp v. Ohio,* 367 U.S. 643 (1961).

[18]*Id.*

[19]361 U.S. 147 (1959).

[20]166 N.E.2d at 391.

[21]*See generally* Jonathan L. Entin, *Judicial Supermajorities and the Validity of Statutes: How Mapp Became a Fourth Amendment Landmark Instead of a First Amendment Footnote*, 52 Case W. Res. L. Rev. 441 (2001).

[22]166 N.E.2d at 391.

[23]367 U.S. at 672–74 & nn. 1–6 (Harlan, J., dissenting).

[24]*Id.* at 674 n. 5.

[25]*Id.* at 672 (memorandum of Stewart, J.). Justice Stewart later explained that he fully supported the extension of the exclusionary rule to the states but regarded *Mapp* as an inappropriate vehicle for taking this step. Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 Colum. L. Rev. 1365, 1389 (1983).

[26]367 U.S. at 655–56.

[27]*Id.* at 657–59. Justice Black concurred despite his concern that the Fourth Amendment alone was not a sufficient basis for the exclusionary rule. Instead, he viewed the rule as a logical corollary of the Fourth Amendment's prohibition of unreasonable searches and seizures and the Fifth Amendment's privilege against self-incrimination. *Id.* at 661–62 (Black, J., concurring). Justice Douglas also concurred,

reasoning that *Wolf* had created an unacceptable asymmetry in the law and contending that *Mapp* was an appropriate case in which to resolve the problem. *Id.* at 670–71 (Douglas, J., concurring).

[28]392 U.S. 1 (1968).

[29]For more details on this case, *see, e.g.,* Symposium, *"Stop and Frisk" in 1968: The Issue, the Cases and the Supreme Court's Decisions in Terry v. Ohio, Sibron v. New York and New York v. Peters,* 72 St. John's L. Rev. 721 (1998).

[30]*State v. Terry,* 214 N.E.2d 114 (Ohio Ct. App. 8th Dist. 1966).

[31]*Terry v. Ohio,* 392 U.S. at 20, 28.

[32]384 U.S. 333 (1966).

[33]*State v. Sheppard,* 128 N.E.2d 471 (Ohio Ct. App. 1955), *aff'd*, 135 N.E.2d 340 (Ohio), *cert. denied*, 352 U.S. 910 (1956). For additional discussion of the *Sheppard* case, *see, e.g.,* Symposium, *Toward More Reliable Jury Verdicts? Law, Technology, and Media Developments Since the Trials of Dr. Sam Sheppard*, 49 Clev. St. L. Rev. 385 (2001); Jonathan L. Entin, *Being the Government Means (Almost) Never Having to Say You're Sorry: The Sam Sheppard Case and the Meaning of Wrongful Imprisonment*, 38 Akron L. Rev. 139, 139–60 (2005).

[34]*State v. Sheppard,* 135 N.E.2d 340, 342 (Ohio 1956).

[35]*Id.* at 343.

[36]*Sheppard v. Ohio,* 352 U.S. 910, 911 (1956) (memorandum of Frankfurter, J.).

[37]*Sheppard v. Maxwell,* 231 F. Supp. 37 (S.D. Ohio 1964).

[38]*Sheppard v. Maxwell,* 346 F.2d 707 (6th Cir. 1965).

[39]*Sheppard v. Maxwell,* 384 U.S. 333, 364 (1966).

[40]*Id.* at 358.

[41]*State ex rel. Tubbs Jones v. Suster,* 701 N.E.2d 1002 (Ohio 1998).

[42]*Murray v. State,* 2002 WL 337732 (Ohio Ct. App. 8th Dist. Feb. 21, 2002), *appeal not allowed*, 772 N.E.2d 1202 (Ohio 2002).

[43]414 U.S. 632 (1974).

[44]*E.g., Goesaert v. Cleary,* 335 U.S. 464, 465 (1948) (upholding a Michigan law forbidding most women from working as bartenders on the basis that the case was "one of those rare instances where to state the question is in effect to answer it"); *Hoyt v. Florida,* 368 U.S. 57, 62 (1961) (rejecting a challenge to a law making it much less likely that females will serve on juries than will males in part on the basis that the law reflects the reasonable assumption that women are "the center of home and family life").

[45]208 U.S. 412 (1908).

[46]*LaFleur v. Cleveland Bd. of Educ.,* 326 F. Supp. 1208, 1213–14 (N.D. Ohio 1971).

[47]*LaFleur v. Cleveland Bd. of Educ.,* 465 F.2d 1184, 1187–88 (6th Cir. 1972).

[48]404 U.S. 71 (1971).

[49]*Cleveland Bd. of Educ. v. LaFleur,* 414 U.S. 632, 642–43 (1974).

[50]*Id.* at 644–47 & n. 13.

[51]*Id.* at 648–50.

[52]*Geduldig v. Aiello,* 417 U.S. 484, 497 n. 20 (1974).

[53]*Gen. Elec. Co. v. Gilbert,* 429 U.S. 125 (1976).

[54]Pub. L. No. 95–555, 92 Stat. 2076 (1978), codified at 42 U.S.C. § 2000e(k).

Hon. Dan A. Polster

U.S. District Judge for the Northern District of Ohio

by Jeremy A. Tor

Jeremy A. Tor is a trial lawyer at Spangenberg Shibley & Liber LLP in Cleveland. He served as a law clerk to Judge Polster from 2011 through 2013 after graduating from the University of Virginia School of Law.

Dan Aaron Polster grew up in the Ludlow neighborhood, the first in Cleveland—and one of the first in Ohio—to be successfully integrated in the 1950s. Polster credits his parents (and other socially conscious individuals) for that success.

In the 1950s, when African-Americans moved into a neighborhood, two things happened. First, banks drew a red line on a map around the neighborhood to indicate they would no longer issue mortgages there. This came to be known as "redlining." The second practice was called "blockbusting." Realtors would go door-to-door and frighten white families into selling their homes, warning that the influx of African-Americans would cause home values to plummet.

In response, Polster's parents and others banded together to form the Ludlow Community Association. They hosted real estate potlucks for prospective home buyers and pooled their resources to provide second mortgages. The goal was to encourage white, as well as African-American, families to move into and thus to stabilize the neighborhood. It worked.

This story of successful racial integration was covered by *The Wall Street Journal* and *Reader's Digest* and is a case study for sociologists and urban planners around the world. *Reader's Digest* described Ludlow in the late '60s as a "stable, high-quality, biracial neighborhood" and its accomplishments as a "moving chapter in the history of race relations in the United States."

When I sat down with Polster to talk about his upbringing and his pathway into the law, he reflected on his parents' efforts: "Ordinary people can do extraordinary, heroic things if they recognize the opportunity and realize, 'This is my time to do something significant, I'm not going to take a pass.' Usually people take a pass." But Polster didn't fully appreciate the significance of his parents' activism until later in life.

In fact, until the sixth grade, Polster wanted only to become a professional baseball player. He had a role model close at hand; his Little League coach was Al Rosen, the Cleveland Indians and four-time All-Star third baseman. (Rosen's son was on Polster's team.)

Unfortunately, Polster's dream clashed with reality; as he readily acknowledges, he lacked any natural ability. Still, his parents never discouraged him and never told him he needed a backup plan. They probably figured he'd come to the conclusion on his own. And he did.

One day at practice Rosen told the team, "Today I'm going to teach you how to hit a curveball." From the mound, he threw slow, easy curves. Polster was smart enough to anticipate how the ball would move through the air. But he could not—no matter how hard he tried—make himself swing where he knew the ball would end up as it crossed the plate. He would swing where it started. As a result, he never got within a foot of the ball. He left practice that day feeling deflated, and when he got home he threw his glove on the floor and declared, "I guess I've gotta be a lawyer."

Polster remembers this episode vividly; he is less clear how the idea of becoming a lawyer originated in his mind. He did not grow up with lawyers. The closest lawyer in the family was a great uncle. He does remember watching "The Defenders," a TV show about criminal defense lawyers who took on tough cases and often lost. The show fascinated and intrigued him. But it seems unlikely a TV show alone can account for his decision to become a lawyer. One suspects his parents' activism had a greater influence.

Judge Polster has been active in the Cleveland Metropolitan Bar Association's and Cleveland Metropolitan School District's "3Rs" Program ("Rights, Responsibilities, and Realities") since its founding in 2006. The 3Rs Program teaches constitutional rights and career planning to high school students. Here, Judge Polster leads a classroom discussion at Cleveland's Lincoln West High School in the 3Rs Program inaugural year. (Photo provided by the Cleveland Metropolitan Bar Association.)

In any event, Polster "was absolutely convinced of that path until senior year of college when suddenly it seemed as though everyone was going to law school." This gave him pause. He asked himself, "Was the idea of becoming a lawyer something I'd seized upon when I couldn't hit Al Rosen's curve but something I never really gave much thought?"

The self-doubt motivated him to defer law school for a year. He took a fellowship in the New York City Department of Consumer Affairs, which at the time was headed by Bess Meyerson. He performed quasi-legal work under the supervision of lawyers. By the end of the year, he was certain he was going to law school for the right reasons.

His plan as he entered law school was to work in the public sector. This was atypical at Harvard Law School, where the students were subjected to a process of heavy socialization, which left many convinced that the purpose of law school was to become a corporate lawyer. The belief permeated the school, but it didn't persuade Polster. He had his sights on the Department of Justice (DOJ).

In the fall of 1975, the main vehicle into the DOJ was the honors program. The person who came to campus to conduct interviews was the assistant attorney general for the Office of Legal Counsel, a man named Antonin Scalia. Polster entered the room but he didn't sit down. Scalia was staring at papers on his desk and, without looking up, asked, "If you get the job, will you stay at least three years?"

"Yes, sir," Polster replied.

"Thank you, that'll be all." And out Polster went.

He remembers being in the room for no more 20 seconds, and he left feeling stunned and crestfallen. To make matters worse, some of his classmates said they'd engaged Scalia in long philosophical discussions about the law. Polster was sure he'd blown the interview. He was wrong. Something about his resume must have impressed Scalia, and he got the job. And he ended up staying more than three years; he spent six years in the antitrust division and 16 as an assistant U.S. attorney (AUSA) in the Northern District of Ohio.

Taking the job as an AUSA was, by Polster's account, the second best decision he ever made. The first best decision was marrying his wife, Deborah Coleman, an accomplished and well-respected lawyer in her own right.

During our discussion of his work as a prosecutor, I asked Polster what he thought of prosecutorial discretion: "If you have a choice between having a prosecutor with very high integrity and a judge with very high integrity, it's more important to have the prosecutor with high integrity." Why? Because "90 percent of what I did as a prosecutor was secret. If things are done confidentially, the only check is the character and integrity of the man and woman doing it." By contrast, "90 percent of what I do as a judge is public."

Although most of his work is open for all to see and often conducted in a courtroom filled with lawyers and members of the public, he confessed that being a judge can be lonely. "There is no lonelier place in the world than sitting on the bench sentencing a person. I often wish I was anywhere in the world but in that chair." But that loneliness is a check on the awesome power he possesses: "The day I can send someone to prison and not feel anything is my last day on the job."

One way Polster combats the loneliness is by staying active in the community. He is probably the most involved judge in Cleveland. If he gets an invitation, "my instinct is to say yes." He enjoys getting out, meeting with students, interacting with lawyers outside the courtroom, and speaking with members of the public. Part of his motivation stems from his desire for people to see federal judges, not as mystical figures, but as ordinary people.

Polster sees himself as the steward of his office, and hopes to pass on to the next generation a judicial system better than the one he inherited. Now in his 18th year on the job, he can recall his fair share of failures and successes. One of the cases he considers a highlight was the Amish beard-cutting case.

Members of a breakaway Amish sect committed a series of attacks on other Amish with whom they'd had religious disagreements. The U.S. attorney brought charges under the Federal Hate Crimes Prevention Act. This high-profile case garnered international media attention. Polster was the first judge in the nation to try a case under this new statute. He faced many challenges, including vexing legal issues, such as whether the statute was a constitutional exercise of Congress's interstate commerce powers and whether intrareligious violence can ever qualify as a hate crime. One of his greatest concerns, however, was making sure the trial didn't become a spectacle: "I am very glad I had that case in my 15th year as a judge. I couldn't have handled it very well as a rookie judge."

Polster remembers being a rookie, including his first day on the job. He took the oath at 9 a.m., attended a judges' meeting, and went back to his empty office. He had no staff and a stack of 30 cases. He opened the first

file: employment discrimination. He knew nothing about that area of law, so he set the file aside. He turned to the next one: patent infringement. Same problem. The next case involved ERISA; he didn't know what ERISA was. The fourth case was even more problematic: trial started in a month. Polster became panic stricken and thought to himself, "Suppose I can't do this job. I just took an oath two hours ago to do it for life. I can't go back now. I can't undo my oath." So he took a deep breath and decided he'd better start learning.

Learning came easy; he just asked a lot of questions at case conferences. He also remembered what his wife told him years earlier. Coleman was a civil litigator and handled several major cases. Every once in a while, after the parties reached an impasse, she'd remark to her husband, "If the judge on this case had only spent one hour with us, the case would've settled." Polster took the message to heart. During the case conferences, in between asking questions, he'd offer a few ideas of his own. To his amazement, the litigants and lawyers listened, and he soon found himself settling cases. Now, 18 years into the job, Polster has a reputation, both locally and nationally, as a remarkably effective mediator. He is often asked by his colleagues to mediate their cases.

I observed Polster mediate several cases during the two years I served as his law clerk. I watched him sit down with a small-business owner in a trademark infringement case, with the spouse of a man who was shot dead by the police officers he'd called for help, and with landowners whose mineral rights had been seized through the power of eminent domain. These individuals were not excited to be in federal court. As Polster noted, "I never met a client that wanted to be written up in a *Federal Reporter* to be talked about in law school. They've got a problem and they want to get back to their lives and business; they don't want to be in court." But these individuals felt aggrieved and wanted to tell their story. For them, the opportunity to sit down with a federal judge was a big deal. This was their day in court. Sometimes it took an entire day—sometimes multiple days and often late into the night—to resolve the case. But Polster did not give up and did not take a pass, though he could have. The time and attention he devoted to the parties must have given them a sense of worth. Indeed, for these ordinary individuals, the experience must have felt extraordinary.

It's little wonder that Polster finds mediating cases the most satisfying part of his job. But, as satisfying as he finds his work as a federal judge, what makes him proudest and happiest are his three children: Josh, who is a lawyer in New York City; Shira, who is pursuing a Ph.D. in mathematics; and Ilana, who recently graduated from Princeton. ⊙

Hon. Thomas M. Rose

U.S. District Judge for the Southern District of Ohio

by Jade K. Smarda

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"All Rosy for Rose." It would be easy to assume that a headline like this, featured in a Southwestern Ohio newspaper, would be an article from the glory days of the Cincinnati Reds' "Big Red Machine." Back-to-back world champions in 1975 and 1976, stars like Johnny Bench, Joe Morgan, Tony Pérez, and Pete Rose were exceedingly popular in Cincinnati and the surrounding areas. (They still are, although one of them is the subject of just a tad more controversy than the others.)

While the headline, from May 2002, was not about the Big Red Machine, it *was* about one of the Reds' most enthusiastic season ticketholders, Judge Thomas M. Rose. Rose, while not a baseball star, had been a star in his legal community for years when the front page of his hometown newspaper, the *Xenia Gazette*, reported on the U.S. Senate's approval (95-0) of his appointment to the U.S. District Court for the Southern District of Ohio. A veteran trial court judge when he was nominated by President George W. Bush, Rose had already served his community from the Greene County Court of Common Pleas for nearly 12 years before joining the federal bench.

Greene County, which is part of the Dayton metropolitan area and only 50 miles from Cincinnati, is a historic area boasting a diverse ideological heritage. In the 1800s, Greene County was home to one of the final stops on the Underground Railroad. In 1856, it hosted one of the first meetings of the newly formed Republican Party. One hundred years later, during the Red Scare of the 1950s, significant populations within Greene County—particularly those affiliated with Antioch College—came under scrutiny for alleged sympathies to the Communist Party due to many local residents' support of left-wing politics. In the late 1960s and early 1970s, parts of Greene County became a hub for the civil rights and antiwar movements. Now, parts of Greene County are known as liberal strongholds, while others are consistently conservative.

In the bastion of diverse ideology that is Greene County, Rose, who was first appointed to the Greene County bench in 1991 and later elected in 1992 and 1998, never ran opposed at either the primary or general election levels. A former assistant Greene County prosecutor who served as chief of the civil division for over 13 years—representing townships, county officers, non-city school districts, and various county boards—Rose developed a reputation for fairness early on. "The commissioners, the township trustees, they loved Tom Rose," recalls Greg Lockhart, Judge Rose's former law partner who later went on to serve as U.S. attorney for the Southern District of Ohio and is now of counsel in the Dayton office of Taft Stettinius & Hollister LLP. "He was reliable, competent, smart. He gave great advice. He always had a sense of where things *ought* to end up—what was reasonable and fair—and had a way of getting people there by agreement." Rose's track record for fairness and civility has continued throughout his career. To use the words of his friend and colleague on the federal bench, Hon. Walter H. Rice, "Judge Rose is a wise person, with an excellent mixture of legal knowledge, a sense of justice, and common sense."

Many attribute Rose's sense of fairness to his small town upbringing in Laurelville, Ohio. His mother, Mary, put herself through college at Ohio University in Athens and became a schoolteacher. Rose's father, Thomas, was a banker who eventually retired as

Top Left: Rose at bench at Court of Common Pleas, Greene County, Ohio. Top Right: Liz Penski (courtroom deputy), Leslie Foley (court reporter), Judge Rose, Doris Evers (judicial assistant), and Pete Snow (law clerk). Bottom Right: Rose, at his Senate Confirmation hearing.

president of the Salt Creek Valley Bank in Laurelville. His parents and older sister, Laura Rose Hinton, always set a positive example. Rose recalls visiting his sister at Ohio University and instinctively knowing that college and the legal profession was for him. "I don't know why, but as early as the sixth or seventh grade, I *knew* that a career in law was my 'destiny,'" explains Rose, placing comedic emphasis on the word "destiny." "But I'm from a small town. Other than watching Perry Mason, I had no experience with attorneys growing up."

When it came time to pursue his dream, and to enroll in college himself, the Vietnam War was at its peak. Rose joined the ROTC and made a commitment to military service, pursuing a degree in history/government at Ohio University. After graduating in 1970, Rose went on to obtain his law degree at the University of Cincinnati College of Law, committing to become a JAG officer. Rose went through basic training for the Army Reserve, but was ultimately released from his JAG obligation as the Vietnam War waned. A fan of all things Cincinnati—including his beloved Reds—Rose literally used a compass to draw a 50-mile radius around Cincinnati for purposes of career planning. Eager to get into the courtroom as quickly as possible, Rose made a fateful decision when he accepted a position in 1973 as an assistant prosecutor for the Greene County Prosecutor's Office.

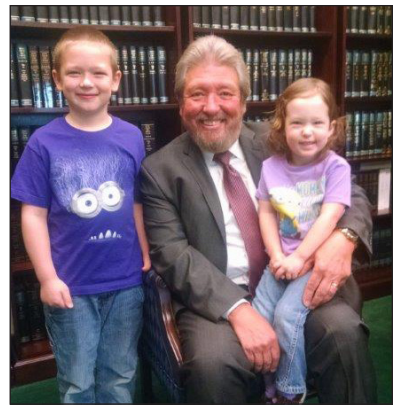
At the prosecutor's office, Rose developed many lifelong relationships, including a steadfast friendship with current Ohio Attorney General Mike DeWine. In addition to practicing side-by-side as assistant prosecutors for two years, they survived one of the worst tornados in Ohio history together. "Tom had enough sense to tell us to get downstairs," DeWine quips when asked about the incident. It was an experience that neither will ever forget:

> We looked outside and saw what looked like a black curtain in the distance, so [Mike and I] ran to the basement. The expression is true—it was like a freight train going over the building. The walls were rumbling so much that the clay bricks were shaking, popping out of the walls, and falling to the ground. We came upstairs [after] and the top floor of our office was gone.

The tornado, which destroyed much of Xenia (the Greene County seat), was part of the "1974 Super Outbreak," which is widely regarded as the most violent tornado outbreak ever recorded. From April 3 to April 4, 1974, there were 148 tornadoes confirmed in 13 U.S. states, including Ohio. The tornado that struck Xenia stands as the deadliest individual tornado of the 1974 Super Outbreak, killing over 30 people and leveling significant portions of the town.

After literally picking up the pieces—Rose and DeWine did what they could to help people move and otherwise clean up the aftermath—the two went through a figurative tornado a year later that changed the trajectory of their careers forever. In 1975, Nick Carrera, the Greene County prosecutor, became suspicious that DeWine would run against him for Greene County prosecutor in the next general election and bugged the prosecutor's office. As scandal loomed around Carrera upon discovery of the wiretap, DeWine and Rose confronted Carrera, resigned, and immediately went into private practice together. However, each would soon return to public service. After the wiretap scandal was exposed to the public, DeWine easily won the position of Greene County prosecutor in 1976. The same year, Rose became a referee for the Greene County Juvenile Court, serving in that capacity until 1978, when he became chief of the civil division for the Greene County Prosecutor's Office.

As chief of the civil division, Rose took on issues of considerable public importance, including land appropriation litigation that shaped the future and long-term economic prosperity of Greene County. In 1990, Greene County Common Pleas Judge Ed Kimmel announced his retirement and Rose was widely regarded as the optimal candidate to succeed him. The landmark year for Judge Rose was not lost on the *Xenia Gazette*: "In



Top Left: Rose's horse, "Perfect M Forever," winner of the 2008 Ohio Breeders Championship. Top Right: Judge Rose enjoying an impromptu visit with his grandchildren. Middle Left: Judge Rose with his wife, Terri Mazur. Bottom Left: Judge Rose with his daughter, Traci, at a Reds game last year.

his 17th year as a Xenia attorney, Rose has had a very enjoyable 1990. Not only did his beloved Cincinnati Reds sweep the Oakland A's for the World Series title, but he is the odds on choice to be appointed to the Greene County Common Pleas Bench."

Rose was appointed to the Greene County bench by the Ohio Governor in 1991, and was reelected twice thereafter. His ability to smoothly transition from one side of the bench to the other came as a surprise to no one, least of all his former colleagues. "Tom was the one who would sit back when the rest of us were arguing about something," recalls Lockhart, reminiscing about his time in private practice with Rose. "When it would calm down a little bit, he always had a knack for adding a comment that would help resolve the issue or bring some sort of closure." Of course, Rose's time on the Greene County bench was not without its challenges. Rose was the first judge in modern Ohio history to be confronted with a capital case in which a defendant wished to proceed *pro se*. Known locally as the "Valentine's Day Shooting," the defendant publicly confronted his estranged wife at a Valentine's Day dance in 1998. Upon being rebuffed, the defendant shot at her and missed, but killed two others in the aftermath. At trial, when facing the death penalty, the defendant sought to proceed *pro se.* Stephen Wolaver, now a Greene County Common Pleas Court judge, was part of the prosecution team on the case. Now that he sits on the other side of the bench, Judge Wolaver appreciates more than ever the difficulty Judge Rose faced: "The law required that the defendant be permitted to represent himself. However, the dynamic of creating an environment for a fair trial, with super due process, without becoming an advocate, is such a difficult balance. Judge Rose did an outstanding job. He took every precaution, including having two lawyers on standby in the gallery." The death penalty conviction was ultimately affirmed.

When Judge Rose was appointed to the Southern District of Ohio at Dayton, members of the Greene County legal community, like Judge Wolaver, were proud but saddened to lose such an esteemed colleague. Their loss, however, was the federal court's gain. Having manned the federal courthouse in Dayton alone for 22 years, Judge Rice could not have been happier that Rose was selected to join him:

> Before I knew it was going to be Tom Rose, I was very concerned because you often spend more time in the courthouse with your associates than you do with your family. But, if I had called Central Casting and asked them to send me the ideal colleague, Tom Rose would have walked through the door. Everything he appears to be, he is. He's a wonderful, collegial, marvelous human being. It is an absolute delight to have him as a colleague. I could not have asked for more.

Indeed, when Judge Rice spoke at Judge Rose's 2002 investiture, he said he felt like a player in a "B" Western he once saw in which a lone soldier awaited a cavalry rescue after a long battle: "What the soldier said, I say to you: 'My God, man, what took you so long?'"

Over the years, Judge Rose and Judge Rice have shared Dayton's varied and complex caseload. By way of example, Judge Rose has presided over multiple patent cases, cases involving U.S. treaties, and sensitive proceedings that touch upon the largest military base operated by the Air Force in United States territory, Wright-Patterson Air Force Base (WPAFB), which is spread over two Dayton-area counties. In 2013, for example, Judge Rose ordered a defendant to pay the U.S. government $473 million plus interest for fraudulently overbilling on jet engines for F-15 and F-16 fighter jets. This year, Judge Rose presided over a criminal case in which a contractor for WPAFB was accused of stealing intellectual property belonging to the U.S. government. Through all of the complexities, he has remained at heart a trial judge whose chief goal is to ensure that all litigants get their opportunity to present their arguments: "No matter what you first *believe* is the truth, there is always another side to the story," he notes. Rose recognizes that when people leave his courtroom, some are happy, and some are not as happy: "You at least want them to leave the courtroom feeling that they have been able to give their side of the story. That they have been heard."

Rose's acumen as a trial judge is also apparent in the way that jurors feel about how he runs his courtroom. Once, sensing that all were growing anxious as a lengthy jury trial approached Christmas, Rose declared that there would be no proceedings on Christmas Eve. The jurors were so overjoyed that they drafted him a poem in the style of *'Twas the Night Before Christmas.* Rather than wear a red suit and speak in a jolly voice, the hero

of this poem "wore a black robe that was shiny and neat, and with a little Southern Ohio drawl he did speak." The poem's famous ending was adapted for the occasion:

> On December 23 he made a decree
> No court proceedings for Christmas Eve
> As the courtroom darkened on that afternoon and off went the lights
> He said, "Don't forget the court's admonition," and Merry Christmas to all and to all a good night.

Judge Rose's consideration for the people around him is also reflected in the loyalty of his staff. Rose's judicial assistant, Doris Evers, has been with him for 37 years, since his Greene County days: "I've never had another boss. Because Judge Rose is so wonderful to work with, I've been able to be a mother and have a career at the same time." Likewise, Judge Rose's court reporter, Leslie Foley, has been with Judge Rose for almost 26 years: "There are stressful days, but they're not as stressful as they could be if it were not for his management style." According to Liz Penski, Rose's courtroom deputy, his management style makes for a positive work environment because "Judge Rose is looking at his dockets every day, and talking to all of us about what is going on. There is nothing that just sits on his desk, or in his email box."

While Judge Rose is organized and efficient, he is not one to impulsively rush justice. His longtime friend and recently retired law clerk, Bob Buerger, explains that "Judge Rose will not sign an order until he fully understands the specific law involved and the full extent of the order's effect." Consistent with Judge Rose's philosophy that there is more than one side to every story, Rose avoids knee-jerk reactions with remarkable discipline. According to law clerk Pete Snow, one of Rose's best qualities is that he "gives himself a chance to reverse himself." He looks at every angle before making a decision.

The office dynamic is also enhanced by Rose's love for his Cincinnati Reds, as well as his lighthearted "rivalry" with Judge Rice, a diehard Pittsburgh Pirates fan. Both have experienced their highs and lows, although Judge Rose jokes that he, "unlike Judge Rice, has at least been able to watch his team win a World Series on a color television." But the Reds have caused Judge Rose plenty of heartache. "Judge Rose claims to be able to put a curse on your team by cheering for them," according to Joseph Brossart, who has clerked for Judge Rose since 2002. Given Rose's love of the game, it is probably no coincidence that baseball references and analogies so often find their way into conversations about him. For example, Judge Michael Barrett (Rose's Cincinnati colleague) opines that Judge Rose is a respected judge, in part, because "he has good understanding of what cases should settle—why they ought to settle—but he also understands that sometimes you just have to go to trial. And he is really comfortable behind the plate, calling balls and strikes in those situations."

The characteristics that make Judge Rose a good jurist also make him a good husband, father, and grandfather. "Honesty, integrity, trustworthiness, patience. These are his best qualities as a judge and as a husband," explains Terri Mazur, Judge Rose's wife, who also serves as the Greene County clerk of courts. "He is the most thoughtful person that I know, and I mean that in the fullest sense of the word, because he *thinks* everything through." Judge Rose is also proud of his daughter, Traci Rose Rider, Ph.D., who teaches architectural graduate students in Raleigh, N.C., and is the author of multiple books on sustainable building. When not in court, Judge Rose decompresses with his family on his horse farm. An avid breeder and racer of Standardbred Pacers, you can be certain that before he comes to court, he has taken care of his horses in the morning. "I really think he gets dressed in the morning in the barn," jokes Evers. "I walk around picking hay off of the carpet. But you don't always want to pick *everything* up. Just because it looks like dried mud, you can't assume it's mud."

Ultimately, Judge Rose's ability to decompress has helped him in his judicial career. Having worked in the court system for years, Mazur never ceases to be amazed by her husband's poise. "It's his grace under pressure. That's what makes him remarkable. That, and that he thinks about the consequences of his rulings for the long term," explains Mazur. "He is not finished with a case, for example, when a defendant is sentenced." In fact, Rose is frequently approached by former defendants. "People don't come up to you, after you've sent them to prison, and express happiness at seeing you unless they feel that they've been fairly dealt with," explains Judge Rice, praising Judge Rose's style. A further testament to Judge Rose's commitment to former defendants in the Southern District of Ohio is his involvement with the local Reentry Court program. Reentry Court aims to minimize barriers to effective reentry, and to promote reduction in recidivism. "Our involvement does not end after we've sent them to prison," explains Judge Rice, describing his and Judge Rose's involvement with Reentry Court. "Once they're home, we do everything we can to tell them, these men and women, that we're happy they're home and that we're here to help." And there is nothing Judge Rose loves more than a success story. One defendant he sentenced years ago in Greene County turned his life around and was able to become a Dayton Police Officer, at one point testifying in Judge Rose's court at a suppression hearing.

Ultimately, relationships are important to Judge Rose, whether those relationships are with his family, friends, colleagues, clerks, staff, former clients, ex-offenders, or his beloved Reds. Just as he will never give up those season tickets, he will never give up on treating people with fairness and respect, and will never stop loving a good success story. Even for the Pittsburgh Pirates, if only so that Judge Rice can see them win a World Series on a color television. ⊙

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Birchfield v. North Dakota (14-1468)

Court below: *North Dakota Supreme Court*
Oral argument: April 20, 2016

Issue

Does a state violate the Fourth Amendment by criminalizing a driver's refusal to take a chemical test to detect blood-alcohol levels without a warrant?

Question as framed for the court by the parties

In the absence of a warrant, may a state make it a crime for a driver to refuse to take a chemical test to detect the presence of alcohol in the driver's blood?

Facts

On July 6 and 7, 2012, drivers driving under the influence of alcohol in North Dakota lost control of their vehicles and caused several tragic deaths. In response, North Dakota passed Brielle's Law, named after one of the victims. Brielle's Law criminalizes a driver's refusal to take a chemical test to determine blood-alcohol levels. Police officers cannot, however, require drivers to take chemical tests unless officers first place "the individual under arrest[,] inform him that he is being or will be charged with driving under the influence," and explain that North Dakota law considers refusal to participate in the test "a crime punishable in the same manner as driving under the influence."

On Oct. 10, 2013, Danny Ray Birchfield drove off a highway and into a ditch in North Dakota. State Trooper Tarek Chase arrived in time to observe Birchfield attempting to drive out of the ditch. Chase suspected that Birchfield was under the influence of alcohol; Birchfield agreed to submit to four field sobriety tests but failed or performed poorly on all four. Chase read the implied consent advisory to Birchfield, as required by state law, and Birchfield consented to an onsite breath test of his blood-alcohol content, which he failed. Chase arrested Birchfield, read him his *Miranda* rights, again read him the implied consent advisory, and asked Birchfield to take a chemical test of his blood. Birchfield refused to take the test. As a result, the state charged Birchfield "with driving under the influence of alcohol or drugs and/or refusing to submit to a chemical test after request by a law enforcement officer."

Birchfield moved to dismiss this charge, stating that the charge violated his Fourth Amendment right against unreasonable search and seizure. The trial court denied Birchfield's motion and found that there had not actually been a search because Birchfield had refused to allow the chemical test.

The Supreme Court of North Dakota agreed with the lower court, and held that Brielle's Law was reasonable and adhered to the state's strong interest in maintaining safe roads free from drunk drivers. The Court found that Birchfield had impliedly consented to such warrantless searches because Birchfield had elected to use North Dakota's highways.

Birchfield appealed; the U.S. Supreme Court granted the writ of certiorari and joined *Bernard v. Minnesota* and *Beylund v. North Dakota* with this case.

In *Beylund v. North Dakota*, Steve Michael Beylund's license was suspended after Beylund submitted to a warrantless chemical blood test of his blood alcohol content after a police officer told him that his refusal to submit would result in his receiving criminal penalties. The North Dakota Supreme Court affirmed Beylund's license suspension. The court held that consent to a blood test is an exception to the Fourth Amendment's warrant requirement for searches and that even if Beylund did have a constitutional right to refuse the test, North Dakota's interest in maintaining safe highways made imputing implied consent reasonable.

In *Bernard v. Minnesota*, police officers arrested William Bernard after he refused to take field sobriety tests. The officers read Bernard the Minnesota Implied Consent Advisory, but he refused to take a breath test. Bernard was charged with two counts of "First Degree Driving While Impaired—Test Refusal." The Minnesota Supreme Court upheld the charges and held that the warrantless breath test was permissible under the Fourth Amendment's search-incident-to-arrest exception.

These cases were consolidated for the convenience of the Court, and as a result the parties avoided making duplicitous arguments.

Discussion

The Supreme Court's decision may adjust state governments' police powers, consider the impact of technology on legal procedures, and redefine the legal understanding of driving.

Importance of driving and implying consent

On behalf of Birchfield, Downsize DC Foundation contends that "the modern notion that driving is a 'privilege' and not a 'right' is a legal fiction" because "driving is not a voluntary commercial enterprise but a necessary aspect of daily living … especially in heavily rural states like North Dakota." DC Foundation argues that asking drivers to choose either to accept warrantless searches via their "implied consent" or to refrain from driving does not provide two meaningful alternatives. Under this illusion of choice, drivers are unconstitutionally coerced into choosing "implied consent."

The Council of State Governments, on behalf of North Dakota, note that driving, although important, is not absolutely necessary: "no one is required to drive" and

millions of Americans affirmatively choose not to drive. The Council of State Governments also notes the improvement of public transportation nationwide and the existence of other alternatives, such as e-hailing services like Uber. The United States further notes that the Court "long ago foreclosed the ['driving is necessary'] approach" in *Hess v. Pawloski* and *South Dakota v. Opperman*, which acknowledged that cars' dangerousness subject them to "continuing governmental regulation and control."

Regulatory penalties versus criminalization

On behalf of Birchfield, the ACLU contends that regulatory penalties, such as suspending a driver's license, are very different from "criminalizing the assertion of one's Fourth Amendment right." The ACLU argues that the state's possibility of asserting regulatory penalties, rather than criminal penalties, for failure to submit to a chemical test renders "criminal penalties to enforce a system of all-purpose 'implied' consent" unconstitutional.

The Council of State Governments seeks to rebut that argument, asserting that drawing a line between "administrative and civil punishments" and criminalization is unpersuasive. Moreover, the criminal penalties enforce state laws whereas administrative and civil punishments would merely place drivers "in the same position they would have been in had they been forthcoming about their unwillingness to accept the condition in the first place."

The practicality of a required warrant system

Amici for Birchfield contend that requiring a warrant before a chemical test is no longer impractical because of technological advances. The National College for DUI Defense provides examples of the use of modern technology with warrants, including telephonic warrants, "Electronic On-Call Warrants" and "widespread electronic communication technology" using smartphones, iPads, email, and text messages.

The United States notes, however, that requiring a warrant system does not address the underlying problem of enforcement. The United States asserts that "breath tests cannot be performed on nonconsenting persons even if a warrant is obtained." According to the United States, a required warrant system may cause delay and additional work for judges but not provide any additional evidence or benefit.

Analysis

The Fourth Amendment and warrantless searches

Birchfield argues that, as a starting point, a state cannot administer a search absent a warrant or consent. Birchfield contends that, because of this restriction, a person cannot face criminal penalties for refusing to submit to a search not authorized by warrant or permissible under an exception to the warrant requirement. In *Missouri v. McNeely*, the Supreme Court held that blood tests for drunk driving constitute a search under the Fourth Amendment and that there was no per se or automatic exception that applied in those circumstances. In light of this holding, Birchfield argues that the state needs a warrant in order to perform a blood or breath test absent consent.

Furthermore, Birchfield contends that no exception applies to this case. Specifically, Birchfield and Bernard claim that the search incident to arrest is inapplicable because that exception is designed to ensure officer safety, which is not at issue during a sobriety stop. Birchfield also claims that the special needs exception only applies when the justification for the search is unrelated to the state's general interest in law enforcement and, because sobriety stops are part of the state's general interest in law enforcement, this exception is inapplicable in this case. North Dakota claims that no warrant is required here because this should be governed under the general standard of reasonableness and that these chemical tests are reasonable in light of the circumstances. Minnesota further argues that, even if no warrant is required, breath tests would be justified under the "search incident to arrest" exception, which allows officers to search suspects while making a lawful arrest.

May states obtain consent implicitly?

Birchfield contends that there was no consent in this case. Specifically, Birchfield contends that consent is only present when it is the product of free and unconstrained choice rather than duress and coercion. Here, Birchfield claims that there was no free or unconstrained choice because petitioners were faced with the option of either consenting to a chemical test or facing criminal misdemeanor penalties. Additionally, Birchfield claims that the actions of merely obtaining a license and using public roads do not produce implied consent to a chemical test because driving is a necessity to carry out basic functions.

Respondents counter that consent under this statutory scheme is voluntary because arrestees can revoke an implied consent and could therefore avoid a nonconsensual warrantless search. Respondents further claim that implied consent statutes are constitutional under both the Fifth and Fourth Amendments. Respondents claim that, under *McNeely*, it is constitutional to punish revocation of consent by suspending a driver's license or using the fact of refusing a chemical test as evidence against a defendant in a criminal proceeding.

Can states condition driving licensure on waiving consent to a warrantless chemical test?

Birchfield asserts that, because the North Dakota law compels consent to a chemical search as a requirement for driving within the state, the law violates the unconstitutional conditions doctrine. The doctrine of unconstitutional conditions prevents states or the federal government from selectively granting a benefit on the condition that the person receiving that benefit surrenders a constitutional right. Here, Birchfield asserts that, because North Dakota has conditioned drivers' privilege to retain their licenses on their submitting to a chemical test upon request by the police, North Dakota is granting a benefit on the condition that drivers give up their Fourth Amendment rights.

North Dakota, on the other hand, claims that, because the penalty here—which is a misdemeanor crime—does not exceed a certain threshold, the Court should weigh the importance of the state interest at issue against the rights of the individual and the nature of the condition. Here, North Dakota claims that the importance of keeping intoxicated drivers off the road weighs heavier than the minor infringement of a chemical test in upholding the condition at issue.

Conclusion

In this case, the Supreme Court will determine whether laws that either infer consent from possessing a driver's license or condition driving upon consenting to a chemical blood-alcohol content test violate the Fourth Amendment. Petitioners, three drivers pulled over for drunk driving, maintain that these state laws violate the Fourth Amendment's prohibition against warrantless searches. Respondents, North Dakota and Minnesota, argue that their compulsion of drivers to submit to chemical tests is

justified and reasonable and that it does not violate the Fourth Amendment because drivers impliedly consent to the tests by driving on the states' roads. The Court's ruling will affect countless drivers stopped by police and the safety regimes with respect to preventing drunk driving in all 50 states. The full text is available at https://www.law.cornell.edu/supct/cert/14-1468. ☉

Written by Jessica Kim and Michael Levy. Edited by Nathan Koskella.

United States v. Texas (15-674)

Court below: *United States Court of Appeals for the Fifth Circuit*

Oral argument: April 18, 2016

Issue

Do states have standing to challenge federal programs that grant temporary deportation protection to some undocumented immigrants, if the programs increase the states' cost of providing voluntarily subsidized benefits? And is the deferred deportation program in this case lawful under the Administrative Procedure Act and Article II of the U.S. Constitution?

Questions as framed for the court by the parties

Does a state that voluntarily provides a subsidy to all aliens with deferred action have Article III standing and a justiciable cause of action under the Administrative Procedure Act (APA), 5 U.S.C. 500 et seq., to challenge the guidance policy because it will lead to more aliens having deferred action?

Is the guidance policy arbitrary and capricious or otherwise not in accordance with law?

Is the guidance policy invalid because it did not go through the APA's notice-and-comment rulemaking procedures?

Does the guidance policy violate the Take Care Clause of the Constitution, art. II, § 3?

Facts

In 2012, the Department of Homeland Security (DHS) implemented the Deferred Action for Childhood Arrivals (DACA) program, which provides temporary protection from deportation (deferred action) primarily for young undocumented immigrants. At launch, about 1.2 million undocumented immigrants qualified for the program. Beneficiaries of the DACA program can renew their deferred action status every three years. The DACA program is an exercise of DHS' prosecutorial discretion. DHS examines DACA applications on a case-by-case basis according to guidance issued by the DHS Secretary (the guidance policy).

In 2014, DHS expanded DACA by creating the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program. DAPA widened DACA's eligibility criteria and covered certain undocumented immigrants who have children who are U.S. citizens or lawful residents. The DAPA program covered an additional 4.3 million undocumented immigrants.

Soon thereafter, 26 states challenged the DAPA program in the U.S. District Court for the Southern District of Texas on three grounds. They alleged that the DAPA program violated the requirements of the APA because DHS failed to undergo the notice-and-comment rulemaking process, which requires agencies to notify the public of new rules and to allow the public to provide feedback. They also argued that DHS lacked the substantive authority to implement the DAPA program under the APA. Finally, the states argued that DAPA violated the president's duty to "take care that the laws be faithfully executed" under Article II of the U.S. Constitution.

Both the district court and the Fifth Circuit held that the states had standing to challenge the DAPA program because the states would suffer a financial injury. For example, lead plaintiff Texas passed laws to prevent unlawful immigrants from obtaining driver's licenses. Texas claimed that DACA would allow otherwise illegal immigrants to become "lawful" immigrants and thus obtain driver's licenses. Texas claimed that these newly lawful immigrants would also be eligible for unemployment benefits that they would not otherwise be eligible for. The district court temporarily enjoined DAPA's implementation because the states had proven a likelihood of success on their claims that DHS had failed to satisfy the notice-and-comment rulemaking requirements. The Fifth Circuit affirmed.

The United States petitioned the U.S. Supreme Court for writ of certiorari, which the Court granted on Jan. 19.

Discussion

The Court's resolution of this case could affect the legal status of undocumented immigrants, the benefits available to undocumented immigrants, and the president's discretionary powers.

What happens if DAPA is implemented?

Immigrant's rights organizations assert that the implementation of the DAPA program will benefit millions of undocumented immigrants who have close ties to the United States. DAPA will not only benefit undocumented immigrants who were brought to the United States as children, but also parents of U.S.-citizen children, family members, employers, and other community members. According to immigrants' rights organizations, deportation protection and the ability to work lawfully allows immigrants to enjoy increased earning potential that will benefit the U.S. economy. The organizations contend that eligible immigrants will have better job opportunities, and by some estimates, their total labor income will increase by $7.1 billion.

Members of Congress and the American Center for Law & Justice (the Center) argue, however, that creating a program that benefits millions does not render the action constitutional. According to the Center, there is a dramatic difference between setting enforcement priorities and creating programs that benefit millions of people, because the former requires the discretionary assessment of each case while the latter does not.

Does the executive branch have broad discretion to adopt immigration enforcement priorities?

Members of Congress contend that the executive branch needs broad discretion to address the complexities of immigration law because immigration's social and policy implications affect the entire nation. Former federal immigration and homeland security officials assert that granting deferred action has been a part of the executive's immigration enforcement power since the 1950s. Members of Congress suggest that DACA and DAPA are responses to the executive's limited resources to enforce the laws. In other words, members of Congress assert that because of limited resources, the executive branch cannot realistically deport all undocumented immigrants, so the executive branch must be able to make decisions about whom it chooses to remove.

But the Immigration Reform Law Institute (IRLI) argues that the Constitution vests plenary powers to control immigration in Congress, not the executive branch. IRLI

maintains that the executive branch cannot unilaterally enforce policies like DAPA without Congress' express authorization, and in this case Congress did not authorize the executive branch's action. IRLI asserts that petitioners' interpretation of the executive branch power would result in overly broad prosecutorial discretion by the executive.

Analysis

The United States argues that the states do not have standing because their claimed injury is a result of self-inflicted policies and does not satisfy the Court's zone of interest requirements. Assuming the Court finds standing, the United States argues that the power to deport undocumented immigrants lies exclusively with the federal government, and that by virtue of the Immigration and Nationality Act (INA), the secretary can take necessary actions to administer and enforce the INA. Therefore, the United States argues, DHS's guidance policy is a legitimate exercise of the secretary's power. Texas argues that the concerned states have standing because DAPA imposes substantial costs on the states' ability to issue driver's licenses as well as administer other social and economic programs. Furthermore, Texas argues that DAPA rewrites immigration law without input from Congress and in violation of Congress' legislative authority.

Does the increased cost of a state's economic program under DAPA grant standing?

The United States contends that Texas lacks Article III standing to challenge the DHS's guidance policy because Texas is not the object of the challenged governmental action, and is merely claiming to be injured by the incidental effects of federal policy. Furthermore, the United States asserts that Texas cannot claim standing on the basis of the increased cost of its voluntary driver's license subsidy and that basing standing on self-generated injuries would result in a slippery slope of litigation against many federal policies. Finally, the United States argues that Texas' voluntary subsidy for driver's licenses is not within the zone of interests of any provision of the INA. The United States argues that the Court, under its zone of interest analysis, looks to whether the issues at hand are protected or regulated by the statute in question. The United States argues that Texas' alleged injury is not within the INA's zone of interests, because the INA carefully preserves a cause of action only for plaintiffs that are adversely affected by agency action, not the incidental effects of federal policy.

Texas maintains that the increased cost of administering its driver's license subsidy and other government programs such as Medicaid and Social Security benefits—for which the undocumented immigrants granted deferred action status are eligible—creates standing. Texas maintains that the United States cannot defeat standing by asserting that Texas could avoid its allegedly self-inflicted injury by changing its policies. Texas argues that fears of a slippery slope of litigation are unfounded because the injury and causation requirements for standing are generally difficult to meet. Therefore, Texas contends, fears of lawsuits by concerned states on issues of federal policy are purely speculative.

Does the secretary have the power to issue the guidance policy?

The United States contends that Congress has given the secretary broad discretion to administer and enforce immigration laws. As such, the United States argues, the issuance of the DAPA guidance policy was a lawful exercise of the secretary's authority. According to the United States, the guidance policy accords with Congress' delegation of power to the secretary by focusing on undocumented immigrants who may have abused the immigration system and committed crimes and by establishing a priority system to remove these identified persons. The United States notes that for over 50 years DHS and the now-defunct Immigration and Naturalization Service implemented policies similar to the DAPA guidance policy and that Congress consistently ratified these policies. Finally, the United States argues that § 1103(a) of the vesting clause of the INA gives the secretary authority to permit immigrants to be lawfully employed as a part of his discretion.

Texas counters, however, that no statute gives the executive branch power to confer lawful presence to undocumented immigrants and suggests that if Congress intends to give that authority to the executive, it would do so explicitly. Furthermore, Texas argues that Congress has specifically made certain categories of immigrants ineligible to work in the United States, and, as such, the executive cannot claim to have a broad, unreviewable authority to issue work permits under the INA.

Is the guidance policy valid and constitutional?

The United States maintains that when a policy meets the requirements for classification under the APA's "general statements of policy," the DHS is not required to follow agency notice-and-comment procedures. The United States argues that because the DHS's guidance policy is a general statement of policy on how the executive would enforce its discretion under the INA, DHS was not required to follow the APA's notice-and-comment procedures. Unlike rules that require notice-and-comment, the guidance policy is not impermissibly binding and does not prevent individual agents from rejecting the application for deferred action status from undocumented immigrants.

Texas argues that the guidance policy establishes a major change in the country's immigration law and should therefore be considered a substantive rule. Additionally, Texas argues that in order to be considered a "general statement of policy," the guidance must be voluntary. Texas asserts, however, that the guidance policy here contains mandatory language and is subject to immediate implementation by immigration officials. Texas remarks that DAPA eliminates agency discretion and that even the president noted that DAPA is binding.

Conclusion

The Supreme Court's decision in this case will determine whether states have standing to challenge the DAPA program and, if so, whether DAPA is constitutional and lawful under APA. The United States argues that DAPA and the guidance policy issued by the DHS to implement the action are within the DHS secretary's constitutional and congressionally ratified powers. Texas and the concerned states argue that the secretary overstepped his constitutional and congressionally directed authority by issuing the guidance policy for the implementation of DAPA. The Court's decision could affect the status of millions of undocumented immigrants and the president's discretionary power. The full text is available at https://www.law.cornell.edu/supct/cert/15-674. ⊙

Written by Maame Esi Austin and Krsna N. Avila. Edited by Chris Milazzo.

United States v. Bryant (15-420)

Court below: *U.S. Court of Appeals for the Ninth Circuit*
Oral argument: April 19, 2016

This case provides the Supreme Court with the opportunity to determine whether the U.S. government (the government) can use uncounseled tribal court convictions to satisfy the predicate offense requirement outlined in 18 U.S.C. § 117(a). Section 117(a) is a domestic assault statute under which the government may prosecute a person who has committed sexual assault within the United States or Indian country and who has already been twice convicted in state, federal, or Indian court of assault against a spouse or intimate partner. The government argues that it may use Michael Bryant Jr.'s prior convictions in his § 117 prosecution because the convictions did not violate the U.S. Constitution but were instead obtained on tribal lands where the Constitution is inapplicable. The government further argues that using the convictions would not violate due process because the statute passes the rational-basis standard of review and is consistent with the principles of comity. Bryant counters by arguing that the Court's precedent establishes a bright-line rule that invalidates convictions obtained in a manner that violates the Constitution, including Bryant's convictions here, and that the government's reading of Court precedent is overly broad. Bryant further contends that allowing these convictions would lead to either admittance of an abundance of suspect convictions or a complex process requiring courts to determine the validity of each conviction. The Supreme Court's resolution of this case will significantly impact the validity of tribal court judgments for purposes of predicate-offense crimes as well as the ability of prosecutors to prevent domestic abuse crimes in Indian country. The full text is available at https://www.law.cornell.edu/supct/cert/15-420. ⊙

Universal Health Services Inc. v. Escobar (15-7)

Court below: *U.S. Court of Appeals for the First Circuit*
Oral argument: April 19, 2016

The U.S. Supreme Court will consider whether the False Claims Act (FCA) applies to fraudulent misrepresentation in payment claims due to violations of staffing regulations for medical centers. Petitioner Universal Health Services (UHS) argues that the basis for liability stemming from the FCA does not allow for the implied certification theory, under which liability may be based on merely filing for payment, and thus should merit reversal of the judgment below. On the other hand, respondent Escobar contends that UHS knowingly and materially committed fraud under the FCA provisions notwithstanding the absence of an express fraudulent statement. This case will determine whether businesses that provide services to the government will be subject to FCA liability and will establish the range of remedies available to qui tam litigants under the FCA. The full text is available at https://www.law.cornell.edu/supct/cert/15-7. ⊙

Encino Motorcars LLC v. Navarro et al. (15-415)

Court below: *U.S. Court of Appeals for the Ninth Circuit*
Oral argument: April 20, 2016

This case asks the Supreme Court to clarify whether automotive "service advisers" qualify for the Fair Labor Standards Act's (FLSA) mandatory overtime pay requirements. Encino Motorcars LLC, a Mercedes-Benz dealership in California, contends that these employees are primarily "servicem[e]n … engaged in … servicing automobiles" and thus they are clearly captured within the law's exceptions. Similarly, Encino argues that even if the statute is sufficiently ambiguous on the matter, the Department of Labor's interpretation of the statute is unreasonable and not entitled to judicial deference. Hector Navarro and other employees assert that construing the statute's exception to include service advisers would violate the text, spirit, and purpose of the FLSA. Relatedly, they maintain that the Department's interpretation is entirely reasonable and thereby warrants deference from the Court. The Supreme Court's resolution of this case could affect the terms of employment between America's 45,000 service advisers and their employers. The full text is available at https://www.law.cornell.edu/supct/cert/15-415. ⊙

Kirtsaeng v. John Wiley & Sons Inc. (15-375)

Court below: *U.S. Court of Appeals for the Second Circuit*
Oral argument: April 25, 2016

In 2013, the Supreme Court decided in favor of Supap Kirtsaeng in a copyright infringement action brought by publisher John Wiley & Sons (Wiley), reversing the lower courts and remanding for an order in compliance with the opinion. On remand in the district court, Kirtsaeng petitioned for costs and attorneys' fees. Although 17 U.S.C. § 505 empowers a district court in its discretion to award costs and attorneys' fees, the court denied the petition and reaffirmed the circuit precedent assigning more weight to one factor in the equitable discretion analysis over all others. Here, the Supreme Court will provide a nonexclusive list of factors a district court should consider in a § 505 equitable discretion analysis and determine whether any of those factors, such as the objective reasonableness of the losing party's position, should be assigned substantial weight. Kirtsaeng argues that placing substantial weight on any one factor risks compromising the discretion granted to the district court by the statute. Alternatively, Wiley argues that a district court in its discretion can assign more weight to the objective reasonableness of the defeated party's position without defying § 505. This case will clarify the approach a district court should take in a § 505 equitable discretion analysis. The full text is available at https://www.law.cornell.edu/supct/cert/15-375. ⊙

Cuozzo Speed Technologies LLC v. Lee (15-446)

Court below: *U.S. Court of Appeals for the Federal Circuit*
Oral argument: April 25, 2016

The Supreme Court will decide the standard that the U.S. Patent Trial and Appeal Board (PTAB) should use when construing claims in an issued patent and whether the PTAB's decision to institute an inter partes review (IPR) proceeding is judicially reviewable. Cuozzo Speed Technologies argues that claims should be given their ordinary meaning and that the PTAB's decision to institute an IPR should be judicially reviewable. Meanwhile, the Patent and Trademark Office (PTO) argues that when the PTAB institutes an IPR, the PTAB should construe claims with their broadest-reasonable construction standard.

Furthermore, the PTO argues that the PTAB's decision to institute an IPR is final and nonreviewable by the courts. The Supreme Court's decision may help resolve inconsistent standards used between district courts and IPR proceedings while affecting innovator's rights. The full text is available at https://www.law.cornell.edu/supct/cert/15-446. ☉

Dietz v. Bouldin (15-458)

Court below: *U.S. Court of Appeals for the Ninth Circuit*
Oral argument: April 26, 2016

This case stems from a vehicle collision lawsuit and comes to the Supreme Court on appeal from the Ninth Circuit. Respondent Hillary Bouldin collided with petitioner Rocky Dietz who subsequently sued Bouldin in Montana state court for injuries sustained during the accident. Bouldin removed the case to federal court and the jury found in favor of Dietz but erroneously awarded $0 in damages, which was legally impossible because Bouldin had admitted to causing at least $10,000 in medical expenses. The Supreme Court will clarify under which circumstances, if any, federal courts may recall jurors dismissed after having rendered a final verdict. Dietz contends that the Court should establish a bright-line rule clearly forbidding such re-empaneling of jurors, asserting instead that the appropriate remedy for an invalid verdict is a new trial. Bouldin counters that federal courts should be allowed to exercise discretion to determine when it is appropriate to recall a jury after its dismissal. This case will affect how federal courts interpret rules and procedures for recalling jurors and will also impact the fairness and finality of jury verdicts and judicial efficiency in federal court proceedings. The full text is available at https://www.law.cornell.edu/supct/cert/15-458. ☉

Mathis v. United States (15-6092)

Court below: *U.S. Court of Appeals for the Eighth Circuit*
Oral argument: April 26, 2016

The Supreme Court will decide how a sentencing court using the "modified categorical approach" should determine if a defendant felon has satisfied the predicate felonies necessary to mandate a higher minimum sentence under the Armed Career Criminal Act (ACCA). Richard Mathis argues that

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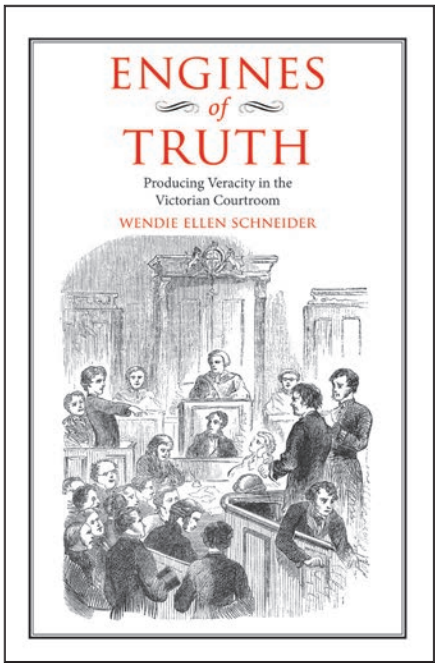


Engines of Truth: Producing Veracity in the Victorian Courtroom

By Wendie Ellen Schneider

Yale University Press, New Haven, CT, 2015.

265 pages, $85.

Reviewed by Henry S. Cohn

A central role for a trial judge is evaluating credibility and veracity. How do judges and the judicial system ensure that lying does not dominate the evidence received in court?

In *Engines of Truth*, Wendie Ellen Schneider, a Yale Law School graduate who teaches history at Iowa State University, explores this issue as it arose in Victorian England from 1840 to 1900. She demonstrates why English law adopted cross-examination as a method to promote truth-telling. She concentrates on civil cases in which lying might be prevalent, such as those involving road accidents, bankruptcy, divorce, and sexual misconduct. Her book does not stress preventing lying by criminal defendants, because, in England, they did not have the right to testify until enactment of the Criminal Evidence Act in 1898.

Schneider catalogs the various approaches ("engines of truth") attempted by the English court system. The first of these was to prosecute witnesses for perjury after a trial had concluded. These prosecutions were rarely successful. They proved costly and time-consuming and, when they were successful, tended to result in excessive punishments. Often the motive for these perjury trials was revenge. As Schneider describes one dramatic case from 1860, Henry Hatch, "a country vicar and part-time schoolmaster, was convicted of indecent assault after one of his pupils, an eleven-year-old girl named Eugenia Plummer, accused him of fondling her at school." Hatch prosecuted Plummer for perjury. She was convicted, but Queen Victoria immediately pardoned her.

A prominent jurist of the time, James Fitzjames Stephen, believed that perjury leading to criminal inculpation should be treated as a serious crime, but, in civil actions, Schneider writes, Stephen cajoled and berated juries into acquitting perjury defendants. In 1859, Parliament passed the Vexatious Indictments Act, requiring more judicial involvement before a perjury charge could be brought against a witness. Loopholes in the statute, however, made it less than fully effective.

An effort to obtain truthfulness in the hotly contested area of divorce was the creation of an office of Queen's Proctor within the Treasury Solicitor's Office. The Queen's Proctor was to intervene in a divorce matter when it appeared that one of the parties was not testifying honestly. In the 1870s, however, the Queen's Proctor lost two cases in which the judges held that the Queen's Proctor had no power to set aside the presumed factual findings of a jury. The functions of the office were diminished by these rulings and its interventions became less frequent.

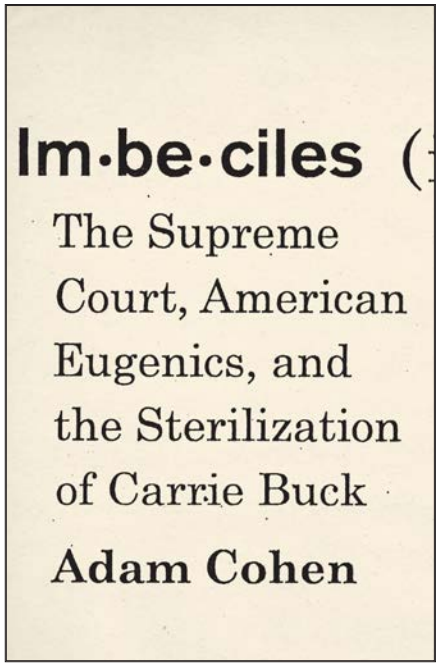
With other methods not producing results, the English courts turned to cross-examination, but that had its own difficulties. The bar took the position in the 1840s that cross-examination must be conducted in a "gentlemanly" manner, not abusively or even assertively. Even as late as 1874, an attorney named Edward Kenealy was subject to censure for professional misconduct for asking one witness whether he had committed perjury and another whether he was of good moral character. He had dared to blacken the reputations of a distinguished British family.

Two emotional divorce cases in which witnesses of high social standing were accused of sexual improprieties also led critics to complain about cross-examination. Opponents of the practice labeled it "a species of forensic attack." Such goings-on might lead witnesses to refuse to testify.

But by the end of the 19th century, many of the objections to cross-examination began to disappear. Schneider writes that "Cross-examination, initially reviled for the way in which it seemed to depend on competitive word-twisting rather than a serious concern for the truth, came to supersede perjury prosecutions as the primary means of guaranteeing witness veracity." Cross-examination was to be allowed "if the case at hand justified it in the barrister's estimation." In 1898, Parliament passed the Criminal Evidence Act, which left the regulation of cross-examination "to the consciences of counsel," as a newspaper put it.

Schneider ably describes the eventual triumph of cross-examination over other engines of truth, interestingly reciting the facts of relevant cases. She also quotes from Victorian novelist Anthony Trollope's *He Knew He Was Right*, *Phineas Redux*, and *Orley Farm*, which portray the Queen's Proctor in court and attorneys engaged in cross-examination. I would have liked to have seen Dickens quoted, too. Who can forget C.J. Stryver's wonderful cross-examination of a witness in *A Tale of Two Cities*, where the witness cannot distinguish Carton from Darney, or the prosecution's examination of the hostile witnesses in *Bardell v. Pickwick*, especially where Mr. Winkle is rattled into describing Mr. Pickwick's promise to Mrs. Bardell? ⊙

Henry S. Cohn is a Connecticut judge trial referee.



Imbeciles: The Supreme Court, American Eugenics, and the Sterilization of Carrie Buck

By Adam Cohen

Penguin Press, New York, NY, 2016.

402 pages, $28.

Reviewed by Christopher C. Faille

As I read *Imbeciles*, I was forcefully reminded of a passage in a lecture that the psychologist and philosopher William James delivered in 1891. It is a passage that I have often pondered. James is discussing how a variety of mutually contradictory moral ideals encounter one another as adversaries in the life of a society, and how their interaction maintains and, over time, reforms that society's character. Accordingly, he lists several of the moral ideals that a percipient New Englander of his day would have encountered:

> See everywhere the struggle and the squeeze; and everlastingly the problem how to make them less. The anarchists, nihilists, and free-lovers; the free-silverites, socialists, and single-tax men; the free-traders and civil-service reformers; the prohibitionists and anti-vivisectionists; the radical darwinians with their idea of the suppression of the weak,—these and all the conservative sentiments of society arrayed against them, are simply deciding through actual experiment by what sort of conduct the maximum amount of good can be gained and kept in this world. These experiments are to be judged, not à priori, but by actually finding, after the fact of their making, how much more outcry or how much appeasement comes about.

There is a lot of food for thought in that list: notably in the word "free," which is used three times, each time as an adjective: once for love, once for silver, and once for trade, forcing the reader to wonder whether it bears the same meaning in each case, or even in any two of them out of the three.

There is food for thought, too, in the punctuation. Sometimes James will separate two ideals by a mere comma, and at other times he will separate them by a semicolon. Thus, "anarchists, nihilists, and free-lovers" are separated from one another only by commas, but from the other items in the list by a semicolon. Is this because anarchists, nihilists, and free lovers are allied in a loose sense? Perhaps. But the prohibitionists and antivivisectionists are likewise joined in apparent alliance. Why?

There is another bit of punctuation worth noting here: the dash. After having listed 11 different moral ideals, each concomitant with its own sort of reform, and after having sorted them neatly into five groups by those semicolons, James contrasts them all with "all the conservative sentiments of society arrayed against them." A *dash* marks that contrast of a crowd of ideals against amorphous sentiments that serve as a counter to them all.

The conservative sentiments of society are on the right-hand side of that dash. All the reform movements, including the "radical darwinians," are on the left-hand side of that dash. I believe that many 21st century readers of this passage probably suspect, if they know anyone they would describe as a "radical darwinian" harboring an idea of the "suppression of the weak," that this person is a tool of the status quo, an intellectualizer of the "conservative sentiments of society." But, for James, these "radical darwinians" are on the opposite side of that dash from the conservative sentiments. They belong in some sense with the members of the other, mutually contending, reform movements motivated by some ideal that demands changes to the status quo.

Who did James have in mind here? If we pay attention to the placement of the semicolon, as I think we should, then we notice that the radicial Darwinians are the only reformers who stand alone, who aren't joined with anyone else in a group of three or even two. He has literally singled them out for us.

So who were they? I submit that James was not talking specifically of those whom in hindsight we call "social Darwinians," typified by the names Herbert Spencer and William Graham Sumner. No: By "radical darwinians," James more likely makes reference to the eugenicists of his day. Eugenics had received its now-conventional name eight years before James' lecture, when Francis Galton, a cousin of Charles Darwin's, published *Inquiries into Human Faculty and Its Development* (1883) and coined the term from the Greek for "good stock."

Galton defined the new word as the science of improving stock, a science addressing questions of "judicious mating" as well as "all influences that tend … to give to the more suitable races or strains of blood a better chance of prevailing speedily over the less suitable…."

As early as 1859, the same year, as it happens, in which Darwin published *The Origin of Species,* the (London) *Times* quoted a "W. Cooper" as saying, "the State has a direct interest in guarding against a deterioration of our race." The idea has been in the Anglophonic air ever since.

Darwin himself, in his follow-up book, *Descent of Man, and Selection in Relation to Sex* (1871), agreed with an already-developing body of opinion to the effect that it was unfortunate that "vaccination has preserved thousands, who from a weak constitution, would formerly have succumbed to small-pox." Darwin, though, backed away from giving any moral significance to such thoughts. Our "instinct of sympathy" has become "more tender and more widely diffused" over time, and we must bear with its consequences, he wrote. It was natural enough, then, for James to refer 20 years later to the "radical darwinians" as those who were more Darwinian than Darwin, in that they thought that policy reforms might and should reverse the purportedly dysgenic consequences of civilization.

I'm reminded of the above passage in James' lecture not simply because James is a minor character in Adam Cohen's new book on eugenics, Justice Oliver Wendell Holmes, and the infamous *Buck v. Bell* decision, but because it is important as a historical matter to distinguish between the social Darwinians of the Spencerian sort, on the one hand,

and the eugenicists such as Galton and his American counterpart, Harry Loughlin, on the other. On a Venn diagram of the two schools of thought, the intersection would be a small one. The Spencerians said, in effect, "the human world still is a jungle, the consequences of the struggle for survival within this jungle are good, and all that is necessary is for governments to remain strictly limited in order for this beneficial jungleness to remain in place and for this progress to continue." The eugenicists, by contrast, said, in effect, "the world is no longer jungle enough, the natural course of evolution has been disturbed by misplaced pity, pieties, charities, widespread inoculations, and so forth. Our race (whether conceived of as the human race or the white race) must now take charge of its own evolution, in large part through judicious government policies." Cohen is not always as clear as he might be about the distinction between the two movements that invoked Darwin for their very different purposes. There is a reason for that though, to which we will come.

As I read the above passage by James, in the context of James' repeated discussions and references to various aspects of Spencer's philosophy, I suspect that James probably did consider *social* Darwinism an expression of the "conservative sentiments of society" arrayed against the other ideals and experiments he listed, including *radical* Darwinism, with its idea of suppression of the weak through eugenics. That is my reading: I claim for it no authoritative character.

Might Makes Right?

After this indirect approach, we may get rather closer to the heart of the book under review. Cohen wants us to see Holmes' infamous assertion in *Buck v. Bell* that forced sterilization is constitutional because "three generations of imbeciles are enough," not simply as a fleeting lapse of judgment or the excessive love of a snappy aphorism; he wants us to see it as part of a deep character flaw, a general and quite cynical disposition to side with "the most powerful organizations or individuals, on the theory that they should be allowed to use their power as they saw fit."

Cohen follows other recent scholars in the dim view he takes of Holmes. He seems especially to have been influenced by Albert Alschuler's takedown of Holmes in *Law without Values* (2000), which was reviewed in *The Federal Lawyer* in February 2001.

It is in his efforts to persuade his readers of this characterization of Holmes that Cohen brings James into the story. After all, James and Holmes knew each other quite well. They moved in the same social circles, and were both members of the "Metaphysical Club," an informal discussion group of Harvard students in the 1870s. More than that, according to G. Edward White, author of the leading biography of Holmes, the future Supreme Court justice felt comfortable enough in the company of William James and his brother, the novelist Henry James, that he accompanied them on summer vacations.

So William James' words, when they shed an unflattering light on his friend, carry some weight. Accordingly, Cohen quotes a letter that William wrote to Henry in July 1876, in which William expressed dismay that the "noble qualities" of their friend were poisoned by "cold-blooded, conscious egotism and conceit." As a consequence, "friendly as I want to be toward him, as yet the good he has done me is more in presenting me something to kick away from or react against than to follow and embrace."

To Cohen, the personal egotism and conceit that James observed were of a parcel with the worldview Holmes was developing in those years, one in which the floor of a legislature is itself a jungle, with the fittest to survive in that jungle encoding their own interests into law. Judges, Holmes believed, need only ratify that coding.

In an 1873 essay, Holmes expressed skepticism about utilitarianism and moved directly from that skepticism to an embrace of eugenic premises: "Why should the greatest number be preferred?" he asked, "Why not the greatest good of the most intelligent and most highly developed?"

I mentioned "race" above. That's worthy of emphasis. W. Cooper, as quoted in the *Times* in 1859, referred to the protection of "our race." This could have had one of two meanings. He might have meant the human race, or he might have meant the "white race" or the "Nordic" race or whatever he would have called the race to which he, in his own eyes, belonged.

An Overt Racism

Eugenics was part of a frankly racist perspective. In making this point Cohen quotes from *The Great Gatsby*, a novel published just two years before the Supreme Court issued its decision in *Buck v. Bell*. In one passage, Tom Buchanan pontificates about how "civilization's going to pieces" and cites "*The Rise of the Colored Empires* by this man Goddard." There was at the time a prominent eugenicist named Henry Goddard, an early champion of IQ testing, but Buchanan's reference better matches *The Rising Tide of Color Against White World Supremacy* (1920), by Lathrop Stoddard, which in turn echoed Madison Grant's *The Passing of the Great Race* (1916). As Cohen observes, Tom's reference to "Goddard" may be a portmanteau of Grant and Stoddard.

The sterilizations inspired by eugenic theories, including that of Carrie Buck, may aptly be considered acts of racial violence. Of course, many victims (including Buck) were white by any definition. This was consistent with the spirit of eugenic theorizing, which saw a need for the white/Nordic race to regulate itself in order to remain both pure and strong enough to maintain its (presumably deserved) world supremacy as "the great race." One might recall in this context Galton's definition of the "science" at issue as including measures that may give "the more suitable races or strains of blood a better chance of prevailing speedily over the less suitable…." Filtering out the bad blood that was presumed to run through Carrie Buck's veins—so ran the theory—gave the whites, as the more suitable race, a better chance of continuing to prevail.

More than half a century elapsed between Holmes' 1873 essay referencing the "greatest good of the most intelligent and most highly developed" and his 1927 decision authorizing state-mandated sterilizations of "mental defectives," including "imbeciles." By Cohen's account, what happened in that interval was a continuous hardening of Holmes' mind, so that a view expressed hypothetically at the earlier date had become a hardened conviction by the time of the latter.

Final Thoughts

I discussed above my reason for regarding social Darwinism and eugenics as quite distinct schools of thought, and I observed that, on a Venn diagram, they would have a small area of intersection. Though small, the intersection exists. Indeed, Cohen's book suggests that Holmes resided in that intersection. For social Darwinism can unite with eugenics if the floor of the legislature itself is considered as a jungle—an arena in which organisms contend for life and death (and procreative freedom) by means different only in form from the eons-old struggles with tooth and claw. Eugenics was a tool in that struggle.

Near the end of *Imbeciles*, Cohen quotes

a letter that Holmes wrote to the political scientist Harold Laski soon after his ruling in *Buck v. Bell.* He wrote that "the other day" he had "delivered a decision upholding the constitutionality of a state law for sterilizing imbeciles," and he felt that he was "getting near to the first principle of real reform."

One will make of that what one will. This book, like Alschuler's and others that have come between them, is a sign that the generations of uncritical worship of the very name "Oliver Wendell Holmes" are now behind us. It took long enough. ⊙

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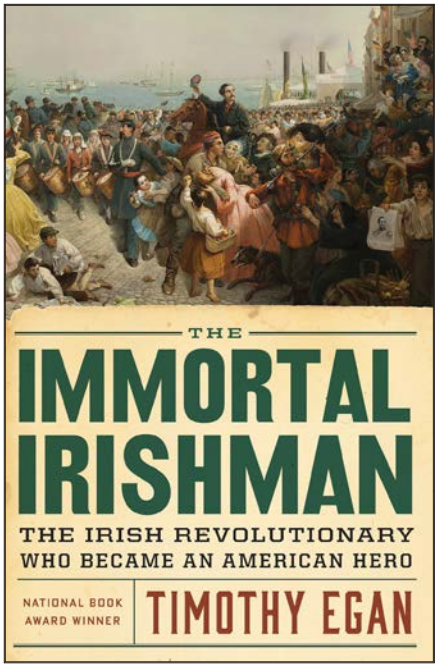

Immortal Irishman: The Irish Revolutionary Who Became an American Hero

By Timothy Egan

Houghton Mifflin Harcourt, New York, NY, 2016.
368 pages, $28.

Reviewed by Elizabeth Kelley

This year marks the 100th anniversary of the Easter Rebellion, or the Easter Rising, a bloody week of insurrection in Dublin during which the Irish, greatly outnumbered by the British, suffered huge casualties, were forced to surrender, and saw their leaders executed. This rebellion fell amidst what Timothy Egan, in *The Immortal Irishman: The Irish Revolutionary Who Became an American Hero*, calls "seven-plus centuries of organized torment." Egan is a Pulitzer Prize-winning reporter, a columnist for *The New York Times*, and a prolific author who won the National Book Award for *The Worst Hard Time: The Untold Story of Those Who Survived the Great American Dust Bowl*.

Egan is unsparing in his description of British rule in Ireland and of the prejudice against the Irish in England and in the United States. Indeed, as long ago as 1155, Pope Adrian IV empowered King Henry II to conquer Ireland and what he called its "rude and savage people." Since then, prejudice against the Irish has flourished both in the law and in people's attitudes. *The Immortal Irishman* does not allow the reader to forget the obstacles and oppression that the Irish have had to overcome on both sides of the Atlantic, and its story of the life and adventures of its hero, Thomas Francis Meagher, teaches us about a neglected chunk of history.

Meagher was born in 1823 in County Waterford, Ireland. His father was a member of the British Parliament—of the House of Commons. But members such as the elder Meagher could not vote. They were allowed to serve based on land ownership. This was a concession the British had made following numerous rebellions by the Irish Catholics.

Thomas Meagher attended a Jesuit boarding school in County Kildare, Ireland, until his father sent him to a prestigious school in England, hoping "that this quarrelsome boy, too much the prankster, would return as a gentleman on a leash." But this, as Egan tells in lively detail, was not meant to be. Meagher, like many of his generation, not only chafed under the subjugation of the British, but openly rebelled against it. The Irish had long suffered at the hands of the British. Catholicism was outlawed, landownership was restricted, education was forbidden, strict curfews were imposed, and anyone daring to play a harp could have his or her fingernails removed. When the potato famine struck Ireland in the 1840s, the British turned a deaf ear. This led to the Irish diaspora and the failed Young Irelander rebellion of 1848. Egan exposes the famine as nothing less than genocide.

Meagher, who was blessed with a silver tongue, became a leader of the Young Irelanders. He was arrested by the British, imprisoned, tried and convicted of sedition, banished to Tasmania, and forbidden from ever returning to Ireland. Relatively speaking, however, Meagher flourished in Tasmania, along with a group of other Irish rebel convicts. He married the daughter of another exile, but she died in childbirth. Yet his heart still burned for freedom. In a tale worthy of a Hollywood movie, Meagher escaped to New York City.

New York in the 1850s was teeming with immigrants. The Irish were quick to embrace the land of the free, and they were happy to be in a country that had bravely declared and won its independence from England. But a wave of anti-immigrant fever began to spread. The Know-Nothing Party gained support for its position that America was emphatically an Anglo-Saxon country, and that all others were unwelcome.

Meanwhile, Meagher began to assimilate or at least assimilate as much as a free-spirited Irishman could. He practiced law, and, not surprisingly, put his oratorical talents to good use in front of juries. He also married the beautiful Elizabeth Townsend. Egan describes the attraction of opposites:

> She was everything the Irish in New York were not: different tribe, different religion, different financial circumstances. If Meagher had stunned his friends by marrying below his class in the penal colony, he drew gasps of another kind by romancing above his standing with a Fifth Avenue daughter of American royalty. By a consensus of those close to him, the love affair was doomed. He was Catholic, she Protestant. He was a Celt, she Anglo-Saxon. He was a convict, she the progeny of refined Yankee bloodlines. She knew nothing of Cromwell's cruelty or Brian Boru's bravery. He knew nothing of the Townsends of New York. To her, the Great Hunger was something that forced thousands of filthy wretches to wash up on Manhattan's shores and chase pigs down 57th Street. She could not tell a Gaelic word from a hairbrush.

But the marriage endured, as both partners respected each other as equals and companions—an unusual concept in the 19th century.

When the Civil War began in 1861, Meagher encouraged the Irish to enlist in the Union Army, and he did so himself. Following numerous acts of bravery as the leader of the Irish Brigade from New York, he was promoted to a general in the Union Army. When Lincoln issued the Emancipation Proclamation in 1863, the loyalties of the Irish-Americans became more complex. Initially, they had rallied to the Union's side because of fierce loyalty to the land that had saved them from the potato famine. But not all Irish were willing to die for the cause of abolition. Egan quotes Frederick Douglass:

> Perhaps no class of our fellow citizens has carried this prejudice against color to a point more extreme and dangerous than have our Catholic Irish fellow citizens, and yet no people on the face of the earth have been more relentlessly persecuted and oppressed on account of race and religion than these same Irish people. The Irish who, at home, readily sympathize with the oppressed everywhere, are instantly taught when they step upon our soil to hate and despise the Negro. They are taught that he eats the bread that belongs to them.

At the end of the Civil War, Meagher looked to the West. Although he yearned for his native land, the wide open spaces of the Northwest presented a welcome contrast to the crowded, dirty conditions of Northeastern cities. He was made the acting governor of Montana Territory and embarked on what were to be the final adventures of an already colorful life.

Montana in the 1860s was truly the Wild West. It was unofficially ruled by the Vigilance Committee, a group of men who enforced what they saw as law and order. Malefactors were hanged for every type of suspected offense, even pickpocketing or the "crime" of being Mexican and not leaving town when told. No one was immune from this type of "justice." Egan describes the scene when the outgoing governor, Sidney Edgerton, greeted Meagher:

> A radical Republican, with a long face whiskered to an arrowhead below his chin, Edgerton looked like a Gothic preacher with a toothache.... When Meagher asked a few perfunctory questions, he discovered that his "richest territory" had its own way of dispatching people on the wrong side of right-thinking citizens. The sheriff, for example. What of him? That would be the *late* sheriff, a Mr. Henry Plummer. *Late*? Considerably so. He'd been hanged. Oh. Was there a trial? No. A specific charge? Not really. But as one of the early leaders of these upstanding gentlemen had written in his diary, Edgerton could "recognize a bad man when he saw one." Wait—they'd killed the lawfully appointed sheriff without a trial or due process? *He had it coming*.

The Vigilance Committee never liked Meagher, and he wrote his own death warrant by granting a reprieve to a citizen who was scheduled for hanging. The Vigilance Committee took umbrage and worked behind as well as in front of the scenes to undermine Meagher. It asked the U.S. Congress to declare all the laws passed by the Montana legislature null and void.

Meagher died under suspicious circumstances. His death appeared to be suicide caused by a drunken plunge into a river at night. This fed squarely into the stereotypes about the Irish and drinking. Egan does a good job of debunking the myth of suicide and of showing how later generations have been kinder to Meagher's memory.

You can tell that writing this book was a labor of love for Egan, whose family hailed from County Waterford. Reading *The Immortal Irishman* was pure pleasure. ⊙

Elizabeth Kelley is a criminal defense lawyer based in Spokane, Wash., and she has a nationwide practice representing persons with mental disabilities. She is serving her third term on the board of the National Association of Criminal Defense Lawyers. She has been appointed to the National Advisory Committee of The ARC's National Center on Criminal Justice and Disability. She hosts two Internet radio shows, CelebrityCourt *and* AuthorChats. *She can be reached at* ZealousAdvocacy@aol.com.

Supreme Court Previews *continued from page 82*

the "modified categorical approach" can be based only on the text of the state criminal statute as well as state court analysis of its elements, without regard to the court record or the means necessary to accomplish an element. The United States contends that the standard is simply that criminal statutes phrased in the disjunctive are divisible and that courts may then use court documents under the "modified categorical approach" to determine if the defendant was convicted of the generic crime. This decision will impact the severity of prison terms for many prior felons and has great repercussions for noncitizen felons. The full text is available at https://www.law.cornell.edu/supct/cert/15-6092. ⊙

McDonnell v. United States (15-474)

Court below: *U.S. Court of Appeals for the Fourth Circuit*

Oral argument: April 27, 2016

In this case, the Supreme Court will decide whether an "official action" is limited to exercise of actual government power. In light of this determination, the court will then decide whether the honest-services statute and Hobbs Act sufficiently define official actions to comply with the Constitution. Robert McDonnell argues that official actions should be limited to the actual exercise of government power and that his conduct as governor was never an exercise of actual government power. Thus, McDonnell argues that his conviction should be overturned on the merits, but he also argues that the trial court's jury instructions were erroneous based on a flawed definition of "official action" given to the jury. In addition, McDonnell argues that the honest-services statute and Hobbs Act are unconstitutionally vague. The United States argues that McDonnell construes the definition of official action too narrowly, and that a proper interpretation encompasses McDonnell's conduct in this case. The United States rejects McDonnell's jury instruction arguments by noting that these instructions included a precise definition of "official action" from the statute, with additional information to clarify the definition. Finally, the United States rejects McDonnell's constitutional challenges by citing a recent and similar Supreme Court challenge to these statutes that failed. The full text is available at https://www.law.cornell.edu/supct/cert/15-474. ⊙

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Left: Rhode Island Chapter: Academy participants and faculty following one of the programs. Lower left: Rhode Island Chapter: Scott Kilpatrick, a former Rhode Island Chapter president, addresses Academy participants. Lower right: Rhode Island Chapter: Magistrate Judge Sullivan and attorney Stephen M. Prignano, a faculty member, evaluate a participant's performance. Bottom top: Rhode Island Chapter: Brooks Magratten, a former Rhode Island Chapter president, addresses Academy participants. Bottom: Rhode Island Chapter: Chief Judge William Smith addresses the Litigation Academy participants.

FIRST CIRCUIT

Rhode Island Chapter

USDC Rhode Island's Litigation Academy

The U.S. District Court for the District of Rhode Island recently completed its third successful Litigation Academy, an ongoing series of programs aimed at developing practical litigation and trial skills. Conceived by Chief Judge William Smith, the Academy prepares local practitioners of all ages with practical hands-on litigation and trial training. In an era when fewer disputes reach court, with far fewer cases tried to verdict, the Academy fills a need for attorneys to develop these practical skills.

Under Judge Smith's leadership, the court reached out to the FBA Rhode Island Chapter and the Roger Williams University School of Law. A unique partnership resulted, pairing seasoned local attorneys and judges with enrolled "student" practitioners. Former Rhode Island Chapter President Brooks Magratten and professor Niki Kuckes help Judge Smith manage the Academy. Each program focuses on a phase of litigation; topics thus far have been deposition and direct and cross examination. The intensive three- to four-day programs are held at the federal courthouse and the law school. Each phase within a program is launched with a lecture, followed by skills sessions. For example, the first phase of the deposition program focused on admonitions, starting with a lecture correlating successes and failures with skillful and not-so-skillful uses of admonitions. A unique feature of the Academy is that, whenever possible, skills sessions are played out in open court. Each program has sold out, with positive reviews from participants. In fact, due to high demand, the deposition program was repeated.

Rhode Island is home to one of the country's finest regional theaters, Trinity Reper-



Top left: Knoxville Chapter: (left to right) Judge Pamela Reeves, Judge Jane Branstetter Stranch, and FBA Chapter President Joshua Wolfe. Top middle: Knoxville Chapter: The reception, which was hosted in chambers by Chief Judge Thomas Varlan. Top right: Knoxville Chapter: The reception, which was hosted in chambers by Chief Judge Thomas Varlan.

tory Company. Members of Trinity's resident troupe performed as witnesses in the past two programs, adding more challenge (and entertainment) to the participants' experience. Tuition is kept well below market rates by the court and Roger Williams University, which hosts the program in their facilities, and by judges and lawyers who volunteer their time to act as faculty. In addition, the FBA Rhode Island Chapter offered 50 percent tuition scholarships, enabling six practitioners to attend who otherwise would not have been able to.

The USDC Rhode Island Litigation Academy serves as an example of how the federal legal community can benefit from genuine collaboration among the bench, bar, and law schools. Judge Smith is pleased to report that the fourth Litigation Academy is in the works for the spring and will focus on opening statements and closing arguments. Another sellout is expected. ⊙

SIXTH CIRCUIT

Knoxville Chapter

March Kickoff Event

The Knoxville chapter held its kickoff event at the Howard H. Baker Jr. United States Courthouse on March 24, 2016. The local bar actively supported the event with donations to the Chapter and with a strong attendance of more than 60 members. Attendees included judges and attorneys as well as faculty and students from the University of Tennessee Law School and the Lincoln Memorial Duncan School of Law. Brief remarks were offered by Chief Judge Thomas Varlan of the Eastern District of Tennessee, by District Judge Pamela Reeves, and by FBA Chapter President Joshua Wolfe. The featured speaker for the event was Judge Jane Branstetter Stranch of the Sixth Circuit Court of Appeals. A reception followed the remarks. ⊙

NINTH CIRCUIT

San Diego Chapter

Government Relations Event: Opening the Lines of Communication Between the Judiciary, Practitioners, and Our Congressional Representatives

Federal judges gathered with representatives of the federal bar in San Diego for the first two installments in what is planned to be a series of government relations events hosted by the FBA's San Diego Chapter. At these events, the local federal judiciary will have the opportunity to engage regional congressional representatives on issues impacting the judiciary, including judicial vacancies, judicial funding, and criminal justice reform. Reps. Darrell Issa and Scott Peters respectively met with the judiciary and FBA leadership at the James M. Carter and Judith N. Keep Courthouse; Issa on Dec. 4, 2015, and Peters on Jan. 22, 2016. Both congressmen are members of the House Judiciary Committee, and Rep. Issa serves as the chairman of the Subcommittee on Courts, Intellectual Property, and the Internet.

Congressman Issa, who represents the 49th Congressional District, including Camp Pendleton and the northern portions of San Diego County, has a long history with Southern District of California Chief Judge Barry Ted Moskowitz. As Chief Judge Moskowitz recounted in his charming introduction at the December 2015 government relations event, he first encountered Rep. Issa when Issa was a patent litigant in Judge Moskowitz's courtroom. Chief Judge Moskowitz fondly recalled Issa's contribution to judicial economy, specifically, his ability to forge a quick and mutually agreeable solution that would settle a case in a matter of minutes.

Noting that the December luncheon was the inaugural event of its kind and that it would set the bar for future meetings, Rep. Issa made only brief introductory remarks in order to allow as many questions as possible and to engage most directly with the nearly 25 judges and attorneys present, including Ninth Circuit Judge Clifford Wallace. He noted there were 66 federal court vacancies, but observed that President Barack Obama has provided only 27 candidates and explained that it would be impossible for Congress to confirm nominees to fill all those seats before President Obama's term ends, even if President Obama made the nominations this month. He also pointed out that although the greatest vacancy rate is in the Eastern District of Texas, the high demand for judges in that district stems from the fact that 25 percent of patent infringement cases are filed there.

A holder of over 30 patents himself, Rep. Issa was not shy about sharing his strong opinions regarding patent litigation, stating his belief that if the cases in the Eastern District of Texas were more efficiently transferred—or disposed by *inter partes* review—the demand would be lessened, as would the need to fill judicial vacancies. Issa obtained many of his patents before running for Congress, having previously served as the CEO of Directed Electronics, a company Issa founded and built in the mid-1990s to manufacture vehicle antitheft devices.

Rep. Issa said he supports revising the criminal code, but acknowledged the chorus

Top left: San Diego Chapter: Rep. Darrell Issa speaks to judges and FBA San Diego Chapter leaders at the James M. Carter and Judith N. Keep United States Courthouse. Top right: San Diego Chapter: (left to right) Ninth Circuit Judge Clifford Wallace, Chief District Court Judge Barry Ted Moskowitz, Chief Bankruptcy Judge Laura Taylor, Rep. Darrell Issa, Magistrate Judge Karen Crawford, and San Diego Intellectual Property Law Association President Leslie Overman.

of opposition from prosecutors who insist that the risk of substantial punishment is critical to securing cooperation and achieving judicious dispositions.

Issa also addressed concerns about the creation of an Office of the Inspector General (OIG) for the judiciary, noting that an executive branch OIG could threaten judicial independence and separation of powers. He challenged judges to better police themselves and their own branch of government in order to avoid the necessity of an OIG to investigate improper or illegal conduct by judges.

In response to a question of whether there would be reduced funding to legal services for the poor should the White House turn Republican, Rep. Issa pointed out that there was no such reduction in 2001 when Republicans gained control of both houses and the Oval Office. He challenged the characterization of Republicans as being mean-spirited and uncaring for the plight of the poor and stated that his party's actual concern was ensuring that federal money is used as intended. Issa recalled a time when he was criticized for opposing funds for Nigerian aid. His objection, however, stemmed from the fact that the equivalent of four times the annual U.S. aid was pocketed by corrupt Nigerian officials from the oil and gas revenues of the country.

Rep. Issa elaborated on his opinion of why the trade organization BIO opposed patent reform. He recognizes that biotech lives and dies on venture capital and, consequently, on its patents. He stated that BIO believes an issued patent is sacrosanct and wants an exception to intellectual property rights (IPR) for biotech patents. Rep. Issa believes that to make the system as robust as possible, every patent should be challengeable. That said, he agrees that the ability to challenge a patent to hedge funds might be an abuse of that system but thinks there are alternatives to regulating such suspect behavior without further adjustment to the IPR process.

After polling the judges and lawyers regarding how many attended a University of California school, Rep. Issa pointed out that universities and research institutions could also be considered patent trolls (i.e., non-practicing entities). Although the University of California and similar institutions wish to be exempt from "loser pays" provisions, Issa does not believe that institutions, which allow their patents to be used to harass businesses, should be exempt.

Rep. Issa asked the final question himself, challenging the judges to think critically about

Left: San Diego Chapter: Rep. Issa discusses issues of judicial administration with judges (left to right) Wallace, Moskowitz, Taylor, and Crawford. Right: San Diego Chapter: Rep. Scott Peters addresses judges, lawyer representatives, and FBA San Diego Chapter leaders over lunch in the jury lounge of the James M. Carter and Judith N. Keep United States Courthouse.

Top left: San Diego Chapter: Chief Judge Barry Ted Moskowitz (seated) greets Rep. Scott Peters in his chambers at the James M. Carter and Judith N. Keep United States Courthouse prior to the government relations luncheon. Top right: San Diego Chapter: Rep. Scott Peters addresses judges, lawyer representatives, and FBA San Diego Chapter leaders over lunch in the jury lounge of the James M. Carter and Judith N. Keep United States Courthouse.

the use of Administrative Law Judges (ALJs). He asked if any of the judges thought about the judicial economy of ALJs and whether they were satisfied, challenging them to think about ways in which ALJs could be used more efficiently and effectively.

Rep. Peters joined the judiciary and members of the bar for the second government relations event in January hosted by the San Diego FBA Chapter. Rep. Peters opened his remarks by recognizing several members of the federal bench, including District Court Judges Dana M. Sabraw and Cynthia A. Bashant and Magistrate Judge Jill L. Burkhardt, all of whom were his colleagues or mentors in private practice before he embarked on his career in government. Rep. Peters serves California's 52nd Congressional District, which includes the cities of Coronado, Poway, and most of northern San Diego. First elected in 2012, he currently serves on the House Armed Services Committee and the House Judiciary Committee and formerly served on the House Committee on Science, Space, and Technology.

During the event, Rep. Peters had few formal comments and spent the majority of his presentation taking questions from the approximately 19 attendees, including nine judges. He echoed Rep. Issa's statements that patent reform is a significant focus for the judiciary committee. Rep. Peters explained that the committee hoped to implement a balanced reform to patent practice by requiring more specific pleadings while still allowing patent holders access to the courts. Peters was "concerned about tilting the scales" and recognized that reforms impact both legitimate patent holders and patent trolls alike.

Rep. Peters explained that there would likely be little movement on judicial vacancies in the coming year. (Although this event took place prior to the unanticipated passing of Justice Antonin Scalia, Rep. Peters' remarks were prescient of the current stalemate over the nomination and approval of Justice Scalia's replacement, D.C. Circuit Court Judge Merrick B. Garland.)

Rep. Peters also explained there was bipartisan support for criminal justice reform. This is a hot button issue for many, and Rep. Peters took questions from various attendees, including judges, an assistant United States attorney, and an attorney with the Federal Defenders of San Diego Inc. Proponents of reform seek sentencing reductions for nonviolent drug offenders, revisions to discovery practices, and a reduction in the sentencing guidelines for various offenses. Opponents argue that increased sentences and minimum mandatory sentences are necessary to incentivize the expeditious resolution of cases, promote judicial economy, and are fair given the harm to society that drug offenses inflict. Rep. Peters believes that bipartisan support for reform exists and the two areas of likely reform will be the reduction or elimination of minimum mandatory sentences for nonviolent drug sentences and increased judicial discretion.

A core issue for many judges and members of the court community is judicial funding. The good news is that the judiciary is well funded for this fiscal year and that the Southern District of California is even receiving funds for a daycare center. This has been a long-standing request and Rep. Peters spoke approvingly of the center's creation.

Rep. Peters further addressed the need for increased immigration court staffing. As most immigration practitioners can attest, the backlog of cases is too long and the attendant delay in resolving cases needs attention. The current backlog is over 500,000 cases and the immigration courts need more staff to efficiently adjudicate pending cases. Rep. Peters believes that bipartisan support exists for the necessary staffing increase and hopes that it will be addressed this year.

In his concluding remarks, Rep. Peters encouraged members of the judiciary and practitioners to engage him in suggested areas of reform, noting that suggestions for reform regarding matters within the purview of the House Judiciary Committee are best addressed early in the year. Rep. Peters sought greater involvement from the attending judges and attorneys.

Both events with Reps. Issa and Peters were a success, and the FBA San Diego Chapter hopes that future presentations will be a catalyst for increased communication and involvement between the judiciary, practitioners, and our congressional representatives. ⊙

By Leslie B. Overman, Ph.D., Esq., president of the San Diego Intellectual Property Law Association; Rebecca S. Kanter, a prosecutor and the government relations liaison for the FBA San Diego Chapter; and Ryan W. Stitt, trial attorney for Federal Defenders of San Diego Inc. and vice president of fundraising for the FBA San Diego Chapter.

FY2017 National Election Results

On July 1, 2016, ballots were counted and verified for FY 2017 national officers. Their terms will begin Oct. 1, 2016. The president-elect and treasurer will serve a one-year term, which expires on Sept. 30, 2017; directors (groups 1–4) will serve three-year terms, which expire Sept. 30, 2019; and vice presidents for the circuits will serve two-year terms, which expire Sept. 30, 2018. Congratulations to these leaders who will serve the association next year!

National Officers

President-elect
Kip T. Bollin

Treasurer
Maria Z. Vathis

Board of Directors

Group 1* Director
Jonathan O. Hafen

Group 2 Director**
Vildan A. Teske

Group 3* Director**
Hon. Robin E. Feder

Group 4** Director**
David A. Goodwin

*One FBA member in good standing and a current or former FBA vice president of a circuit.
**One FBA member in good standing and a current or former chair of an FBA section or division.
***One FBA member in good standing and a current or former FBA chapter president.
****One FBA member in good standing and who has served as an FBA chapter officer, a national FBA YLD officer or board member, or as an FBA chapter leader with YLD responsibilities. In addition, at the time of election, the person must be age 40 or younger.

Vice Presidents for the Circuits

First Circuit
Matthew C. Moschella

Second Circuit
Ernest T. Bartol

Third Circuit
Frank J. McGovern

Fourth Circuit
Hannah Rogers Metcalfe

Fifth Circuit
Barry W. Ashe

Sixth Circuit
Thomas G. McNeill

Seventh Circuit
Sheri H. Mecklenburg

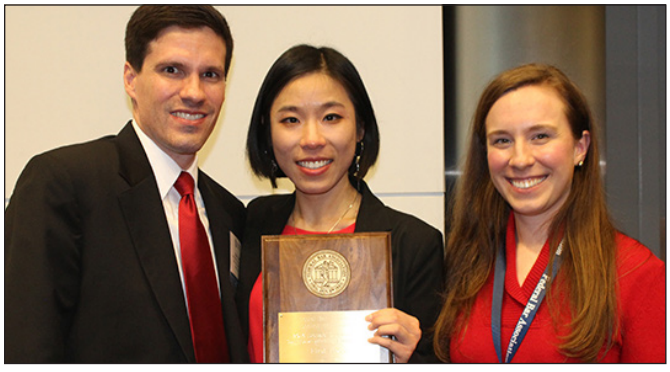
Eighth Circuit
Adine S. Momoh

Ninth Circuit
Hon. Alison S. Bachus

Tenth Circuit
Daniel W. Lewis

Eleventh Circuit
Michael S. Vitale

D.C. Circuit
Elizabeth Pugh



Top left: Section on Taxation: Section Chair Ryan Kelly welcomes the attendees to the Annual Tax Law Conference. Middle left: Section on Taxation: Yue Dai receives the first place prize for the Donald C. Alexander Tax Law Writing Competition. Left to right: Section Chair Ryan Kelly, Yue Dai, and Donald C. Alexander Tax Law Writing Competition Co-Chair Laura Pisarello. Middle right: Section on Taxation: Members of the section speak with IRS Commissioner John Koskinen. Left to right: Tax Law Conference Committee Co-Chair Shamik Trivedi, Anne Gordon, IRS Commissioner John Koskinen, and Section Chair Ryan Kelly. Bottom: Section on Taxation: IRS Chief Counsel William J. Wilkins speaks at the Tax Law Conference luncheon.

Immigration Law:

On March 9, the Immigration Law Section held its monthly Immigration Leadership Luncheon Series. The event, which included over 60 attendees, was held at Carmine's Restaurant in Washington, D.C. The guest speaker for the luncheon was Chief Charles Oppenheim of the Immigrant Visa Control & Reporting, Bureau of Consular Affairs, and U.S. Department of State.

Tax Law:

The Section on Taxation held the 40th Annual Tax Law Conference on March 4 in Washington, D.C. This year's conference featured more than 70 speakers from the federal government, including the IRS chief counsel, the acting assistant attorney general of the Department of Justice Tax Section, and the IRS commissioner. More than 500 attorneys from the government and private practice attended the conference, which focused on all aspects of civil and criminal tax law. ☉

Member Spotlight: March 2016

† Denotes New Member * Denotes Sustaining Member

FIRST CIRCUIT

Maine
† Francis M. Jackson

Massachusetts
† John McInnes
† Jodi-Ann McLane
† Anna A. Palka
† Amanda R. Phillips

Hon. Raymond L. Acosta—Puerto Rico
† Alfredo A. Castellanos
† Jose R. Perez-Riera
* Raquel G. Loubriel Colon
* Julio I. Lugo

SECOND CIRCUIT

District of Connecticut
† Kevin Duffy
† Eric L. Green

Eastern District of New York
† Janelle Aaron Johnson
† Colleen K. Angus-Yamada
† Jonathan Bari
† Mena Beshay
† Laina R. Boris
† Christina M. Brennan
† Jordan T. Buff
† Claudia Carbone
† Christina Christoforo
† Stephanie Cipolla
† Morgan Cline
† Kathryn Cronin
† Arielle Cummings
† Kaitlin Decker
† Andrew J. Edvin
† Jennifer Flores
† Anastasia Galstian
† Marlee Ch Galvez
† Kaitlyn Gaskin
† Kyle D. Gens
† Jessica M. Goldberg
† Zach S. Goldman
† Shira Goltche
† Madeline Goralski
† Bryant Gordon
† Christopher W. Hofmann
† Michael Hofmann
† Sorya M. Jamelo
† Annemarie Jones
† Taisha Lazare
† Harlan M. Lazarus
† Mark Lith
† Meghan M. Lombardo
† Michael D. Manzo
† Debra March
† Steven Masillo
† Ashraf Mokbel
† Kyle F. Monaghan
† Cory Morris
† Erin M. Mullins
† Avery I. Nagy-Normyle
† Nicholas A. Oliva
† Maria Ortega Lobos
† Ryan D. Rayder
† Diana Ricaurte
† Arthur Rushforth
† Jonathan Schwartz
† Taha Scolnik
† Sarah E. Smith
† Maxwell Weiss
† Alexander Yakaitis
† Justin Z. Zim
* Leo K. Barne Jr.

Southern District of New York
† Phillip S. Allen
† Vivian Rivera Drohan
† Baree Nichole Fett
† Peter J. Gleason
† Robert Juceam
† Justin Kelton
† Evelyn H. Seeler
† Daniel Seltz
† Bryan C. Skarlatos
† David Thompson
* Marissa J. Moran

Western District of New York
† Michael D. Sliger

THIRD CIRCUIT

Delaware
† Jeremy D. Anderson
† Gregory J. Flasser
† Alexander P. Ibrahim
† Nicholas Donald Mozal
† Ryan Patrick Newell

Middle District of Pennsylvania
† Cory Winter

New Jersey
† Aliya J. Akhtar
† William Joseph Volonte

Western District of Pennsylvania
† Joseph Peter McHugh
† Jana Saralee Pail
† Daniel S. Schiffman

FOURTH CIRCUIT

Eastern District of North Carolina
† Amy Broughton
† Shauna A. Guyton
† Stacy Julian Maynor
* Jennifer A. Dominguez

Hampton Roads
† Deborah Yeng Collins

Maryland
† Sally J. Dworak-Fisher
† Donna M. Glover
† Linda S. Morris
† Edward Wea Neufville III
† Susan C. Trimble
* Stephanie Lane-Weber

Middle District of North Carolina
† Ama S. Frimpong

Northern Virginia
† Lisa A. Bolen
† Vic Goel
† John Henault
† Seth James Bryan Obed
† Roger B. Sabin
† Jacob Madison Small
† Destin Valine
* Eric W. Schweibenz

Richmond
† Kyle R. Hosmer
† Lindsey Ann Strachan

South Carolina
† Hon. Joseph F. Anderson
† Hon. Jacquelyn D. Austin
† Hon. Mary G. Baker
† Hon. Timothy M. Cain
† Hon. J. Michelle Childs
† Hon. Richard M. Gergel
† Hon. Paige J. Gossett
† John R. Haley
† Hon. Shiva V. Hodges
† Hon. Mary G. Lewis
† Thomas F. Moran

FIFTH CIRCUIT

Austin
† Valerie Barker
† Matthew James Booth
† Meghan Paulk Ingle
† Amber L. Mckeon Muller
* Robert A. Summers

Baton Rouge
† Caroline Jordan Barnes
† Fred T. Crifasi
† Alan A. Stevens
† Hon. Erin J. Wilder-Doomes

Dallas
† Scott Richard Larson
† Stephanie Woods Samuels
† Jessie Schreier
* Javier Aguilar

El Paso
† Ian Martinez Hanna
* Jose Luis Gonzalez

Fort Worth
† Kenneth E. East
* William D. Copenhaver

Mississippi
† Elissa Johnson
† Edgar Reeves Jones

New Orleans
† Bianca Marie Brindisi
† Laurie D. Clark
† Monique Gougisha Doucette
† Samuel Furman
† John J. Gillon Jr.
† Matthew D. Hemmer
† Christopher Leger
† Mary Elizabeth Lorenz
† Kathleen A. Manning
† Becky Stevenson
† Lynda A. Tafaro

San Antonio
† Stephen K. Luxton

Southern District of Texas
† Magali Suarez Candler
† Matthew Hoffman
† Thomas McCulloch

SIXTH CIRCUIT

Chattanooga
† Ariel Anthony
† Stephen R. Beckham
† Michael H. Frost
† John Cain Harrison
† Caleb T. Holzeapfel
† Hon. Travis R. McDonough
† Samuel F. Robinson III
† Hon. Christopher H. Steger
† Megan B. Welton
† Hon. Nicholas Whittenburg

Columbus
† Kara Herrnstein
† Hon. Kimberly A. Jolson
† Larae C. Schraeder
† David P. Shouvlin

Dayton
† Donald Eric Burton
† John Hardisky
† Michael A. Zamora

Eastern District of Michigan
† Jennifer Lord
† Diane Nelson

John W. Peck Cincinnati/ Northern Kentucky
† Calvin S. Tregre Jr.

Kentucky
† John David Cole Jr.

Knoxville
† John Jeter Britton
† Wade Davies
† James Friauf
† Maria Victoria Gillen
† Benjamin Lauderback

Memphis Mid-South
† Kathryn Maceri
† Dean Norris
† Joseph Reafsnyder
† Allison Wannamaker

Nashville
† Agnieszka Haupt
† George III S. Scoville

Northern District of Ohio
† James R. Bedell
† Brittany N. Chencivski
† John N. Dabon Jr.
† Owen A. Doherty
† Alison J.W. Epperson
† Ethan A. Isaacson
† Lulu Jing
† Yaahuan Kaug
† Terrence J. Killeen Jr.
† Julie A. Kulin
† Jiaqi Li
† Shannon E. Meyer
† Lidia C. Mowad
† Jia Olia
† James P. Oliver
† Vicar Rizvi
† Michael B. Silverstein
† Holger K. Sonntag
† Jason E. Stafford
† Stephanie A. Starek
† Robert J. Vecchio
† Kristi L. Winner
† Brandon A. Wojtasik
† Daniel P. Wolfe

Western District of Michigan
† Sean E. Cahill
† Rebecca L. Strauss

SEVENTH CIRCUIT
* Susan Aasen

Chicago
† Jason W. Anderson
† Chirag G. Badlani
† Michael Bartolic
† Celeste Pagano Boles
† Yolanda Carrillo
† Stevie D. Conlon
† Julianne Cook
† Tiffany Nicole Hardy

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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; 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.

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 | Suite/Floor

City | State | Zip | Country

( ) | Phone | Email Address

Address | Apt. #

City | State | Zip | Country

( ) | Phone | Date of Birth

Email Address

Bar Admission and Law School Information (required)

U.S.
*Court of Record: _____
State/District: _____ Date of Original Admission: / /

Foreign
*Court/Tribunal of Record: _____
Country: _____ Date of Original Admission: / /

Tribal
*Court of Record: _____
State/District: _____ Date of Original Admission: / /

Students
Law School: _____
State/District: _____ Expected Graduation: / /

***Court of Record:** Name of **first court** in which you were admitted to practice.*

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 email address, I hereby consent to receive faxes and email 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 $15 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.

	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
- ❍ Alternative Dispute Resolution ..$15
- ❍ Antitrust and Trade Regulation... $15
- ❍ Banking Law $20
- ❍ Bankruptcy Law $25
- ❍ Civil Rights Law $10
- ❍ Criminal Law $10
- ❍ Environment, Energy, and Natural Resources $15
- ❍ Federal Litigation $20
- ❍ Government Contracts $20
- ❍ Health Law $15
- ❍ Immigration Law $10
- ❍ Indian Law $15
- ❍ Intellectual Property Law $10
- ❍ International Law $10
- ❍ Labor and Employment Law $15
- ❍ LGBT Law $15
- ❍ Qui Tam Section $15
- ❍ Securities Law Section $0
- ❍ Social Security $10
- ❍ State and Local Government Relations $15
- ❍ Taxation $15
- ❍ Transportation and Transportation Security Law $20
- ❍ Veterans and Military Law $20

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 40 or younger or admitted less than 10 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.

Alabama
- ❍ Birmingham
- ❍ Montgomery
- ❍ North Alabama

Alaska
- ❍ Alaska

Arizona
- ❍ Phoenix
- ❍ William D. Browning/ Tucson–$10

Arkansas
- ❍ Arkansas

California
- ❍ Inland Empire
- ❍ Los Angeles
- ❍ Northern District of California
- ❍ Orange County
- ❍ Sacramento
- ❍ San Diego
- ❍ San Joaquin Valley

Colorado
- ❍ Colorado

Connecticut
- ❍ District of Connecticut

Delaware
- ❍ Delaware

District of Columbia
- ❍ Capitol Hill
- ❍ D.C.
- ❍ Pentagon

Florida
- ❍ Broward County
- ❍ Jacksonville
- ❍ North Central Florida–$25
- ❍ Orlando
- ❍ Palm Beach County
- ❍ South Florida
- ❍ Southwest Florida
- ❍ Tallahassee
- ❍ Tampa Bay

Georgia
- ❍ Atlanta–$10
- ❍ Southern District of Georgia Chapter

Hawaii
- ❍ Hawaii

Idaho
- ❍ Idaho

Illinois
- ❍ Central District of Illinois–$25
- ❍ Chicago
- ❍ P. Michael Mahoney (Rockford, Illinois) Chapter
- ❍ Southern District of Illinois

Indiana
- ❍ Indianapolis
- ❍ Northern District of Indiana

Iowa
- ❍ Iowa–$10

Kansas
- ❍ Kansas and Western District of Missouri

Kentucky
- ❍ Kentucky

Louisiana
- ❍ Baton Rouge
- ❍ Lafayette/ Acadiana
- ❍ New Orleans–$10
- ❍ North Louisiana

Maine
- ❍ Maine

Maryland
- ❍ Maryland

Massachusetts
- ❍ Massachusetts –$10

Michigan
- ❍ Eastern District of Michigan
- ❍ Western District of Michigan

Minnesota
- ❍ Minnesota

Mississippi
- ❍ Mississippi

Missouri
- ❍ St. Louis
- ❍ Kansas and Western District of Missouri

Montana
- ❍ Montana

Nebraska
- ❍ Nebraska

Nevada
- ❍ Nevada

New Hampshire
- ❍ New Hampshire–$10

New Jersey
- ❍ New Jersey

New Mexico
- ❍ New Mexico

New York
- ❍ Eastern District of New York
- ❍ Southern District of New York
- ❍ Western District of New York

North Carolina
- ❍ Eastern District of North Carolina
- ❍ Middle District of North Carolina
- ❍ Western District of North Carolina

North Dakota
- ❍ North Dakota

Ohio
- ❍ Cincinnati/ Northern Kentucky-John W. Peck
- ❍ Columbus
- ❍ Dayton
- ❍ Northern District of Ohio–$10

Oklahoma
- ❍ Oklahoma City
- ❍ Northern/ Eastern Oklahoma

Oregon
- ❍ Oregon

Pennsylvania
- ❍ Eastern District of Pennsylvania
- ❍ Middle District of Pennsylvania
- ❍ Western District of Pennsylvania

Puerto Rico
- ❍ Hon. Raymond L. Acosta/ Puerto Rico–$10

Rhode Island
- ❍ Rhode Island

South Carolina
- ❍ South Carolina

South Dakota
- ❍ South Dakota

Tennessee
- ❍ Chattanooga
- ❍ Knoxville Chapter
- ❍ Memphis Mid-South
- ❍ Nashville
- ❍ Northeast Tennessee

Texas
- ❍ Austin
- ❍ Dallas–$10
- ❍ El Paso
- ❍ Fort Worth
- ❍ San Antonio
- ❍ Southern District of Texas–$25
- ❍ Waco

Utah
- ❍ Utah

Vermont*
- ❍ At Large

Virgin Islands
- ❍ Virgin Islands

Virginia
- ❍ Northern Virginia
- ❍ Richmond
- ❍ Roanoke
- ❍ Hampton Roads Chapter

Washington*
- ❍ At Large

West Virginia
- ❍ Northern District of West Virginia–$20

Wisconsin
- ❍ Wisconsin

Wyoming
- ❍ Wyoming

Chapter Total: _____

Payment Information

TOTAL DUES TO BE CHARGED
(membership, section/division, and chapter dues): $ _____

❍ Check enclosed, payable to Federal Bar Association
Credit: ❍ American Express ❍ MasterCard ❍ Visa

Name on card (please print)

Card No. Exp. Date

Signature Date

Spotlight *continued from page 96*

† Julianne Hartzell
† Katie Klamann
† Shermin Kruse
† Diana M. Martinez
† Stephen Novack
† Severiano Ortiz
† Steven Joseph Roeder
† Evan Schanerberger
† Todd Allen Smith
† Daniel James White
† Lisa Wood

Southern District of Illinois
† Georgiann Oliver

EIGHTH CIRCUIT

Arkansas
† Xiomara Camacho Baney
† Elisabeth Courson

Iowa
Minnesota
† Brooke A. Achua
† Brandon L. Blakely
† Charles A. Delbridge
† Kate Fisher
† Brennan K. Gaeth
† Grant W. Gunderson
† Christina Hanson
† Haccison T. Krupnick
† Cassandra Marie Lasley
† Brittany Suzanne Mitchell
† Pablo Orozco
† Elizabeth M.C. Scheibel
† Sean Robert Somermeyer
† James B. Soper
† Lindsey Streicher
† William D. Thomson
† Roxanne N. Thorelli
† Elizabeth R. Vadakara
* Michael T. Berger
* Shamus P.O. Meara
* Mike Stinson

Nebraska
† Jessica Feinstein
† Paul E. McGreal
† Gregory Steven Ramirez

St. Louis
† Denise Baker-Seal
† Joseph A. Bleyer
† Stephen Casey
† Ted Gianaris
† Cynthia A. Hagan
† Blaire Klehm
† Justin A. Kuehn
† Daniel Ray Price
† Russell Kenneth Scott
† John Stobbs
† Nathan D. Stump
† Lisa Yemm

NINTH CIRCUIT

† Casey Matthew Arbenz
† Aaron P. Brecher
† Ernest Radillo

Alaska
† Jamila M. Hall
† Michael Bernard Hershberg
† Hon. Suzanne Alice Littlefield
* Larry W. Fouche
* John P. O Brien
* Bret T. Thrasher

Hawaii
† Lisa Williams Cataldo
† Jordan Kealaikalani Inafuku
† Jordon J. Kimura
† Kurt William Klein
† Randall K. Schmitt
† Donald Lester Spafford Jr.

Idaho
† Peter C. Erbland
† Robert Faucher
† Kennedy K. Luvai
† Ausey H. Robnett

Inland Empire
* Michael A. Bell

Los Angeles
† B. Otis Felder
† Esteban Galvan
† William Michael Haney
† Katherine Hight
† Frank A. Perez
† Archibald Magill Smith
* Neal J. Fialkow
* Ellyn S. Garofalo

Nevada
† K. Alexandra Monaco

Northern District of California
† Johanna Grosse
† Bonita S. Gutierrez
† C. Mark Humbert
† Mark L. Krotoski
† Timothy L. Moore
† Gary G. Rudholm
* Elizabeth Link

Orange County
† Jeanne Tollison

Oregon
† Diana Manley Bailey
† Patrick M. Gregg
† Ashley McDonald
* Steven E. Klein

Phoenix
† Mark A. Bracken
† Kristina Reeves
† Christina Retts
* Thomas J. Moriarty
* James Novak

Sacramento
† Rebecca L. Ferguson
† Tara Kristine Hoveland
* Gayle K. Tonon

San Diego
† Adriana Eugenia Ahumada
† Christopher M. Alexander
† Adrian R. Cyhan
† Christopher B. Ghio
† Ashley Elizabeth Goff
† Helen J. Hodges
† Janine Lee
† Megan Mazza
† Erica Pineda
† Huey Shalom Ratcliff
† Heather S. Riley
† Lauren Williams
* Ethan T. Boyer
* Holly Sue Hanover
* Karen P. Hewitt

South Dakota
† Shaun Eastman
† Megan LaFromboise
† Leroy V. LaPlante Jr.

William D. Browning—Tucson
† Baird S. Greene
* Shelley Clemens

TENTH CIRCUIT

Colorado
† David Norman Simmons

Kansas and Western District of Missouri
† Hon. Gwynne E. Birzer
† Michael Thomas Raupp

Oklahoma City
† Paola Marie Alvarez de Bennett
† Hon. John F. Fischer
† Hon. Bernard M. Jones
† Travis H. White
† George J. Wright
* Shannon E. Bickham

New Mexico
† Lee M. Redeye
† Stephanie M. Salazar
† Chase A. Velasquez
* Rufus E. Thompson

Northern/Eastern Oklahoma
† Jesse Allen

ELEVENTH CIRCUIT

Broward County
† Constantine Economides
† Steven Holzman
* Gabriel L. Imperato

Montgomery
† Joel T. Caldwell

North Alabama
† Nathanael Causey

North Central Florida
† Thomas C. McThenia Jr.

Orlando
† Alena Baker
† Arthur James Baker
† Dawn Ivy Giebler-Millner
† Kristen Nichole Hawes
† Kimberly Dunkel Healy
† Hannah Robertson Miller
† Clifford B. Shepard

Palm Beach County
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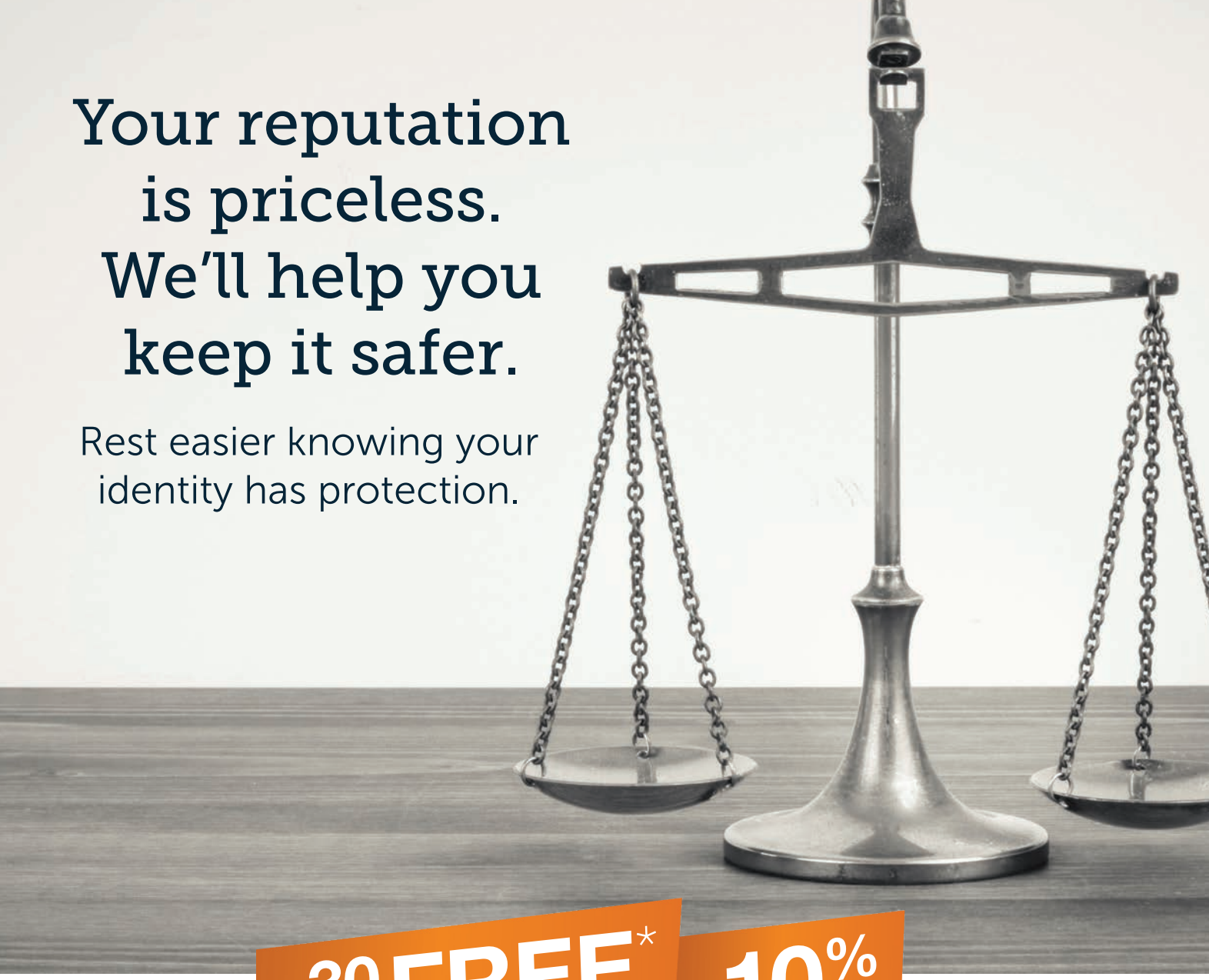

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