March 2013

Washington Watch
Who and What to Watch in 2013
page 8

Judicial Profiles
pages 28–36

Member Spotlight
View Your Chapter’s New Members and Sustaining Members
page 99

FBA Events
Midyear Meeting • April 4–6
Indian Law Conference • April 11–12
Labor and Employment Law Conference • May 2–3
Insurance Tax Seminar • May 30–31
Annual Meeting and Convention • Sept. 28–30

Criminal Law
The annual Midyear Meeting for the Federal Bar Association, comprised of the National Council, Chapter Presidents, Section and Division Chairs, Vice Presidents for the Circuits, and Board of Directors. Please join us for the meeting; below is a tentative schedule of events.

**Friday, April 5**
- 3 p.m. – 5 p.m.  Midyear Registration and Packet Pick-up
- 9 a.m. – 5 p.m.  FBA Board of Directors Meeting *(Held at FBA Headquarters)*
- 2 – 4 p.m.  FBBC Board Meeting *(Held at FBA Headquarters)*
- 6 – 8:30 p.m.  Moot Court Competition Final Round and Reception
  
  U.S. COURT OF APPEALS FOR THE ARMED FORCES, 450 E STREET, NW, WASHINGTON, D.C. All are encouraged to attend.

**Saturday, April 6**
- 7 a.m. – 5 p.m.  Registration
- 7 – 9 a.m.  Continental Breakfast
- 8 – 10:15 a.m.  Circuit Vice Presidents/Section/Chapter Leaders Meeting
- 10:30 – 11:30 a.m.  Circuit Vice Presidents/Section/Chapter Leaders Breakouts
- 11:30 a.m. – 1:30 p.m.  Foundation of the FBA Board Meeting
- Noon – 1:30 p.m.  Luncheon ($45/ticket)
- 2 – 5 p.m.  National Council Meeting
- 5 – 6 p.m.  Reception (Immediately after National Council Meeting)
- 6:30 p.m.  Foundation of the FBA Dinner (Fellows and Guests Only)

*INVITATION TO FOLLOW*

Please check boxes for events you plan to attend; all events held at the hotel unless otherwise noted.

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Please let us know about any special needs you may have

I would like to purchase _______ Luncheon Tickets @ $45/each. Lunch tickets are also available online at www.fedbar.org. **Luncheon is the only cost associated with the Midyear Meeting.**

☐ My check, payable to the FBA, is enclosed.  ☐ American Express  ☐ MasterCard  ☐ Visa

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**Westin Arlington Gateway**
801 North Glebe Rd.
Arlington, VA 22203

**Group Rates**
- Tuesday, April 2 and Wednesday, April 3 $198/night
- Thursday, April 4 through Saturday, April 6 $156/night

**Reservations**
For reservations, call 888.627.7076 and mention the FBA Midyear Meeting. Reservations should be made by March 12, 2013.

Discounted car rental is offered to FBA members by Avis. To reserve, call (800) 331-1600 and use ID Code A974699.

To register, mail or fax this form to:
FBA Midyear Meeting
1220 N. Fillmore St.
Suite 444
Arlington, VA 22201
(571) 481-9090 (fax)
or register online at www.fedbar.org.

Please submit your registration no later than March 12, 2013.
March 2013: Criminal Law

46

A History of the Criminal Justice Act of 1964
By Geoffrey Cheshire

55

Federal Re-entry Courts and Other New Models of Supervision
By Hon. Laurel Beeler

61

Must a Wolf Prove that He Withdrew from the Pack?
The Supreme Court Addresses the Burden to Prove Withdrawal from a Conspiracy in Smith
By Jennifer Beidel

67

Returning to Confrontation Clause Sanity
The Supreme Court (Finally) Retreats from Melendez-Diaz and Bullcoming
By Hon. G. Ross Anderson Jr.

74

Sixty Years of Touhy
By John A. Fraser III

Also in this issue

37
Focus On: Why MSPB Judges Reject 98 Percent of Whistleblower Appeals
By Robert J. McCarthy

38
Focus On: Ten Commandments for Effective Case Management
By Hon. Jack Zouhary

42
Focus On: Strategic Considerations for Appellees in the Federal Courts of Appeals
By Andrew J. Tuck
COLUMNS
3 President’s Message • By Robert J. DeSousa
What Gets Measured (Part One)

4 At Sidebar • By James I. Briggs Jr.
Language Assistance Obligations for Recipients of DOT Federal Financial Assistance

8 Washington Watch • By Bruce Moyer
Who and What to Watch in 2013

10 Technology Talk • By Richard K. Herrmann
A Lawyer’s iPad Personal Journal

13 Corporate Type • By John Okray
Updated Guidance on the U.S. Foreign Corrupt Practices Act

15 Labor and Employment Corner • By Corie J. Tarara
The FLSA: The Law That (Most) Every Employer is Violating

18 Litigation Brief • By William Frank Carroll
Class Actions—The Battles Continue

23 Tax Talk • By Christine S. Hooks
The Tax-Related Privilege You May Have Already Waived

84 Language for Lawyers • By Gertrude Block
What Gets Measured (Part One)

85 Supreme Court Previews • Provided by Cornell Law School

JUDICIAL PROFILES
28 Hon. Michael R. Barrett • By Joan Brady and Lindsay Potrafke
U.S. District Judge, Southern District of Ohio

31 Hon. Gregory A. White • By James W. Satola
U.S. District Judge, Northern District of Ohio

34 Hon. Jane J. Boyle • By Katie Cummiskey
U.S. District Judge, Northern District of Texas

BOOK REVIEWS
91 Lincoln’s Code: The Laws of War in American History
By John Fabian Witt • Reviewed by Burrus M. Carnahan

93 Lincoln’s Hundred Days: The Emancipation Proclamation and the War for the Union
By Louis P. Masur • Reviewed by Henry Cohen

94 Executive Employment Law: Protecting Executives, Entrepreneurs and Employees
By Joatham S. Stein • Reviewed by V. John Ella

95 The 10 Stupidest Mistakes Men Make When Facing Divorce
By Joseph E. Cordell • Reviewed by Caroline Johnson Levine

96 America’s Unwritten Constitution: The Precedents and Principles We Live By
By Akhil Reed Amar • Reviewed by Jon Blue

DEPARTMENTS
6 Chapter Exchange
9 Sections and Divisions
98 Member Spotlight: October and November 2012
104 Last Laugh
What Gets Measured (Part One)

There is an old saying in management: “What gets measured gets done.” It sounds simple but often we don’t tell folks what we expect from them and therefore they don’t deliver. In the FBA we are recommitted to delivering great membership value. Under the leadership of our new executive director, Karen Silberman, the organization has a renewed focus on member value. We have set up measurements for each staff person. On the communications level, you may have noticed an increase in our Facebook postings, tweets, and relevant content on our webpage. (If you are not following us on these forums I suggest you do; we have a lot of activities going on which add value to your membership.) Moreover, we are working to make all of those outlets more relevant and timely. For example, directly after Hurricane Sandy, the board of directors appointed board member Patrick O’Keefe to head a Sandy outreach to our fellow lawyers in New Jersey and New York.

It is an exciting time for the FBA because we are considering many new programs and initiatives that will enhance the member experience and provide an enriched return on your membership dollars. The programs being explored include a regular calendar of webinars available for CLE credit. Our topics will be diverse and hopefully will appeal to a broad base of members. We are also making listserves available for sections and divisions as well as chapter leaders and circuit vice presidents to improve communication and provide another way for members and leaders to connect with one another. To help us measure the value of our association to our members, a special committee headed by board member Kip Bollin has been formed. This committee is studying the entirety of the services offered by the FBA and reviewing how these services assist our members. Additionally, Judge Gus Gelpi, our national president-elect, is leading a team to explore broadening the FBA reach by partnering with specialty bar associations. Finally, we are measuring our value to young aspiring potential lawyers. Prof. Elizabeth Kronk, with the aid of Dean Jim Rosenblatt, is helping to establish our new Law Student Division—so if you know some eager law students, then send them our way!

You will find that we are measuring our responsiveness, flexibility, and growth in members as a key part of our ability to provide services, but we still want to hear your ideas on how we can improve your membership. If you have any comments or suggestions, please don’t hesitate to contact me at cptjag@yahoo.com or Karen at ksilberman@fedbar.org.

And I hope to see you at our Midyear Meeting this March in Arlington, Va., or this September in San Juan, Puerto Rico! ☺

Friend Us. Follow Us. Join Us.

www.fedbar.org
By now, recipients of federal financial assistance from the U.S. Department of Transportation (DOT) are well versed in federal programs for “disadvantaged business enterprises” and are becoming better acquainted with programs for accommodating individuals with disabilities. However, another initiative that may not have yet garnered the attention of Recipients is a DOT program operated under Title VI of the Civil Rights Act of 1964—persons with limited English proficiency (LEP). My legal practice involves the operation of U.S. commercial service airports, which receive federal financial assistance and are operated by local government entities. With the obvious likelihood that travelers who might have a limited ability to understand English utilize airports, the Federal Aviation Administration (FAA) has placed particular importance on addressing language assistance for passengers with LEP.

Who Is a Person With LEP?

Individuals who do not speak English as their primary language and who have a limited ability to read, speak, write, or understand English can be “limited English proficient.” According to recent data from the U.S. Census Bureau, approximately 25 million people (or 8.7 percent of the U.S. population) do not speak English at all or do not speak English well. Among limited English speakers, Spanish is the language most frequently spoken, followed by Chinese (Cantonese or Mandarin), Vietnamese, and Korean. These individuals may be entitled to language assistance.

What Is the DOT/FAA Policy Regarding Recipients Providing Language Assistance to LEP Persons?

In accordance with Executive Order No. 13166, Improving Access to Services for Persons With Limited English Proficiency, signed on Aug. 11, 2000, the DOT issued its Policy Guidance Concerning Recipient’s Responsibilities to Limited English Proficient (LEP) Persons in December 2005. This DOT guidance explains that recipients of federal funding must take reasonable steps to ensure that LEP persons have meaningful access to all their programs and activities, not just to the programs and activities that receive federal funds. This guidance provides that the DOT may consider a failure by a recipient to ensure that LEP persons can effectively access activities and services to be a violation of the prohibition against national origin discrimination under Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d) and DOT’s Title VI regulations.

How Does a Recipient Determine the Language Assistance to Be Provided?

The DOT 2005 guidance outlines four factors for recipients to use in assessing the language needs of LEP persons and in determining the steps to take to ensure that LEP persons have meaningful access.

1. The recipient should determine the number or proportion of LEP persons eligible to be served or likely to be encountered by a program, activity, or service that the recipient provides. Information on the LEP population can be obtained from the U.S. Census Bureau American Community Survey data, which includes information regarding language ability, from state and local governments and local schools and universities.

2. The recipient should determine the frequency with which LEP individuals come in contact with the program, activity, or service provided by the recipient. Because Census Bureau data will not capture non-local LEP individuals such as tourists and layover passengers, airport operators should conduct surveys of passengers and keep track of the contacts between LEP persons and airport tenants, such as restaurants and gift shops.

3. The recipient should rate the nature and importance of each of the programs, activities, or services available from the recipient. A particular service is probably important if a delay or denial of access could have serious implications. The more important the activity, service, or contact to the
LEP person, the more likely language services are needed (e.g., evacuation signs or announcements, security procedures or announcements, police or medical assistance, and wayfinding).

4. The recipient should determine its available resources and the costs of steps to ensure meaningful access. The DOT guidance suggests that the DOT does not expect smaller recipients with more limited budgets to provide the same level of language services as larger recipients. Therefore, recipients should explore cost-effective means of providing language assistance.

DOT’s guidance suggests a balanced approach to providing meaningful access by LEP persons to programs, activities, and services while not imposing an undue burden on recipients. Basically, the greater the proportion of LEP persons served by the recipient, the greater the frequency of contact with the recipient, and the greater the importance of the program, activity, or service provided by the recipient, then the more likely the recipient must provide some type of enhanced language service.

What Enhanced Language Services Should Recipients Provide to LEP Persons?

First, recipients have two basic ways to provide language services: (1) oral interpretation, either in person or remotely (e.g., via telephone); or (2) written translation, which includes universal symbols and pictograms. The proper mix of interpretation and translation services is determined by the DOT four-factor analysis as to what is both necessary and reasonable. For example, oral interpretation may be necessary during a high-risk emergency or where the frequency of contact is quite high. Whereas, for low-importance or low-frequency contacts, the use of written translations may be appropriate. Second, as to be expected, the languages spoken by the LEP persons with whom the recipient has frequent contact will determine the interpretation and translation languages. For the written translation obligation, a recipient generally should translate its vital documents for any LEP group that has over 1,000 persons or exceeds five percent of the population of persons eligible to be served or likely to be encountered by the recipient. Again, the DOT guidance suggests a balance of meaningful access by LEP persons while not imposing undue expense on Recipients.

What Is the Framework for a Recipient’s LEP Plan?

Recipients should have a written plan, periodically updated, which identifies the LEP populations that have contact with the recipient and provides specific procedures on assisting these LEP persons. The recipient’s staff should have access to the LEP plan and should be adequately trained on the plan’s procedures. While drafting the LEP plan, the recipient should seek the input from local communities and from the local LEP populations. The plan also should require notice to LEP persons regarding the availability of language assistance services and that the services are provided free of charge.

What Additional Recipient Actions Are Needed to Meet the Obligations for Assisting LEP Persons?

Recipients should inform the public of the availability of LEP services and the processes for filing a complaint. Recipients also should establish a procedure for documenting any Title VI complaints, lawsuits, and past compliance reviews. For example, airport operators should post notices of such services and processes on the airport website and in high-volume passenger areas within the terminal building (e.g., screening checkpoints, information centers, baggage claim, etc.). In addition, the Title VI obligations should be included in the recipient’s agreements with contractors, lessees, tenants, and permittees.

The FAA Office of Civil Rights has been conducting compliance audits of the LEP assistance programs of airport operators. Information regarding the DOT/FAA LEP programs, obligations, and requirements is available on a few websites:

Endnotes

FIFTH CIRCUIT

Mississippi Chapter
Chief Judge Discusses Reorganization Plan for Southern District

The Mississippi Chapter met at the Capital Club in Jackson, Miss., on Nov. 20, 2012, where Chief Judge Louis Guirola of the Southern District of Mississippi spoke to an overflowing crowd. Chief Judge Guirola shared with FBA members a reorganization plan for the Southern District following its initial approval by the judges of the district. The reorganization plan was necessary to deal with the pending closure of the historic federal courthouse in Meridian, Miss., but also allowed other factors such as travel time and courthouse location to be incorporated into the plan. The proposed plan sees the district moving from five to four divisions, which will be named Northern (Jackson), Southern (Gulfport), Eastern (Hattiesburg), and Western (Natchez). Chief Judge Guirola answered questions from federal practitioners about how this plan would affect their practice. A number of federal judges and their judicial clerks were guests of the chapter.

New officers for 2013 were elected at the meeting: President Ryan Beckett of Butler Snow, Vice President Kate Margolis of Bradley Arant, Treasurer Meta Margolis of Bradley Arant, Treasurer Meta Copeland of Mississippi College School of Law, and Secretary/Membership Chair Mike Hurst, assistant U.S. attorney. Dean Jim Rosenblatt will continue as the executive director of the Mississippi Chapter.

Event for Chapter Law Student Division

The Mississippi College School of Law student group associated with the Mississippi Chapter of the FBA partnered with the Phi Delta Phi legal fraternity to host U.S. District Court Judge Carlton Reeves for a meeting with MC Law students on Nov. 26, 2012. Judge Reeves described his legal experience leading to his appointment as a federal judge, shared practice tips, and offer guidance in terms of how law students should prepare for their work in the legal community.

SEVENTH CIRCUIT

Palm Beach Chapter
Chapter Luncheon Series

The Palm Beach County Chapter held its second luncheon of the 2012-13 season on Friday, Dec. 7, 2012, at the Colony Hotel. The chapter presented a plaque to Immediate Past President Kelly Reagan in recognition of his outstanding service in the office of president during the 2011-12 season. This month’s speaker was Murray Greenberg, retired Miami-Dade County attorney and adjunct professor of election law and state and local government law at the University of Miami School of Law, FIU College of Law, and St. Thomas University College of Law. Greenberg provided an informative discussion on election law issues and fielded questions on the subject. For a complete listing of the chapter’s upcoming events, please visit www.fedbar.org/Chapters/Palm-Beach-Chapter.aspx.

Chapter Exchange is compiled by Jane Zaretskie, FBA manager of chapters and circuits. Send your information to jzaretskie@fedbar.org. Visit www.fedbar.org for the latest chapter news and events.
FBA’s Chapter Activity Fund Assists in Making Military City, USA Government Contract Symposium a Success

With great uncertainty, the San Antonio Chapter set sails in unfamiliar waters to provide federal government contract law practitioners five star opportunities for CLE and collegiality deep in the heart of Texas. Ordinarily, federal procurement law practitioners must travel to the East Coast to receive the benefits of a significant and engaged population of government contract attorneys. The San Antonio Chapter saw another developing population right here and seized the moment. However, the uncertainty of success raised the concern over risk. FBA Board of Directors member Elizabeth Smith of the San Antonio Chapter suggested an application be made to the Chapter Activity Fund and the rest is history ... in the making. The chapter’s first ever two-day Military City USA Government Contract Symposium held in April 2012 attracted five star presenters and practitioners from around the country, not to mention a full complement of local public and private practitioners. One Social included a private river barge ride along the beautiful and charming San Antonio Riverwalk.

This Symposium could not have offered such incredible opportunities without the generous support of the Chapter Activity Fund. The Grant we received help put this event on the map. We encourage Chapters to manifest ideas for chapter activities by seeking the support of the Chapter Activity Fund.

About the FBA Chapter Activity Fund

Officers: Devinti M. Williams, chair; Hon. Robert Bacharach; Ernest T. Bartol; Frank J. McGovern; and Bridget E. Montgomery

Five (5) members administer the Fund, two Chapter Presidents appointed by the President and three Vice Presidents for the Circuits appointed by the Vice Presidents for the Circuits Chair.

The FBA Chapter Activity Fund exists to help your chapter grow and engage membership. If you would like to apply for the funds, note that all requests for funds will be considered if they meet at least one of the following objectives: (1) promote FBA membership and awareness, (2) serve the federal bar and bench, and (3) create and sustain legally-related educational or other pro bono projects and activities.

If your chapter is interested in applying for the Chapter Activity Fund monies, please contact Jane Zaretskie at jzaretskie@fedbar.org or visit www.fedbar.org for more information and a copy of the application.
With the start of President Barack Obama’s second term and the beginning of a new Congress, here’s a guide to the key legal policy issues and players to watch in Washington in the year ahead.

Three Areas to Watch

Judicial Nominations

President Obama has a second chance to improve upon the spotty judicial nominations record he compiled during his first term. More judicial vacancies remained at the conclusion of 2012 than existed when he entered office four years earlier. The President may have the opportunity to name at least one more nominee to the U.S. Supreme Court in 2013. The replacement of Justice Ruth Bader Ginsburg, who is 79 and the oldest member of the Court, however, would not tip the Court’s balance of power. No president since Ronald Reagan has appointed three Supreme Court justices.

Outlook: The White House will ramp up to vet and send judicial nominees to the U.S. Senate more quickly. Senate Republicans are likely to continue to push hard to deny President Obama a legacy based on his choices for the federal court bench.

Immigration

Another attempt at comprehensive immigration reform is expected early in the 113th Congress. Many analysts, and some GOP leaders have suggested that the tough stance on immigration taken by many Republican lawmakers in the past may have cost them the White House and contributed to weakened numbers in the U.S. House of Representatives and in the Senate in the last election. A barometer for congressional action will be the fate of the DREAM Act, which creates a procedure for undocumented immigrants to gain citizenship if they were brought to the United States before age 16, have been in the country for five years, and graduated from high school.

Outlook: Lawmakers from both parties may be eager to show they can actually get something done. But some GOP leaders have cautioned that a change in their party’s position on immigration issues alone may not necessarily win over more ethnic voters.

Gun Control

The Sandy Hook massacre has propelled gun control back to the top ranks of the policy agenda in Washington. The ban on military style assault weapons, which expired in 2004, is not likely to be revived. Congress could require more intensive background checks to keep guns out of the hands of individuals suffering from serious mental illness.

Outlook: The brutal slayings of 20 children in Connecticut has had a profound impact upon public attitudes among Americans about guns and gun rights, especially the ownership of assault weapons. The National Rifle Association and the gun rights lobby will face the strongest test of their power in years.

Five Key Players to Watch

Rep. Robert Goodlatte (R-Va.) will take over the chairmanship of the House Judiciary Committee, replacing Rep. Lamar Smith (R-Texas), who was limited by House GOP caucus rules from continuing to hold the gavel. Reps. Goodlatte and Smith hold similar conservative views. Rep. Goodlatte chaired the Intellectual Property, Competition, and Internet subcommittee during the drafting of the controversial Stop Online Piracy Act (SOPA), which eventually was shelved after criticism from free speech advocates.

Sen. Patrick Leahy (D-Vt.) will continue to lead the Senate Judiciary Committee, after declining at the end of last year to use his seniority to take over the chairmanship of the Appropriations Committee, following the death of that panel’s long-time leader, Sen. Daniel Inouye (D-Hawaii). Sen. Leahy, a former prosecutor, will continue to be called upon for moving judicial nominees through the Senate confirmation process.

Sen. Chuck Grassley (R-Iowa), the top Republican on the Judiciary Committee, is beginning his 32nd year on the panel, and will continue to be his party’s leading opponent of targeted nominees and a proponent of aggressive oversight of the Obama administration.

Sen. Diane Feinstein (D-Calif.) is the second most senior Democrat on the Judiciary Committee. Sen. Feinstein pushed for the creation of more federal judgeships in the last Congress, and her plan for 10 district judgeships in five courts facing emergency situations could be approved in early 2013, as part of a funding bill for the federal courts. She also will lead efforts to renew the assault weapons ban.

Whether Attorney General Eric Holder Jr. will remain as the nation’s top law enforcement officer remains uncertain. The attorney general was the subject of numerous Republican inquiries during President Obama’s first term, including one that led to an unprecedented House vote that found him in contempt of Congress. Further Obama cabinet shuffling could include the top spot at the U.S. Department of Justice.
Environment, Energy, and Natural Resources Section

Supreme Court Focused Program

On Jan. 24, 2013, the FBA Environment, Energy, and Natural Resources Section co-sponsored an event organized by the D.C. Bar’s Environment, Energy, and Natural Resources Section entitled “Environmental & Energy Law: Recent Developments in the Supreme Court.” The program featured a panel of attorneys who addressed the environmental and energy cases before the Supreme Court as well as looking back at key recent developments and trends. Some of these developments included the recent grant of certiorari in two Clean Water Act cases and two Fifth Amendment takings cases; and the recent denial of certiorari in important Clean Air Act cases. The program was moderated by Peter J. Schaumburg, principal, Beveridge & Diamond PC. Panelists included Ethan G. Shenkman, deputy assistant attorney general, Environment and Natural Resources Division, USDOJ; Jessica L. Ellsworth, partner, Hogan Lovells; Amanda Cohen Leiter, associate professor of law, American University Washington College of Law, and Aaron Colangelo, senior attorney, Natural Resources Defense Council.

Federal Career Service Division

Eleventh Annual Public Service Career Fair

On Feb. 1, 2013, the Federal Career Service Division co-sponsored the 11th Annual Washington, D.C./Baltimore Public Service Career Fair at George Mason University School of Law. The program offered law students an opportunity to learn about participating organizations and agencies, including available summer and post-graduate positions. The fair was an excellent opportunity for employers to meet talented students seeking public service careers, and for students to develop their job search strategies and interviewing skills. The event featured public service, government, and networking opportunities for students from the seven area law schools that co-sponsored the event which included American University Washington College of Law, University of Baltimore School of Law, The Catholic University of America Columbus School of Law, University of the District of Columbia David A. Clarke School of Law, George Mason University School of Law, Howard University School of Law, and University of Maryland Francis King Carey School of Law.

Transportation and Transportation Security Law Section

Luncheon Program at the DOT

On Jan. 28, 2013, the Transportation and Transportation Security Law Section held a luncheon program at the Department of Transportation Conference Center on recent legal research initiatives of the Transportation Research Board and the Airport Cooperative Research Program. Panelists included Marci A. Greenberger, senior program officer, Airport Cooperative Research Program; David Bannard, partner, Foley & Lardner; Stephan A. Parker, senior program officer, Transportation Research Board of The National Academies; and Ernest R. Frazier Sr., retired Amtrak police chief. The lunch event is a continuing program series coordinated by the Transportation and Transportation Security Law Section.

REGISTER for the Midyear Meeting April 5–6, 2013

See the inside front cover of this magazine for more information or contact Sherwin Valerio at svalerio@fedbar.org or (571) 481-9108.

Section on Taxation: At the luncheon on Jan. 28—(l to r) Monica Hargrove, TTSL section chair; David Bannard, partner, Foley & Lardner; Marci A. Greenberger, senior program officer, Airport Cooperative Research Program; Stephan A. Parker, senior program officer, Transportation Research Board of The National Academies; and Ernest R. Frazier Sr., retired Amtrak police chief; Nancy Kesler, TTSL past chair, Alice Koethe, TTSL secretary; Kathryn Gainey, TTSL board member.

Sections and Divisions is compiled by Sherwin Valerio, FBA manager of sections and divisions. Send your information to svalerio@fedbar.org. Visit www.fedbar.org for the latest chapter news and events.
Jan. 1, 2013 • 2:42pm: I Think I Want an iPad

I have decided to buy an iPad and use it in my practice. Our district court now permits lawyers to bring electronic devices into the courthouse. I have my iPhone and it does permit me to keep track of e-mail during downtime, but its practical use for other things is somewhat limited by its screen size and keypad. I am not exactly sure how I will use the iPad, but I have to imagine it could be a practical tool and should not be much more difficult to operate than my iPhone. Of course, I have several buying questions and have asked other users but each has a different opinion. Someone suggested I attend a local iPLUG (iPad Lawyers’ Users’ Group) meeting before I purchase. There are none in my area; however, I did visit the iPLUG Delaware website, which was very helpful. I plan on contacting one of the active lawyers in that group next week before I shop.

Jan. 12, 2013 • 9:23am: Purchasing Considerations

After contacting two lawyers at the iPLUG, I know my options and can make a decision. The first issue is whether to get a regular size iPad or a Mini. The Mini looks very convenient and is much smaller—about the footprint of a paperback. The regular size iPad is more like the size of an 8 1/2 x 11-inch notebook. That seems to be the most significant difference. Since I am going to be carrying it around in a briefcase most of the time, I don’t see size being an important issue, so I intend to opt for the larger one. It will be easier to read (more like a full sheet of paper).

The iPLUG folks also walked me through the question of whether to get just wireless (Wi-Fi) or to also buy an iPad that is 4G (4th generation)-capable. There is about $100 difference. I was surprised to learn I don’t need to have a two-year carrier contract to take advantage of the cellular capability; I can do it monthly. This makes it a no brainer. Go for the 4G. I was also surprised to discover I have to select the carrier before I purchase. A 4G Verizon-capable iPad will not work with AT&T and vice versa. Finally, I discussed the question of how many gigabytes (GB) to get: 16 GB, 32 GB, or 64 GB. I am told the middle level ought to be fine for work, as long as I am not planning on watching too many video depositions on it. It would be nice to be able to download an occasional movie, but as long as I don’t plan on storing too many on the iPad (which I don’t plan on doing) this should not be a problem. So I am planning on purchasing a regular size iPad which is 4G AT&T-capable with 32 GB of memory. I think I will get it over the weekend.

Jan. 16, 2013 • 8:47pm: The Purchase

I visited the Apple Store this morning and completed my purchase. The place was nothing short of amazing. There was an army of kids in red tee shirts as pleasant and helpful as one could imagine. I purchased my iPad and took a look at cases and accessories. I opted for the Apple magnetic cover, which automatically puts the iPad to sleep when the cover is closed. I bought the Apple Care extended warranty as well. Once I took it home, I found the registration to be a snap; the iPad connected to my home Wi-Fi and it simply walked me through the process. Tomorrow I am going to work on how to set up my screens and determine which applications (apps) to download first. Tonight I will do a little bit of Internet research.

Jan. 17, 2013 • 10:31 am: Tips

I found some simple tips online which I think will be very helpful. When I am at the desktop, I see three little dots at the bottom, just above the dock. These dots represent pages of apps. The dot that is lit represents the page I am on. If I am on page three and want to get to the first page, I can swipe to the right or just touch the bottom button on the desktop. This will take me to any app or contact or e-mail, or even the web—very helpful. Finally, if I touch an app and hold it down, they all begin to shake. Now I can move the apps anywhere on the desktop; and if I move one app onto another, a folder appears, containing both apps.

Richard K. Herrmann practices technology and intellectual property litigation in Wilmington, Del., with Morris James LLP. He teaches technology law at Widener University School of Law and at the National Judicial College. He is the founder of the iPad Lawyers Users Group (iPadGroup) and the National Judicial College iPad Judges Users Group. Herrmann is on the Executive Committee of the Richard K. Herrmann Technology Inn of Court and the dean of the soon to be launched American Inns of Court Technology University. © 2013 Richard K. Herrmann. All rights reserved.
Jan. 17, 2013 8:20pm: Apps

There are so many apps at the App Store it is difficult to know where to start. I know no additional apps are needed to sync my e-mail and calendar with Outlook. I could spend the time necessary to connect to Outlook in the settings menu, but I decided to save a step and ask my IT folks for help.

I have asked some “power users” for recommended apps and now know enough to see general favorites. It makes sense to get necessary to connect to Outlook in the settings menu, but I decided to save a step and ask my IT folks for help.

Word Processing: These apps are so inexpensive I may try to a couple of different ones to see which suit me the most. Since our office uses Microsoft Word, I have to keep myself compatible. DocsToGo by Dataviz has been around for a number of years. It is a skinny version of Microsoft Office. I know I will be able to review Word documents, Excel, and PowerPoint. I understand it is a bit awkward for editing and creating, but for $17 it is worth having. The basic word processing program from Apple is Pages ($9.99). It is a fine app for creating documents and permits me to e-mail the document in a number of formats including Microsoft Word. It will become my general “go to” text editing app. For general note taking, I am starting with the app called “Notes.” It comes with the operating system and is incredibly easy to use. When I search from the search bar on the black screen (mentioned above in Tips), I can find any word in the Notes app.

I understand there are more sophisticated word processing and notes apps. When I am ready I will add them. One is called CloudOn (free). It is a cloud-based program which gives me the full Microsoft Office online. It is fully functional. The only issue I see is it requires me to save my documents in a cloud service such as Drop Box (free). This is not generally acceptable to me for client-related documents due to confidentiality concerns. I may try to resolve the issue with an encryption app such as BoxCrypter (free), but I have enough to learn now. There are also a number of impressive note-taking apps. I know one I intend to add is called Notability ($0.99). It will permit me to take notes and record at the same time. I can sync my notes with the recorded file as I go. Since I am not much of a note taker, this should be very useful.

PDFs: I have narrowed my needed PDF apps to two, although I have been told there are a host of good ones. PDF Expert ($9.99) is easy to use and has a number of annotation tools. The real strength over the others is in its organizational structure. I can save PDFs in folders and they automatically sort in alphabetical order. I can zip folders and e-mail the entire bunch or store them on a cloud server like Drop Box. In fact, the file structure makes this a perfect tool as a trial notebook. I can keep a folder of opening and closing statements, another for trial exhibits, witness direct, and cross .... I could even use the app to present the exhibits with a computer if I become comfortable enough (I take that back, I think I will leave that to a paralegal). The second PDF app I need is PDF Converter ($6.99). This will permit me to turn any document created in another format to a PDF. There is no learning curve and it is very compatible with PDF Expert.

Slide Presentations: I have always been a PowerPoint user. If I want to stay with PowerPoint, I think the easiest approach will be the CloudOn app I will be using for Microsoft Word. If I have time, I will experiment with Apple’s Keynote ($9.99). This looks as easy to use as the word processing program Pages. Since Keynote is made by Apple it will be particularly intuitive on the iPad. Once I am comfortable with the slide creation process, I am looking forward to using the iPad for presentations. I will have a number of alternatives, such as presenting directly from the iPad with a cable or wirelessly, or using the iPad as a remote with the added benefit of being able to see my slides on it while presenting.

Other Apps: There are so many apps and so little time. I know I want to do other things and become more efficient. But I run the risk of never becoming totally comfortable with the iPad if I try to do too much too quickly. I will leave the jury selection and trial presentation apps for another time. I suppose it wouldn’t do any harm to get certain basic references on the iPad now, such as the Federal Rules of Evidence, and Civil and Criminal Procedure. All are available in one app called LawStack (free). A number of state statutes are also available. Of course, if I am connected to the Internet, I will continue to use my favorite website, www.law.cornell.edu. I simply type the rule number in Google and I get the Cornell link as the first or second hit. No indexes or apps to learn and the format is great. I can convert the page to a PDF and save most frequently used rules in a folder.

Jan. 23, 2013 12:32am: My Plan

I have had the iPad now for about a week and have developed a plan for its future use. I am going to put my home laptop away for two or three months and use the iPad as my main computing device. This will force me to become an expert quickly. I know I may not be totally efficient at first, but I have a couple of different choices for getting information into the iPad. I have just purchased a stand and a wireless keyboard. The stand is really well designed. It is powered enabled, which will permit be to keep the iPad plugged in while I am using it at my desk at home.

Technology continued on page 21
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Speaker: Olivera Medenica, Co-founder & Partner, Wahab & Medenica LLC

on

March 6, 2013

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On Nov. 14, 2012, the Criminal Division of the U.S. Department of Justice (DOJ) and the Enforcement Division of the U.S. Securities and Exchange Commission (SEC) jointly released A Resource Guide to the U.S. Foreign Corrupt Practices Act (the FCPA Guide). The FCPA Guide describes how these agencies currently approach enforcement of the U.S. Foreign Corrupt Practices Act of 1977 (FCPA), as amended. While this article provides an overview of certain aspects of the FCPA and the new guidance, corporate counsel for any company currently engaged in or contemplating transacting business with foreign governments and/or corporations will want to familiarize themselves with the entire FCPA Guide.

Summary of the FCPA

The FCPA prohibits certain classes of persons and entities from making payments (bribes) to foreign government officials in order to obtain or retain business. It generally extends to publicly traded companies and their officers, directors, employees, stockholders, and agents. This may include U.S. or foreign companies listed on a U.S. stock exchange (as either stock or American Depository Receipts) or those that trade in the over-the-counter market in the United States which are required to file SEC reports. The FCPA has two primary provisions—ante-bribery and accounting. In the scope of attempting to influence a foreign official to secure business, the anti-bribery provisions prohibit offers, payments, promises, or authorizations to pay money or other valuable consideration to foreign officials, foreign political parties, or candidates for public office. Prohibited consideration includes cash and cash equivalents (including using charitable contributions to funnel bribes), but also could include non-cash items such as computer equipment, medical supplies, vehicles, and non-business-related travel payments or reimbursements. The FCPA Guide summarizes the intent of the anti-bribery provision by quoting a 1977 U.S. Senate report:

Corporate bribery is bad business. In our free market system it is basic that the sale of products should take place on the basis of price, quality, and service. Corporate bribery is fundamentally destructive of this basic tenet.

Corporate bribery of foreign officials takes place primarily to assist corporations in gaining business. Thus foreign corporate bribery affects the very stability of overseas business. Foreign corporate bribes also affect our domestic competitive climate when domestic firms engage in such practices as a substitute for healthy competition for foreign business.

The accounting provisions require that a covered entity make and keep books, records, and accounts that accurately and fairly reflect the transactions involving the company’s assets. Additionally, companies are required to maintain a system of internal controls that meet the act’s requirements. The FCPA Guide highlights the rationale behind the accounting provisions by again quoting the Senate report, which stated: “In the past, ‘corporate bribery has been concealed by the falsification of corporate books and records’ and the accounting provisions ‘remove[] this avenue of coverup.”

Updated Guidance

While the FCPA Guide does not change the act itself or its interpretation, since it does reflect DOJ and SEC enforcement priorities, companies should take note of the areas highlighted. Some of the noteworthy examples include:

- Recognizing Corporate Compliance Programs: The FCPA Guide notes that “DOJ and SEC may decline to pursue charges against a company based on the company’s effective compliance program, or may otherwise seek to reward a company for its program, even when that program did not prevent the particular underlying FCPA violation that gave rise to the investigation.” Companies are encouraged to have clear guidelines for gift-giving by the company’s directors, officers, employees, and agents. The FCPA Guide also provides examples of how charitable contributions and inappropriate travel reimbursements can run afoul of the FCPA.

- Guidance Related to Mergers and Acquisitions: Companies contemplating potential merger and acquisition activities at any point in the future may benefit from the FCPA Guide’s “Practical Tips to Reduce FCPA Risk in Mergers and Acquisi-
tions.\textsuperscript{77} The first option described is to seek an opinion from the DOJ in anticipation of a potential acquisition when pre-acquisition due diligence information available to an acquiring company is severely limited. The FCPA Guide notes that this avenue is a special situation and such a DOJ opinion would likely contain stringent requirements. Therefore, risk-based FCPA due diligence and disclosure is suggested as the more likely avenue for most companies. This option includes (1) FCPA and anti-corruption due diligence related to the target company, (2) the acquiring company having an effective code-of-conduct and compliance policies and procedures, (3) training for directors, officers, employees, and agents of the acquired or combined entity on the FCPA and related laws, (4) conducting an FCPA-specific audit of the acquired or combined business, and (5) disclosure of any corrupt payments discovered during due diligence. The FCPA Guide states that “DOJ and SEC will give meaningful credit to companies who undertake these actions, and, in appropriate circumstances, DOJ and SEC may consequently decline to bring enforcement actions.”\textsuperscript{78}

\textbf{Alternative Avenues for Prosecuting Commercial Bribery Not Necessarily Involving Foreign Officials: The FCPA Guide offers a reminder that the Travel Act\textsuperscript{9} serves as an additional or alternative means for prosecuting corruption.\textsuperscript{10} The Travel Act prohibits travel in interstate or foreign commerce or using the mail to promote, manage establish, or carry on any unlawful activity. Unlike the FCPA, the Travel Act extends to state commercial bribery laws. The FCPA Guide warns “if a company pays kickbacks to an employee of a private company who is not a foreign official, such private-to-private bribery could possibly be charged under the Travel Act.”\textsuperscript{11} Other U.S. legal regimes available for prosecution referenced include money laundering, mail and wire fraud, certification and reporting violations, and tax violations. Therefore, an effective corporate anti-corruption compliance program may need to take other relevant U.S. and foreign laws, such as the UK Bribery Act,\textsuperscript{12} into consideration.

\textbf{Avenues for Prosecuting Accounting Violations:} Companies are reminded that in addition to the Act’s accounting requirements, issuers may have reporting obligations arising under the Securities Exchange Act of 1934, as amended (Exchange Act) and the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley). For example, the FCPA Guide notes that an issuer could face anti-fraud and reporting violations under §§ 10(b) and 13(a) of the Exchange Act for failure to file an annual report disclosing material liabilities related to bribery of foreign officials, which could in turn result in the restatement of a company’s financial statements. Among other requirements, Sarbanes-Oxley (1) imposes obligations on chief executive officers and chief financial officers to certify in writing the integrity of the company’s financial statements, (2) requires companies and their auditors to assess the effectiveness of internal controls, and (3) prohibits the altering, destruction, or falsification of records.

\textbf{Whistleblower Provisions and Protections:} In 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act)\textsuperscript{13} added § 21F to the Exchange Act to address whistleblower incentives and protections. The FCPA Guide reminds companies that § 21F allows the SEC to provide monetary rewards to eligible individuals who provide information that leads to an SEC enforcement action with a sanction over $1 million. Such an award could range between 10 and 30 percent of the amount recovered. Moreover, the Dodd-Frank Act prohibits employers from retaliating against whistleblowers and also provides employees who are retaliated against with a private right of action.

Companies may also find reviewing recent FCPA-related regulatory enforcement actions to be informative.\textsuperscript{14} The FCPA Guide offers valuable insights to corporations on how to avoid potential violations of the FCPA and other anti-corruption laws. Nevertheless, the first paragraph of the FCPA Guide cautions that enforcing the FCPA is a continuing priority at the DOJ and the SEC.

\textbf{Endnotes}


5. Id. at 3.

6. FCPA GUIDE, supra note 1, at 56. See also id. n.307.

7. Id. at 29.

8. Id.


10. FCPA GUIDE, supra note 1, at 48.

11. Id.


The Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 210 et seq. was enacted in 1938 during a period of widespread unemployment and dismal profits. The purpose of the FLSA is to establish “fair labor standards in employments in and affecting interstate commerce, and for other purposes.” Minimum wage was set at 40 cents ($0.40) per hour. The FLSA mandated that covered employers, for the first time, pay employees 150 percent of their “regular rate” for all hours worked over 40 per workweek. The overtime pay requirement was designed to incentivize employers to hire more workers, spreading the work among the unemployed rather than having already employed individuals work longer days for the same pay.

The U.S. Department of Labor (DOL), through its Wage and Hour Division, has implemented regulations at 29 C.F.R. ch. V that interpret the FLSA. However, it is the regulations that both provide guidance and confusion for the employers attempting to comply with the FLSA. Although the DOL attempts to clarify certain regulations for requesting employers by issuing opinion letters, those opinions may change from one administration to the next.

For example, on January 16, 2009, numerous opinion letters were issued by the then-Acting Administrator Alexander J. Passantino. However, because those signed letters were not literally placed in a mailbox prior to the change in the presidential administration, they were withdrawn by the then-Deputy Administrator for Enforcement John McKeon. Although the DOL stated a final response to the opinion letter requests might be provided in the future, they have not, leaving confusion whether the current DOL stands by its then-opinion.

Regardless of the changing administrations and interpretations of regulations, employers must adhere to the FLSA. Unfortunately, many employers, whether through lack of knowledge or changing regulations, are in violation of the FLSA in some manner or another. While a self-audit may not be in every employers budget for 2013, it would be prudent for every employer (or its counsel) to at least take a mental inventory of some of the more common violations and hopefully correct mistakes prior to a DOL audit or employee complaint.

Ten Common Violations of the FLSA

While the FLSA has been instrumental in prohibiting oppressive child labor and mandating fair wages, the changing regulations and enforcement investigations have left many employers scratching their heads when contacted by the DOL. Most employers know that hourly employees are entitled to time and a half for work performed over 40 hours. However, there are a host of common mistakes that catch many employers off guard. Although these do not take into consideration more stringent state laws, the following are some of the more common mistakes that employers make (whether by policy or through supervisor discretion) under the FLSA:

1. Not Paying Overtime Because the Employer Erroneously Believes It Is Not Covered Under the FLSA

An employee may be covered by the FLSA if their employer is an “enterprise” that is covered by the FLSA. To be an “enterprise” the employer must have at least two employees and:

(1) have an annual sales volume or business of at least $500,000; or

(2) be a hospital, business providing medical or nursing care for residents, schools and preschools, and government agencies.

However, even if the employer does not meet the above definition, an employee may still be covered under the purview of the FLSA if their work regularly involves interstate commerce. This “individual coverage” includes those who assemble parts that will go out of state, make phone calls to other states, or even handle credit card transactions. In our current electronically-engaged world that includes internet transactions and credit card transactions, virtually every worker is covered under the FLSA.

2. Improperly Calculating the “Regular Rate”

The definition of “regular rate” is the backbone to the FLSA and its overtime regulations. It is defined as:

all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include—

1. sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not
measured by or dependant on hours worked, production, or efficiency;

2. payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause ... and other similar payments to an employee which are not made as compensation for his hours of employment;

3. sums paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly...? 

Employers who do not include the above remuneration in an employees' "regular rate" will be in violation of the overtime provisions of the FLSA. For example, if an employer pays an employee a non-discretionary bonus such as a production bonus, and then fails to layer that bonus back into the wages earned, the employee's regular rate is lower than it should be for purposes of calculating the overtime due. In such instances where non-discretionary bonuses are paid to hourly employees who work overtime, the employer is in violation if it does not layer back the bonus onto the wages for that workweek and recalculate the overtime due and pay the additional overtime as a result of the bonus.

3. Failing to Pay for Overtime Hours Worked

While some employers may violate this by simply not paying for overtime hours, other employers may fail to pay overtime even though they have the best of intentions. For example, allowing employees to "carry over" hours from one week to the next in the private sector is not allowed. An employee cannot consent to an FLSA violation. Even if the employee asks to be able to work longer on a Monday to make up having to leave early on a Friday (the previous work week) to take care of a sick child, for example, it is not permitted under the FLSA, and overtime must be paid.

4. "Off the Clock" Work

In larger companies, executive management may not be aware of these violations, and may have a specific set of consequences in place to try to dissuade such violations. However, in certain industries, such as the restaurant industry, where managers are evaluated on the hours clocked by subordinates, employers need to be especially cautious that hourly employees are in fact recording all hours worked. For example, store supervisors may force an employee to clock out when they know that employee is reaching 40 hours in a workweek and tell the employee they can make it up the following week, or even worse, that the employee simply won't be paid but must work.

5. Misclassifying an Employee as Exempt From Overtime

The FLSA is clear that all employees working for a covered employer—unless they are exempt from the overtime provisions of the FLSA—must be paid overtime. The FLSA specifically exempts, “any employee employed in a bona fide executive, administrative, or professional capacity, or in the capacity of outside salesman.” Whether an employee is exempt “must be determined on the basis of whether the employee’s salary and duties meet the requirements of the regulations.” In order to determine whether an employee is exempt from overtime, the employer must make a fact-intensive inquiry into the individual employee’s daily activities and responsibilities and then apply the DOL’s requirements. Although many employees may ask to be “salaried” or “exempt” to feel like they are in a higher position, again, the employee is unable to consent to any violation of the FLSA. A solution to this may be payment of a salary plus overtime, which is discussed in number 10 below.

6. Misclassifying an Employee as an Independent Contractor

This issue could take an entire article, but is also one that is well known. Employers must take care to properly classify any individual performing work as a bona fide independent contractor. Although the DOL, IRS, states, and courts may use different tests, the old adage applies: if an individual looks like an employee, works like an employee and is treated as an employee, then the individual probably is an employee.

7. Changing the “Workweek” Often to Avoid Overtime

With some exceptions, the FLSA requires that overtime be paid based on a workweek (i.e., Monday–Sunday). However, some employers may attempt to change the “workweek” to avoid paying overtime. While an employer may not change the workweek to evade paying overtime, a permanent change may be made for the purpose of reducing the number of hours in their normal work schedules that must be paid at the overtime rate.

8. Improper Tip Credit and Overtime

So long as employees customarily and regularly receive more than $30 per month in tips, under the FLSA (not necessarily state law), employers can pay tipped employees $2.13 per hour and claim a “tip credit” for the rest of the minimum wage, if tips actually received average at least $5.12 per hour. However, a violation occurs where an employee does not receive enough tips to make up the difference between the cash payment and the tips; where an employee only receives tips; where deductions are made for a shortage at a register or other such deductions; or where the employee must contribute to a tip pool that includes employees who do not customarily and regularly receive tips (such as cooks). In addition, overtime must be calculated on the full minimum wage, not the lower wage payment. An employer may also not take a larger tip credit for an overtime hour than it would for a straight time hour. In 2011, the DOL issued a rule clarifying that a tip is the sole property of the tipped employee even if a tip credit is taken; the employer may not use an employee’s tips, even if it takes a tip credit, except as a credit against minimum wage obligations.

9. Failing to Pay Minimum Wage/Improper Deductions

Employers must be sure to pay minimum wages. This seems simple enough. Minimum wages may include commissions, some bonuses, tips received, and the reasonable cost of room, board, and other “facilities” if provided for the employee’s benefit. However, where an employer runs into trouble is when deductions are made for items that primarily benefit the employer (uniforms, tools, dam-
age to property, theft), or if the deductions reduce the employee’s wage below minimum wage or cuts into overtime compensation. To be safe, any employee paid minimum wage should not have any deductions taken for items that primarily benefit the employer, as to do so would reduce their wages below minimum wage.

10. Improper Use of the Fluctuating Workweek Method for the Payment of Overtime

Although overtime is commonly referred to as “time and a half,” some employees who are not exempt from the overtime requirements of the FLSA may be paid “half time” for overtime hours worked so long as certain conditions are met. This is known as the “fluctuating workweek method” or the “coefficient table method.” The fluctuating workweek method is commonly utilized by seasonal employers to provide employees a predictable set salary each pay period regardless of whether they are working five hours during rainy stretches or 50 during sunny ones. Not known to many, the DOL regulations permit the payment of a fixed salary to employees who work fluctuating hours, so long as they are paid overtime at half the employee’s regular rate. However, this method may only be used in certain conditions: (1) the salary must be sufficiently large so that at no time does the salary fall below minimum wage; and (2) the employee must clearly understand that the salary covers all hours worked whether few or many. It is also important that no deductions for absences are taken from their salary, and that overtime is paid at half of the regular rate. The regular rate must also take into consideration any bonuses paid, or other wages so that the overtime is paid at the proper rate.

As noted above, one common mistake employers make is misclassifying an employee as “exempt” and paying them a fixed salary, as opposed to an hourly wage. In employee misclassification cases, the DOL and many courts (but not all) will allow the use of the fluctuating workweek method in calculating backwages, as the employee has already received a salary for all hours worked, just not the extra half time due for overtime hours. The FLSA provides that in order to determine the overtime due, the “salary is divided by number of hours worked, the resulting amount is divided by half and that rate is multiplied by the number of hours worked in excess of 40 to arrive at the overtime compensation due to the employee.”

Conclusion

While any single violation of the FLSA against a single employee may be relatively small, the FLSA provides that a collective action may be maintained against an employer, so long as the plaintiffs are “similarly situated.” The FLSA allows for collective actions to proceed in order for one or more employees to recover “for and in behalf of himself ... and other employees similarly situated.” Unlike in a “class action,” collective action “class” members must opt-in to the litigation by giving their written consent. Since the FLSA requires the affirmative action of opting-in, the court has discretion to authorize—and facilitate—the notice of the collective action to putative class members. Accordingly, it is important that employers have their pay practices regularly audited, properly train management, and quickly resolve any potential violations before a small mistake turns into a large liability.

Endnotes

4. Opinion letters can be found at www.dol.gov/whd/opinion/flsa.htm.
6. Id. § 203(b).
7. Id. § 207(e)(1)(3). Simply, the “regular rate” is “[w]age divided by hours.” Overnight Motor Transp. Co., 316 U.S. at 572, n.16; Walling, 325 U.S. at 424 (clarifying the “regular rate” as the “hourly rate actually paid the employee for the normal, non-overtime workweek for which he is employed”).
9. Id. § 541.2 (2004).
The U.S. Supreme Court has during its most recent two terms devoted a disproportionate amount of resources to matters involving class action litigation. The 10 cases already considered or still to be considered by the Court during this period evidence an unusual but not unprecedented contest between the inventiveness of lower courts and the determination of the High Court. The 2012 Term promises to continue to provide further examples of this contest.

The 2011 Term

During 2011, the Supreme Court decided four cases involving class action-related issues. Although not all were of equal significance, each of the cases is important in delineating the parameters of class action litigation.

One of the most important of those decisions was AT&T Mobility Ltd. Liability Co. v. Concepcion. The Supreme Court held that a provision in a consumer contract requiring arbitration under the Federal Arbitration Act (FAA) and waiving the right to pursue class action relief prevailed over assertions that enforcement violated state public policy or prevented the consumer from enforcing his claim because of costs.

In the second major decision, Wal-Mart Stores, Inc. v. Dukes, the Court considered the propriety of certifying a 1.5-million-member class of current or former female Wal-Mart employees who asserted gender discrimination in pay and promotions. The lower courts certified an injunctive relief class under Rule 23(b)(2) of the Federal Rules of Civil Procedure, although monetary damages were also sought, on the ground that the damage request did not “predominate” over the request for injunctive relief. The Supreme Court found that the predominance requirement was not met absent proof that there was a general Wal-Mart policy of discrimination and that there was a common answer to the question of whether any particular class member was the subject of discrimination. The Court further noted that class actions under Rule 23(b)(2) can be certified only when the monetary relief is “incidental” to injunctive relief.

In the third case, Smith v. Bayer Corp., the Supreme Court considered the issue of whether a federal court, which has denied class certification, can enjoin a state court from proceeding to certify the same class in a subsequent proceeding. Reversing the trial court injunction, the Court found that (1) the standards for certifying classes in federal and state court differed such that the issues were not the same and (2) the plaintiff in the second case, although a member of the uncertified federal class, was not a party to the prior litigation.

The final case for the 2011 Term was Erica P. John Fund v. Halliburton Co. In this case, the Court considered the question of whether a class action plaintiff had to establish loss causation at the class certification stage in a suit alleging securities violations under Rule 10b-5. The Court crafted a narrow ruling that loss causation did not have to be proven at class certification; however, the Court did not decide a number of other issues relating to the burden of proof at such stage that a class action securities plaintiff must meet.

The 2012 Term

One could have expected that the Supreme Court might take a respite from class action litigation cases in the 2012 term. To the contrary, 2012 promises to be an even more class action laden docket than 2011. To date, the Supreme Court has granted certiorari in six cases raising a plethora of class action-related issues—many of which were left open in the four 2011 decisions discussed previously.

1. Daubert and Class Certification

In Comcast Corp. v. Behrend, the Supreme Court granted certiorari to consider the question of whether “a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis.” Comcast was sued by customers alleging Sherman Act violations. One of the elements plaintiffs had to establish was that damages were “capable of proof at trial through evidence that is common to the class rather than individual to its members.” The plaintiffs relied on the expert opinion of Dr. James McClave, who submitted a model calculating damages
allegedly suffered by the class. The lower courts approved the class certification, concluding that a common methodology to measure damages was provided and that the validity of the model was not even an issue at the certification stage. A dissenting judge argued that the model did not comport with any of the causation theories and noted that even Dr. McClave admitted that the model could not attribute damages to any particular theory. Comcast sought certiorari on the ground that the holding conflicted with Dukes. Comcast, according to Comcast, held that Rule 23 is more than a pleading standard and requires a plaintiff to prove that the requirements of Rule 23 are actually satisfied. This requires meeting the standard for expert testimony established by Daubert v. Merrell Dow Pharmaceuticals, Inc. Plaintiffs countered that such evaluation is a matter for the merits phase of the litigation. The Supreme Court in Dukes did not specifically address this question, although it suggested that the Daubert standard would apply. This case will provide the opportunity to clarify the role of Daubert at the class certification stage.

2. Proof of Materiality at Certification

In Amgen, Inc. v. Connecticut Retirement Plans & Trust Funds, involving class certification in a Rule 10b-5 securities fraud case, the issue presented is whether materiality must be shown at the class certification stage. To obtain class certification in such a case, Rule 23(b)(3) requires the plaintiff to show that the element of reliance is common to the members of the class. In Basic v. Levinson, the Supreme Court held that the fraud-on-the-market presumption can be used to show reliance. The fraud-on-the-market presumption holds that the market price of a security traded in an efficient market reflects all information known to the public about the security, and thus a purchaser of the security presumably relied on the truthfulness of that information in deciding to purchase the security. A defendant can rebut the presumption with the "truth-on-the-market" defense by showing that "despite [the defendant's] allegedly fraudulent attempt to manipulate market price, the truth credibly entered the market and dissipated the effects of the misstatements."12

The district court certified the class, finding that reliance was common to the class using the fraud-on-the-market presumption. Further, the court held that the plaintiff was not required to prove that the alleged misrepresentations were material at the certification stage. The court also held that rebuttal of the presumption was an issue for trial and therefore Amgen could not raise its truth-on-the-market defense in opposition to certification. The U.S. Court of Appeals for the Ninth Circuit affirmed, holding that plaintiffs' claims "stand or fall together" on the materiality issue, meeting the critical inquiry for Rule 23.13

The first issue for the Supreme Court will be whether materiality of the alleged fraud-on-the-market must be proven before a class can be certified, and the second issue is whether the defendant is allowed to present evidence of a truth-on-the-market rebuttal at the certification stage.

Amgen argued that Basic requires proof of materiality at the class certification stage and noted that three other circuits agreed with that position. Amgen also argued that it must be given the opportunity to rebut the presumption of fraud-on-the-market and demonstrate that the alleged misrepresentations were not material. This case will allow the Supreme Court to further expound, following Halliburton, upon the requirements of proof in a Rule 10b-5 case at the certification stage.

3. Offer of Judgment and Mootness

In Genesis HealthCare Corp. v. Symczyk, the Supreme Court granted certiorari to consider whether a class action under the Fair Labor Standards Act (FLSA) becomes moot when, before moving for certification and before any other plaintiff opts into the suit, the putative class representative receives a Rule 68 offer of judgment that fully resolves all claims. The plaintiff alleged that her employer deducted meal breaks from the pay of some employees whether or not the employees performed compensable work during those breaks. Genesis served Symczyk with a Rule 68 offer of judgment that fully resolved her claims. Symczyk did not respond and Genesis moved to dismiss for lack of subject matter jurisdiction. The district court dismissed, concluding that the Rule 68 offer and her rejection mooted her claims.

The U.S. Court of Appeals for the Third Circuit reversed and remanded noting that traditional mootness principles do not fit neatly within the representative action paradigm. The court relying on its prior precedent held that under Rule 23, "where a defendant makes a Rule 68 offer to an individual claim that has the effect of mooting possible class relief asserted in the complaint, the appropriate course is to relate the certification motion back to the filing of the class complaint." Genesis argued in its application for certiorari that such an approach violated the mandate of Article III of the U.S. Constitution that federal courts may only hear actual cases or controversies. This case should provide the Court the opportunity to resolve the tension between the jurisdictional mootness issue created by a Rule 68 offer of judgment and the policy issues underlying Rule 23.
4. CAFA and Damage Stipulations

In Standard Fire Insurance Co. v. Knowles, the plaintiff filed a putative class action in state court against Standard Fire Insurance Company alleging that Standard’s underpayment on damage to real property claims breached his homeowner’s insurance policy. Plaintiff executed a stipulation that no individual class member’s claim would exceed $75,000 inclusive of costs and attorneys’ fees and that the total recovery would not exceed $5 million inclusive of costs and attorneys’ fees, thus coming under the Class Action Fairness Act (CAFA) of 2005 amount in controversy threshold for removal. Standard removed to federal court, asserting that Knowles’ stipulation was insufficient to defeat removal. Standard emphasized that Knowles’ counsel had not signed a stipulation stating that he would refuse fees that would cause the total recovery to exceed the jurisdictional threshold. Standard further argued that Knowles’ stipulation was insufficient to defeat removal. Standard argued that Knowles’ stipulation was insufficient to defeat removal. Standard argued that Knowles’ stipulation was insufficient to defeat removal. Standard argued that Knowles’ stipulation was insufficient to defeat removal. Standard argued that Knowles’ stipulation was insufficient to defeat removal.

Knowles moved to remand.

The district court remanded, noting that a legally binding stipulation can bar removal to federal court under Eighth Circuit precedent. The court held that Knowles’ stipulation was sufficient even without a stipulation from counsel given that Knowles agreed to limit recovery to less than $5 million including attorneys’ fees. Additionally, the court held that Knowles could decide what recovery to seek for the class and noted that class members could opt out and pursue their own remedies if they did not accept those agreed to by Knowles.

Standard asserted in its application for certiorari that the decision conflicted with Smith discussed previously. According to Standard, Smith held that until certification, the named plaintiff in a putative class action does not represent the putative class members and cannot bind them. Therefore, Standard argued, the stipulation was a nullity at the time of removal and not binding on the class members. This case presents a number of interesting questions. Although not specifically an issue, by implication this tactic raises a question as to whether a plaintiff who stipulates to damages less than those to which the class might be entitled, is an adequate class representative under Rule 23(a)(4).

5. Federal Statutory Rights/Expense Exception to Concepcion

In Concepcion the Supreme Court made it clear that the FAA is the law of the land and that state legislative or judicial exceptions to its application are highly suspect and to be narrowly construed. The U.S. Court of Appeals for the Second Circuit, in its third consideration of class certification, held that an arbitration clause in a credit card acceptance agreement was unenforceable in a suit for antitrust violations under the Sherman Act because pursuing individual actions would not be economically feasible.

The Supreme Court granted certiorari in American Express Co. v. Italian Colors Restaurant, to consider the issue of whether an arbitration clause containing a class action waiver can be enforced if it would be “economically irrational” for the plaintiff to proceed on an individual basis. The case raises the question of whether there is an enforcement of federal statutory rights/expense exception to the mandate of the FAA. This federal statutory rights/expense exception finds its genesis in dicta in the decision in Green Tree Financial Corp.-Alabama v. Randolph. With the circumscription of the exceptions to mandatory arbitration in Concepcion, this case gives the Supreme Court the opportunity to close one of the few remaining avenues to avoid arbitration.

6. Class Action Arbitration

In Stolt-Nielsen v. Animal Feeds International Corp., the Supreme Court held that a party may not be compelled to submit a dispute to class arbitration unless it has agreed to do so. In Sutter v. Oxford Health Plans, Ltd. Liability Co., an arbitrator held that the parties had agreed to class arbitration. The arbitrator concluded that although class arbitration was not mentioned in the agreement, the fact that the agreement contained broad language authorizing arbitration of “any civil action,” authorized class arbitration. The lower courts affirmed.

The Supreme Court granted certiorari in Oxford Health Plans Ltd. Liability Co. v. Sutter, to resolve the split between the Third Circuit’s decision in Reed v. Florida Metropolitan University, Inc. Contrary to Oxford, the Reed court held that a court must carefully review the contractual basis supporting class arbitration to determine if in fact there was an agreement.

The Reed court further concluded that broadly worded arbitration clauses cannot alone be the basis for finding that the parties agreed to class arbitration. This case will provide the Supreme Court with the opportunity to further clarify the proof necessary to conclude that a party has agreed to class treatment of a dispute in an arbitration forum.

Conclusion

The decisions in Concepcion and Dukes have a significant and general impact on class action litigation, as do Haliburton and Smith in narrower areas. The Supreme Court’s granting of certiorari in the six discussed cases may result in further revolutionizing class action litigation—and the 2012 term is still young. There is certainly the possibility that other class action-related matters percolating in the lower courts may find their way to the High Court in Washington, D.C., before the end of the 2012 Term.

Endnotes

564 U.S. 131 S. Ct. 2541 (June 20, 2011).
564 U.S. 131 S. Ct. 2368 (June 16, 2011).
Id.
131 S. Ct. at 2541.
Id. at 248-49.
660 F.3d 1170 (9th Cir. 2011).
See In re Salomon Analyst Metromedia Litig., 544 F.3d 474, 481 (2d Cir. 2008); Oscar Private Equity Invs. v. Allegiance Telecom, Inc., 487 F.3d 261, 264 (5th Cir. 2007); In re PolyMedica Corp. Sec. Litig., 432 F.3d 1, 7 n.11 (1st Cir. 2005).
March 2013 • THE FEDERAL LAWYER • 21

TECHNOLOGY continued from page 11

The stand also permits me to rotate the iPad in landscape and portrait mode. The stand I chose is made by Mophie ($150). With the Bluetooth keyboard and the stand, it is like having a small desktop computer. The only difference is I do not have a mouse. Instead of using my finger, I purchased a stylus. There are actually two different styluses I like. One is called Bamboo ($25) and the other is called Hand ($29.99).

When I use the iPad while on the go, I find myself dictating with the microphone. This process is very quick and incredibly accurate. The microphone is located to the left of the space bar on the keyboard. It turns the dictation into text as I dictate. I understand I need to be connected to the Internet to do this. However, since I am either connected by Wi-Fi or through my data plan, this is not an issue.

Once I have more time with the iPad, I hope I will be able to write an article about its use to assist other lawyers. Who knows, I might even be able to get it published in The Federal Lawyer if I am lucky. ☺

LABOR AND EMPLOYMENT continued from page 17

29 C.F.R. § 778.114(a).
Id. § 778.114(c).
Hoffmann-La Roche, 493 U.S. at 165.

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You can be forgiven if you’ve never heard of the tax practitioner privilege. After all, it is a statutory privilege created by the U.S. Congress in 1998 that can only be claimed in noncriminal tax-related administrative and judicial proceedings involving the Internal Revenue Service (IRS) or United States. Essentially, it extends the protections of the common-law attorney-client privilege to communications between non-lawyer tax practitioners, such as accountants, and their clients. But like the attorney-client privilege, the tax practitioner privilege may be waived by disclosure of the communications to third parties. While the tax practitioner privilege may only be claimed in tax proceedings, it can be waived in any type of proceeding, including non-tax proceedings. Therefore it is useful for non-tax practitioners to be aware of its protections.

Relationship to the Attorney-Client Privilege

As noted, through 26 U.S.C. § 7525 Congress extended the protections of the attorney-client privilege to certain communications between tax practitioners and their clients. The statute provides that communications between tax practitioners and their clients are protected in tax proceedings “to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney.” There are few cases applying the tax practitioner privilege, but the courts generally apply the same elements that are applied in the context of the attorney-client privilege. The formulation of these elements varies somewhat from circuit to circuit, but generally includes the following:

(1) Where legal advice of any kind is sought; (2) from a professional legal advisor in his capacity as such; (3) the communications relating to that purpose; (4) made in confidence; (5) by the client; (6) are at his instance permanently protected; (7) from disclosure by himself or his legal advisor; (8) except the protection be waived.

Both privileges are intended to promote full and frank communication by clients in seeking legal or tax advice. Therefore only those communications “which reflect the lawyer’s [or tax practitioner’s] thinking [or] are made for the purpose of eliciting the lawyer’s [or tax practitioner’s] professional advice or other legal assistance” fall within the privilege. However, because one of the objectives of the privileges is to assist clients in conforming their conduct to the law, litigation need not be pending or anticipated at the time of the confidential communication.

Who Qualifies as a Tax Practitioner?

Under the statute, the privilege only extends to communications with a “federally authorized tax practitioner.” A federally authorized tax practitioner “means any individual who is authorized under federal law to practice before the Internal Revenue Service if such practice is subject to federal regulation under section 330 of title 31, U.S. Code.” 31 U.S.C. § 330 allows the Secretary of the Treasury to regulate the practice of representatives of persons before the U.S. Department of the Treasury. Those authorized to practice before the IRS include attorneys, certified public accountants, enrolled agents, and actuaries. However, the regulations governing tax practitioners in activities before the IRS expressly state that nothing in the regulations shall “be construed as authorizing persons not members of the bar to practice law.” Thus, the tax practitioner privilege applies to confidential communications made in the course of an accountant’s or other tax practitioner’s practice before the IRS, which may include advising on proper tax treatment, representing taxpayers in audits, appearing before the IRS’s Office of Appeals, and corresponding with the IRS. As is true for the attorney-client privilege, both outside practitioners and in-house accountants who are federally authorized tax practitioners are covered by the tax practitioner privilege.

What Types of Communications Qualify?

The tax practitioner privilege only applies when the tax practitioner is doing the equivalent of lawyer’s work. Even though the tax practitioner is not a lawyer, he or she may have sufficient knowledge and expertise in the area of tax law to be able to provide tax advice regarding the tax treatment of a particular transaction or the likely IRS position in any tax-related dispute. Thus, it is only confidential communications made to a tax practitioner for the purpose of seeking tax advice that are protected by the privi-
le. Courts have held that communications made for the purpose of preparing tax returns do not fall into this category. Even if such communications are made for mixed purposes, preparing tax returns and litigation, they are not protected by privilege. Also not protected are communications related to obtaining accounting advice that is in the nature of business, as opposed to legal, advice. For instance, documents raising issues regarding a corporate taxpayer’s inventory methods, compensation packages, or general structure, even if coupled with tax analysis, have been held not protected. 

Exceptions to the Privilege

There are exceptions to the protection of the tax practitioner privilege. Like the attorney-client privilege, the tax practitioner privilege is subject to the crime-fraud exception. Under this exception, no privilege applies to communications made in furtherance of a crime or fraud. In other words, when the communication is made to seek advice relating “not to prior wrongdoing, but to future wrongdoing,” the communication is not protected. For instance, like the attorney-client privilege, the tax practitioner privilege is subject to the crime-fraud exception. Under this exception, the party seeking to abrogate the privilege would be aware of its protections and limitations. By being cognizant of the various protections and limitations, a procedure can be implemented for identifying privileged materials similar to those employed with respect to the attorney-client privilege. When considering whether to voluntarily disclose documents, those reviewing the documents for privilege claims should become familiar with the authors and recipients who are accountants or other tax practitioners so that they can evaluate whether the documents may be waived, it is important, even for non-tax practitioners, to be aware of its protections and limitations. By being cognizant of the various protections and limitations, a procedure can be implemented for identifying privileged materials similar to those employed with respect to the attorney-client privilege. When considering whether to voluntarily disclose documents, those reviewing the documents for privilege claims should become familiar with the authors and recipients who are accountants or other tax practitioners so that they can evaluate whether the documents may be waived, it is important, even for non-tax practitioners, to

Waiver of the Privilege

Because the tax practitioner privilege only extends to communications that would be privileged if they had been between an attorney and client, the tax practitioner privilege is subject to the same rules regarding waiver as the attorney-client privilege. For instance, like the attorney-client privilege, the tax practitioner privilege may be impliedly waived in a proceeding by putting the tax advice at issue. In the tax context this often arises in defending against the imposition of penalties, where penalties may be reduced if the taxpayer had “reasonable cause” for taking a position that resulted in a significant tax understatement. When a taxpayer relies on advice from a tax advisor as this “reasonable cause,” it effects a waiver of the tax practitioner privilege for all communications on the same subject.

More importantly for non-tax practitioners, the privilege can also be waived by voluntary disclosure to third parties. This can be a knotty problem for corporate taxpayers, who may have occasion to share information with several internal departments, outside auditors and consultants, third parties on the opposite side of proposed transactions, and government regulators. Disclosure to any of these people or entities may waive the privilege. Many courts have held that voluntary disclosure to government agencies and outside independent auditors will waive the privilege. In most cases, disclosure to a third-party company, even in the context of due diligence prior to acquisition, will waive the privilege. These waivers will often occur even if a non-waiver agreement or confidentiality agreement is in place. While generally confidential communications can be shared among internal employees whose knowledge is integral to the advice, some courts have held that disclosure outside of a close circle of “need to know” employees may waive the privilege.

Conclusion

In light of the ease with which the tax practitioner privilege may be waived, it is important, even for non-tax practitioners, to be aware of its protections and limitations. By being cognizant of the various protections and limitations, a procedure can be implemented for identifying privileged materials similar to those employed with respect to the attorney-client privilege. When considering whether to voluntarily disclose documents, those reviewing the documents for privilege claims should become familiar with the authors and recipients who are accountants or other tax practitioners so that they can evaluate whether the documents might convey confidential communications for the purpose of obtaining tax advice. Any such documents should be reviewed by the client’s accountant, or in the case of a corporate taxpayer, its tax department, to determine whether the documents relate to tax advice as opposed to business/accounting advice. While it may ultimately be concluded that the benefits of disclosing outweigh the costs of waiver in the particular context, armed with an awareness of the tax practitioner privilege the decision whether to disclose can be an informed one. ☐

Endnotes

2Id. § 7525(a)(1).
3In re Grand Jury Subpoena (Mr. S), 662 F.3d 65, 71 (1st Cir. 2011) (quoting 8 J.H. Wigmore, Evidence § 2292, at 554 (McNaughton rev. 1961)).
5United States v. Frederick, 182 F.3d 496, 500 (7th Cir. 1999).
6United States v. BDO Seidman, 492 F.3d 806, 815 (7th Cir. 1999).
27 C.F.R. § 10.3.
28 Id. § 10.32.
31 In re Grand Jury Proceedings, 220 F.3d at 571; United States v. Frederick, 182 F.3d 496, 501 (7th Cir. 1999).
32 Valero v. United States, 569 F.3d 626, 631 (7th Cir. 2009).
33 United States v. Zolin, 491 U.S. 554, 562-63 (1989). See also United States v. BDO Seidman, 492 F.3d 806, 818 (7th Cir. 2007).
34 United States § 7525(b). A “tax shelter” is defined as any plan or arrangement, a significant purpose of which is the avoidance or evasion of federal income tax. Id. § 6662(d)(2)(C)(ii).
35 Valero, 569 F.3d at 632-33. See also United States v. Textron, Inc., 507 F. Supp. 2d 138 (D.R.I. 2007) (holding that exception did not apply to advice given regarding tax shelter transactions entered into in the past).
36 Valero, 569 F.3d at 632-33. See BDO Seidman, 492 F.3d at 818; Valero, 569 F.3d at 634.
37 See Textron, 507 F. Supp. 2d at 151.
38 Salem Fin., Inc. v. United States, 102 Fed. Cl. 793, 798 (Fed. Cl. 2012).
42 See Fed. R. Evid. 502(e) (“An agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.”); Boune v. AmBase Corp., 150 F.R.D. 465, 478-79 (S.D.N.Y. 1993) (non-waiver agreement between parties in one case not binding on third party in another civil case).
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7:00 A.M.–5:00 P.M.  Conference Registration
7:00 A.M.–5:00 P.M.  Career Tables, Exhibits, and Vendors
8:00–8:15 A.M.  Welcoming Remarks
8:30–10:00 A.M.  Plenary 1: Pathways to Power—Energy Development in Indian Country
9:00 A.M.–1:00 P.M.  NNALSA Annual Meeting
10:15–11:45 A.M.  Plenary 2: Harnessing Financial Forces & Creating, Protecting and Regulating Markets in Indian Country and Beyond
10:15–11:45 A.M.  Breakout 1: Strengthening the Practice of Indian Law—Indian Law on State Bar Exams
12:00–1:30 P.M.  Luncheon Program
1:45–3:15 P.M.  Plenary 3: From Carcieri to Ramah—Mining The Supreme Court’s Jurisprudence
3:30–5:00 P.M.  Plenary 4: Innovations in Tribal State Compacting—Tobacco Taxes
3:30–5:00 P.M.  Breakout 2: Preserving Morton v. Mancari’s Dynamic Legacy
6:30 P.M.  Dinner Reception

Friday April 12, 2013
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9:00 A.M.–12:00 P.M.  NNALSA Elections
10:15–11:45 A.M.  Plenary 6: Indian Mascots—Identity as a Driver of Sovereignty
10:15–11:45 A.M.  Breakout 3: Cobell Implementation
12:00–1:30 P.M.  Luncheon Program
1:45–3:15 P.M.  Plenary 7: Surging Forward in Law Enforcement: Report from the TLOA Commission
1:45–3:15 P.M.  Breakout 4: Emerging Trends in Tribal Policies—Same Sex Marriage
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Sociable, gregarious, friendly, quick-witted, and approachable are all words that have been used to describe Judge Michael R. Barrett of the U.S. District Court for the Southern District of Ohio. However, when we recently attempted to interview Judge Barrett over lunch, he was reluctant to discuss himself, and so modest that he might have been mistaken for an introvert. Since his reserved demeanor was in stark contrast to the general impressions around the courthouse, we enlisted the help of his former law clerk, Magistrate Judge Stephanie Bowman, and current career law clerk, Grace Royalty, to complete this profile.

Upon visiting his chambers, one thing is immediately apparent—Judge Barrett’s passion for all things Cincinnati. Lining the walls are paintings depicting Cincinnati landmarks, such as Mt. Adams, Music Hall, the Museum Center, and Fountain Square. The back corridor leading to his courtroom is adorned with memorabilia from his undergraduate and law school alma mater, the University of Cincinnati (UC), where he earned a B.A. in 1974 and a J.D. in 1977. Framed displays include signed jerseys from former UC basketball players, a pencil sketch of UC’s College of Law, and photographs of various board configurations from his nine-year tenure on UC’s Board of Trustees.

His personal office provides even more insight into this Cincinnati native’s background. Photographs and curiosities reflect both personal and professional accomplishments. The eastern wall bears witness to undergraduate, law school, and honorary doctorate UC degrees. To the left of his degrees are two gavels—one from his term as chairman of UC’s Board of Trustees, and a second from his tenure as chair of the Hamilton County Republican Party. That same shelf also contains photographs and badges from his service as a chief assistant of the Felony Trial Division and the chief of the Arson Task Force for the Prosecutor’s Office of Hamilton County, Ohio. Adjacent walls are decorated with photographs of Judge Barrett with Presidents George H.W. Bush and George W. Bush and their wives Barbara and Laura; Sens. Bill Frist, Rob Portman, George Voinovich, and Bob Dole; Secretary of State Colin Powell; and numerous personalities including Bill Moyers, Ted Turner, Ben Stein, Bill Cosby, Arnold Schwarzenegger, and Jason Fabini.
Although it is apparent from these memorabilia that Judge Barrett has many noteworthy personal and professional achievements, there is more to the story than meets the eye.

Developing a Passion for Trial Practice

Like many law students, Judge Barrett was uncertain of where his legal career would lead. A fortuitous first legal job as an administrative hearing officer for the State of Ohio quickly clarified his professional goals. In that role, he joined a hastily assembled task force of 30 law school graduates who had taken the bar, but had not yet been admitted to practice. He began work the Monday immediately following the July 1977 Ohio Bar exam. After 30 days of training, he criss-crossed the State of Ohio for five months, hearing administrative appeals of Ohio workers’ employment classifications and preparing administrative orders. During those months, Judge Barrett observed various styles and qualities of lawyering, gaining an understanding and appreciation of the importance of good advocacy. After six months, he had a keen desire to be one of the “good advocates” as a practicing trial attorney. He did not have to wait long for the opportunity. Just as the task force was winding up, he was hired by the then Hamilton County Prosecutor, Simon Leis Jr.

Other than his stint as a hearing officer, Judge Barrett had no trial experience. Nevertheless, on his first day of work in the Prosecutor’s Office, he was handed a file and instructed to try a felonious assault case. Although nervous, he succeeded in obtaining a guilty verdict on that case, and never looked back. He began taking on, and trying, as many cases as possible. His work ethic reaped dividends, permitting him to successfully prosecute a vast number and variety of cases, including two highly publicized aggravated murder and kidnapping cases. Along the way, he spent hours observing “the great trial attorneys of the 1970’s” at the Hamilton County Courthouse. Earning recognition on his own merit, he was promoted to chief of the Felony Division.

After six years with the Prosecutor’s Office, Judge Barrett sought to apply his skills in private practice. He joined the firm of Graydon, Head and Ritchey, LLP as a general litigation associate, and quickly was promoted to partner. Ten years later, he moved to Barrett & Weber, again concentrating on general litigation. Unlike most in private practice, Judge Barrett resisted specialization. He continued to defend criminal cases, and represented both plaintiffs and defendants in an unusually wide variety of state and federal cases involving torts, administrative law, malpractice, environmental law, antitrust law, securities law, and domestic relations. Needless to say, his client base was equally broad, including alleged rapists and murderers, and on the civil side, crime victims, corporate executives, politicians, businesses, and property owners.

On the Bench and in the Community

Judge Barrett was nominated for a district court seat by President George W. Bush and confirmed on May 25, 2006. He brought with him to the federal bench a breadth of experience in civil and criminal litigation from every side of the adversary process. His extensive and varied trial experience leads him to eschew any particular judicial philosophy. Rather, he prefers to look at the specific facts of each case and to rely on his own legal experiences. Paraphrasing John Adams’ “Facts Are Stubborn Things,” he adds: “Two distinct sets of facts, involving identical legal principles, can result in two distinctly different outcomes.” He therefore believes facts are critical to the outcome of the case, and are essential to the fair administration of justice.

Although the courtroom remains his primary passion, Judge Barrett enjoys taking an active role in court-facilitated settlement negotiations, often to the surprise of lawyers new to his docket. With a smile, he concedes that his negotiation skills can be attributed in part to his upbringing. As a middle son of six children raised by a physician and accomplished businessman, Dr. Charles M. Barrett, and a gracious mother, Mrs. Maybelle Finn Barrett, he had to learn at an early age the art of compromise. He has applied those lessons throughout his career, viewing himself as a problem solver. That trait was highlighted during his judicial nomination process when his counterpart, the chairman of the Hamilton County Democratic Party, was quoted in the Cincinnati Enquirer as stating, “Obviously, I disagree with a lot of his politics, but he is open-minded and willing to be fair.” These sentiments were reflected again in his confirmation hearings, where the Senate voted 90-0 to confirm him.

Consistent with his sociable personality and reflective of his commitment to advocacy, Judge Barrett regularly participates in, and initiates, educational opportunities for law students. Although he prefers long-term law clerks, he appreciates the role of the courts in legal education. He therefore accommodates as many externs as possible from both his alma mater and other law schools across the nation, and tries to provide them with valuable learning opportunities.

This past summer, for example, he designed a mock trial program for the externs of all Cincinnati district court judges, using outside speakers, other judges, and two juries before whom the students presented their cases. Judge Barrett also gives trial practice presentations at the UC College of Law. When asked about his significant time commitment, Judge Barrett explains:

Judge Barrett accommodates as many externs as possible from both his alma mater and other law schools across the nation, and tries to provide them with valuable learning opportunities.
“I believe I have valuable insight to provide from my experiences, both the successes and, perhaps more importantly, the hard-knocks. I also think most of the students are somewhat surprised by the amount of time it takes to prepare for the various stages of trial, especially witness examination. The earlier they understand that aspect of the profession, the better.”

In the larger sense, he hopes that additional education and practical experiences can help to ease the stress and strain that he has observed in practice, when he served on the Ohio Supreme Court’s Board of Grievance and Discipline, and that he continues to observe in his current judicial role.

Judge Barrett is assisted by a hard-working staff of two law clerks, a courtroom deputy, and a judicial assistant. One of the first traits that his staff describes is Judge Barrett’s involvement in the local community. Consistent with his commitment to legal education, Judge Barrett is heavily involved in the Potter Stewart Inn of Court. He also routinely presents to the Cincinnati and Kentucky Bar Associations, and engages in trial practice work with UC Law School’s moot court teams. Judge Barrett’s staff also describes his many years of coaching UC’s Rugby Team as well the Cincinnati Wolfhounds Men’s Rugby Club (teams for which he played prior to a leg injury in his early 30s). He frequently spends weeknights coaching rugby practices and Saturday afternoons at rugby games.

On a more informal level, Judge Barrett stays involved in the local community by taking a personal interest in those around him. On a weekly basis, he generously stops on his way in to the office to pick up coffee for his entire chambers, and invites everyone to gather in the kitchen for casual discussions about the day’s schedule and other spontaneous topics. His law clerks caution that it takes Judge Barrett 20 minutes to walk two blocks to lunch because he stops to chat with everyone he recognizes on the way, including corporate executives, janitors, bank tellers, store owners, politicians, former law partners, former adversaries, and friends from high school, college and law school. His personal contacts extend beyond those brief greetings, as he regularly meets the same individuals for lunch or after-work get togethers. One favorite pastime is pheasant hunting with a high school friend, which he has kept up for many years. From Judge Barrett’s perspective, he enjoys being involved in the community and taking an interest in others because “you can close the door in this job and be busy the rest of your life, but the world lives out there on the street.”

Despite his many accomplishments and busy lifestyle, Judge Barrett still makes time for family and fun. He enjoys spending time with his only son, Will, and cooking for and entertaining friends. According to his staff, one of his favorite hobbies is pulling pranks on them and other judges in the courthouse. However, when asked directly, Judge Barrett gives away only a mischievous grin and an artful response: “This job and the work we do is very serious, but I try to remind myself and others not to take ourselves too seriously.” Judging by the numerous whimsical objects scattered throughout the chambers, including stuffed animals, a bobble head of his likeness, cutout posters of characters from the film Austin Powers, and a life-size suit of armor from which hang pictures of his former externs, he has succeeded at keeping the mood light-hearted.

As our interview concludes, Judge Barrett steers the conversation to his respect and admiration for his colleagues in the Southern District of Ohio. “I don’t know how it is in other places, but the judges in Cincinnati, Dayton, and Columbus genuinely respect and like each other. Our meetings, while informative, also are collegial and often entertaining. This atmosphere spills over to the Cincinnati judges’ relationship with our counterparts in the Eastern District of Kentucky, as we meet regularly for lunch and an exchange of ideas.” This is one of many reasons Judge Barrett feels fortunate to work in the Southern District of Ohio.

Judge Barrett stays involved in the local community by taking a personal interest in those around him. On a weekly basis, he generously stops on his way in to the office to pick up coffee for his entire chambers, and invites everyone to gather in the kitchen for casual discussions about the day’s schedule and other spontaneous topics.
At a recent “brown bag luncheon” hosted by the Northern District of Ohio Chapter this past January, U.S. Magistrate Judge Greg White opened with a light-hearted question to the audience: “How is a law career like baseball?” The answer: “When you can’t practice anymore, they put you on the bench.” All kidding aside, Judge Gregory A. White has now been on the federal bench for over five years after a long and storied career as the U.S. attorney for the Northern District of Ohio, and before that as the Lorain County, Ohio, prosecutor. Did you also know that Judge White would be perfectly happy and capable of building the bench, too? More on that later.

Judge White’s career path has had a decidedly west-to-east direction across the state of Ohio. He was born in Huron County, Ohio, then moved east to Lorain County, where he graduated from Oberlin High School in 1967 and later served for 22 years as Lorain prosecuting attorney. He finally settled even farther east in Cuyahoga County, first as the Northern District of Ohio’s U.S. attorney for six years, and now sitting as a U.S. magistrate judge, with his chambers located at the Cleveland, Ohio, federal courthouse. Despite the earlier west-to-east move across the state of Ohio, Judge White has no current plans to move farther east and take over Youngstown; he says he’s at the Cleveland courthouse to stay. That’s a good thing, as he is also an active and dedicated member of the Federal Bar Association’s Northern District of Ohio Chapter Board of Directors, where he continues to add valuable direction to the chapter’s many programs and activities, including helping to coach the Garrett Morgan High School Mock Trial team over the past three years in connection with the Cleveland Metropolitan School District’s Mock Trial Tournament.

Judge White began his journey after high school by joining the U.S. Marine Corps, serving his country for two years, from 1968–1969, including a Vietnam tour of duty with the Ninth Infantry Regiment. While in the Marines, he was awarded the Silver Star Medal (for “gallantry in action against an enemy of the United States”), the Bronze Star Medal (for “heroic achievement or service”) with a “V” designation (indicating “valor,” resulting from an act of combat heroism), and the Naval Commendations Medal (for “distinguishing oneself by heroism, meritori-
In November 2002, Judge White received a call from the White House that would change his career and propel him toward the federal legal arena.

In 1973, Judge White graduated with a B.A. in criminal justice and police administration. He jokes that it was advice given by one of his former accounting professors that had him “giving serious thought toward going to law school.” Judge White took that advice, and entered Cleveland-Marshall College of Law in 1973, where he completed his J.D. in 1976, graduating magna cum laude. While studying at Cleveland-Marshall, Judge White also worked days as a carpenter, and he still enjoys woodworking, spending many a winter afternoon in the garage pursuing the craft. As indicated earlier, Judge White not only sits on the bench, but he can build it too.

Judge White began his legal career as a solo practitioner, sharing an office with, and “given a desk and chair” by, Lorain County solo practitioner Hub Wilcox. A short time later, in 1979, when the city of Elyria’s then-law director was appointed to the bench, Judge White made his first foray into Lorain County politics, seeking, and being appointed by Elyria’s mayor to, the open law director position. However, later that same year, the mayor lost a re-election bid by 61 votes, which, as a result, carried with it the end of Judge White’s law director appointment.

So, in 1980, just three years out of law school, Judge White ran for Lorain County prosecutor and won, a position he held for the next 22 years. While serving as county prosecutor, he was active in the Ohio Prosecuting Attorneys Association and served as president of that organization from 1989–1990. He was selected Outstanding Prosecuting Attorney of Ohio in December 1995. While county prosecutor, Judge White served for 10 years on the Ohio Criminal Sentencing Commission, helping to revise Ohio’s criminal code. He also chaired a statewide Victims of Crime Task Force, which made recommendations to the Ohio governor resulting in new laws relevant to the investigation and prosecution of crimes perpetrated against mentally challenged and disabled individuals. For eight years, he also chaired the Ohio attorney general’s Victims of Crime Advisory Board.

In November 2002, Judge White received a call from the White House that would change his career and propel him toward the federal legal arena. He was nominated to the position of U.S. attorney for the Northern District of Ohio. Judge White recalls fondly the honor of being named the district’s top law enforcement officer, and particularly the experience of his interview at the U.S. Department of Justice, including the majestic sight of seeing the inscription ringing the walls of the alcove outside the attorney general’s office in Washington, D.C., stating: “The United States Wins Its Point When Justice Is Done Its Citizens In The Courts.” The position of U.S. attorney is perhaps best described in a paragraph written by U.S. Supreme Court Associate Justice George Sutherland more than 70 years ago:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.


While serving as the U.S. attorney, Judge White was appointed by the U.S. attorney general to the Attorney General’s Advisory Committee, and served as chair of the Law Enforcement Coordinating, Victim, and Community Issues Subcommittee. He also served on subcommittees addressing terrorism and national security, border issues, and violent crime. On top of this, he is a past chairperson of the Cleveland Federal Executive Board.

At the recent Federal Bar Association “brown bag luncheon,” Judge White humorously noted: “Public corruption has followed me throughout my career.” Thankfully, not instigating it but rather prosecuting it! First, there were various investigations of public corruption relating to Lorain County affairs while he was Lorain County prosecutor; then, as U.S. attorney, the prosecution of former East Cleveland Mayor Emmanuel Onuwar along with businessman Nate Gray in connection with a long-term bribery scandal that sent both men to federal prison; on through to participation in the investigation and prosecution of Tom Noe and other persons involved in investment improprieties with the Ohio Bureau of Workers Compensation funds; and, most recently, the early stages of the wide-ranging Cuyahoga County corruption investigation, which, has to date, resulted in over 40 convictions. To quote Judge White: “It was a historic ride.” His favorite part of the work as U.S. attorney was working in the neighborhoods—“dealing with guns, gangs, and the like”—while helping those neighborhoods to better address their problems and to thrive.

Then, in 2008, after “27 years of stomping out fires” as a county prosecutor and U.S. attorney, Judge White
arrived at what he describes as “five years of very quiet.” On March 1, 2008, Judge White began his duties as a U.S. magistrate judge for the Northern District of Ohio, the culmination of a rigorous and extensive vetting process leading to his selection as a magistrate judge by the district judges of the U.S. District Court for the Northern District of Ohio. He describes the docket he now oversees as a “large dose” of state habeas corpus cases and Social Security Administration benefits appeals, the latter of which often involves a process that can be “very trying for people” in light of how long it takes for such cases to work their way through what can be many levels of review.

Perhaps his favorite part of being a U.S. magistrate judge is participating in the mediation process, especially the personal interaction with lawyers and litigants, where for many of them it represents “their first real chance to say their peace.” One particular case that stands out is the recent $4 million settlement mediated by Judge White, involving the death of famed R&B singer Sean Levert in the Cuyahoga County jail, awarded to Angela Lowe, Sean Levert’s widow. The case stemmed from facts showing that after Levert entered the jail on charges for a non-violent crime (failure to pay child support), and after he gave the authorities his anxiety disorder medication (Xanax), he was placed in a restraint chair, then later died from withdrawal symptoms. Lowe has since testified before the Ohio House of Representatives in support of passage of “Sean’s Law,” dealing with the treatment of inmates who have drug prescriptions when admitted into custody.

While Judge White’s service as a magistrate judge primarily involves civil litigation—dealing with his own docket of cases as well as matters referred by district judges for a “Report and Recommendation”—he notes that “civil practice attorneys sometimes can be tougher than criminal lawyers to work with.” He also has a criminal case rotation, involving two-week stints on the criminal docket, handling arraignments, traces, warrants, and occasionally pleas, followed by six weeks off the criminal case rotation. He particularly enjoys the civil practice, finding it a satisfying intellectual experience. As to opinion writing, he describes himself as “an editor as much as anything else,” with his longtime law clerks preparing first drafts of the many orders and opinions that issue from his courtroom, then refining them to reflect his considered decisions. Judge White describes the general docket of the district court as “very busy,” and thinks that the Northern District of Ohio’s emergence as a venue for multidistrict litigation (MDL) is a great asset to the district.

Yes, it has been a “historic ride” for Judge White, first as county prosecutor, then as a U.S. attorney, and now as a U.S. magistrate judge. We can be sure that it will continue to be an interesting ride for Judge White while at the Cleveland federal courthouse … unless, of course, he changes his mind about taking over Youngstown.

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.
“Well, I think my experience really starts and ends with the fact that I have always loved this area, always loved the courtroom, and always loved trial work. It’s not something that I have to force myself to do; it’s just something that I enjoy. I can’t really get enough of it.”

– Judge Jane Boyle

In 1981, when Judge Jane J. Boyle graduated with her J.D. from the Dedman School of Law at Southern Methodist University, her peers focused on involvement in the high-profile areas of law at that time—real estate and oil and gas. However, Judge Boyle had her sights set on a different direction: the district attorney’s office. She knew that those aforementioned areas of law did not lend themselves to the courtroom, and that is exactly where Judge Boyle wanted to be.

The judge describes being in the courtroom as “the most wonderful job in the world.” She is excited to wake up every morning and go to work; she simply cannot get enough of it. Since her sophomore year at the University of Texas at Austin, Judge Boyle knew that she wanted to pursue a law degree. In fact, it was when she met people who were in the law school that she decided it would “be a dream come true to do something like that.” After graduating with honors, there was nothing that could stop her from achieving her dream of becoming a lawyer and eventually a U.S. district judge.

“[Judge Boyle] was one of the most dedicated law students in our class,” recollects U.S. Magistrate Judge Jeff Kaplan, a fellow graduate of Judge Boyle’s law class. “She knew she wanted to be a trial lawyer from the very beginning of law school.” It was Southern Methodist University’s law school “criminal clinic” program that hooked Judge Boyle on the idea of working in the courtroom. For one summer, she defended people in real criminal cases in actual trials just as if she were a practicing lawyer. Judge Boyle’s newfound spark of interest developed her urge to learn as much as she could to enhance her experience, and the best place to do that was the district attorney’s office.

Judge Boyle began her legal career in 1981 as an assistant district attorney for Dallas County. Her initial cases involved traffic and speeding tickets, but from there she moved up to misdemeanor and then felony court, including the career criminal section. In 1985, Judge Boyle was promoted to chief felony prosecutor of the Major Commercial Fraud Unit of the Dallas District Attorney’s Office. In this high-level position, she prosecuted white-collar crime cases, including securities fraud and embezzlement, for two years.
In 1987, Judge Boyle was hired as an assistant U.S. attorney for the Northern District of Texas. Judge Boyle describes the U.S. attorney’s office as very different and the work much more “proactive” for the prosecutors than the district attorney’s office. At the U.S. attorney’s office, the prosecutors are much more involved from the inception of the investigation through the grand jury process and then through the conviction and sentencing phases of the case. By contrast, in the district attorney’s office, the police arrest an individual in the course of a crime and present the case to a grand jury, which later goes to the prosecutor who then assumes charge of the entire case. Judge Boyle emphasizes that because of the heavy burdens in the U.S. attorney’s office, experience is an important prerequisite to working there. As Judge Boyle explains, in the U.S. attorney’s office, attorneys tend to have a lot more control over their cases, which can leave room for more things to go wrong, thus translating into increased responsibilities on her part. Judge Boyle reflects,

I had one case, which was one of my first long trials, which lasted almost 13 weeks. It was a mail fraud case that involved about 500 victims across the United States who succumbed to these ads for a make-up distributorship. A lot of people invested what little money they had—one man invested his child’s college fund. The distributor did not follow through with sending their purchased goods, and people lost their money. We had a trial, and close to 500 victims came down to testify against the distributors. Most of them were convicted and given lengthy prison sentences.

Although by this time, Judge Boyle had fulfilled her aspiration of spending over nine years in the state and federal courtrooms, her ambitions did not end there. In 1990, she was appointed to the position of U.S. magistrate judge for the Northern District of Texas, Dallas Division, where she served 12 years. Judge Boyle credits her experience in the courtroom to helping her have a solid understanding of what works and does not work. Judge Boyle’s respect for, and recognition of, lawyers who truly know how to practice law was substantiated during her time as a magistrate judge.

“It was a window into the world of civil lawyers—watching them in the heat of the moment,” explains Judge Boyle. One differentiating factor of a civil case, like those she tried as magistrate judge, was that these cases do not go to a grand jury. Judge Boyle estimates that during her tenure as a magistrate judge, she heard thousands of discovery hearings. Judge Boyle used the experience she gleaned from her many judicial positions to advise others through their careers as well. Judge Kaplan reflects, “It seems in almost every career decision that I have made, [Judge Boyle] was one of the first people that I consulted for advice. She has incredible wisdom and judgment and she was very helpful to me in understanding what all the [magistrate judgeship] would entail.” She believes her years of hard work culminated on April 16, 2002, when she was appointed by President George W. Bush to be the U.S. attorney for the Northern District of Texas. Most noteworthy about this position was that she was the first woman to serve as the top federal prosecutor for the Northern District of Texas—a significant honor. She describes this as “one of the best experiences [I’ve] ever had.” Judge Boyle admits she was initially a bit intimidated by this high office. But once her position began, Judge Boyle’s accomplishments gave way to what she describes as one of the most rewarding things she has ever taken part in. “It was an interesting time to be at the U.S. attorney’s office,” recalls Judge Boyle, “because it was right after 9/11.” Most of her tenure there focused on antiterrorism efforts with the FBI. In addition to a heavy emphasis on drug conspiracy and sex trafficking cases, Judge Boyle also dealt with white-collar fraud cases due to Enron’s collapse in 2001. Toward the end, her office also handled an onslaught of cyber crimes. Two years later, President Bush appointed Judge Boyle a U.S. district judge for the Northern District of Texas, the position she currently holds.

Judge Boyle’s main drive is her love for the law and, as she reflects, “you see social benefits from it, see disputes getting resolved, a criminal defendant getting a fair sentence, and you see that you help do that. It is so fulfilling to be a part of that.” Judge Boyle describes her time as a district judge to be extremely interesting because “we have such a broad jurisdiction over civil and criminal cases…. We see everything from patent cases, to white collar cases, to immigration cases.”

One must wonder what kinds of characteristics are necessary for someone to achieve such an esteemed position as a U.S. district judge. Judge Boyle asserts that being prepared and completely informed about the case at hand, including reading all the documents, is first and foremost. Possessing an open mind and not “pre-judging” anything are two crucial mindsets to remaining completely objective and fair. These are mindsets that Judge Boyle consistently upholds. In regard to disposition, being even-tempered is very important to Judge Boyle and helps when interacting with the lawyers and witnesses in her courtroom. After observing Judge Boyle in her element, it is quite apparent just how important her thorough understanding of every detail of the case at hand is to her before issuing
a sentence. She is also very fair and treats people on the stand with great respect, no matter their status as a lawyer or charged citizen. Above all, Judge Boyle respects the legal system, and her passion for the law is why she says that “even after many years, the work is still fun.”

Judge Boyle has seen a wide range of lawyers come through her courtroom, and this helps her distinguish the traits of the most successful ones. “You see that [some] of these issues are life or death to the litigants…. And then you see the skill of their lawyers and how it helps them win or lose. It’s a wonderful thing to see,” describes Judge Boyle. One of her favorite things is observing a lawyer who has really studied and honed his or her skill, and who then parleys that knowledge and abilities to help win a case. However, Judge Boyle has also seen the other end of the spectrum. Lack of obvious preparation, causing a lawyer to let their client down, is something Judge Boyle unfortunately witnesses as well.

As evidenced by Judge Boyle’s ratings in the Dallas Bar Association poll, she receives positive marks from others in the legal world. Most notable is her favorable rating in regard to her preparedness for hearings and trials—something Judge Boyle contends is very important for judges and lawyers alike.

Even though she is the first lawyer in her family, Judge Boyle is not a novice to forging her own path. Her father instilled in her early on that “no one is going to come along and knight you with a sword on each shoulder. You have to go out and you have to seek what you want. ... And when you do that, you have to understand that for a lot of the journey you are going to get knocked down,” Judge Boyle explains. Her father was a huge influence, and it was his advice that helped her ignore those around her who voiced negative opinions about attending law school and becoming a lawyer.

Although it may seem surprising, Judge Boyle’s seemingly fluid journey has not always been a walk in the park. “I sat in a lot of offices as I was moving my way through asking for jobs which I didn’t get. ... I sat through a lot of ceremonies where someone else got the job I applied for,” recollects Judge Boyle. The ability to get back up and keep persevering is something Judge Boyle holds dear.

In order to keep the legal system flourishing, Judge Boyle believes the key is “integrity and character.” She also emphasizes that this is a profession first, and secondly, a business. This profession is one that helps people on any level with their problems—from the poorest to the richest. Judge Boyle finds that in the end, “our system in America is based on the hope that it provides a level playing field decided by objective people” who must continue to believe fairness is what amalgamates our whole judicial system. When asked what her ideal legacy as a U.S. district judge would be, she thought for a few moments and responded, “just that I treated people with respect and made decisions fairly.” She again refers back to her father’s guidance when he told her that she owes it to the lawyers and to the system to be prepared and exercise justice. “You can never rest on your laurels,” admonishes Judge Boyle, “you always have to take every project like it’s as important as the one 20 years ago.” Judge Boyle’s unflagging dedication is what has helped her maintain her fairness in the courtroom.

Judge Kaplan reinforces this belief. “[She] is truly a great judge. But she’s an even better person.” Judge Boyle’s stalwart position in the courtroom is coupled with the compassion and love she holds for her utterly supportive family. “I wouldn’t be here if I hadn’t married the man I married,” says Judge Boyle of her husband, John Boyle, an assistant U.S. attorney. Judge Boyle believes her husband’s encouragement has been the foundation of her success. The Boyles have two children: Casey, who currently attends the U.S. Air Force Academy; and Joe, who graduated from the Academy in May 2012.

Judge Boyle’s professional organizations include the Texas Bar Foundation (for which she is a Fellow), and the Dallas Bar Foundation (for which she has served on the Board of Trustees). She also served as former president of the William “Mac” Taylor Chapter of the American Inns of Court. In 2001, Judge Boyle served as vice chair of the Dallas Bar Association’s Business Litigation Section and then served as co-chair of the Pro Bono Activities Committee. In 2007, she was appointed to serve on the Criminal Jury Charge Committee of the U.S. Court of Appeals for the Fifth Circuit.

Judge Jane Boyle was honored with the Distinguished Alumni Award for judicial services from SMU’s Dedman School of Law in 2009. This award praised Judge Boyle because her “personal and professional stature reinforced the quality of the legal education program of the school.” In 2008, Judge Boyle received the Samuel Pessarra Outstanding Jurist Award from the Texas Bar Foundation. This award honors an active federal or state judge who exceptionally exemplifies “competency, efficiency, and integrity.” These three characteristics clearly summarize Judge Boyle’s legal career as well as her ideals. Her contributions to and achievements in the courtroom will undoubtedly continue to set standards in her profession.
Why MSPB Judges Reject 98 Percent of Whistleblower Appeals

Federal law requires government employees to report fraud, waste and abuse, and promises to protect them from retaliation. The Civil Service Reform Act of 1978 created the U.S. Merit Systems Protection Board (MSPB) to adjudicate appeals by employees from prohibited personnel practices, including whistleblower reprisal. Frustrated at the failure of the MSPB to remedy retaliation under existing law, Congress adopted the Whistleblower Protection Act of 1989 (WPA). Lawmakers again sought to improve MSPB compliance with additional WPA amendments in 1994. My analysis of MSPB decisions in recent years suggests that these legislative reforms have had little to no effect.

The MSPB is governed by a three-member, bipartisan board appointed by the president. The board in turn employs a large cadre of “administrative judges,” who hold hearings in whistleblower and other personnel appeals, and who issue “initial decisions.”

These initial decisions favor the agencies involved in a shocking 95 percent of all cases and up to 98 percent of whistleblower appeals. On further appeal, the full board routinely affirms 97 percent of the initial whistleblower decisions and a similarly overwhelming proportion of other personnel decisions. Upon final review by the U.S. Court of Appeals for the Federal Circuit, 98 percent of the Board’s whistleblower decisions are left undisturbed. Such a rubber stamp approach to agency personnel decisions raises serious questions concerning bias, and even puts in doubt the merits of the MSPB and its $44 million annual budget.

MSPB recently revised its adjudicatory Whistleblower Protection Act, ostensibly to strengthen protections against retaliation. President Obama recently signed into law the Whistleblower Protection Enhancement Act of 2012, which again seeks to strengthen protections against retaliation, mainly by closing some judicially-created loopholes in the WPA. Unfortunately, the law fails to address the primary reason for the MSPB’s historic hostility toward whistleblowers and federal employees in general.

Despite the deceptive similarity in titles, MSPB administrative judges are not “administrative law judges” (commonly referred to as “ALJs”)—an entirely separate classification of independent, highly skilled, and carefully screened judicial officers defined by the Administrative Procedure Act (APA). The APA and the MSPB organic statute make no reference to “administrative judges,” but the MSPB statute does refer to “administrative law judges.” Although the APA generally mandates adjudication by ALJs, cases involving “the selection or tenure of an employee” are exempt from the hearing provisions of the APA. Similarly, MSPB’s governing law permits the Board to delegate authority to ALJs or “other employees.”

MSPB regulations coined the term “administrative judge” by defining “judge” to include “[a]ny person authorized by the Board to hold a hearing or to decide a case without a hearing, including an attorney-examiner, an administrative judge, an administrative law judge, the Board, or any member of the Board.” MSPB’s administrative judges actually are the agency’s own lawyers. MSPB itself uses the term “attorney-examiner” for performance evaluations of its so-called administrative judges.

Why does the board use its lawyers in place of ALJs, and why does it matter? Actually, the board does make limited use of ALJs, for example, in appeals by board employees and in appeals by government officials who are accused of violating personnel laws, such as by retaliating against whistleblowers. Whistleblowers themselves, however, like other employees appealing such adverse personnel actions, are denied access to ALJs.

Presumably, the board opted to replace ALJs with “attorney-examiners” at least partly to save money, since the more highly qualified ALJs make higher salaries than do the board’s attorneys. The board’s decision to use ALJs for its own staff and in appeals by officials accused of violating personnel laws—but not for those who are the victims of such violations—suggests a second, more sinister motive.

The selective use of cut-rate, less qualified judicial officers is significant because ALJs are far more likely than MSPB lawyers to dispense justice fairly and with a modicum of due process.
Focus On: Case Management

by Hon. Jack Zouhary

Ten Commandments for Effective Case Management

Does active judicial case management mean that a judge is on the backs of the lawyers throughout the case? Not at all. Active judicial management means “hands off” in those cases where experienced lawyers are able to work together professionally, and “hands on” when they or their clients are misbehaving. I have found that the more time I spend on a case at its outset, the more time I end up saving later on (and money saved for the clients). Case management is all about prioritizing time and resources—devoting attention where needed. It “takes a village” to case manage, and a judge’s chamber staff is intimately involved. We try to meet biweekly to review a decisional list—our bible—which outlines those cases that need attention, particularly those with key dates for motion deadlines, rulings, and trials.

1. One Size Does Not Fit All

Each case is unique. The justice system needs to be flexible and considerate of lawyers and parties so that cases can proceed efficiently and cost effectively. These principles guide my case management. Judicial accessibility binds these principles together. This means a judge should be available throughout the life of a case—especially early in the process. How early? My staff reviews the complaint when it hits the docket. We review it for jurisdiction, making sure the case is appropriately brought in federal court and for any likely issues with service. Our standard order asks the lawyers to exchange information and documents, and it asks them to be prepared to discuss the case in some detail at the initial conference. We also make an assessment of whether settlement talks might be productive at the initial conference and, in this regard, inquire of counsel whether there already have been settlement discussions and if they would like to set aside extra time at the conference to either begin or continue such discussions.

2. In Defense of Disclosures

To ensure a meaningful conversation about a case schedule, I usually require Rule 26(a) disclosures prior to the initial conference. These disclosures cannot be superficial. Since documents and names are exchanged and each side’s cards are laid out on the table, this allows for more realistic input into scheduling dates. It also minimizes litigation expense by avoiding ritualistic or form discovery requests. By reviewing the pleadings beforehand and often asking counsel to rank claims and defenses, I too am prepared. “Speaking” complaints and answers—those that contain factual details—are helpful in fully understanding the case. In addition, I encourage the presence and participation of parties so that they have a firsthand view of my role and how the case will be handled. Counsel of course are free to recommend or request that party presence be excused to save costs or because in-person settlement talks are premature. Counsel can attend by phone if necessary to save costs.

3. E-discovery Made Easy

Complex cases, such as class action, patent, and antitrust are not amenable to early full disclosure. In those cases, disclosures are allowed in stages, and we require that e-discovery has parameters so that it does not delay (or worse, overtake) the case schedule. It is helpful to focus in terms of key players, not documents, and the computers they use (office computer, home laptop, Blackberry, etc.) and key phrases for the search. As long as information is preserved, a review can be postponed until necessary—a significant cost savings. I urge proportionate discovery in traditional cases and especially for complex cases—balancing the need for information with the burden, expense, and potential importance of that information.

4. Civility

To further minimize litigation cost, I strongly encourage cooperation among counsel. Studies have shown that collegiality among lawyers minimizes expense and allows for more efficient case handling. In this regard, I encourage counsel to abide by the American College of Trial Lawyers (ACTL) Code of Pretrial and Trial Conduct, copies of which sit in our chambers reception area. (Copies were provided to attendees at the recent U.S. Court of Appeals for the Sixth Circuit Judicial Conference.) I

Hon. Jack Zouhary was appointed a federal district court judge in Toledo, Ohio, in 2006. He currently serves on the Institute for the Advancement of the American Legal System (IAALS) / American College of Trial Lawyers (ACTL) Joint Task Force on Discovery, and recently was appointed to the Judicial Conference Committee on Rules of Practice and Procedure. He has served as a visiting federal judge in Michigan, Texas, Arizona, California, and Connecticut, and by assignment on the Sixth and Ninth Circuits Courts of Appeals.
also make it mandatory reading for lawyers who wish admission pro hac vice. If I detect excessive or combative filings, I will initiate a phone conference to address expectations.

5. Firm Trial Date

Dates that are set at the initial conference are not “dictated” by me; rather, they are agreed upon by all counsel. I adhere to the recommended track set forth in the local rules. This means if the case is designated “standard,” the trial date will usually occur within 15 months from the filing of the complaint. At the initial conference, we set the target month (and year) the trial will be held. Everyone knows there is a finish line. I tell the parties that I respect the importance of their case and that their trial date will not be “kicked” for another case. Later, when we agree on an exact date, I may offer a backup date within two weeks, depending upon the docket congestion. I have yet to disappoint. Trial lawyers and their clients appreciate a firm trial date and a ready judge.

6. Hold That Motion!

Summary disposition motions are not appropriate in every case, although some lawyers (or clients) feel otherwise. I usually do not assign a dispositive motion date at the initial conference. Litigants rarely know whether there is a disputed issue of material fact until at least some discovery has taken place. On the other hand, where there has been some pre-suit discovery (e.g., administrative proceedings in a wrongful termination case), the parties may already know there are disputed facts. We address the need for a dispositive motion date at a later telephone status where I inquire if the movant, after discovery, has a good-faith belief in the success of such a motion. I may encourage the parties to go straight to trial—bringing the case to conclusion quicker and at less cost than briefing motions. Sometimes a motion date is set as early as the initial conference—if there is a narrow legal issue that makes sense to decide while discovery is stayed. Again, Rule 16 allows for flexible approaches.

7. Pick and Choose

Not every motion requires a “law review” opinion. Frequently, lawyers prefer a prompt decision so the case can move forward (or not). Sometimes this is handled at the initial conference, a later telephone conference, or a hearing with a decision “spoken” from the bench followed by a brief order. This is especially true for discovery disputes, many of which can be resolved during a telephone conference. Our Local Rule 37.1 prohibits the filing of a motion to compel unless the parties represent that they have in good faith attempted to resolve their differences. And then, we require only a faxed joint letter setting forth the position of all parties. We follow up with a telephone call usually that same day or the next. On the rare occasion where the discovery dispute deserves briefing, we of course allow it. The key is to make every effort to prevent such a dispute from lingering or disrupting the case schedule.

8. What’s the Difference

Depending on the nature of the case, there may be one or more status telephone conferences. During these conferences, I receive an update from counsel, set additional dates, and address problems. I also use this time as an opportunity to slow down for a moment and determine whether parties wish to discuss settlement. It is my personal philosophy that whether a case settles or goes to trial is not as important as whether the parties at least consider settlement along the way. If the case is tried, the parties should know what their real differences are—is the gulf $1 or $1 million? And, of course, there are those cases
where the principle at stake demands a trial. A trial is not a failure of the system. After all, we are trial judges with courtrooms equipped with advanced technology and a jury box inviting use as envisioned by the Declaration of Independence and the U.S. Constitution.

9. Be Prepared

For me, the courtroom bench is my desk. One of my major disappointments has been the decline of the jury trial. As a consequence, when a case goes to trial, lawyers do not know what to do (e.g., how to effectively communicate with and persuade a jury). To provide lawyers with courtroom experience, especially young lawyers, and to keep the docket moving, I utilize hearings and oral arguments on certain dispositive motions. This allows lawyers the opportunity to appear in the courtroom and speak. It allows me an opportunity to resolve some sticky issues by pressing counsel at argument. I almost always send a list of questions to counsel before the hearing, and usually these questions help to focus the discussion. We do not use an appellate court format, but rather a point/counterpoint format that allows lawyers to reply directly and immediately to their opponent’s comments. This also allows me to test the facts or law.

10. First Impressions

During trial, we come in contact with the public yet again, either as parties or as jurors. We reach out to jurors in questionnaires before they come to the courthouse for the trial. By striving for a court system that provides a favorable jury experience, we can help to educate potential jurors, while helping to combat the negative impressions that are often felt by jurors. Also, conversations between the court and counsel before a trial begins help to minimize down time during trial, which in turn helps me devote my full attention to the trial. This procedure reflects a basic respect for the jurors’ time, as well as for the time and expense of the parties.

Conclusion

For those familiar with raising children, you know that each child is different, and treating them fairly does not mean you treat them each the same way. What works with one child may not work with another. The same can be said for cases on our docket. Each case is unique in some way, and may require different handling. And just as parents cannot take all the blame or credit for successful, well-adjusted children (whatever that means), neither can we as judges take all the blame or credit for successful case management. Trial lawyers and courthouse staff are an integral part of the team that must work together. Justice Stephen Breyer remarked recently that cases do not belong to the trial lawyer—they belong to the justice system. And the best perspective I have been given is that my courtroom is not mine—I am merely a placeholder until I hand the gavel to my successor.

We are, after all, a service industry, not unlike the family grocery store where I worked growing up. If we don’t “sell well,” customers will take their disputes elsewhere—outside the court system. This is exactly what happened over the past two decades with the rise of private mediation. But private mediation should be a supplement, not a substitute. Our court system, long admired and envied the world over, must be responsive to our “customers.” The courthouse doors deserve a welcome mat, which is why we try to rule on pretrial motions and deposition objections before trial, why we try to have a draft of the jury instructions on counsels’ table the first day of trial, and why I say to litigants at the last conference before trial begins: “My staff and I look forward to hosting you.”

MSPB continued from page 37

Under laws comparable to the Whistleblower Protection Act that mandate hearings before ALJs, appellants routinely prevail in far greater numbers than do those whose hearings are held by MSPB attorney examiners. For example, under an array of whistleblower statutes administered by the U.S. Department of Labor, ALJs routinely decide in favor of appellants in one-third of appeals. ALJs acting under other types of statutes and in other agencies have similar records.

ALJs are far from perfect, and in fact are frequently accused of pro-agency bias. The primary motive for such alleged bias is that despite their statutory independence and professionalism, the ALJs are likely to identify with their employer, the government. Lacking such protections and qualifications, MSPB lawyers are far more likely to indulge such inclinations, in addition to other inherent biases they may share with ALJs, such as class and race.

Does the fact that the board and the court of appeals routinely affirm the administrative judges suggest that their initial decisions, biased or not, are correct? No, because MSPB administrative judges have broad discretion to determine legal and factual issues, to control discovery, to admit or deny evidence and witnesses, to rule on objections—in essence, to create the record that is before the reviewing tribunal. Further, their factual findings are upheld if there is “substantial evidence” in the record to support them.

Finally, and perhaps most significantly, findings concerning the credibility of witnesses are deemed “virtually unreviewable.” Ironically, these highly deferential standards are taken directly from the APA standards of review as applied to hearings conducted by ALJs, and from appellate court rules regarding findings by U.S. district court judges.

Any reform that does not mandate hearings before qualified ALJs rather than agency lawyers, or at least eliminate appellate deference to the latter, will leave whistleblowers and other federal employees searching for due process and equal justice under the law.

Endnote

The Younger Lawyers Division is hosting its annual Supreme Court Admissions Ceremony at the Court. As in years past, we will be inviting the Justices to join us for a breakfast reception after the ceremony. Although the Younger Lawyers Division sponsors this event, FBA members of all ages and levels of practice are welcome to participate.

More information is available at www.fedbar.org.

Contact Sherwin Valerio at (571) 481-9100 or svalerio@fedbar.org with questions.
Focus On: Appellate Practice

by Andrew J. Tuck

Strategic Considerations for Appellees in the Federal Courts of Appeals

It is common for attorneys on appeal to treat the role of appellee as purely defensive—wait for the appellant to strike with its opening brief and respond with counterarguments in a response brief. This strategy overlooks both a trap for the unwary appellee and a potentially powerful weapon for the appellee.

First, the trap for the unwary follows from two well-accepted rules—(1) the appellee can raise alternative arguments in defense of the judgment below that the trial court either rejected or ignored (the so-called right for any reason rule), and (2) the appellant waives any argument in favor of reversal not raised in its opening brief. The logical combination of these two rules is that an appellee waives any arguments not raised under the right for any reason rule in its opening brief. This combination has the potential to be particularly devastating where a party wins in the trial court despite losing on a potentially meritorious argument, then simply defends the appeal without affirmatively raising the issues on which he lost. In that situation, in the event the appellate court reverses, the appellee may have foregone the opportunity to have appellate review of the issue on which he lost.

Second, in certain circumstances, the appellee can file a cross-appeal. A cross-appeal is a powerful weapon for the appellee because it gives the appellee an extra brief—the sur-reply—and the ever-important last word before oral argument or decision.

This article briefly summarizes these two strategic considerations, describes when each applies, and collects relevant rules and cases in various federal courts of appeals.

Appellate Waiver by the Appellee

Appellee waiver flows from two well-accepted rules. First, an appellant waives any argument in favor of reversal by not raising that argument in its opening brief.1 Second, the appellee need not simply respond to the arguments raised in an appellant’s brief; instead “an appellee may rely upon any matter appearing in the record in support of the judgment below.”2 Therefore, in its response brief the appellee can affirmatively raise arguments from the court below that the trial court either rejected or ignored. This practice provides the appellee with two powerful advantages: (1) it allows the appellee to present the court additional avenues to affirm the beneficial judgment, and (2) it forces the appellant to spend valuable pages in its reply brief responding to new issues rather than supporting its initial brief’s arguments in favor of reversal.

The logical combination of these two rules—appellant waiver-by-omission and “right for any reason”—presents a trap for the unwary appellee. As the U.S. Court of Appeals for the Eleventh Circuit recently held, if the appellee fails to raise an issue in its response brief, it is deemed to have abandoned that issue.3 In Hamilton v. Southland Christian School, as succinctly stated by Judge Ed Carnes, “[a] woman of childbearing age was hired as a teacher at a small Christian school. Then she got pregnant, married, and fired—in that order. Then she filed a lawsuit. She lost on summary judgment.”4 The trial court had rejected the school’s argument that the employment law “ministerial exception” barred the former teacher’s suit.5 The school defended the lower court’s judgment on appeal, but did not use the right for any reason rule to raise the ministerial exception as an alternative ground for affirming the judgment.6 After briefing was complete in Hamilton, the U.S. Supreme Court issued an opinion supporting the ministerial exception in Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission.7 The school in Hamilton filed a notice of supplemental authority directing the Eleventh Circuit to the Supreme Court’s decision in Hosanna-Tabor.8 The parties also addressed the ministerial exception at oral argument.9 The court, nonetheless, refused to consider the issue:

The requirement that issues be raised in a party’s brief on appeal promotes careful and correct decision making. It ensures that the opposing party has an opportunity to

Andrew J. Tuck is a senior associate in the Litigation & Trial Practice Group at Alston & Bird LLP and a member of the Atlanta Chapter of the Federal Bar Association. His complex litigation practice focuses on appeals, class actions, and antitrust matters. He would like to thank Alston & Bird summer associate and Georgetown law student Emily R. Chambers for her invaluable help researching the issues discussed in this article. © 2013 Andrew J. Tuck. All rights reserved.
reflect upon and respond in writing to the arguments that his adversary is raising. And it gives the appellate court the benefit of written arguments and provides the court and the parties with an opportunity to prepare for oral argument with the opposing positions and arguments in mind.\textsuperscript{10}

Two other circuits—the U.S. Courts of Appeals for the Seventh and Tenth Circuits—have (in passing and without analysis) reached somewhat similar conclusions regarding appellee waiver. In the U.S. Court of Appeals for the Fourth Circuit, Judge Hamilton has dissented and urged application of an appellee-waiver rule.\textsuperscript{11}

In contrast, the U.S. Courts of Appeals for the Second, Fourth, Fifth, and Sixth Circuits refuse to apply a waiver rule to appellees.\textsuperscript{12} These courts have allowed application of the right for any reason rule even where the alternative argument in favor of affirming is first raised at oral argument.\textsuperscript{13}

Additionally, in the U.S. Courts of Appeals for the Third, Eighth, District of Columbia (D.C.), and Federal Circuits, an appellee’s failure to raise alternative grounds for affirmance under the right for any reason rule will have no effect on its ability to assert those grounds in the district court on reversal or in a second appeal.\textsuperscript{14} These courts reason that applying a waiver rule to prevent appellees from raising arguments in subsequent appeals that could have been raised under the right for any reason rule in a previous appeal is inappropriate because “[a]ppellees do not select the issues to be appealed” and “are at a procedural disadvantage in appeals because they can neither file reply briefs nor choose when to appeal.”\textsuperscript{15} Though not explicitly accepting a rule that appellees do not waive arguments in their initial appeal by failing to raise them, these courts’ reasoning suggests they would not apply such a rule, and confirm that even were such a rule applied, it would not bar eventual appellate consideration of the waived arguments in a subsequent appeal.

In summary, appellees in all circuits can and should affirmatively raise issues decided adversely to their client (or ignored by the trial court) under the right for any reason rule. The practice is procedurally proper, presents the court additional reasons why a beneficial judgment was correct, and lessens the impact of the appellant’s reply brief by forcing the appellant to address new issues in reply rather than supporting its arguments in favor of reversal. In addition, in the Eleventh Circuit, and possibly in the Seventh and Tenth Circuits, failing to raise right for any reason arguments could result in waiver.

**Cross-Appeals**

Cross-appeals are a potent weapon for an appellee for the simple reason that they provide the appellee an additional brief, and the additional brief comes last in time.\textsuperscript{16} Once the losing party files a notice of appeal, the appellee can choose to file a brief in response, or file a cross-appeal.\textsuperscript{17} The appellee must file a cross-appeal to raise an issue that will alter the judgment in the appellee’s favor.\textsuperscript{18} Without a cross-appeal, “the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary.”\textsuperscript{19} Said differently, a party granted the entirety of the relief it sought in the trial court is not “aggrieved” for purposes of appellate standing, and therefore cannot file its own appeal.\textsuperscript{20}

There are multiple ways a prevailing party can seek to amend the judgment in its favor, necessitating a cross-appeal: seeking to enlarge or reduce the measure of damages,\textsuperscript{21} seeking enhanced damages or punitive damages,\textsuperscript{22} seeking attorneys fees (or an alternative measure of fees),\textsuperscript{23} challenging an award of attorneys fees,\textsuperscript{24} or seeking an alternative prejudgment interest rate.\textsuperscript{25} An appellee can also cross-appeal where a challenged
portion of the lower court’s ruling would have collateral estoppel effect in subsequent litigation.26

In addition, some circuits permit an appellee to file a conditional cross-appeal.27 The conditional cross-appeal preserves issues that could become adverse to the appellee should the appellate court vacate or modify the district court’s judgment on related issues.28 Other courts, however, have explicitly rejected conditional cross-appeals.29

Other than the few circuits allowing a conditional cross-appeal, a cross-appeal that does not seek to expand or modify a judgment in the cross-appellant’s favor is generally improper.30 Moreover, courts disfavor cross-appeals, as Judge Frank H. Easterbrook has explained:

Cross-appeals for the sole purpose of making an argument in support of the judgment are worse than unnecessary. They disrupt the briefing schedule, increasing from three to four the number of briefs, and they make the case less readily understandable to the judges. The arguments will be distributed over more papers, which also tend to be longer. Unless a party requests the alteration of the judgment in its favor, it should not file a notice of appeal.31

In summary, an appellee derives the procedural benefit of an additional brief from a cross-appeal, and appellees risk waiving the ability to challenge undesirable portions of a favorable judgment by not cross-appealing. Therefore, an appellee should always carefully consider whether there is a good-faith basis to file a cross-appeal and balance the possible exercise of that right against the reasons courts have articulated for disfavoring cross-appeals.

Conclusion

In its response brief, an appellee should raise any strong alternative arguments supporting the judgment in its favor, even those rejected or ignored by the trial court, using the right for any reason rule. Not only is it beneficial to raise the alternative arguments, failure to raise these arguments will, in some circuits, result in a waiver. In addition, in analyzing the appeal, an appellee should determine whether it can arguably be considered to be requesting an alteration of the favorable judgment. If it can, there is a good-faith basis to file a cross-appeal, and the appellee should balance the procedural benefits to be gained by filing a cross-appeal against the disruptive issues that have caused some courts to disfavor cross-appeals. 32

Endnotes

2Blem v. Bacon, 457 U.S. 132, 137 n.5 (1982); see also United States v. American Ry. Express Co., 265 U.S. 425, 435 (1924) (“it is likewise settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it.”).
4Id. at 1317.
5Id. at 1318.
6Id.
8Id. at 1319.
9Id.
10Id.
12International Ore & Fertilizer Corp. v. SGS Control Servs., Inc., 38 F.3d 1279, 1286 (2d Cir. 1994) (“The [right for any reason] rule applies even when the alternate grounds were not asserted until the court’s questioning at oral argument.”); accord Kennedy v. City of Villa Hills, Ky., 635 F.3d 210, 214 n.2 (6th Cir. 2011); Hillman, 263 F.3d at 343 n.6; Shell Offshore, Inc. v. Director, Office of Workers’ Comp. Programs, Dept’ of Labor, 122 F.3d 312, 317 (5th Cir. 1997). But see Burnley v. City of San Antonio, 470 F.3d 189, 200 n.10 (5th Cir. 2006) (appellee waived argument for appellate attorneys fees by failing to sufficiently brief).
13International Ore, 38 F.3d at 1286.
15Laitram, 115 F.3d at 954.
17Id. 28(b), 28.1(c)(2).
20Klamath Strategic Inv. Fund v. United States, 568 F. 3d 537, 546 (5th Cir. 2009); see also Perez v. Ledesma, 401 U.S. 82, 87 n.3 (1971).
21See International Ore & Fertilizer Corp. v. SGS Control Servs., Inc., 38 F.3d 1279, 1286 (2d Cir. 1994) (refusing to address appellee argument in favor of additional damages because appellee did not cross appeal); Zapico v. Bucyrus-Erie...
Co., 579 F.2d 714, 725-26 (2d Cir. 1978) (Friendly, J.) (refusing to reduce damages because party failed to cross-appeal); Aerospace Servs. Int’l v. LPA Group, 57 F.3d 1002, 1004 n.3 (11th Cir. 1995) (requiring cross-appeal to challenge calculation of damage).

22Laitram Corp. v. NEC Corp., 115 F.3d 947, 955 (Fed. Cir. 1997).

23Id.


25Speaks v. Trikorka Lloyd P.T., 838 F.2d 1436, 1439 (5th Cir. 1988).

26In re DES Litig., 7 F.3d 20, 23 (2d Cir. 1993) (recognizing that prevailing party has standing to challenge lower court’s rulings that would have adverse collateral estoppel effect, but refusing to apply that rule to trial court’s personal jurisdiction ruling, which would not have such an effect); cf. Camreta v. Greene, 131 S. Ct. 2020, 2028-33 (2011) (holding that Supreme Court can review appeals from § 1983 defendants who were held to have violated the U.S. Constitution but were entitled to qualified immunity).


28See, e.g., Nautilus Group, Inc. v. Icon Health & Fitness, Inc., 437 F.3d 1376, 1378 (Fed. Cir. 2006).

29Aventis Pharma S.A. v. Hospira, Inc., 637 F.3d 1341, 1343 (Fed. Cir. 2011), aff’d, 675 F.3d 1324 (Fed. Cir. 2012); Marcatante v. City of Chicago, Ill., 657 F.3d 433, 438 (7th Cir. 2011); Mitchell Partners, Ltd. P’ship. v. Irex Corp., 656 F.3d 201, 208 n.7 (3d Cir. 2011); National Union Fire Ins. Co. of Pittsburgh, Pa. v. West Lake Acad., 548 F.3d 8, 23 (1st Cir. 2008); Leprino Foods Co. v. Factory Mut. Ins. Co., 453 F.3d 1281 (10th Cir. 2006); In re Sims, 994 F.2d 210, 214 (5th Cir. 1993).

30Jordan v. Duff & Phelps, Inc., 815 F.2d 429, 439 (7th Cir. 1987); accord Nautilus Group, Inc., 437 F.3d at 1377.
A History
of the
Criminal Justice Act of 1964

by Geoffrey Cheshire
“The right to competent counsel must be assured to every man accused of crime in Federal court, regardless of his means.”

—President John F. Kennedy, State of the Union Address (Jan. 14, 1963)

“[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth.”


“By its impact on the administration of criminal justice, it is quite possible that the act will become recognized and rank as one of the major legislative achievements in a decade spanning both the New Frontier and the Great Society and crowded with congressional actions.”


Captain Thomas Preston, from his jail cell off Queen Street in the Boston Gaol, believed he that had little prospect other than the death penalty, “loss of life in a very ignominious manner.” Boston in 1770 was a time of great stress, both internally and externally. Relations between its citizens and forces manning the British garrison were extremely tense. Conflict between the colonies and the ruling government in London had brought matters to the precipice of armed conflict. Stormy debates on the rights of citizens and the nature of freedom crackled. An atmosphere of mistrust and suspicion prevailed. During these acute tensions, a group of British soldiers, with Captain Preston as their commanding officer, fired into a crowd of angry Bostonians, killing five. The soldiers were set upon, and mob anger threatened to overbear the rule of law.

A Boston lawyer was called upon to risk career and reputation to defend Preston and the British soldiers in an American courtroom before American jurors. This lawyer was no British loyalist seeking to curry favor with the Crown, but a future Founding Father, signer of the Declaration of Independence, and second President of the United States. His name was John Adams.

Adams devoted a year of his life to this unpopular cause. At stake was a principle that lies at the foundation of law in a free society—that justice for all is secure only when every accused, no matter how unpopular the cause, how low his station, or how heinous his charge, receives a fair and impartial trial: fairness guarded with the representation of able counsel.

With Adams’ assistance, and the “stubborn” facts of the cases (among them that no evidence of an order to fire was proved), Captain Preston and six of the soldiers were acquitted outright. Two of the soldiers who had fired directly into the crowd, charged with capital murder, received the lesser verdict of manslaughter.

For this work, Adams was paid 18 guineas by the soldiers, barely enough to buy a pair of shoes.

Many observers, while acknowledging the legal setback, felt the vindication of the American judicial system a worthy compensation. Samuel Cooper wrote to Benjamin Franklin that the trials should, “wipe off the imputation of our being so violent and blood-thirsty a people, as not to permit law and justice to take place on the side of unpopular men.”

In England, the rule had been that a defendant was only afforded the right to counsel when charged with a misdemeanor. No right to representation was afforded in cases of treason or felony. The judge, apologists reasoned, had the duty to see that proceedings were regular, witnesses were examined, the defendant was advised of her rights, and that she was not unjustly convicted. Sir Edward Coke confidently recorded in 1669 that when a serious crime was charged, “after the plea of not guilty, the petitioner can have no counsel assigned to him … nor defend him” as “the testimonies and the proofs of the offence ought to be so clear and manifest, as there can be no defence of it.”

However, William Blackstone criticized this optimistic conceit, labeling it, “not at all of a piece with the rest of the humane treatment of prisoners by the English law. For upon what face of reason can that assistance be denied to save the life of a man, which yet is allowed him in prosecutions for every petty trespass?”

In contrast to English common-law restrictions, the right to counsel in any criminal case has long been the American tradition. At least 12 of the 13 original colonies contained such guarantees, a right that continued through the post-revolutionary period. The Judiciary Act of 1789 provided that “in all courts of the United States, the parties may plead and manage their own causes personally or by assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct causes therein.” In 1790, the federal Crimes Act guaranteed that "[e]very person indicted of treason or other capitol crime, shall be allowed to make his full defense by counsel learned in the law; and the court before which he is tried, or some judge thereof, shall immediately, upon his request assign him such counsel not exceeding two, as he may desire, and
they shall have access to him at all reasonable hours.7

The right to counsel in federal criminal cases became a constitutional guarantee with the ratification of the Bill of Rights in 1791. The Sixth Amendment provides that “in all criminal prosecutions, the accused shall enjoy the right … to have the assistance of counsel for his defense.”

However, the Sixth Amendment’s phrasing begged a crucial question. What if a defendant lacked sufficient funds to hire counsel? For over 100 years, the answer was: too bad.

During the evolution of the right to counsel, the adversarial process was frequently subject to failure where one side was unable to present its case effectively, either as to the law or in regard to the facts, during both the pretrial and trial stages. It was not until 1932 that the U.S. Supreme Court ruled in Powell v. Alabama,4 that the right to counsel was of such a fundamental nature that its denial by a state, under certain aggravating circumstances, constituted a violation of the Fourteenth Amendment. Powell did not hold that the Sixth Amendment applied in all state proceedings, but rather that due process required the assistance of counsel “at least in cases like the present.” To deny poor, illiterate defendants facing the death penalty legal representation “would be little short of judicial murder.”9

In July 1939, Virgil Cooke was 4 years into an 11-year federal sentence. From his cell in the U.S. penitentiary at McNeil Island, Washington, he penned a petition for relief on grounds that he had been denied the assistance of a lawyer in violation of the Sixth Amendment. On March 5, 1935, Cooke had been arraigned, pleaded guilty, and was sentenced. He had not requested counsel, and the court did not advise him of the right. Cooke’s hopes for relief were seemingly well founded. The Supreme Court had recently held in Johnson v. Zerbst,10 that the failure to provide counsel to an indigent defendant in federal court was a fundamental violation of the rights of an accused.

The two defendants in Zerbst had been arrested on charges of passing counterfeit money. They were informed of the indictment, arraigned, tried, convicted, and sentenced to four and a half years imprisonment on the same day, all without the assistance of counsel. During their arraignment, the court asked whether they were represented by a lawyer. The two replied they were not. The court asked if they were ready for trial. Both replied they were. They did not ask the court to appoint counsel, and the court did not advise them of the right to appointed counsel.

The Supreme Court reversed their convictions. Justice Hugo Black, for the majority, emphasized that the right to counsel was so important as to be “necessary to insure fundamental human rights of life and liberty.” He continued:

The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not “still be done.” It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly and necessary to the lawyer, to the untrained layman may appear intricate, complex and mysterious.11

The Sixth Amendment therefore guarantees the accused the right to the assistance of counsel. “[C]ompliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court’s authority to deprive an accused of his life or liberty.”

With the backing of the Supreme Court for his argument, Cooke must have felt some confidence in his chances. Not so. The district court denied his petition, stating,

There is no requirement that counsel represent a defendant when he intends to enter a plea of guilty. The entry of such a plea indicates that he knows with what he is charged. It is tantamount to a waiver, not only of the right to counsel, but of the right to trial by a jury.22

The U.S. Court of Appeals for the Ninth Circuit concurred, with a touch of pique. “There is nothing in the law of the land as interpreted by the much misread Zerbst opinion that requires a person, free from disability, to have counsel in a United States court.”23 A practical right to counsel in the federal courts would yet be long in coming.

In 1944, U.S. district courts adopted the Federal Rules of Criminal Procedure that stated:

If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel.14

Attorneys in private practice were assigned to represent indigent defendants on a case-by-case basis. Such assignment systems varied widely in their “success in spreading the workload throughout the bar and in picking a suitable lawyer for a particular case.”15 In a few urban districts, privately financed legal aid societies or voluntary defender organizations had been established to take appointments in federal court. But these were the exceptions to the ad hoc rule.

However, Zerbst called for effective and meaningful representation of the accused—representation which frequently required incurring expenses and employing experts and other service providers. Lacking any mechanism to provide it, assigned counsel were obliged to use their own resources. Actions by lawyers for fees were universally rejected. In Nabb v. United States,16 for example, the U.S. Court of Claims held that the Sixth Amendment is a “declaration of a right in the accused, but not of any liability on the part of the United States.” Instead, the lawyer, as an officer of the court, was expected to perform such representations as a professional obligation.

Much criticism was leveled at this state of affairs, which not only imposed hardships upon assigned attorneys, but resulted in inadequate representation of poor people in the federal courts. An article in the ABA Journal observed in 1959 that this “volunteer” system occasionally procured distinguished lawyers of talent and proficiency, but that most assignments fell to young lawyers with little experience, limited budgets, and no hope of reimbursement, even for out-of-pocket expenses.

The result of all this is that in many instances a person who
has been charged with a crime before a federal court and who cannot afford to hire competent counsel will receive a perfunctory or ineffective defense. The result is, in effect, a double standard of justice: one for those who can afford to retain unusually competent and effective lawyers and other for those who must rely on the legal counsel provided to them by a court assignment.  

James V. Bennett, director of the Bureau of Prisons from 1937–1964 wrote in 1949 that he,

hears almost every prisoner complain about the way he has been represented at his trial and wonders whether in fact his right to counsel is, as so frequently charged, merely an empty gesture. And it is not so much at the actual trial of important and serious cases where the right to counsel has a hollow ring as during the preliminary proceedings, the fixing of sentence and the ultimate disposition of minor offenders who are without friends or funds.

Bennett also observed that during this period, the bulk of the American bar shunned criminal practice, leaving judges with few lawyers to choose from when they did seek to appoint lawyers for poor defendants. Even more starkly, Bennett believed that many of his prisoners refused to be represented under the assigned counsel system because they feared such counsel would do them more harm than good.

Even this substandard representation was frequently absent. Statistics for 1963 showed that less than one-third of defendants in federal criminal cases had counsel assigned to them.

Frustrated, some courts began to push for change within the context of individual cases. In United States v. Germany, the court dismissed an indictment because the government refused to pay the expense of assigned counsel to interview witnesses or view the scene of the alleged offense. The court found that a failure to provide such resources deprived the defendant of the effective assistance of counsel, and thus violated the Sixth Amendment.

Seeming to agree, then U.S. Attorney General Robert F. Kennedy stated in a 1963 hearing before the U.S. House of Representatives’ Committee on the Judiciary: “There are going to be cases thrown out all over the country if this [case] is followed and it makes a good deal of sense, I must admit.”

The conclusion for many federal criminal justice administrators, participants, and observers was that a national federal defender system was needed. In September 1937, the Judicial Conference of the United States adopted, at the recommendation of Attorney General Homer Cummings, a resolution supporting the creation of a public defender system in districts where the volume of cases would justify the position. In less busy locales, the Judicial Conference recommended that counsel be appointed on an individual basis and compensated when services involved substantial time or effort.

In 1941, then Attorney General (and later Supreme Court Associate Justice) Robert H. Jackson came to a similar conclusion, stating:

To impecunious defendants in criminal cases, as to others, the Constitution guarantees a right to counsel which the Supreme Court has broadly construed. It is frequently difficult to protect that right under the present system of assigned counsel. Yet the assistance of competent counsel for the proper protection of the defendant’s rights is the concern of the Government as much as an efficient and zealous prosecution. The problem has been the subject of a thorough study in the Department of Justice. The result of this study has been the conclusion that the office of public defender should be established in the federal courts. Such an office has existed for a number of years in various states and cities where it has functioned with marked success. Its establishment in the federal system would materially further the impartial administration of justice.

The Judicial Conference approved, in September 1945, the report of a study on the provision of counsel led by New York Circuit Court Judge Augustus N. Hand. That report concluded that the mere payment of fees to appointed counsel would not solve the problem of indigent defense in metropolitan centers where numerous poor people were accused of crimes. For larger cities, the conference recommended the appointment of salaried
federal public defenders. Meanwhile, the Nuremberg Trials of major Nazi war criminals, led by Justice Jackson as the chief U.S. prosecutor, began in November 1945 with compensated defense counsel appointed by the tribunal,\(^2^6\) a protection U.S. citizens continued to lack in their own federal courts. Judicial Conference support for the federal defender program was renewed in 1946 and 1947.

In February 1947, Henry P. Chandler, director of the Administrative Office of U.S. Courts, wrote to the U.S. Senate Judiciary Committee and summarized the opinion of informed observers that the lack of compensation for appointed counsel is a “defect in the Federal judicial system” that should be corrected.\(^2^6\) Bureau of Prisons Director Bennett reported in 1949 that “most wardens and prison administrators have come to the conclusion that the public defender system gives living actuality to the right to counsel better than any other plan so far suggested.”\(^2^7\)

In March 1949, the Senate Judiciary Committee reported out a short bill for the provision of counsel to indigent defendants. It provided:

That whenever a defendant shall be arraigned in any district court of the United States upon the charge that he has committed any felony or misdemeanor, and shall request the court to appoint counsel to assist his defense, and shall by his own oath, or such other proof as may be required, satisfy the court that he is unable, by reason of poverty, to procure counsel, the court shall appoint counsel, not exceeding two, for such defendant, to be paid upon order of the court by the United States marshal, $15 for service in the preparing for trial or plea and not to exceed $20 per day for each counsel, for the number of days such counsel is actually employed in court upon the trial.\(^2^8\)

The committee’s report, prepared in conjunction with the bill, explained:

Many criminal cases have been tried in the United States district courts wherein the defendant has not had the financial ability to procure an attorney to defend him, and the United States district judges had, in those cases, appointed attorneys to represent the defendant at his plea and at his trial. The services of the attorneys have always been gratis so that the time and labor in preparation of such cases and for the participation in the trial has placed upon them a severe hardship. In many instances, the attorneys have been required to travel distances from their offices in order properly to defend the clients that have come to them through appointment by the judges of the United States district courts. It is felt that it is not proper to require attorneys to give their services in such cases without some compensation, particularly in view of the fact that in addition to the time and labor there is most generally some expense involved.\(^2^9\)

The bill languished on the unanimous consent calendar, a significant sticking point being the creation of a federal defender system.

In a 1951 law review article, Professor David Fellman lamented:

It is difficult to understand why such a modest bill of such obvious merit should take such a long time getting through Congress. In the interests of both indigent defendants and the legal profession, it ought to be adopted.\(^3^0\)

In fact, the “long time getting through Congress” was only beginning.

On Feb. 17, 1953, Rep. Emanuel Celler (D-N.Y.) opened a hearing on the representation of indigent defendants in federal criminal cases with the observation:

I have been offering a bill for a public defender for indigent defendants in criminal cases in the United States district courts for many, many years, and I am very happy to note that some action is now being taken on the bill. ... [I]t is like the story they tell in east India, that if you rub a bar of steel long enough, you can finally make a needle out of it, and I hope we can make a needle out of this bar of steel. ... Representative Celler further remarked that the federal public defender bill was “one of the most important and immediate problems confronting … this session of the 83d Congress.”\(^3^1\)

In that hearing, testimony established that 36,600 criminal cases were disposed of by the federal district courts. Of those, 4,000 went to trial. In one-third of the cases, the defendant could not afford counsel. Representative Celler commented that such a result was “startling,” and “indicates a strong possibility for attack on our system of criminal jurisprudence.”

No measure advanced in either body of Congress, however, until the Senate passed a bill (S. 3275) late in 1958 which authorized each U.S. district court to appoint a federal public defender. The federal defender provision received Senate approval without controversy, likely reflecting the multi-year advocacy by the Judicial Conference, the U.S. Department of Justice (DOJ), and others. Unfortunately, passage came too late in the session for House consideration.

On April 28, 1959, S. 895 was reported out of the Senate Judiciary Committee. Identical to the 1949 bill, conservative Sen. Roman Hruska (R-Neb.) observed that the proposed legislation “may not, in this form, fulfill all the ambitions or realizes all the desires of a public defender system. ... But to the end that it safeguards and promotes the rights established under the [Sixth] Amendment to the Constitution, the bill deserves the unanimous support of the Senate.”\(^3^2\) Notwithstanding a growing consensus on the need for such legislation, the bill died in the House.

In May 1959, the House Judiciary Committee held hearings relating to four bills addressing indigent representation in federal court. Each bill had a different approach to the problem. The chairman of the House committee sponsored a counterpart of the Senate bill (H.R. 4185), but strong opposition to the federal defender options remained. A rival bill providing only for compensation to private, appointed counsel was supported by a majority of the committee. This alternate bill had no cap on the rate of compensation, but its sponsor indicated he would acquiesce to such a cap if that would assure passage.

The House measures failed to receive further action toward
passage, however, and in 1960 the committee ordered further study of ensuring the right to representation in federal court. The initial study, title Representation for Indigent Defendants in Federal Criminal Cases, failed to sway enough members of the committee, and the chairman tabled consideration of the measures for the time being.

While public defender legislation for the district courts stalled again, Congress passed the District of Columbia Legal Aid Act of 1960. This act, foreshadowing future national legislation, established a mixed system of a legal aid agency alongside private, appointed members of the bar. In effect, the act created a public defender program for Washington, D.C.

Sen. Hruska, along with fellow “rock-ribbed conservative Republican” Sen. Norris Cotton of New Hampshire, Sen. Kenneth Keating (R-N.Y.), and later Democratic Sen. Sam Ervin of North Carolina, introduced S. 1484 in March 1961. This bill revised the measure passed by the Senate in the last congress by incorporating a number of recommendations made by the House report.

The test for eligibility was whether a defendant was “financially unable to employ counsel,” notwithstanding the use of “indigent” in other parts of the bill. The bill included a public defender provision, and these public defenders would represent defendants at all stages, beginning at the preliminary hearing. The federal defender’s salary would be comparable to that paid to the U.S. attorney for the same district. Reimbursable expenses included costs for experts and other services “reasonably incurred.” Individually appointed attorneys were to have at least five years of experience, and their compensation was not to exceed $50 per day. On appeal, counsel would be provided in any matter “not plainly frivolous.”

The Judicial Conference’s Criminal Law Committee met in January 1962 to discuss the status of the indigent defense legislation then pending before Congress. The committee made recommendations for amendments, and Sen. Hruska introduced a modified bill (S. 2900). That bill would have expanded representation to defendants, regardless of their means, whose cases were sufficiently unpopular to prevent them from securing adequate representation. All eligible defendants would be afforded counsel during appeals, and the daily maximum for private lawyers was increased to $100. The purpose of these last two changes was to support continuity of representation and attract qualified counsel.

The committee went on to make further changes before reporting out the bill, including the requirement that public defenders be confirmed by the Senate and providing reimbursement for investigators in appointed cases. Public defenders were barred from accepting payments from a defendant without prior court approval. Again, the Senate passed the bill too late for House consideration, and nothing more than a record was made for the benefit of the next Congress.

President John F. Kennedy gave his final State of the Union address to a joint session of Congress on Jan. 14, 1963. Included in this address was the assertion that the “right to competent counsel must be assured to every man accused of crime in federal court, regardless of his means.”

On the afternoon of President Kennedy’s address, Sen. Hruska again introduced his bill to secure adequate representation of counsel. This bill, S. 63, was essentially the same bill passed by the Senate the previous October.

Sen. Hruska’s accompanying remarks sought to build on the momentum created by the President’s call to action.

To those of us who have urged passage of this bill, and have worked to that end for several years, the remarks of the President in his State of the Union message this afternoon were understandably gratifying. The expressed declaration of administration support of this effort, coupled with that of the American Bar Association [the ABA had made the passage of a public defender bill its legislative project of the year] and the Federal judiciary will, I am confident, increase the prospects for passage by both Houses in the current session.

In April 1961, shortly after taking office, Attorney General Kennedy had appointed a special committee to study the problem of indigent
defense in the federal system. It was dubbed the “Allen Committee” after its chair, University of Michigan Law School Professor Francis A. Allen.

The Allen Committee report, Poverty and the Administration of Federal Criminal Justice, took a broad look at access to justice by low-income citizens in the federal system. A major area of investigation was adequate representation by qualified counsel. Many of its recommendations were incorporated into the language and structure of the Criminal Justice Act of 1964.

First, the report expanded “local options” for providing counsel. Along with private attorneys and salaried public defenders, the report recommended the option of bar associations, legal aid societies, and local defender organizations. Second, the report recommended expanded services available to defense counsel from investigators and experts to “investigative, expert and other services necessary to an adequate defense.” Third, representation was to be provided at every stage of the proceeding, from initial appearance through a final appeal, to ensure early access to, and continuity of, counsel. Fourth, eligibility for appointment of counsel was changed from “indigence” to “persons financially unable to obtain an adequate defense,” and supported the notion of partial eligibility.

The report’s call for action was forceful and direct:

Although Johnson v. Zerbst did not resolve all issues relating to the constitutional rights of counsel in the federal courts, the fundamental obligation of the federal government was clearly and unmistakably indicated. It is a matter of legitimate concern therefore, to discover that, except for legislation restricted in its application to the District of Columbia, Congress has as yet done little to implement the constitutional commands by placing the defense of financially disadvantaged persons on a systematic and satisfactory basis and that the federal statutes leave us little closer to the solution of these basic problems today than was true a quarter-century ago when Johnson v. Zerbst was decided.

The report was sent to Congress with a cover letter from Attorney General Kennedy to President Kennedy dated March 6, 1963. The cover letter referenced the President’s State of the Union message, summarized the long struggle for adequate access to counsel for the poor, cited court decisions mandating such representation, catalogued the many deficiencies of the current system, and outlined the major features of the proposed legislation.

The President included a message to the vice president and the Speaker of the House dated March 8, 1963. He recommended that Congress promptly consider the legislation, stating: “Its passage will be a giant stride forward in removing the factor of financial resources from the balance of justice.”

Legislation based on the Allen Committee recommendations was introduced by Sens. Hruska and James Eastland (D-Miss.) as S. 1057 on March 11, 1963. The same bill was introduced by House Judiciary Committee Chairman Celler on March 13, 1963, as H.R. 4816. Both committees began hearings. In the Senate, opinion was broadly supportive of the federal public defender system, with most debate centered on keeping the system modest enough to overcome House objections. In the House, however, the public defender option ran into opposition serious enough to threaten its inclusion.

The strategy in the Senate was to move the bill through as quickly as possible. Delayed action would be a disadvantage if the measure went to conference over the public defender provision. Working with lawyers from the Deputy Attorney General’s Office, Sen. Hruska revised S. 1057 to limit the federal defender option to the 18 districts with 150 or more appointments.

Because of these and other changes, a substitute bill, S. 1057, was reported unanimously on July 10, 1963, and was passed within the month. The bill was described by Senator Hruska during debate as

the product not only of past experience with public defender legislation introduced in this body but of extended hearings before the Judiciary Committee and consultation with ... colleagues on both sides of the aisle and in both Chambers of the Congress. It is carefully drawn to avoid abuse while seeking to remedy a chronic problem of serious proportion in our Federal courts... We are mindful, on the other hand, that the assumption of this responsibility will not be without costs. But these costs ... are rightfully to be borne if the realization—not merely the aspiration—of equal treatment for every litigant is to be achieved.

The Judiciary Committee reported the bill to the full Senate in late October 1963, but the measure failed to proceed further that year.

On the House side, debate took place on Jan. 15, 1964, and displayed a full spectrum of opinions. The public defender system was discussed at length, but measures introduced into the Senate bill were never incorporated. Further, the more limited scope of eligibility was retained, despite the problem of changed circumstances and partial eligibility reforms. Finally, ceilings on payments remained in place without alteration. This House version, with its significant limitations, was passed, and the bill proceeded to conference to resolve the differences.

Conference finally took place in August 1964, delayed in part by congressional debate over civil rights legislation. During this pause, conferees had explored compromises on the major differences between the two bills. Informal agreement was reached as to all the points except for the major dispute—the establishment of a federal public defender program. Senate conferees, among them Sen. Hruska, fought hard for the federal public defender program. In an effort to at least plant the seed, their final proposal would have started a defender program on an experimental basis to test, in actual practice, the advantages or shortcomings of such system. To retain congressional control of the process, a five-year lifespan was proposed, and the program would sunset if not renewed or expanded at that time. Further, the program would be limited to five districts, each of which would have to have at least 150 annual appointments. The plan would have to be approved by the Judicial Conference, and supplemented by an appointed counsel system to preserve the vitality of the private bar.

House delegates were not swayed by any of these modifications. The best the Senate delegates could procure was an invitation in the conference report for the DOJ to continue its study of the federal public defender system in view of the approved program and following experience with the new system in practice. The department was urged to cooperate with the Judicial
Conference to evaluate the need for a federal defender option going forward. After 27 years of agonizingly slow progress, the possibility of a federal defender program for the U.S. courts again failed to materialize.

On Aug. 6, 1964, the conference committee submitted their report to a receptive Congress. The House accepted the report first. Rep. Arch Moore (R-W.V.) commented: “I am proud that I had a significant hand in guiding this legislation and that it was my bill … that the Judiciary Committee reported to the House. ...” The Senate took action that same afternoon. Sen. Hruska, as usual, championed the cause.

The passage of The Criminal Justice Act of 1964, after 30 years of struggle, was hailed as a watershed moment in the history of federal criminal justice. Even its timing was propitious. The act was passed on Aug. 6, 1963, just one day after Clarence Earl Gideon was acquitted, with the assistance of his appointed lawyer, after remand from the Supreme Court’s landmark right to counsel decision in Gideon v. Wainwright, 372 U.S. 335 (1963).

Endnotes

17 Publications of the colonial society of Massachusetts 10 (1905).


2Paul Aron, We Hold These Truths . . . And Other Words That Made America 13 (2009).


4William Blackstone, Commentaries *2592 (Bancroft-Whitney ed. 1916).

5Id. at 72–73.

6Coke v. Swope, 109 F.2d 955 (9th Cir. 1940) (citation omitted).


91 Cl. Ct. 173 (1864).

10David Mars, The Problem of the Indigent Accused: Public
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Federal Reentry Courts and Other New Models of Supervision

by Hon. Laurel Beeler
Drug courts have been a mainstay in state courts for over 20 years. These courts were developed in part in reaction to a docket collapsing under the weight of cases related to drug or alcohol abuse. Faced with a repeating pattern of incarceration and re-offending, state courts embraced evidence-based supervision and treatment practices to break the cycle, treat substance abuse and other risk factors associated with crime, achieve rehabilitation, and reduce recidivism. State drug courts evolved into a non-adversarial forum for problem-solving and collaboration by all stakeholders in the criminal justice system: judges, law enforcement, prosecutors, defendants, probation officers, treatment providers, and community members.

Federal courts, by contrast, are relative newcomers to this model of supervision and treatment. Unlike state courts, which often deploy targeted strategies as an alternative to incarceration, federal drug courts employ similar strategies to facilitate re-entry, “the process of leaving prison and returning to society.” The U.S. Department of Justice and the Administrative Office of the U.S. Courts, which also encompasses the Office of Defender Services, have made strong commitments to re-entry programs, recognizing that their comprehensive and collaborative approach is a more efficient and cost-effective means of protecting public safety and creating more successful outcomes for former inmates.

This article examines new models in federal supervision, including re-entry courts, diversion courts, and the cognitive-based supervision model called “The Courage to Change.”

Evidence-Based Practices

The federal and state models rely on evidence-based practices to target interventions to the criminogenic needs of defendants to achieve lower recidivism and better public safety. In this context, risk means an individual’s resistance to standard interventions and thus a risk of continuing to engage in substance abuse and related crime. Among drug defendants, for example, risk factors include a younger age, male gender, early onset of substance abuse or delinquency, prior felony convictions, previously unsuccessful attempts at treatment, and antisocial peers or affiliations. The drug court model targets persons with these risk factors, supervises them intensively, and holds them accountable for their actions so that they may succeed in treatment, stop substance abuse, and avoid future criminal behavior.

Evidence-based practices also consider an individual’s criminogenic needs, meaning needs that—if ameliorated—reduce the likelihood of continued criminal behavior. Addiction is an example of a criminogenic need. Addiction often co-occurs with serious psychiatric disorders. Specialized services such as treatment can help individuals function better and desist from criminal behavior. Addressing other needs—housing, education (including basic literacy), job skills, and living skills—can reduce criminal behavior too.

In the federal system, targeting interventions to an individual’s criminogenic risks and needs starts with the use of an actuarial risk assessment tool called the Federal Post-Conviction Risk Assessment (PCRA). That process reflects an institutional determination that actuarial prediction of risk outperforms clinical judgment. The tool allows probation officers to manage risk on an ongoing basis and takes into consideration static factors such as criminal history and age as well as dynamic factors such as recency and severity of substance abuse, financial issues, and social and family support.

Then, in all evidence-based models, interventions are targeted to the person’s particular risks and needs, with the goal of reducing recidivism at the least cost to the taxpayers. An important part of the model is that not all individuals require the same treatment: effective treatment for an addict, for example, may be different than effective treatment for a (voluntary) drug abuser. Similarly, different interventions may be needed for an addict with extensive criminal history and an addict who commits lower level crimes to fund a drug habit. The former may need drug treatment and extensive supervision to treat and control a chronically antisocial lifestyle, and the latter may respond well to treatment without a need for other interventions. Indeed, the research suggests that including both in the same drug court only exposes the lower-risk person to antisocial influences and a greater risk of recidivism.

In addition to this actuarial assessment of risks and needs and targeted interventions to address them, other treatment principles used include enhancing participants’ intrinsic motivations through motivational interviewing, providing skills training with directed practice (using cognitive methods), increasing positive reinforcement, and engaging ongoing community support for participants (particularly with employment).

As the name implies, a foundation of “evidence-based” practice is systematically and objectively measuring the results of these treatment and accountability principles by collecting data and using that data to inform and guide ongoing best practices.

The Federal Drug Re-entry Court

Most re-entry courts in the federal system are drug courts focused on persons with high criminogenic risks and needs. The target participant typically suffers from drug or alcohol dependence, mental health issues or deficiencies in adaptive functioning, and negative risk factors such as early onset of delinquency and previous failures in treatment. Participants in the program regularly appear on a status calendar, partici-
pate in formal drug and mental health treatment, receive the support (whether therapeutic or vocational) to achieve longer term goals such as a drug-free life and a job, and are subject to consequences if they fail to meet the program’s requirements.

The model is grounded in theories of effective behavioral change. For example, participants are immediately capable of meeting certain short-term goals and supervision requirements (such as attending counseling sessions and court). Other goals are more deeper rooted or continual (such as long-term abstinence, employment, or effective parenting). Higher magnitude sanctions (such as jail time or community service) may be appropriate for failure to comply with some of these basic supervision requirements (such as attending treatment and drug tests) and less appropriate for a positive drug test that instead might be treated more effectively with additional therapy and counseling. Also, incarceration ends bad behavior abruptly, but positive supports—jobs, education, productive use of time, and other pro-social activities—create behaviors over time that are inconsistent with drug abuse and crime. The model thus incorporates practices designed to reward good behavior that is incompatible with drug use and crime.

This model of incentives to reward good behavior and graduated sanctions to address bad behavior is a hallmark of a drug re-entry court. Punishment is not the goal: changing behavior is. The certainty and immediacy of sanctions is important. Sanctions need to be fair, predictable, and targeted to reduce a supervisee’s bad behavior. Incentives are used to increase desirable behaviors such as going to work or school.

Not all drug re-entry courts in the federal system are the same, but there are some common characteristics. The re-entry team typically is composed of a federal judge, a federal public defender, an assistant U.S. attorney, a probation officer, and treatment specialists who work collaboratively to devise appropriate incentives for positive behavior and sanctions for negative behavior. In particular, judicial engagement in the process is a significant factor in a positive outcome that includes better lives and decreased recidivism (and enhanced community safety). Frequent and random drug testing (including on weekends and holidays) is associated with positive results.

Other Federal Re-entry Courts

State courts have evolved to address problems other than drug use. Examples of these problem-solving courts include mental health courts, domestic violence courts, homeless courts, teen courts, and family courts. Following this model, federal re-entry courts sometimes target supervisees who have problems other than substance abuse. For example, several courts target participants who have been in gangs, and other courts target mental health issues.

An even newer federal model is a post-guilty plea, pre-sentence diversion program that offers a blend of treatment, sanction alternatives, and incentives to address offender behavior, rehabilitation, and community safety. In the Central District of California, the Conviction and Sentence Alternatives program requires participants to plead guilty and be supervised in a program that includes drug and mental health treatment and employment and education services. Upon successful completion of a term of supervision (one to two years generally), the participants have their cases dismissed or receive a sentence of time served.

Non-Judicial Cognitive-Behavioral Programs: The Courage to Change

Not all re-entry programs include judicial involvement. One model that began in the federal probation office in the District of Hawaii (a district actively involved with re-entry programs) is called the Courage to Change. The cognitive-behavioral...
program includes life skills classes, peer counseling, and interactive journaling that addresses criminogenic risks and needs for medium- to high-risk supervisees, most of whom have substance abuse problems. The journals cover topics such as self-control, peer relationships, social values, family ties, skills for successful living, and strategies for success.

People on supervision work as a team with probation officers to apply evidence-based strategies to learn how to make changes in their thinking, feeling, and behaviors. The participants examine their relationships and influences and consider who is a negative influence and who is a supportive influence as they implement new strategies to make positive changes in their lives, including sobriety, pro-social relationships, and employment. The model is a collaboration between supervisees and probation officers to build a positive peer support network.

The program can operate as a stand-alone program, but it also forms an important part of some re-entry courts. In the Northern District of California, for example, a probation officer facilitates a Courage to Change group in a time slot that immediately precedes re-entry court.

Do the Federal Programs Work?

An important part of evidence-based practice is measuring results through an empirical assessment to see whether the programs reduce recidivism effectively. Re-entry programs are so new in the federal system that there is little long-term empirical research, and effective evaluation requires measurement of large-enough sample sizes over the long term for treatment and control groups.

Still, preliminary results are encouraging. In the Northern District of California, participants performed better on three of four outcomes compared to control groups (fewer violation reports, arrests, and revocations in the post-intervention period) and should be cost-effective. Evaluations of programs in the District of Massachusetts, the Western District of Michigan, and the Eastern District of Pennsylvania show more successful outcomes for program participants, including reductions in re-arrests and supervision revocations. State court evaluations provide a more robust assessment of outcomes, including the better outcomes and cost advantages of programs that provide training for team members.

On a qualitative front, participants—supervisees, judges, prosecutors, defense lawyers, probation officers, and treatment providers—describe near-unanimous support in the two programs most accessible to this author: the Northern District of California and the District of Oregon.

The District of Oregon’s model shows why in a video that can be viewed online at www.ord.uscourts.gov/en/public/re-entry-court. The Oregon re-entry court, which was started by Chief Judge Ann Aiken, is a team-based approach designed to provide a continuum of services to address all facets of a person’s life: substance abuse, mental health needs, family and community ties, education, and job training. This approach makes sense because a key factor in reducing recidivism is getting and keeping a job, and for a person with a criminal record, the chances of that are improved significantly if all the person’s needs are addressed. And issues of addiction, for example, are treated more effectively through a medical treatment model than through a penological one.

The re-entry model also is about changing expectations. In the Northern District of California, participants said that re-entry court was the first time they felt that the authority figures in the criminal justice system (judge, prosecutor, and probation officer) genuinely were trying to help. One graduate explained that the program became a “family setting” where he did not “want to let them down.” Another said, “It’s weird but now you want to reciprocate to the authority figure. [That’s] not usually how it is for guys like me. ... When people are helping you, you don’t want to let them down.”

Peer involvement also builds community and encourages accountability. Participants value the advice and input given by their peers and feel that shared experiences help overcome obstacles and addiction. Mistakes are met not only by admonishment from the judge but also from peers.

At the same time, participants value positive and ongoing feedback from peers and authority figures. One participant in the Northern District of California noted that positive feedback was important to keep him on track when his job search was not going well: “They told me that I was doing all the right things, that it was me performing the right actions, I was in
control, and to keep trying. It helped me keep up the progress.” Others felt that the ongoing feedback and group setting helped accomplish short-term goals because they would have to report progress every two weeks and would receive feedback. Another remarked, “Every criminal I’ve ever known, the only time they get a pat on the back is when they pull off a crime or beat the system. Otherwise, we’re expected to fail. [So] a pat on the back once in a while helps. It goes a long way, especially coming from the P.O. or the judge.”

Another expectation that changes through the re-entry model is what participants expect of themselves. Judge Aiken speaks of setting goals high and describes her role as “helping people find their way out of the system to be successful.” Another way of looking at it is that the model is about believing in people until they learn to believe in themselves. Participants learn to believe in themselves by experiencing successes: developing strategies to avoid future substance abuse, learning job skills, working on self-control, examining negative influences, building positive support communities and relationships, filling up time with pro-social activities (not antisocial ones), learning to deal with setbacks, and persevering until they get and keep a job. There is no better way of changing expectations than experiencing something different, not because it is given out but instead because it is the product of one’s own hard work.

Re-entry courts not only reintegrate people into the community, but also, they create communal bonds through building family and community ties. In Oregon, Judge Aiken and the Re-entry Program were the impetus for the University of Oregon’s Courthouse Garden, a once-vacant lot near the federal courthouse in Eugene that now is a productive and beautiful garden, Oregon’s Courthouse Garden, a once-vacant lot near the federal court that Judge Aiken created as a community garden. Community members, and together they grow food for those in need. Another expectation that changes through the re-entry model is what participants expect of themselves. Judge Aiken speaks of setting goals high and describes her role as “helping people find their way out of the system to be successful.” Another way of looking at it is that the model is about believing in people until they learn to believe in themselves. Participants learn to believe in themselves by experiencing successes: developing strategies to avoid future substance abuse, learning job skills, working on self-control, examining negative influences, building positive support communities and relationships, filling up time with pro-social activities (not antisocial ones), learning to deal with setbacks, and persevering until they get and keep a job. There is no better way of changing expectations than experiencing something different, not because it is given out but instead because it is the product of one’s own hard work.

Re-entry courts not only reintegrate people into the community, but also, they create communal bonds through building family and community ties. In Oregon, Judge Aiken and the Re-entry Program were the impetus for the University of Oregon’s Courthouse Garden, a once-vacant lot near the federal courthouse in Eugene that now is a productive and beautiful garden. Volunteers include students from the University of Oregon, re-entry court participants, at-risk youth, and community members, and together they grow food for those in need. One re-entry court participant speaks of the importance of giving back and how good deeds create good deeds.

Another, volunteering in the garden, said, “I’m not in a re-entry court because I’ve never been a part of this world. I looked ‘re-entry’ up in the dictionary and you have to be a part of something and leave it in order to re-enter it. So I call it entry court.”

Alternative models of supervised release such as re-entry court can have a life-changing effect on participants (reducing recidivism and costs and increasing public safety as a result). In the Northern District of California, participants showed improved attitudes and a willingness to accept responsibility for mistakes, work toward goals, participate in treatment, and recognize and celebrate successes, leading to progress and better results (including fewer relapses). Re-entry court not only changes the participants but also has an impact on the judges, lawyers, probation officers, treatment providers, and other stakeholders, requiring them to rethink their own roles in the criminal justice system. As a prosecutor in Oregon remarked, “It’s a chance for ... people [to] step outside the comfortable roles that they occupy in government and actually go beyond those roles to effect real change in people.” Northern District of California probation officers said that their experiences improved their ability to supervise their caseload overall and helped them develop a better understanding of the cognitive struggles of supervisees and what it takes to successfully change. And at the end of the 2012 graduation ceremony in the Northern District of California, a U.S. district judge—the sentencing judge for one of the participants—told the packed courtroom that it was one of the best experiences of his career.

Hon. Laurel Beeler is a U.S. magistrate judge in the Northern District of California, a co-founder of the district’s first re-entry court, and a former president of the Northern District of California Chapter of the Federal Bar Association. © 2013 Hon. Laurel Beeler. All rights reserved.

Endnotes
4See id.; Tracy Russo, A Comprehensive Anti-Violence Strategy: Re-entry, Prevention and Enforcement, THE JUSTICE BLOG (Oct. 11, 2012), blogs.justice.gov/main/archives/2518, As Deputy U.S. Attorney General James M. Cole said in October 2012: [W]e can no longer afford the societal and budgetary costs incurred when people cycle in and out of our prisons. ... As we developed our comprehensive Anti-Violence Strategy, we realized that we cannot arrest and prosecute our way out of this devastating problem. While prosecutions are important, we also have to prevent the violence from happening ... and one important way to do this is to pay attention to the people incarcerated in our prisons and as they prepare to leave those institutions make sure that they are ready to reenter our communities as productive, law abiding members.
6Meaning, tending to produce crime.
8Id. at 179-81.
9Id. at 180-81.
10Id. at 181.
11Id. at 182.
12Id. at 183.
13J.C. Oleson, et al., Training to See Risk: Measuring...

Marlowe, supra note 7, at 178-79.

See id. at 184-85.

See id. at 192-93.


See id.

See id.

See Meierhoefer, supra note 4, at 38.

See Marlowe, supra note 7, at 184-85.

Id. at 185-86.

Id. at 187-88.

Id. at 188-89.

Id. at 189.


Meierhoefer, supra note 4, at 39. Interestingly, that may be a short-term incentive, but the long-term results appear to supplant that incentive as a motivator for participants. See Alex Banh, Re-entry Court: Making the Case for Judge-Involved Supervision. An Evaluation and Analysis of the Northern District of California’s U.S. Court’s Re-entry Court Pilot Program 14-15 (unpublished manuscript) (on file with the author).

Meierhoefer, supra note 4, at 37-39.

Vance, supra note 3, at 64.

Id.


Must a Wolf Prove That He Withdrew From the Pack?

The Supreme Court Addresses the Burden to Prove Withdrawal From a Conspiracy in Smith v. United States

by Jennifer L. Beidel
In the case of *Smith v. United States*, the U.S. Supreme Court recently heard oral argument on the question of who bears the burden of proving or disproving that a defendant was a member of a conspiracy during the relevant statute-of-limitations period. In the words of Justice Samuel Alito during the oral argument, conspiracy is “a dangerous thing,” like “rounding up a ‘pack of wolves.’” Like any wolf pack, a conspiracy comports with the adage that there is strength in numbers. It follows that, as a matter of public policy, the law should encourage individual conspirators to withdraw from, and thereby weaken, the conspiracy. It is this policy objective that gives rise to the affirmative defense of withdrawal. If a defendant has withdrawn from a conspiracy outside of the relevant statute-of-limitations period, he can no longer be charged with conspiracy. The question then becomes who bears the burden to prove such withdrawal—the defendant or the government?

The issue has given rise to a circuit split. The U.S. Courts of Appeals for the Second, Fifth, Sixth, Tenth, Eleventh, and District of Columbia (D.C.) Circuits have said that the burden of proving withdrawal always rests on the defendant. The U.S. Courts of Appeals for the First, Third, Fourth, Seventh, and Ninth Circuits have held that the burden of proving withdrawal shifts to the government once the defendant has met his burden of production on the withdrawal defense. It remains to be seen how the Court will resolve this circuit split, but its resolution has the potential to make the withdrawal defense far less attractive to defendants. If a defendant bears the burden to prove withdrawal himself, he may not be willing to assert it, especially considering that an allegation of withdrawal is an implicit admission of prior membership.

**The Facts of Smith**

The case of *Smith* arose from a decades-long conspiracy to distribute drugs in Washington, D.C. From 1988 through March 2000, defendants Rodney Moore and Kevin Gray led a conspiracy of at least 14 members that operated the drug distribution ring. The ring wreaked havoc across the city and was accused of at least 31 murders. On Nov. 17, 2000, the defendants were charged in a 158-count superseding indictment and were tried by a jury for over 10 months. The jury returned guilty verdicts on many of the charges, including drug conspiracy, Racketeer Influenced and Corrupt Organizations Act (RICO) conspiracy, and murder. The defendants generally received sentences in excess of life imprisonment. Under the federal system, a five-year statute of limitations is applicable to conspiracy. Given this conspiracy’s 12-year length and relatively large size, it stands to reason that some of its members may have withdrawn prior to the statute-of-limitations period and may, as a result, have a valid defense to the conspiracy charges. One such defendant, Calvin Smith, introduced evidence to establish that he had withdrawn prior to the statute-of-limitations period. Smith offered a stipulation that starting in 1994, he was incarcerated after pleading guilty to a shooting and that as a result, he could no longer have been a member of the conspiracy. He further contended that as evidenced by testimony of a government witness, he told the witness that he had refused to comply with a directive from Gray to kill the witness. Another witness testified that Smith and Gray did not communicate after Smith’s arrest and that Smith was upset with Gray for not sending him money.

At trial, the government offered contradictory evidence that despite Smith’s imprisonment, he was still an active participant in the conspiracy during the statute-of-limitations period. Such evidence included the fact that Smith confessed to a co-conspirator that he had agreed to the guilty plea that led to his imprisonment in an effort to assist Gray in getting reduced charges. The evidence further suggested that Smith struck this deal in exchange for a promise from Gray of drugs and money for Smith and his wife during Smith’s prison term. The government further offered evidence that while in prison, Smith looked out for the interests of the conspiracy by threatening witnesses and providing information to Gray.

On the statute-of-limitations issue, the district court instructed the jury that one of the elements of conspiracy was that the charged conspiracy existed for some time between 1988 and November 2000 “and continued within the period of the applicable statute of limitations.” In its jury instructions, the district court explained:

If you find that the evidence at trial did not prove the existence of the narcotics conspiracy at a point in time continuing in existence within five years before ... May 5, 2000 for defendant Calvin Smith ... you must find the defendant [not guilty of Count One.]

After nearly 12 days of deliberation, the jury posed the following question to the court: “If we find that the Narcotics or RICO conspiracies continued after the relevant date under the statute of limitations, but that a particular defendant left the conspiracy before the relevant date under the statute of limitations, must we find that defendant not guilty?” Smith argued that the question should simply be answered “yes.” Over Smith’s objections, and as requested by the government, the court told that jury: “Once the Government has proven that a defendant was a member of a conspiracy, the burden is on the defendant to prove withdrawal from a conspiracy by a preponderance of the evidence.” The court further explained: “The defendant must meet his burden by showing that he took affirmative acts inconsistent with the goals of the conspiracy and that those acts were communicated to the defendant’s co-conspirators in a manner reasonably calculated to reach those co-conspirators. Withdrawal must be unequivocal.”
Smith's Appeal to the D.C. Circuit

Among Smith's many grounds for appeal to the D.C. Circuit was that the district court erred in instructing the jury that he bore the burden to prove that he had withdrawn from the conspiracy. Smith's position is that because he met his burden of proof to show that he withdrew from the conspiracy, due process required the government to prove that he was a member of the conspiracy during the relevant period.16

In its decision, the D.C. Circuit noted that due process requires the government to prove all of the elements of an offense beyond a reasonable doubt. When the defendant raises a defense that negates an element of the offense, the government bears the burden to disprove the defense. As a result, the issue, in the D.C. Circuit's view, turned on whether or not withdrawal is a defense that negates an element of the offense, namely, membership in the conspiracy. The D.C. Circuit affirmed, concluding that withdrawal did not negate an element of the crime of conspiracy and that as a result, Smith bore "the burden of proving that he affirmatively withdrew from the conspiracy if he wished to benefit from his claimed lack of involvement."17

The court's decision was premised, in large part, on its previous decision in the sentencing context that a defendant bears the burden to prove withdrawal from a conspiracy.18 The court did not undertake a detailed analysis in an effort to resolve the circuit split presented in Smith.

Smith sought rehearing and rehearing en banc on the issue, arguing that the sentencing cases relied upon by the D.C. Circuit did not implicate the same due process considerations that apply in the context of jury instructions that shift the burden of proof at trial to the defense. The D.C. Circuit denied the rehearing request, making the circuit split 6-5 on the issue.19

The Petition for Writ of Certiorari

Smith filed a petition for writ of certiorari on Feb. 27, 2012. In it, Smith stated the importance of the question as follows:

The burden of proof question presented by this petition is an important and recurring constitutional question that has seriously divided the federal appellate courts. Because conspiracies are ongoing crimes that often exist over several years, with membership changing throughout, and because conspiracies are often prosecuted only after years of investigation, whether a particular defendant withdrew from a particular conspiracy before the statute of limitations period is a question that arises with great frequency in conspiracy trials.20

The Court granted the petition for writ of certiorari on June 18, 2012.

Conspiracy, Withdrawal, and the Statute of Limitations

A conspiracy is an agreement between two or more persons to commit an unlawful act.21 Conspiring is seen as an independent societal ill, distinct from any substantive offenses that the conspirators may commit.22 It follows then that a conspiracy conviction simply requires proof of: (1) the existence of the conspiracy; and (2) the defendant's membership in it.23 Once established, a conspiracy generally continues until abandon-

ment or success, at which time the statute of limitations is triggered. As long as two people share the conspiracy's goals, it continues, meaning that conspiracies survive membership changes.24 Generally, a conspirator is liable for the acts of his co-conspirators during the entire course of the conspiracy even absent knowledge of or participation in the crimes at issue.25 As Justice Oliver Wendell Holmes observed: "Plainly a person may conspire for the commission of a crime by a third person."26 However, this liability for the acts of others cannot go on indefinitely or it would conflict with the statute of limitations' goal of bringing a definitive end to potential criminal exposure. Therefore, to be relevant, the defendant's membership in the conspiracy must have occurred at some point during the limitations period (i.e., within the five years preceding the date of the indictment).27

This is where withdrawal comes into play: if a defendant withdrew from a conspiracy prior to the five years preceding the date of the indictment, he cannot be convicted of conspiracy. To withdraw from a conspiracy, a conspirator must disavow or abandon its purposes and goals. Withdrawal must be accompanied by an affirmative action; mere cessation of activity is not enough.28 Standing alone, withdrawal merely exonerates the defendant from liability for criminal acts completed by his co-conspirators after he withdrew. This is because the crime of conspiracy is complete once a person has entered into a proscribed agreement. However, when coupled with the statute of limitations, withdrawal operates as a complete defense. If the defendant has withdrawn from the conspiracy outside of the statute-of-limitations period, he cannot be convicted of conspiracy, regardless of whether the acts at issue occurred before or after withdrawal.29

Who Bears the Burden to Prove Withdrawal?

Generally, the burden to prove an affirmative defense rests with the defendant, while the government must prove the elements of a crime beyond a reasonable doubt.30 One common justification for this burden allocation is that the defendant is typically in a better position to know and provide evidence regarding a defense, particularly when it involves issues of the defendant's subjective thoughts, beliefs, or actions.31

But, where the defense negates an element of the crime itself,
the proof question becomes murky. Were the burden to prove the defense to rest with the defendant, he would be called upon to establish his innocence, which contravenes the reasonable doubt standard and, with it, principles of due process. Accordingly, the Court has held that a defendant does not bear the burden to prove a defense that negates “the critical fact in dispute.” So, for example, the defense of heat of passion negates the element of malice aforethought for a murder conviction and must, therefore, be proved by the government. Other examples are less clear. The Court has held that the burdens to prove self-defense or extreme emotional disturbance may still rest on defendants because, although certainly related to the elements of a crime, they do not negate them.

So, is withdrawal an affirmative defense that must be proved by the defendant because it is unrelated to the elements of the crime? Or, like heat of passion, does withdrawal negate an element of the crime, namely, membership in the conspiracy, such that it must be proved by the government? Or is withdrawal somewhere in the middle, like self-defense or extreme emotional disturbance, in that it is related to but does not negate one of the elements of conspiracy? As recognized by the Seventh Circuit in United States v. Read, it was “well-settled” through the 1980s in almost every court that the burden of proving withdrawal rested on the defendant. Read sparked a change in that pattern by finding that withdrawal directly negates the element of membership in the conspiracy, requiring the burden of proof to be borne by the government. From there, the present circuit split has evolved.

So which is it? Some argue that because the withdrawal defense is based on a procedural requirement like the statute of limitations, it is unrelated to the defendant’s blameworthiness for a criminal act and cannot, therefore, be seen as negating an element of the crime. After all, if the defendant was a member of a conspiracy but seeks to escape liability on a “technicality” like the statute of limitations, he has not proved that he is “innocent” in the traditional sense of the word. In fact, “a defendant’s withdrawal from a conspiracy tends to confirm, rather than deny, his membership in it,” and the statute-of-limitations defense “operates to preclude the imposition of criminal liability on defendants, notwithstanding a showing that they committed criminal acts.” Others argue that “technicalities” like the statute of limitations are just as important to a determination of guilt or innocence as are the more substantive elements of a crime. If the statute of limitations can be the difference between imprisonment and freedom, surely it can be considered an element of a crime. And, here, perhaps membership is akin to a mental state or mens rea requirement, in which case the government should bear the burden to prove that the defendant intended to be a member of the conspiracy during the statute-of-limitations period.

The Oral Argument

It is against this backdrop that the Court heard oral argument on Smith. The argument centered around the key question of whether membership in the conspiracy during the limitations period is an element that is negated by the defense of withdrawal. Some members of the Court explicitly saw it as a close question. Justice Stephen Breyer referred to it as a “rabbit-duck.” As shown above, the rabbit-duck is an ambiguous figure that has its origins in psychology. When an individual views the figure, her brain switches back and forth between seeing a duck and seeing a rabbit. Psychologists use the illusion to prove that context matters: when viewing the figure on Easter Sunday, people are more likely to see a rabbit than at any other time.

Justice Breyer’s analogy certainly highlights the point that the seemingly simple question of who bears the burden to prove withdrawal is actually quite complex and can be viewed in different ways depending upon the context. In considering the question, the Court focused on four main points: (1) the statute of limitation’s treatment elsewhere as a waivable, affirmative defense; (2) the fact that withdrawal does not negate previous membership; (3) that the defendant is in the better position to prove the facts of withdrawal; and (4) whether conspiracy is a group or individual defense.

Is the Statute of Limitations a Waivable, Affirmative Defense?

Justices Ruth Bader Ginsburg and Antonin Scalia noted that the government can prove a crime beyond a reasonable doubt without the statute-of-limitations issue ever having been raised (i.e., the statute of limitations is a waivable defense). Justice Ginsburg also noted that in civil jurisprudence, the statute of limitations is an affirmative defense that must be pled and proved by the defendant. Smith countered that the Court has never referred to the criminal statute of limitations as an affirmative defense; instead, the Court has referred to it as part of the merits of the case. Although the statute of limitations does not need to be pleaded in the indictment, the government must present evidence of it and prove it.

Does Withdrawal Negate the Membership Element?

The government argued that membership during the statute-of-limitations period is not an element in the constitutional sense. To be an element in the constitutional sense, (1) the government has to allege the issue in the indictment, (2) the government has to prove it in every case, (3) the jury has to be instructed on it in every case, and (4) the defendant cannot waive it by failing to raise it. According to the government, none of these factors applies to membership during the limitations period.

The government further argued that active membership is not an element of the crime because the Court held in Hyde v. United States that membership continues absent withdrawal, even if such membership is not active. Justice Ginsburg seem-
ingly endorsed this position when she noted that withdrawal “doesn’t reach back to negate that there was membership at some time, it just says: After withdrawal we no longer prosecute.”

Nonetheless, Smith argued that withdrawal from a conspiracy negates the key element of participation. Unlike in a self-defense case, according to Smith, the element and the affirmative defense cannot co-exist. While a defendant may simultaneously have the intent to kill and act in self-defense, he cannot simultaneously withdraw from and participate in a conspiracy. Yet, Justice Breyer observed: “The fact that there is a statute of limitations [issue] makes [Smith’s] case weaker, not stronger, because the statute of limitations is less directly connected to the elements of the offense than is self-defense or duress.”

Is Conspiracy a Group or Individual Defense?

To Chief Justice John Roberts, the issue “basically reduces to the fact that when it comes to the statute of limitations, [Smith] argues that the Court should treat the conspirators as individuals rather than as members of the conspiracy.” The Chief Justice pointed out that such individual treatment does not occur for other aspects of the crime of conspiracy because, for example, one conspirator can be held liable for the acts of another. Yet, the chief justice later noted: “You’ve indicted an individual, and it’s not clear to me why you didn’t have to show that that individual’s conduct was within the statute of limitations period.”

Who Is in the Better Position to Prove Withdrawal?

Justice Breyer focused on the aspect of the withdrawal defense that requires proof of the defendant’s mental state. He analogized the issue to the Thomas Crown Affair. If Thomas Crown robs an art museum but produces evidence of his subjective intent to return the art, Justice Breyer asked who bears the burden to prove Thomas Crown’s intent? Justice Breyer’s point with the Thomas Crown analogy appeared to be that the defendant in both scenarios is in a better position to prove his subjective mental state (i.e., to return the stolen art in the Thomas Crown Affair or to withdraw in the case at issue). Nonetheless, Smith argued that for Thomas Crown, the subjective intent to return negates the element of the defense that requires an intent to permanently deprive an owner of his property, so that the burden should be placed on the government.

Several of the justices questioned in detail what the government’s proof burden would look like. Justice Ginsburg asked if the government would have to prove membership twice. She said: “They prove membership in the conspiracy, and then you say once he alleges that he withdrew, they have to prove it again.”

Smith argued that the government could rest on its original proof of membership, including an attack on the credibility of any testifying witnesses, and the permissive inference that he was a member during the limitations period. But, Chief Justice Roberts questioned how that could qualify as proof beyond a reasonable doubt. Chief Justice Roberts also observed that the government may face an evidentiary burden. If the defendant allegedly told a co-conspirator that he withdrew, the government certainly could not call that co-conspirator as a witness because of the Fifth Amendment protection against self-incrimination. Smith countered that the government could simply call in to question why the witness had not come forward to support the defendant’s story.

In an effort to sum up, Justice Sonia Sotomayor noted that Smith’s “intuitive argument is, I can’t be responsible for a crime I wasn’t a part of during the limitations period,” which makes membership during the limitations period an element of the offense. The government responded that it “proved that the crime was committed within the limitations period because the conspiracy existed in the limitations period.” It remains to be seen how the Court will decide this question.

Conclusion

Who bears the burden to prove withdrawal is both a basic and a complex question. Its outcome is likely to turn on the Court’s decision as to whether withdrawal negates or is simply related to the membership element of the offense of conspiracy. Jurisprudence on this issue is less than clear. While withdrawal arguably negates the element of membership, the defendant is certainly in a better position to prove withdrawal than is the government. The Court’s decision on this issue is likely to turn on whether it is more persuaded by the intellectual argument that withdrawal negates membership or by the more pragmatic proof issues that would be faced by the government if it bore the burden.

Whatever the Court decides, resolution of Smith will affect whether defendants are willing to bear the risk of asserting a withdrawal defense. A defendant who alleges that he withdrew from a conspiracy implicitly admits that he was once a member of the conspiracy. He will be more likely to accept this risk if the government, rather than he, bears the burden of proof on the issue. Such a resolution would also further the asserted policy rationale of the withdrawal defense (i.e., to reduce the effectiveness of the conspiracy by encouraging its wolves to leave the pack).

Editor’s Note

As this article was going to print, the Supreme Court issued its decision in Smith v. United States on Jan. 9, 2013. In an opinion delivered by Justice Scalia, the Court held that the defendant bears the burden to prove withdrawal from a conspiracy. The Court concluded that withdrawal does not negate an element of the crime of conspiracy because commission of a crime “within the statute-of-limitations period is not an element of the conspiracy offense.” In so deciding, the Court noted the “informational asymmetry” that heavily favors imposing the burden on the defendant. As the Court noted, the ultimate decision-making authority here rests with Congress, which remains free to alter the burdens via statute if it so chooses. Smith v. United States, 133 S. Ct. 714, 720 (2013) (emphasis in original).

Jennifer Beidel concentrates her practice at Saul Ewing LLP on complex commercial litigation matters in the federal and state courts. She has worked with clients in the healthcare and pharmaceutical, foodservice and agriculture, financial services, insurance and reinsurance, telecommunications, construction and manufacturing industries, among others. In the pro bono arena, Beidel represents low-income defendants in criminal proceedings in federal court.
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Endnotes

5. Id. at 39-40, 65.
10. Id. at *6.
12. Id.
14. Moore, 651 F.3d at 89 (emphasis added).
16. Moore, 651 F.3d at 89.
17. Id. at 90.
18. Id. at 89-90.
20. Id. at *15.
22. Iannelli, 420 U.S. at 778-79.
25. Pinkerton v. United States, 328 U.S. 640, 647 (1946) (“The criminal intent to do the act is established by the formation of the conspiracy. Each conspirator instigated the commission of the crime .... If [the overt act] can be supplied by the act of one conspirator, we fail to see why the same or other acts in furtherance of the conspiracy are likewise not attributable to the others for the purpose of holding them responsible for the substantive offense.”).
27. Read, 658 F.2d at 1232.
34. Id.
36. 658 F.2d 1225 (7th Cir. 1981).
37. Id. at 1233, 1236.
39. Canton, supra note 2, at 455.
44. Id. at 10.
46. Id. at 12.
47. Id. at 2.
48. Id. at 6.
49. Id. at 3.
50. Id. at 16.
51. Id. at 3-4.
52. Id. at 4.
53. Id.
54. Id. at 8.
55. Id. at 5.
56. Id. at 14.
57. Id.
On March 8, 2004, with its *Crawford v. Washington* decision, the U.S. Supreme Court made one of the most impractical decisions in recent criminal procedure history—plaguing trial courts with confusion and overburdening prosecutors. In a majority opinion written by Justice Antonin Scalia, the Court overturned *Ohio v. Roberts* and ruled that certain hearsay statements would no longer be admissible in criminal proceedings—even though the same statements had been deemed reliable by the courts for decades. Waxing poetic about the history of the Confrontation Clause, the majority held that the Sixth Amendment “demands unavailability and a prior opportunity for cross-examination” when a criminal defendant is faced with a “testimonial” hearsay statement. While some scholars hailed the decision as “a vindication of the rights of the accused,” others conjectured that the Court’s refusal to define “testimonial” would create uncertainty for defendants and prosecutors alike.
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The latter group’s fears proved to be true, and the Court took it upon itself to address the problem just two years later in Davis v. Washington. But in attempting to define “testimonial statement,” the Court failed to dispel the confusion and left lower courts and criminal practitioners with many unanswered questions. Then, Michigan v. Bryant seemed like a step in the right direction, but the Court again muddied the waters with Melendez-Diaz v. Massachusetts and Bullcoming v. New Mexico. Thankfully, the Court appears to be interpreting the Confrontation Clause more narrowly with its most recent Crawford decision, Williams v. Illinois. While Williams provides some welcome relief to trial courts, prosecutors, and lab analysts, the decision does not go far enough and give what is so desperately needed—a complete reevaluation of the Confrontation Clause that provides better guidance and a more workable standard.

Background

The Sixth Amendment guarantees that a criminal defendant “shall enjoy the right … to be confronted with the witnesses against him.” This is commonly known as the Confrontation Clause. Although the Supreme Court’s recent jurisprudence has further complicated the Confrontation Clause landscape, such confusion is hardly new. Ever since defense lawyers began arguing its violation, courts have struggled to define the outer limits of this constitutional right. Despite this, the Supreme Court did not make a major ruling implicating the Confrontation Clause until 1965’s Pointer v. Texas. Further, it was not until Roberts that the Court articulated any sort of framework for how trial courts should approach the issue. The Roberts Court held that the Sixth Amendment’s right of confrontation does not bar admission of an unavailable witness’ statement against a criminal defendant if the statement bears “adequate ‘indicia of reliability.’” Rather than leaving it to guesswork as to which evidence would be reliable enough, the Court clearly stated that evidence is reliable when it “falls within a firmly rooted hearsay exception” or has “particularized guarantees of trustworthiness.” The Roberts standard worked well for almost a quarter of a century.

However, in 2004, the Supreme Court turned heel and attempted to formulate a new standard with its Crawford decision. In Crawford, the Court proclaimed that the Confrontation Clause does not allow “admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.” However, unlike the defined “reliability” standard in Roberts, the Court refused to address in any comprehensive fashion which statements are “testimonial.”

Some scholars heralded the new Crawford standard as a “very positive development” that afforded essential protections to criminal defendants. Others saw the undefined “testimonial” mandate for what it truly was—an unworkable and impractical standard that would unleash havoc on trial courts for years to come. One such voice came from the late Chief Justice William Rehnquist in his Crawford concurrence. Chief Justice Rehnquist insisted that prosecutors “need answers as to what … kind[ ] of ‘testimony’ … is covered by the new rule. They need them now, not months or years from now. Rules of criminal evidence are applied every day in courts throughout the country, and parties should not be left in the dark in this manner.” Unfortunately, Chief Justice Rehnquist’s admonition proved true, and courts and prosecutors are still largely left in the dark as to the “testimonial” standard.

The Court’s first attempt to clarify the “testimonial” standard came in 2006 in two cases decided together: Davis and Hammon v. Indiana. Davis involved statements made during a 911 call, and Hammon concerned statements given to a police officer after the underlying emergency had stopped and later included in an affidavit. In what has become known as the “primary purpose” analysis, the Court defined a testimonial statement as one made when there is no “ongoing emergency, and [when] the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” Yet this definition of “testimonial” was criticized from the very beginning as “difficult for courts to apply” and has proven to be grossly inadequate to meet every statement within the purview of the Confrontation Clause.

Several years later, in Michigan v. Bryant, the Court gave hope for a narrower interpretation of the Confrontation Clause and, with it, more practicality. Keeping within the bounds of the “primary purpose” test, the Court held that because statements of a mortally wounded crime victim about the identity of his shooter were made during an ongoing emergency and their “primary purpose” was to enable police to meet that emergency, the statements were not “testimonial.” Interestingly, the Court
sought to broaden the “primary purpose” test somewhat by finding that “rules of hearsay, designed to identify some statements as reliable, will be relevant” in the determination—a statement strikingly similar to the Roberts standard. Justice Scalia, in his scathing dissent, saw the opinion for what it truly was—a departure from the “testimonial” standard he set forth in Crawford and “a revisionist narrative in which reliability continues to guide our Confrontation Clause jurisprudence.”

Yet, the Court beat back hope of a return to sanity that arose from Bryant later that same year, with Bullcoming. In its 2009 Melendez-Diaz decision, the Court held that “certificates of analysis” identifying evidence as cocaine are testimonial and thus cannot be used against a defendant absent unavailability of the declarant and a prior opportunity for cross-examination. The Court stated that the analysts who conducted the tests (and identified the substance as cocaine) are witnesses providing testimony against the defendant and that confrontation would be useful in “testing analysts’ honesty, proficiency, and methodology” in “many of the other types of forensic evidence commonly used in criminal proceedings.”

In 2011 with Bullcoming, the Court extended the claws of Crawford even further by labeling yet another laboratory report testimonial. The Court held that a blood alcohol concentration analysis could not be admitted because the analyst who testified was not the analyst who had prepared the report. As Justice Anthony Kennedy points out in the dissent: “Before Bullcoming the Court had not held that the Confrontation Clause bars admission of scientific findings when an employee of the testing laboratory authenticates the findings, testifies to the laboratory’s methods and practices, and is cross-examined in trial.” Effectively, the Court held that the prosecution must bring to trial the very same analyst who conducted the test, lest the results be deemed inadmissible testimonial evidence. Nevertheless, Justice Sonia Sotomayor, a former prosecutor and district court judge, noted in her prescient concurrence in Bullcoming a number of factual circumstances to which Bullcoming did not apply. With this bit of silver lining, the Court would go on in the very next term to decide the case of Williams.

Williams: A Step in the Right Direction

Williams presented the Court with yet another opportunity to broaden the Confrontation Clause. Williams involved a bench trial for rape during which the prosecution called an expert from the Illinois State Police lab who testified that a DNA profile produced by an outside laboratory, Cellmark, matched a profile produced by the state lab using a sample of the defendant’s blood. The DNA profile produced by Cellmark was never admitted into evidence, but the defense argued that because no analyst from Cellmark testified about the report, it was a violation of the Confrontation Clause for the state’s expert to refer to the report on the stand. In a plurality opinion written by the dissenters from Bullcoming, with Justice Clarence Thomas concurring in the judgment, the Court held that DNA profiles do not implicate the Confrontation Clause because they are not “testimonial.” Thus, the economic and logistical nightmare that could have arisen from an opposite holding did not come to pass. However, both the plurality’s and Justice Thomas’ legal analysis try to skate around the Crawford framework rather than explicitly overrule it. Justice Samuel Alito and the plurality certainly indicate a willingness to re-evaluate Crawford and the decisions that followed. Yet, the plurality fails to transcend these “binding precedents” and instead offers two “independent bas[es]” for the Court’s practical decision.

First, the Court says that the expert’s reference to the DNA profile was “not admitted for the truth of the matter asserted” because under Rule 703 of the Federal Rules of Evidence, “an expert may express an opinion that is based on facts that the expert assumes, but does not know, to be true.” Yet as Justice Elena Kagan retorts in her dissent: “[T]he Confrontation Clause’s protections are not coterminous with rules of evidence.” Even Justice Thomas proclaimed in his concurrence that “I do not think that rules of evidence should so easily trump a defendant’s confrontation right.” Moreover, the reference to the DNA profile was obviously admitted for its truth. The state’s expert unequivocally vouched for the Cellmark report when she said that the vaginal swab contained DNA matching the defendant’s. The defendant was convicted at least partly based on this positive match, and the plurality utterly fails to explain away a statement so clearly “bound up with its truth.”

Justice Alito then offers a second independent reason why the Confrontation Clause would not have been violated even if the report had been admitted into evidence. He distinguishes the Cellmark report from the reports at issue in Melendez-Diaz and Bullcoming. Justice Alito confidently explains that this report “is very different, [because] [i]t plainly was not prepared for the primary purpose of accusing a targeted individual.” The difference seems to be the fact that the defendant was still at large when the sample was sent to the Cellmark lab for processing; therefore, the “primary purpose” of the report was not to accuse the defendant of the crime. As Justice Kagan points out in the dissent: “[W]here that test comes from is anyone’s guess.” None of the prior post-Crawford cases had formulated what the dissent calls “an accusation test.”

The fact that the report was not made with a specific individual in mind, the plurality argues, also negates any motivation that the analyst might have to fabricate the data, effectively rendering it trustworthy. This harkens back to the “reliability” standard of Roberts. However, as Justice Kagan points out, the Cellmark report is not really distinguishable from the report at issue in Bullcoming: “The Cellmark analysis has a comparable title; similarly describes the relevant samples, test methodology,
and results; and likewise includes the signatures of laboratory officials.”64 Furthermore, Justice Kagan writes, the majority in Melendez-Diaz conjectured at length about the “serious deficiencies ... in the forensic evidence used in criminal trials.”65 Thus, trying to use the reliability standard within the Crawford framework simply does not work.

Finally, in a last ditch effort to distinguish this case from the Crawford progeny, Justice Thomas offers his own interpretation of the Confrontation Clause in a concurring opinion. He reasons that the Confrontation Clause “regulates only the use of statements bearing 'indicia of solemnity.'”66 Justice Thomas goes on to conclude that the Cellmark report in Williams does not qualify for Confrontation Clause protection because it is “neither a sworn nor a certified declaration of fact.”67 Yet, as Justice Kagan rebuts, Justice Thomas’ approach “grants constitutional significance to minutia.”68 Whatever the original intent of the Confrontation Clause was, this certainly does not seem to be it.

While Williams offers some relief to trial courts and others, the long-term effects of the decision still remain to be seen. With such convoluted analysis, trial courts are left to wade through the murky waters of the Confrontation Clause with little guidance. Indeed, as the law presently stands, a blood alcohol analysis report69 is subject to the Confrontation Clause,70 but a DNA profile report lies outside of the clause’s purview.71 Further, courts are left guessing how many of the analysts that were involved in a report’s preparation actually have to testify.72 In fact, unless something changes, the Supreme Court will have to address every situation involving a forensic laboratory report on a case-by-case basis. Justice Stephen Breyer, in his concurring opinion, exposed this conundrum and expressed the need for a new framework:

[Williams v. Illinois] raises a question that I believe neither the plurality nor the dissent answers adequately: How does the Confrontation Clause apply to the panoply of crime laboratory reports and underlying technical statements written by (or otherwise made by) laboratory technicians? In this context, what, if any, are the outer limits of the “testimonial statements” rule set forth in Crawford v. Washington ... ? Because I believe the question difficult, important, and not squarely addressed either today or in our earlier opinions ... I would set this case for reargument.73

In just the short time since Williams was decided, this uncertainty about the outer limits of the Confrontation Clause and how Williams is to be applied has already surfaced in lower court opinions. For instance, in Hall v. State,74 the Texas Court of Appeals faced the issue of whether the trial court’s admission of a drug analysis report violated the Confrontation Clause. In its analysis, the appellate court had to decide whether Melendez-Diaz/Bullcoming or Williams controlled.75 The Hall court held that the case was analogous to Melendez-Diaz and Bullcoming, partly because “the lab report [was] prepared ... after appellant’s arrest.”76 The court seems to have applied “the accusation test.”

On the other hand, in Wisconsin v. Deadwiller,77 the Wisconsin Court of Appeals discussed Williams at length and held that it controlled.78 The court stated that it was not necessary to give a reason for affirming the trial court’s admittance of an analyst’s testimony regarding a DNA profile match based on a different laboratory’s report because “the narrowest holding agreed-to by a majority [in Williams] ... is that the Illinois DNA technician’s reliance on the outside laboratory’s report did not violate [the] right to confrontation because the report was not testimonial ...”79

Likewise, the U.S. Court of Appeals for the Tenth Circuit showed its frustration with Williams and the Court’s current Confrontation Clause confusion in United States v. Pablo,70 stating:

[W]e cannot say the district court plainly erred ... as it is not plain that a majority of the Supreme Court would have found reversible error ... it appears that five Justices would affirm the district court in this case, albeit with different Justices relying on different rationales as they did in Williams ... The four-Justice plurality in Williams likely would determine that Ms. Snider’s testimony was not offered for the truth of the matter asserted ... Meanwhile, although Justice Thomas likely would conclude that the testimony was being offered for the truth of the matter asserted, he likely would further determine that the testimony was nevertheless constitutionally admiss-
sible because the appellate record does not show that the report was certified. ...”  

As these cases demonstrate, lower courts throughout the country are dumbfounded by the Supreme Court’s current Confrontation Clause jurisprudence and have been left to guess the meaning of “testimonial” since Crawford. Further, the Court’s recent decisions have wreaked logistical and economic havoc that Williams may be too little and too late to remedy. Indeed, the added workload these decisions have created for prosecutors, the courts, and lab analysts is formidable. In these difficult economic times, states and the federal government are forced to use already limited resources to ensure analysts’ availability. In 2009, there were only 411 publicly funded crime laboratories in the nation with an estimated 13,100 full-time personnel. Yet, that same year—the year Melendez-Diaz was decided—there were an estimated 4.1 million requests for forensic services. Furthermore, in 2010, there were a total of 27,648 violent crimes reported in South Carolina alone. While the majority in Bullcoming tried to ease the pain by saying only “a small fraction of ... cases ... actually proceed to trial,” the five to 10 percent of cases that do go to trial are the cases in which the most is at stake and in which analysts are most likely to be used. For example, in July 2008 the Virginia Department of Forensic Science had only 43 drug case subpoenas. However, just one year later after the decision in Melendez-Diaz, the number of subpoenas had increased to 925. In the last six months of 2009, state lab analysts in Virginia were subpoenaed to testify in 5,651 drug cases and sometimes had to travel over 100 miles just to testify in court.

All of this increased activity has worsened the already substantial backlog in the nation’s crime labs. Since the decision in Melendez-Diaz, some state laboratories estimate that the backlog of drug tests has risen 40 percent and the backlog of alcohol or toxicology tests has increased by 15 percent. In turn, this backlog in cases and increased burden on prosecutors, courts, and analysts has greatly slowed the wheels of justice and, in some cases, thrown them off course. Justice Scalia conjectured that “defense attorneys and their clients will often stipulate to [the contents of the lab report, and that it] is unlikely that defense counsel will insist on live testimony whose effect will be merely to highlight rather than cast doubt upon the forensic analysis.” However, as pointed out by Justice Kennedy in his dissent, Justice Scalia’s optimism is contrary to what has been “understood to be defense counsel’s duty to be a zealous advocate for every client.” Criminal defense attorneys now possess “the formidable power to require the government to transport the analyst to the courtroom at the time of trial.” Advocating for their clients, Justice Kennedy predicted that these attorneys would either use this right at trial or use it as a bargaining chip to “insist upon concessions” from the government.  

In the years following these decisions, Justice Kennedy’s fears have been validated in lower courts. In numerous cases, prosecutors have had to ask whether “it’s really worth it” to call the lab analysts to testify. In fact, many prosecutors have had to make plea deals that they otherwise would not have made because of the fear that they will have to make the lab analyst available at trial. Moreover, many lower courts have had to “delay or even dismiss cases when lab technicians didn’t show up.” This “giant game of chicken” that the Supreme Court has allowed defense attorneys to play with prosecutors must come to an end.

**Time for a Change**

The time has now come for the Supreme Court to re-examine Crawford and its progeny. Lower courts, prosecutors, defense attorneys, and especially the nation’s limited supply of lab analysts need a clearer and more workable standard.

While Roberts may not have been perfect, its framework was at least widely understood and efficient. Prosecutors, lower court judges, and defense attorneys alike knew that a statement was admissible if it fell “within a firmly rooted hearsay exception” or if the trial court determined that it had “particularized guarantees of trustworthiness.” The standard may have been vague, but it left the determination as to what evidence is reliable enough to be admitted to trial courts—a gatekeeping role that trial courts have often played (e.g., with scientific evidence).

Of course, it is unlikely that the Supreme Court will return to the Roberts standard, but the Court could reevaluate its interpretation of “testimonial” and pull back from its broad application in Melendez-Diaz and Bullcoming. But for the sake of ensuring the administration of justice in our courts, and for the sake of the sanity of forensic analysts across the country, the Court should retract the claws of Crawford.

Notably, pulling back from Crawford through a narrower reading of the Confrontation Clause would not leave defendants without a remedy. The state will still have to make its case, which, under the Federal Rules of Evidence, necessitates showing evidentiary chain of custody and interpreting test results before a lab report will be admitted. Also, if reliability of a report is at issue, a defendant may always subpoena the authoring analyst. In this manner, the defense will have an opportunity to cross-examine and point out any problems. Finally, the defense can call its own experts to demonstrate the unreliability of a report at issue.

**Conclusion**

When Crawford was decided in 2004, then-Chief Justice Rehnquist foresaw that “thousands of federal prosecutors and the tens of thousands of state prosecutors need answers as to what ... kind[] of ‘testimony’ ... is covered by the new rule.” He said that these answers are needed “now, not months or years from now.” It has been almost eight years since Crawford was decided, and prosecutors, as well as trial courts and defense attorneys, are still waiting. The few bits of information provided by the Supreme Court have been confusing and disjointed. Moreover, the decisions in Melendez-Diaz and Bullcoming threaten to overwhelm the justice system by constantly requiring the country’s limited number of forensic analysts to appear at trial. While the recent decision in Williams has departed somewhat from those decisions, in the end it may only further increase the confusion surrounding Crawford and the Confrontation Clause. The day has come for the Supreme Court to re-evaluate its Confrontation Clause jurisprudence and consider the practical effects of its decisions.
Confrontation Clause in accordance with Ohio v. Roberts. ... to each statement freed the evidence from challenge under the ground that the applicability of a traditional hearsay exception now, the district court rejected these [admissibility] challenges on 177 (6th Cir. 2007) (“Quite understandably then, quite wrongly unanswered: ‘What is a testimonial statement?’”).

The most obvious question emanating from the decision was left the Confrontation Clause and the evils it was designed to eradicate, 67 (2005) (“Despite much detail about the historical significance of Hammon / Crawford” “Testimony” Does Not Mean Testimony and “Witness” Does Not confront; “chief among them is uncertainty about the definition of ‘testimonial statements.’”); Adam Silberlight, [and c]. . . chief among them is uncertainty about the definition of ‘testimonial statements.’”

The new decision fails to give a satisfactory explanation of why the are many problems with the Court’s reasoning in Davis/Hammon. 10557 U.S. 305 (2009). The Supreme Court attempted to dis-

The Confrontation Clause Re-Root-

• • •
In this case, the declarant was the analyst who conducted the test. Id. at 308.

Id. at 311.

Id. at 313.

Id. at 320–21.

564 U.S. at ___, 131 S. Ct. at 2705.

Id. at ___, 131 S. Ct. at 2711.

Id. at ___, 131 S. Ct. at 2713.

Id. at ___, 131 S. Ct. at 2705.

Id.

Id. at ___, 132 S. Ct. at 2221.

Id. at ___, 132 S. Ct. at 2227.

See id. at ___, 132 S. Ct. at 2244.

See id. at ___, 132 S. Ct. at 2242 n.13 (“Experience might yet show that the holdings in those cases should be reconsidered for the reasons, among others, expressed in the dissent the decisions produced.”).

See id. at ___, 132 S. Ct. at 2228.

Id. at ___, 132 S. Ct. at 2272 (Kagan, J., dissenting).

Id. at ___, 132 S. Ct. at 2256 (Thomas, J., concurring).

Id. at ___, 132 S. Ct. at 2270 (Kagan, J., dissenting).

Id.

Id. at ___, 132 S. Ct. at 2243.

Id.

Id. at ___, 132 S. Ct. at 2273 (Kagan, J., dissenting).

Id. at ___, 132 S. Ct. at 2274 (Kagan, J., dissenting).

Id. at ___, 132 S. Ct. at 2244.

Id. at ___, 132 S. Ct. at 2266 (Kagan, J., dissenting).

Id. at ___, 132 S. Ct. at 2275 (Kagan, J., dissenting) (quoting Melendez-Diaz, 557 U.S. at 319).

Id. at ___, 132 S. Ct. at 2259 (Thomas, J., concurring).

Id.


Id.


Williams, 567 U.S. at ___, 132 S. Ct. at 2244.

See id. at ___, 132 S. Ct. 2212 (“Each [DNA] case will involve at least 12 technicians ... more complex cases involve even greater number of technicians.”).

Id. at ___, 132 S. Ct. at 2244 (Breyer, J., concurring).


Id. at **7–8.

Id. at *8.


Id. at *5 (“We are bound in this case by the judgment in Williams ....”).

Id.

No. 09-2091, 2012 WL 3860016 (10th Cir. Sept. 6, 2012).

Id. at *8.


Id.


Id. at ___, 131 S. Ct. at 2718 (quoting Melendez-Diaz, 557 U.S. at 305).

Tamara F. Lawson, Before the Verdict and Beyond the Verdict: The CSI Infection Within Modern Criminal Jury Trials, 41 Loy. U. Chi. L.J. 119, 127 (2009) (“At first glance, ten percent may appear to be a small percentage of the overall criminal justice case-load. However, cases that proceed to jury trial carry the highest stakes and most severe punishments; allegations often include violent rape or murder.”); see James L. Spies, Violent Crimes Murder Charges, Law Office of James L. Spies, www.aggressivecriminallaw.com/admin/aggressivecriminallaw-lawoffice.com/PracticeAreas/Violent-Crimes-Murder-Charges.html (last visited Oct. 2, 2012) (“As a former prosecutor and current criminal defense attorney, I know that violent crime and murder cases will almost always go to trial—rarely are they resolved through plea negotiations.”).


Id.


See id. (statement of Pete Marone, director of the Virginia Department of Forensic Science).

Melendez-Diaz, 557 U.S. at 328.

Id. at 353 (Kennedy, J., dissenting).

Id. at 355 (Kennedy, J., dissenting).

Id.

Conery, supra note 86.

Id.

McGlone, supra note 88.

Id.

See Brief for Respondent at 12, Crawford v. Washington, 541 U.S. 36 (2004) (No. 02-9410) (“During the ensuing 23 years since the Roberts decision, the trend of this [C]ourt has been to adhere to and refine this framework. Petitioner and Amici, however, would have this Court disregard both this past 23 years of successful application of the Roberts framework ....”).


Id.

Melendez-Diaz, 557 U.S. at 340.

Id.

Crawford, 541 U.S. at 75 (Rehnquist, C.J., concurring).
Sixty Years of Touhy

by John A. Fraser III
Sixty years ago, in United States ex rel. Touhy v. Ragen, the U.S. States Supreme Court sidestepped a direct confrontation between the judicial branch and the executive branch. The confrontation grew out of a habeas corpus proceeding in which a notorious gangster and state penitentiary inmate claimed that his conviction and imprisonment were the products of fraud. The district court where the habeas corpus matter was pending issued a subpoena duces tecum which directed the head of the local Federal Bureau of Investigation (FBI) office to appear and produce relevant FBI investigative records. The head of the FBI office appeared but respectfully declined to produce the records, citing a U.S. Department of Justice (DOJ) regulation that required the approval of the U.S. attorney general before such a production could occur. The DOJ regulation was in turn based on a “housekeeping” statute that empowered the heads of federal agencies to set regulations, inter alia, for recordkeeping and subpoena responses.

The district court held the FBI agent in contempt, ruling that the FBI records were relevant and that the housekeeping statute did not create a privilege against a court-ordered subpoena. The U.S. Court of Appeals for the Seventh Circuit reversed, holding that the housekeeping statute created a statutory privilege against production of the records. The Supreme Court granted certiorari, and then sidestepped the primary issue of privilege. The Supreme Court held that the contempt power was not available to enforce a subpoena served on a subordinate federal employee when a valid regulation instructed the employee not to honor such a subpoena.

In Touhy, the Supreme Court neatly avoided the confrontation between the executive and the judiciary created by a district court that wielded the contempt power to enforce a subpoena against the executive. Touhy exemplifies the judicial wisdom of not confronting the executive branch without a compelling need and an assurance of compliance. However, the ruling left many questions to be decided, including the division of labor between the judicial and executive branches in determining whether particular government records are privileged, or are in fact grist for the mill of civil litigation. If the contempt power is not available to enforce a civil subpoena, are other enforcement tools available? In practice, does the executive branch make the final determination of privilege for its documents?

In the ensuing 60 years, the U.S. Congress, numerous executive agencies, and the lower courts have responded to Touhy in a variety of ways. After Touhy was decided in 1951, numerous executive agencies adopted or revised regulations that implemented the housekeeping statute and attempted to delegate and regularize the executive discretion affirmed in Touhy. Through their Touhy regulations, executive agencies have sought to avoid serving as a cost-free source of discovery and expert opinions for civil litigants in cases where the government is not a party. In 1958, Congress tried without much effect to limit the practical consequences of Touhy by amending the housekeeping statute.

Lower courts have followed the narrow contempt holding of Touhy, but have found other methods of enforcing discovery from federal agencies, especially in civil cases where federal agencies are parties. A number of academic articles have criticized the alleged defects of Touhy and suggested a variety of “remedies” for the denial of the contempt power to district courts. The majority of lower courts have recognized that it is up to Congress to regulate the boundaries of the statutory “housekeeping privilege,” and have therefore looked to the U.S. Code for the law that governs discovery from federal agencies. In contrast, two appeals courts have ruled that district courts must evaluate claims of privilege under Rule 45 of the Federal Rules of Civil Procedure, and not under Touhy.

This article explores 60 years of Touhy by first describing the legal background that led to Touhy. In the second section it relates the essentials of Touhy and its practical effects in subsequent administrative regulations and lawsuits. The third section describes the 1958 congressional legislative response to Touhy, and the very limited results of that legislation. The fourth section outlines how the majority of federal courts have looked to the U.S. Code for jurisdictional and statutory guidance on the boundaries of the “housekeeping privilege,” which is based entirely on legislative acts dating back to 1789. The fifth section describes the U.S. Court of Appeals for the Ninth and District of Columbia (D.C.) Circuits decisions and a few academic articles which have assumed that federal judges must have the power to finally determine all questions of privilege, and have therefore insisted on judicial means for enforcement of subpoenas, despite Touhy.

The concluding section argues the point that judges are not endowed by the U.S. Constitution or the U.S. Code with the authority to independently and finally determine all questions of privilege, regardless of circumstances. At present, the U.S. Code empowers the heads of federal agencies to make initial determinations regarding the release of agency records and subjects those determinations to judicial review under circumstances and standards defined by the same code. Unless the determinations of privilege violate a statutory or constitutional standard, federal judges do not have inherent authority to overrule lawful executive branch or congressional determinations of privilege. Section VI argues that generalized notions of judicial supremacy should not be substituted for express statutory authority to determine privilege.

The History of the Housekeeping Statute and Privilege Up to 1950

The first Congress passed the “housekeeping statute” in 1789 and authorized Secretary of State Thomas Jefferson (and other department heads) to act as official records custodians for the
new Republic. As it reads today, the statute authorizes agency heads to “prescribe regulations for the … custody, use, and preservation of [the agency’s] records, papers, and property.”

There are no pre-Civil War reported instances of court orders compelling officers of the executive branch to produce records or testimony in civil litigation where the federal government was not a party. In 1842, President John Tyler described the prevailing practice of the executive branch:

It is certainly no new doctrine in the halls of judicature or of legislation that certain communications and papers are privileged, and that the general authority to compel testimony must give way in certain cases to the paramount rights of individuals or of the Government. Thus, no man can be compelled to accuse himself, to answer any question that tends to render him infamous, or to produce his own private papers on any occasion. The communication of a client to his counsel and the admissions made at the confessional in the course of religious discipline are privileged communications. In the courts of that country from which we derive our great principles of individual liberty and the rules of evidence, it is well settled, and the doctrine has been fully recognized in this country, that a minister of the Crown or the head of a department cannot be compelled to produce any papers, or to disclose any transactions relating to the executive functions of the Government which he declares are confidential, or such as the public interest requires should not be divulged; and the persons who have been the channels of communication to officers of the State are in like manner protected from the disclosure of their names. Other instances of privileged communications might be enumerated, if it were deemed necessary. These principles are as applicable to evidence sought by a legislature as to that required by a court.

After the Civil War and before 1900, the courts routinely ruled that the executive branch was not required to provide records or testimony in civil cases, and that the contempt power was not available to state or federal courts to require records or testimony. The U.S. attorney general consistently opined that production of records and testimony was discretionary with the executive. Where the United States was a party, the rule was different.

In 1900, the Supreme Court approved an agency’s reliance on the housekeeping statute as grounds for refusing to produce records in response to a subpoena. In *Boske v. Cominore*, a Kentucky state court held a federal revenue collector in contempt for refusing, in compliance with a regulation promulgated by the Commissioner of Internal Revenue, to produce tax records in response to a state court subpoena.

The Supreme Court held in *Boske* that a Kentucky state court could not hold the federal revenue collector in contempt. Relying on the housekeeping statute, the Court held that an Internal Revenue regulation was a valid, constitutional exercise of the powers of the Secretary of the Treasury—and through him, the Commissioner of Internal Revenue—“to prescribe regulations … for the … custody, use, and preservation of … records, papers, and property.” Thus, the Court held that the Secretary “may take from a subordinate, such as a collector, all discretion as to permitting the records in his custody to be used for any other purpose than the collection of the revenue, and reserve for his own determination all matters of that character.”

Between 1900 and 1951, under the housekeeping statute, executive agency heads determined which records or witnesses to release to civil litigants, and how to do so. In effect, the agencies had a privilege against discovery.

*Touhy and the Touhy “Privilege”*

The Supreme Court unanimously decided *Touhy* in 1951, holding that a federal employee may not be held in contempt as a means of enforcing a district court subpoena for production of the records of the federal agency when that agency has instructed its employee to decline to honor the subpoena. Although the Supreme Court had granted certiorari on a petition that presented the question of the existence of a statutory privilege against production of records, the Court declined to address that issue. Justice Felix Frankfurter wrote a separate concurrence that specifically underlined the Court’s narrow holding regarding the contempt power, and also noted that the existence of a privilege was not addressed by the Court.

Since 1951, federal agencies have used the statutory lan-
guage of the housekeeping statute, in conjunction with *Touhy*, to justify agency regulations that require designated agency officials to give their approval before employees can testify or provide agency records in disputes to which the federal government is not a party.21 Such regulations generally direct subpoenaed employees “respectfully to refuse to provide any testimony or produce any document” if the designated agency official does not authorize compliance with the subpoena.22 Most *Touhy* regulations delegate to a senior official the determination of whether and how the agency will comply with a subpoena. The regulations typically list various factors for that official to consider, including privilege, burden on the agency, and the need to protect confidential information.21

Other agencies have taken a different approach to *Touhy* regulations: these agencies treat civil subpoenas as requests for records under the Freedom of Information Act (FOIA), first enacted in 1966.24 In response to a subpoena, the regulations require employees to appear in court, “respectfully decline to produce the records” on the grounds that doing so is prohibited by the regulation, and state that the agency will handle the subpoena under FOIA.25

The agency then sends the subpoena to its FOIA office. That office may redact portions of records or withhold them entirely pursuant to FOIA exemptions. The U.S. Food and Drug Administration (FDA), the U.S. Department of Agriculture (USDA), the Office of the Comptroller of the Currency, and the Consumer Product Safety Commission have *Touhy* regulations that treat subpoenas as FOIA requests.26

Lower courts have interpreted *Touhy* as preventing any contempt ruling against agency employees,27 and have looked to the express provisions of the U.S. Code for other non-contempt means of subpoena enforcement when the agency is not a party to the suit. As is discussed below, the practical effect of *Touhy* (in most of the United States) is that agencies determine when and how much information and testimony will be released when other parties are in litigation. Under *Touhy* and the law that has developed under it, federal agencies do not serve as a free speaker’s bureau, expert witness laboratory, and research agency for civil litigants. This is what is referred to by federal practitioners as the *Touhy* privilege.

**Congress Responds to *Touhy* in 1958**

Congress amended the “housekeeping” statute in 1958 to clarify that it “does not authorize withholding information from the public or limiting the availability of records to the public.”28 Congress apparently believed that the housekeeping statute “was being miscited as statutory authority for nondisclosure.”29 The stated purpose of the 1958 Amendment was to clarify that the housekeeping statute confers no authority upon the head of a department to suppress information.30 One court held that the amendment was meant to “knock[] the judicially sanctioned prop out from under the bureaucratie privilege claims.”31 But the 1958 Amendment left undisturbed the core principles of *Touhy*—that department heads have the authority to determine responses to subpoenas, and may delegate responses to discovery requests and immunize subordinates from contempt.32

The 1958 Amendment had little practical effect on federal agency refusals to produce information.33 Some commentators believe that the amendment was intended to reverse *Touhy* by erasing its statutory base.34 After the 1958 Amendment, however, courts have approved immunity from testimony beyond what was allowed in *Touhy*.35 If the 1958 Amendment was passed to overrule the housekeeping privilege, it did not have that effect. In fact, *Touhy* is the case most often relied on by executive branch agencies and by courts when overruling demands for evidence from federal agencies.36

The Majority of Lower Courts Look to the U.S. Code for Guidance on the Limits of the Housekeeping Statute

If the contempt power is not available to enforce subpoenas, how then may a civil litigant seek to obtain information, documents, or testimony from a federal agency that is not a party to the litigant’s suit? The answer depends on the federal circuit in which the litigant has brought suit.

The U.S. Court of Appeals for the First, Second, Third, Fourth, Fifth, Seventh, Tenth, and Eleventh Circuits have held that courts may review an agency’s refusal to comply with a subpoena under the Administrative Procedure Act (APA).38 Under the APA, courts will set aside agency actions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”39 The First and Second Circuits have held that a litigant in federal court need not file a separate action against an agency, but may move to compel compliance with a subpoena under the APA in the same suit where the subpoena was issued.40 The D.C. Circuit has ruled that a separate APA action is necessary when the matter arises in state court. 41

In those circuits where the APA provides the only path to challenge an agency decision not to produce documents or witnesses, agencies maintain broad practical discretion in responding.42 This result is what is loosely referred to as the “*Touhy* privilege.” Under the APA, a litigant who has been refused agency documents or testimony can prevail if the agency withheld the documents in contravention of the agency’s regulations.43 Therefore, agencies write regulations forbidding compliance with subpoenas, and the agency is not “arbitrary and capricious” under the APA when it complies with those same published regulations.44

Beyond the APA, the D.C. and Ninth Circuits have held that a litigant may challenge an agency’s refusal to comply with a subpoena by filing a motion to compel compliance under Rule 45 of the Federal Rules of Civil Procedure.45 A Rule 45 motion to
compel is more favorable to a party seeking discovery because it does not incorporate the APA’s deferential standard of review, does not require a second lawsuit, and is heard by the judge who presides over the parties’ dispute. Under Rule 45, the judge conducts a “balancing” test in which the judge, rather than the Agency, weighs the asserted need for secrecy against the asserted need for release of the information.

However, it is unclear whom a litigant should sue when she brings a Rule 45 motion to compel compliance with a subpoena against an agency. A litigant cannot sue an agency employee who refuses to disclose information pursuant to a valid agency regulation because *Touhy* prohibits the court from holding the employee in contempt. Although the agency head is not protected by *Touhy* (which protects subordinate employees), the agency head may not easily be served within the court’s territorial jurisdiction. A collateral action in the district where the agency’s head office is located—often the District of Columbia—may be necessary. The requirement of a separate lawsuit against the agency head in a different jurisdiction is a significant litigation burden.

Does FOIA provide a jurisdictional basis for court enforcement of subpoenas issued in litigation? On the face of the statute, there does not appear to be any reason why an agency may not treat a subpoena as a written request for release of information under FOIA, and to treat FOIA as a codification of common-law privileges. However, the case law on this point is mixed.

Will resorting to state court resolve the issue of a lack of contempt power in federal court? The answer is “no.” State courts do not have the authority to hold federal employees in contempt, or to resolve claims of privilege asserted by federal agencies. Sovereign immunity prevents state courts from enforcing subpoenas against the federal government. If a state court seeks to compel a federal employee to comply with a subpoena, the federal employee can remove the matter to federal court. The federal court will recognize that the state court had no jurisdiction to compel compliance from a federal employee. Because federal courts on removal derive their jurisdiction from the state court from which the matter was removed, the federal court will also determine that it lacks jurisdiction to enforce the subpoena.

The Ninth and D.C. Circuits and Some Academic Articles Have Sought to Avoid *Touhy* by Arguing for Judicial Supremacy over All Questions of Privilege

In *Exxon Shipping Co. v. U.S. Department of the Interior*, the Ninth Circuit held that neither *Touhy* nor the housekeeping statute allow federal agencies to forbid agency employees from complying with a court’s subpoena. *Exxon Shipping* is the first court of appeals’ decision holding that the housekeeping statute does not grant agency officials the authority to withhold subpoenaed documents or employee testimony in a civil action to which the government is not a party. The Ninth Circuit ruling does not deprive the housekeeping statute and *Touhy* of all mean-
is a question of law, for which the U.S. Code may well provide the answer. If the U.S. Code assigns a privilege issue to the executive branch, then that is the law that should be followed. 64

If Touhy Presents a Dilemma, Judicial Supremacy Is Not the Answer

In United States v. Nixon, the Supreme Court held: “It is the province of this Court ‘to say what the law is’ with respect to the claim of privilege in this case.” 65 In a “state secrets” case, the Supreme Court rhetorically declared that “[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers.” 66 These and other holdings form the basis for the rhetorical argument that federal judges must resolve all claims of privilege that are asserted in federal litigation. However, this rhetorical argument goes too far.

At bottom, this argument assumes that federal judges must have the power to make the final determination of whether government information is better released, or better kept in confidence. 67 Of course, it is a truism that federal judges decide questions of law over which jurisdiction is assigned to the federal courts. This truism aside, the question presented in each case is whether an Act of Congress or the U.S. Constitution has committed a particular privilege issue to federal judges, or to the executive, or to the legislative branch.

There are privilege and secrecy determinations which judges are not empowered to second-guess, even when those determinations are questioned in federal litigation. 68 These determinations include questions of information classification, 69 contracts for espionage, 70 military strategy, 71 patent applications, 72 scientific secrecy, 73 foreign relations and diplomacy, 74 atomic weapons safeguards, 75 qualifications for the military draft, 76 tax return confidentiality, 77 census record privacy, 78 and legislative privilege under the Speech and Debate Clause. 79 In these cases, federal judges do not have the authority to over-rule the substantive decision of another branch that the information in question should remain confidential. Judges do not weigh and “balance” the litigant’s need for the information or testimony against the asserted privilege in these areas. Obviously, separation of powers is honored in such cases, despite the fact that the judges are not empowered to overrule the executive or the legislative assertions of privilege.

Conclusion

The housekeeping statute of 1789, now codified at 5 U.S.C. § 301, provides the answer to critics of Touhy and the Touhy privilege. The statute sets the boundaries and authorizes executive branch assertion of the privilege. If Congress determines that the statutory protections for agency records are flawed, then Congress has the power to amend the housekeeping statute. Absent legislation assigning to them a final role as arbiters of privilege, the courts should abide by Touhy and the statute. 60

John A. Fraser III is an attorney employed by the U.S. Department of Defense. The views expressed herein are entirely his own.

Endnotes

2 Once executive privilege is asserted, coequal branches of the Government are set on a collision course. The Judiciary is forced into the difficult task of balancing the need for information in a judicial proceeding and the Executive’s Article II prerogatives. This inquiry places courts in the awkward position of evaluating the Executive’s claims of confidentiality and autonomy, and pushes to the fore difficult questions of separation of powers and checks and balances. These occasions for constitutional confrontation between the two branches should be avoided whenever possible. Cheney v. U.S. District Court, 542 U.S. 367, 390 (2004) (citations and internal quotations omitted).
3 Roger Touhy was a notorious gangster, kidnapper, bootlegger, and organized crime chieftain known in the Chicago underworld as “Terrible Touhy” and “Roger the Terrible Touhy.” See the FBI website www.fbi.gov/about-us/history/famous-cases/roger-the-terrible-touhy and the Wikipedia website www.en.wikipedia.org/wiki/Roger_Touhy (describing career and legal appeals).
4 The district court held an FBI agent in contempt for refusal to produce certain FBI records that the district court deemed relevant to a habeas corpus proceeding. 340 U.S. at 465, but did not reach the broader issue of privilege presented by the petition, ruling instead that the power of contempt did not lie against the individual employee. Id. at 467-70.
5 The Seventh Circuit reversed, holding that the DOJ had a statutory privilege against production of the documents under 5 U.S.C. § 301—the “housekeeping” statute. United States ex rel. Touhy v. Ragen, 180 F.2d 321, 327 (7th Cir. 1950).
7 The Supreme Court did not reach the broader issue of privilege presented by the petition, ruling instead that the power of contempt did not lie against the individual employee. 340 U.S. at 467-70.
8 Act of Sept. 15, 1789, ch. 14, 1 Stat. 68 (codified as amended at 5 U.S.C. § 301 (2010)). The housekeeping statute now reads:

The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

9 In Marbury v. Madison, 5 U.S. (1 Cranch) 137, 143-44 (1803), the Secretary of State was the defendant, and Attorney General Levi Lincoln objected to being asked to testify regarding his duties and actions as acting Secretary of State, yet was required to testify to some events and allowed to assert a privilege as to other events. In particular, he successfully asserted a privilege against testifying as to the exact location and fate of the presidential commission that was the subject of the mandamus petition in the suit. Id. at 145. In the criminal prosecution of Aaron Burr, Chief Justice John Marshall (sitting as a trial judge on circuit duty) ruled that the Court did not have the power to compel President Thomas Jefferson to produce all portions of
the executive branch correspondence that the criminal defendant sought to compel. *United States v. Burr*, 25 F. Cas. 187, 192 (C.C.D. Va. 1807) (“In no case ... would a court be required to proceed against the president as against an ordinary individual.”). It is also worth noting that, by the time of the Madison Administration, secret government documents were labeled as “secret,” “confidential,” and “private.” Edward F. Sayle, The Historical Underpinnings of the U.S. Intelligence Community, 1 Int’l J. of Intelligence & Counterintelligence 10-11 (1986).

103 Hind’s Precedents 182 (1907). It should be noted that at common law, a bill of discovery was not generally available against a third party in civil litigation. John S. Smith, A Treatise on the Practice of the Court of Chancery 498 n.la (1842).

11See In re Weeks, 82 F. 729 (D. Vt. 1897) (ordering release of Internal Revenue employee who refused to testify about confidential federal records); In re Hutman, 70 F. 699 (D. Kan. 1895) (same); Gardner v. Anderson, 9 F. Cas. 1158 (C.C.D. Md. 1876) (communications between executive officials are privileged from civil subpoena).


13See, e.g., *United States v. Hutton*, 26 Fed. Cas. 454, 459 (S.D.N.Y. 1879) (the court determines which confidential Treasury papers must be produced in discovery when the government is a party).

14177 U.S. 459, 462-63 (1900). A second federal statute made it a crime for a federal Treasury agent to divulge tax information without authorization. *Id.* at 462. Arguably, the commissioner’s regulation prohibiting employees from producing tax information in response to a subpoena was also supported by the criminal statute.

15*Id.* at 470.

16Bank of America v. Douglass, 105 F.2d 100, 104 (D.C. Cir. 1939) (Treasury Secretary has power to determine use of department’s documents); Ex parte Sackett, 74 F.2d 922 (9th Cir. 1935) (FBI agent may not be held in contempt to enforce subpoena); In re Valencia Condensed Milk Co., 240 F. 310 (7th Cir. 1917) (contempt power not available to subpoena records from federal department); Foukes v. Dravo Corp., 5 F.R.D. 51 (E.D. Pa. 1945) (denying order to compel production of federal records); United States v. Potts, 57 F. Supp. 204, 206 (M.D. Pa. 1944) (quashing subpoena to the U.S. Attorney for the Middle District of Pennsylvania for grand jury witness list); Wailing v. Comet Carriers, 3 F.R.D. 442 (S.D.N.Y. 1944) (quashing subpoena to U.S. Department of Labor); United States ex rel. Bayarsky v. Brooks, 51 F. Supp. 974 (D.N.J. 1943) (quashing subpoena issued to the U.S. District Attorney of New Jersey); Federal Life Ins. Co. v. Holod, 30 F. Supp. 713 (M.D. Pa. 1940) (motion to compel production of draft board records denied); Harwood v. McMurry, 22 F. Supp. 572 (D. Ky. 1938) (denying subpoena against government); Steggall v. Thurman, 175 F. 813, 824 (N.D. Ga. 1910) (granting habeas corpus to federal employee jailed by state court for refusing to divulge evidence required to be kept confidential by Treasury regulation); In re Lamberton, 124 F. 446, 450-51 (W.D. Ark. 1903) (federal Internal Revenue agent discharged from state custody for contempt); Parsons v. State, 251 Ala. 467, 474, 38 So. 209 (1948) (U.S. Attorney General may decline to honor request for identity of informant); Meyer v. Home Ins. Co., 127 Wis. 293, 106 N.W. 1087, 1090 (1906) (federal departments cannot be compelled to produce documents or witnesses; such documents are privileged); 40 Op. Atty. Gen. 45, 49 (1941) (executive branch makes decision as to privilege without judicial supervision or review); 25 Op. Atty. Gen. 326 (1905) (cabinet official may decline to testify or produce records under state court subpoena).

17See Raoul Berger, Government Immunity From Discovery, 59 Yale L.J. 1451, 1464-66 & n.64 (1950) (rule that government may withhold evidence in third-party cases is “well-settled”); James Pike, Discovery Against Federal Agencies, 56 Harv. L. Rev. 1125, 1130 & n.19 (1943) (long-standing rule that when third parties seek discovery in private litigation, federal government is exempt).

18340 U.S. at 463-65.

19The district court held an FBI agent in contempt for refusal to produce certain FBI records that the district court deemed relevant to a habeas corpus proceeding. *Id.* at 465. The Seventh Circuit reversed, holding that the DOJ had a statutory privilege against production of the documents under 5 U.S.C. § 301, the “housekeeping” statute. United States ex rel. Touhey v. Ragen, 180 F.2d 321, 327 (7th Cir. 1950). The Supreme Court granted certiorari, 340 U.S. 806 (1951), but did not reach the broader issue of privilege presented by the petition, ruling instead that the power of contempt did not lie against the individual employee. 340 U.S. at 467-70.

20340 U.S. at 472 (Frankfurter, J., concurring).


23For example, DOJ regulations prohibit employees from complying with subpoenas in proceedings in which the government is not a party without the approval of designated department officials. 28 C.F.R. § 16.22(a) (2010). The regulations direct the responsible department officials to consider whether disclosure is “appropriate under the rules of procedure” governing the underlying case and the “relevant substantive law concerning privilege.” *Id.* § 16.26(a). The regulations provide that information will not be disclosed in particular instances, such as where disclosure would “violate a specific regulation,” “reveal classified information,” or “improperly reveal trade secrets without the owner’s consent.” *Id.* § 16.26(6).


2621 C.F.R. § 20.2(a) (2010) (FDA); 7 C.F.R. § 1.215(a) (2010) (USDA); 12 C.F.R. §§ 4.33, 4.34, 4.37(a) (2010). The U.S. Environmental Protection Agency has by regulation adopt-

27See, e.g., In re Boen, 25 F.3d 761, 763 (9th Cir. 2004) (FBI agent may not be held in contempt under Touhy); Swett v. Schenck, 792 F.2d 1447, 1451-52 (9th Cir. 1986) (following Touhy); Davis v. Braswell Motor Freight Lines, Inc., 363 F.2d 600, 605 (5th Cir. 1966) (following Touhy to reject contempt remedy); North Carolina v. Carr, 264 F. Supp. 75, 80 (W.D.N.C. 1967), appeal dismissed, 386 F.2d 129 (4th Cir. 1967) (following Touhy); Reynolds Metals Co. v. Crowther, 572 F. Supp. 288, 290 (D. Mass. 1982) (denying subpoena for documents under Touhy).


30H.R. Res. No. 85-1461 (1958), reprinted in 1958 U.S.C.C.A.N. 3352. The amendment added one sentence to the statute: “This section does not authorize withholding information from the public or limiting the availability of records to the public.” Id. at 3353.


32See Chrysler Corp. v. Brown, 441 U.S. 281, 309-12 (1979) (describing how the 1958 Amendment to § 301 came about and holding that § 301 does not authorize the release of information that is otherwise confidential).

33Jason C. Grech, Note, Exxon Shipping, the Power to Subpoena Federal Agency Employees, and the Housekeeping Statute: Cleaning Up the Housekeeping Privilege for the Chimney-Sweeper’s Benefit, 37 WM. & MARY L. REV. 1137, 1144 (1996) (“Although the language of the amendment was direct in its demand for openness, the addition had little, if any, effect on federal agency responses to discovery requests.”).

34Gregory Coleman, Touhy and the Housekeeping Privilege: Dead But Not Buried, 70 Tex. L. REV. 685, 688-89 (1992) (Touhy does not mean that a government agency may withhold documents or testimony at its discretion; “is not good law and hasn’t been since 1958”).


36Coleman, supra note 34, at 687. See also Milton Hirsch, “The Voice of Adjuration”: The Sixth Amendment Right to Compulsory Process After United States ex rel. Touhy v. Ragen, 30 Fla. St. U. L. Rev. 81, 83 (2002) (“Touhy is the case most cited by both executive branch agencies in support of their regulations and by courts confronted by a demand for evidence withheld in reliance upon such regulations.”)

37Where the government is a party to a suit, it is subject to the Federal Rules of Civil Procedure. Al Fayed v. CIA, 229 F.3d 272, 275 (D.C. Cir. 2000) (citing United States v. Proctor & Gamble Co., 356 U.S. 677, 681 (1958)).

38See, e.g., Hasie v. Office of the Controller of the Currency, 633 F.3d 361, 369 (5th Cir. 2011) (reviewing denial under APA); Cabral v. U.S. Department of Justice, 587 F.3d 13, 22-23 (1st Cir. 2009) (review of Touhy refusal only available under APA); EPA v. Gen. Elec. Co., 197 F.3d 592, 598-99 (2d Cir. 1999) (affirming that “the APA provides the only express waiver of [sovereign] immunity by which General Electric can seek the documents it desires by way of discovery”); COMSAT Corp. v. National Sci. Found., 190 F.3d 269, 274 (4th Cir. 1999) (“When the government is not a party, the APA provides the sole avenue for review of an agency’s refusal to permit its employees to comply with subpoenas.”); Oklahoma v. Hopkins, 1998 U.S. App. LEXIS 25779, 162 F.3d 1172 (10th Cir. 1998) (table) (refusing to enforce a subpoena served on an FBI agent for the purpose of defending against state criminal charges; other remedies include action in federal court pursuant to APA); Edwards v. U.S. Department of Justice, 43 F.3d 312, 314 (7th Cir. 1994) (proper review of refusal of subpoena compliance is APA); Moore v. Armour Pharm. Co., 297 F.2d 1194, 1197 (11th Cir. 1991) (evaluating agency’s decision not to comply with subpoena to determine whether it was arbitrary, capricious, or an abuse of discretion under the APA); Davis Enters. v. U.S. Environmental Protection Agency, 877 F.2d 1181, 1186 (3d Cir. 1989) (same).


The Eighth Circuit appears to follow a rule in which Touhy regulations are disregarded, or are treated as merely procedural. United States ex rel. O’Keefe v. McDonnell Douglas Corp., 132 F.3d 1251, 1254-55 (8th Cir. 1998). Under this rule, district courts determine whether to enforce subpoenas based on common-law or statutory standards, and give no weight or consideration to departmental regulations. Carter v. High Country Mercantile, 2009 U.S. Dist. LEXIS 65619, at **8-10 (W.D. Mo. 2009).

The D.C. Circuit allows APA review of refusal to produce documents or testimony when the issue arises in state court. Houston Business J., Inc. v. Office of the Comptroller, 86 F.3d 1208 (D.C. Cir. 1996). When the issue arises in federal court, the issue is resolved under Rule 45 of the Federal Rules of Civil Procedure. Watts v. Securities & Exchange Comm’n, 482 F.3d 501, 508 (D.C. Cir. 2007) (an agency’s refusal to comply with a Rule 45 subpoena should proceed and be treated not as an APA action but as a Rule 45 motion to compel (or an agency’s Rule 45 motion to quash)); Linder v. Calero-Portocarrero, 251 F.3d 178, 181 (D.C. Cir. 2001) (holding that the waiver of sovereign immunity contained in the APA is not limited to actions brought under APA).


40Cabral v. U.S. Department of Justice, 587 F.3d 13, 22-23 (1st Cir. 2009) (review of Touhy refusal available under APA in same lawsuit); General Electric, 197 F.3d at 599 (same).

41Houston Business J., Inc., 86 F.3d at 1208. An APA action
is also available in the Ninth Circuit when an agency declines to provide witnesses for state court litigation. Sierra Pac. Indus. v. U.S. Department of Agric., 2011 U.S. Dist. LEXIS 147424 (E.D. Cal. 2011).

42The First Circuit asserts that the APA is the appropriate basis for review of Touhy refusals, but also holds that Touhy and the housekeeping statute create no privileges. The First Circuit decides privilege claims under the common law. Puerto Rico v. United States, 490 F.3d 50, 61 (1st Cir. 2007), cert. denied, 552 U.S. 1295 (2008).

43COMSAT Corp., 190 F.3d at 277-78 (approving the National Science Foundation’s refusal to comply with subpoenas, where “[a]cting in accordance with the procedures mandated by its regulations, NSF reached an entirely reasonable decision to refuse compliance with document subpoenas”). Cf. Ceroni v. 4Front Engineered Solutions, Inc., 793 F. Supp. 2d 1268, 1276-78 (D. Colo. 2011) (under APA review, the district court finds that the U.S. Postal Service’s decision not to supply testimony or inspection of premises was arbitrary and capricious, essentially because the district court deemed the evidence important).

44Of course, a district court that is determined to enforce a subpoena may control, acknowledge controlling precedents and then enter an order in disregard of those precedents. See, e.g., Scott v. Lockheed Martin Aerospace Corp., 2006 U.S. Dist. LEXIS 46769, at **6-8 (S.D. Miss. 2009) (acknowledging applicable APA case law and reviewing subpoena refusal under rules of civil procedure).

45See, e.g., Watts v. Securities & Exchange Comm’n, 482 F.3d 501, 508 (D.C. Cir. 2007) (“[A] challenge to an agency’s refusal to comply with a . . . subpoena should proceed and be treated not as an APA action but as a Rule 45 motion to compel . . . .”); Exxon Shipping Co. v. U.S. Dep’t of the Interior, 34 F.3d 774, 780 (9th Cir. 1994) (“Federal district courts, in reviewing subpoena requests under the federal rules of discovery, can adequately protect both an individual’s right to ‘every man’s evidence’ as well as the government’s interest in not being used as a ‘speakers’ bureau for private litigants.’”). See Yousuf v. Samantar, 431 F.3d 248, 250 (D.C. Cir. 2006) (federal agencies are persons subject to subpoenas issued pursuant to Rule 45).

46Preferably, the presiding judge has more knowledge of why the information, documents, or testimony will be of help to the court or jury. At the same time, the presiding judge must be persuaded to consider the burdens inflicted on an agency that is used by litigants as a cost-free expert witness bureau. One agency successfully persuaded a federal judge that its employees should not be turned into tax-paid expert witnesses in products liability litigation. Moran v. Pfizer, 2000 U.S. Dist. LEXIS 11039, at **7-8 (S.D.N.Y. 2000) (FDA employees should not be required to serve as experts in Viagra litigation).

47See, e.g., Exxon Shipping Co., 34 F.3d at 779-780 (discussing factors to be considered under Rule 45).

48Touhy, supra, 340 U.S. at 467-70.

49See Securities & Exchange Comm’n v. Selden, 445 F. Supp. 2d 11 (D.D.C. 2006). Selden issued two subpoenas to the FDA in connection with a proceeding in federal court in Massachusetts. Id. at 12-13. However, Selden determined that he needed to file a separate action to compel in federal district court in Washington, D.C. See id. at 12. It may also be possible to notice the deposition of an agency as a third-party witness under Rule 30(b)(6) of the Federal Rules of Civil Procedure and require the agency to respond under its Touhy regulations. See Metropolitan Life Ins. Co. v. Muldoon, 2007 U.S. Dist LEXIS 94530 (D. Kan. 2007) (denying motion to quash, in part).


51Association for Women in Science v. Califano, 566 F.2d 339, 341-42 (D.C. Cir. 1977) (criticizing agency for treating subpoena as FOIA request); Moore-McCormack Lines v. ITO Corp. of Baltimore, 508 F.2d 945, 947-50 (4th Cir. 1974) (ruling that FOIA exemption 5 does not support rejection of subpoena); Cofield v. City of LaGrange, Georgia, 913 F. Supp. 608, 612-13 & n.4 (D.D.C. 1996) (noting that DOJ Touhy regulations incorporate FOIA exemptions, the court quashed a subpoena under the regulations, after analyzing the FOIA exemptions); Securities & Exchange Comm’n v. Biopure Corp., 2006 WL 2789002, at *1 (D.D.C. Jan. 20, 2006) (FDA Touhy regulations that require submission of FOIA request rather than subpoena are to be enforced).

52See Edwards v. U.S. Department of Justice, 43 F.3d 312, 315 (7th Cir. 2004) (state court has no power to force disclosure of federal records); United States v. Williams, 170 F.3d 431, 434 (4th Cir. 1999) (APA is the appropriate avenue for review of an agency decision not to comply with a state court subpoena); Boron Oil Co. v. Downie, 873 F.2d 67, 68 (4th Cir. 1989) (describing a federal employee’s removal to federal court of a state court subpoena proceeding).

5328 U.S.C. § 1442 (2010) (authorizing federal officers sued in state court for actions taken under color of their federal offices to remove the suits to federal court).

54Smith v. Cromer, 159 F.3d 875, 879 (4th Cir. 1998) (“Where an agency has not waived its immunity to suit, the state court (and the federal court on removal) lacks jurisdiction to proceed against a federal employee acting pursuant to agency direction.”).

5534 F.3d 774, 778 (9th Cir. 1994).

56See id. at 780 & n.11.


58Richmond, supra note 35, at 190-91.


61Note, Taking Touhy Too Far, Etc., 99 Geo. L.J. 1227, 1231, 1251-57, 1260 (2011). Beyond mere assertion, the article failed to explain how the final decision of all privilege issues under “common-law privilege rules” is a “core constitutional role” of the courts.

62Separation-of-powers principles are vindicated, not disproved, by measured cooperation between the two political branches of the Government, each contributing to a lawful objective through its own processes.” Loving v. United States, 348 U.S. 820 (1954).
517 U.S. 748, 773 (1996) (rejecting argument that only the Congress may set rules for the U.S. Army). In another case, a federal statute directed the court of claims to defer to executive agencies as to whether the release of information would damage the United States. *Pollen v. United States*, 85 Ct. Cl. 673 (Ct. Cl. 1937). That statute effectively separated the executive branch decision on privilege from the Article I judges of the U.S. Court of Claims.

63See, e.g., *Ex Parte Peru*, 318 U.S. 578, 589 (1943) (a district court is required to defer to the U.S. Department of State in its sphere of foreign relations and mandamus is available to compel its deference).

64Rule 501 of the Federal Rules of Evidence provides that the common law of privilege governs that “[u]nless any of the following provides otherwise: the United States Constitution; a federal statute . . . .”


66*United States v. Reynolds*, 345 U. S. 1, 9-10 (1953). However, in *U.S. Environmental Protection Agency v. Mink*, 410 U.S. 73, 84 (1973), the Supreme Court held that district courts have no authority to second-guess or review classification decisions of the executive branch under FOIA. Once a document is found to be classified, the district court’s role “is at an end.” *Id.* Congress subsequently amended the FOIA to permit in camera review of classified material, but only in narrow circumstances. *Weinberger v. Catholic Action Network*, 454 U.S. 139, 144 (1981). Under the current FOIA, once a judge determines that a document is properly classified, the judge should not require *in camera* inspection or other discovery. *ACLU v. U.S. Department of Defense*, 628 F.3d 612, 619 (D.C. Cir. 2011).

Even more colorful quotes about separation of powers can be dredged from other cases involving subpoenas issued to the President or Vice President. See *Cheemey v. United States District Court*, 542 U.S. 367, 382 (2004) (“[p]aramount necessity of protecting the Executive Branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties”); *United States v. Burr*, 25 F. Cas. 187, 192 (C.C.D. Va. 1807) (“In no case . . . would a court be required to proceed against the president as against an ordinary individual.”) (Chief Justice Marshall, declining to force production of evidence objected to by President Jefferson).

67This need for judicial authority is almost always asserted as a “balancing test” in which the need for the information is weighed against the harm to be inflicted on the public interest in continued confidentiality. See, e.g., *Exxon Shipping Co. v U.S. Department of the Interior*, 34 F.3d 774, 779-80 (9th Cir. 1994) (discussing factors to be considered under Rule 45). The person doing the “balancing” is always a federal judge when these authors argue in favor of a balancing test. Why such balancing cannot be performed by a knowledgeable executive or legislator is not addressed by these authors.

68Rule 501 of the Federal Rules of Evidence provides that the common law of privilege governs “[u]nless any of the following provides otherwise: the United States Constitution; a federal statute . . . .”

6950 U.S.C. § 403g (national security information).

70*Tenet v. Doe*, 544 U.S. 1 (2005) (suit to enforce espionage contract may not be entertained because of government privilege); *Totten v. United States*, 92 U.S. 105 (1876) (suit may not be entertained where it concerns secret contract for espionage).


74*El Masri v. Tenet*, 437 F. Supp. 2d 530, 536-37 (E.D. Va. 2006) (military and diplomatic matters; greater ability to predict effect of disclosure on national security); *Kumari Sabbithi v. Waled KH N.S. Al Sateh*, 605 F. Supp. 2d 122, 126 (D.D.C. 2009) (“In view of the State Department’s determination that the defendants are diplomats and its certification that as diplomats they are immune from suit pursuant to the Vienna Convention, the Court concludes that these defendants are entitled to diplomatic immunity.”).


79*United States v. Helstoski*, 442 U.S. 477, 487-88 (1979) (speech and debate privilege of Congress is not subject to judicial exceptions, although it can be waived); *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 503 (1975) (once it is determined that members are acting within the legitimate legislative sphere, the Speech or Debate Clause is an absolute bar to interference by courts).
Question: Which of the choices below is correct?

The boy should promptly deliver the message.
The boy promptly should deliver the message.

Answer: Philadelphia attorney Charles F. Forer, who sent this e-mail, added, “This question always bedevils me.” But he should relax, for both of his choices are grammatically correct. However, for stylistic reasons I prefer a third choice: “The boy should deliver the message promptly.”

My reason is that the most important part of a sentence should come at the end, the next most important language at the beginning, and all the rest of the language should be placed in the middle, because the middle of the sentence is what the reader pays least attention to. Both of Attorney Forer’s sentences placed the phrase “deliver the message” right next to or within the verb phrase, which is desirable. (In this message, there may not be a need to call attention to the adverb “promptly.”)

Attorney Forer asked another good question, which many other readers have asked: whether the pronoun “that” is necessary in the following sentences:

The boy told me he broke the window.
The boy told me that he broke the window.

Again, both sentences are grammatically and stylistically correct, but the word “that” in the first sentence could be omitted. Usually brevity is desirable in writing: When you can say something in fewer words, do so. But sometimes “that” must be included, when leaving it out would cause confusion, forcing the reader to go back and re-read the sentence.

Take a look at the first sentence of my answer to Attorney Forer’s second question and delete the fourth word “that.” What’s left is “My reason is the most important part of the sentence ....” The omission of “that” might make the reader think that the sentence equates “reason” with what follows. So don’t omit the word “that.”

Another illustration of the importance of adding “that” is in a sentence like, “I heard your speech yesterday was very effective.” Reading the sentence quickly some people would understand that sentence to mean that the writer had been present during the speech. Adding the word “that” would save the reader some time and perhaps annoyance.

Speaking of annoyance, this column has received e-mails from many people who are annoyed when that (instead of who or whom) is used to refer to human beings, a usage considered incorrect until recently. Here are two illustrations:

The people that (whom) I met in my new job were very cordial.
The man that (who) crossed the street against the light was hit by a bicycle.

In each of these sentences, who or whom were formerly the only correct choice; that applied only to animals, places, objects, and other things. (Animal owners are also apt to bestow the honorific “who/whom” on their pets.) However, linguists describe language as it is currently used, not as they think it should be used; and there is now wide usage of that to refer to people who are not known by the speaker, or who are thought of as members of a group, not as individuals. (My own prejudice favors the traditional usage.)

Potpourri

A Boston reader reports that in New England there is now a third choice available for an answer to the question “Married or single?” The answer is “Not married but not single.” That phrase now describes a “couple” who are not engaged, but are in a “relationship.” (I have not heard that description in the South, but it may be more widespread in the New England area.) ☀

Gertrude Block, lecturer emerita at the University of Florida College of Law, can be reached at block@law.ufl.edu or by snail-mail: Gertrude Block, Lecturer Emerita, Levin College of Law Library, University of Florida, Gainesville, FL 32611.
The previews are contributed by the Legal Information Institute, a nonprofit activity of Cornell Law School. The previews include an in-depth look at two cases plus executive summaries of other cases before the Supreme Court. The executive summaries include a link to the full text of the preview.

U.S. AIRWAYS V. MCCUTCHE (11-1285)
Appealed from the U.S. Court of Appeals for the Third Circuit
Oral argument: Nov. 27, 2012

Questions Presented

“Whether the Third Circuit correctly held—in conflict with the Fifth, Seventh, Eighth, Eleventh, and D.C. Circuits—that ERISA Section 502(a)(3) authorizes courts to use equitable principles to rewrite contractual language and refuse to order participants to reimburse their plan for benefits paid, even where the plan’s terms give it an absolute right to full reimbursement.”

Issue

Does ERISA Section 502(a)(3) allow courts to apply equitable principles to refuse to order a participant to reimburse the plan for medical coverage where the contract provides the plan with an absolute right to full reimbursement?

Background

Early in 2007, a young driver lost control of her car and crashed into James McCutchen’s vehicle. The accident left McCutchen functionally disabled as McCutchen, who has a history of back surgeries and pain, continues to suffer from chronic pain that he cannot relieve with medication.

Prior to the accident, McCutchen entered into a Health Benefit Plan administered and self-financed by his employer, US Airways. The Plan paid McCutchen $66,866 to cover the medical expenses incurred from the accident. After receiving the Plan payout McCutchen, with the assistance of counsel, sued the driver who caused the crash. Because the young driver was underinsured and the accident killed or seriously injured three other people, McCutchen only recovered a $10,000 settlement from the young driver. McCutchen also subsequently recovered $100,000 in underinsured motorist coverage. From his $110,000 net recovery, McCutchen paid his lawyers 40% in contingency fees and legal expenses and retained less than $66,000.

Subsequently, US Airways demanded full reimbursement for the $66,866 it paid to cover McCutchen’s medical expenses. US Airways based its suit on Section 502(a)(3) of the Employee Retirement Security Act of 1974 (“ERISA”), which allows plan fiduciaries to sue for “appropriate equitable relief.” Relying on a subrogation clause in the Plan, which required reimbursement for “any monies recovered from a third party,” the trial court decided that US Airways was entitled to the entire $66,866, regardless of legal expenses. On appeal, the Court of Appeals for the Third Circuit decided that Section 502(a)(3) requires courts to provide relief in a manner that is equitable to both parties. The court ruled that McCutchen need not reimburse US Airways for the entire amount of his medical expenses, and US Airways has appealed to the Supreme Court of the United States to reverse the Third Circuit’s ruling.

Implications

On appeal, US Airways, argues that the language of Section 502(a)(3) of the Employment Retirement Security Act of 1974 (ERISA) requires courts to enforce the exact terms of health benefit contracts, including terms guaranteeing full reimbursement. James McCutchen argues that the Third Circuit properly applied equitable doctrines to provide a remedy that is fair for both parties. The two sides disagree on the impact allowing courts to use equitable principles in reimbursement actions will have on both ERISA litigation and on health plan management.

Effect on ERISA Litigation

The Blue Cross Blue Shield Association (“Blue Cross”) contends that allowing courts to consider equitable doctrines will increase the burden of ERISA litigation. Blue Cross argues that equitable doctrines would require courts and health plan providers to investigate and answer numerous complicated factual questions, rather than purely relying on the contract terms. Moreover, the Chamber of Commerce claims that applying equitable principles to ERISA litigation will encourage all beneficiaries to take disputes to court. Central States Funds argue that, rather than negotiate with plan administrators, participants will litigate disputes, hoping to avoid the plan terms.

The Pennsylvania Association for Justice counters that ensuing cases involving reimbursement rights will define how courts apply equitable principles. The Pennsylvania Association for Justice maintains that allowing plan administrators to recover 100% of their reimbursements will discourage participants from suing third parties if they expect the recovery will be the same or less than their medical expenses. Further, the Pennsylvania Association for Justice maintains that an equitable approach will incentivize plan participants to file good claims against third parties because participants can expect to receive some portion of any recovery.

Implications for Health Benefit Plan Management

Next, Blue Cross contends that allowing courts to use equitable principles to change health plan terms will lead to rising costs for beneficiaries and over-
all reductions of health plan benefits. Specifically, Blue Cross argues that plan administrators rely on specific contract terms to calculate their costs, and plan administrators will struggle to determine their likely reimbursement if courts decide plan terms on a case-by-case basis. The Chamber of Commerce argues that this loss of funds—plus the higher costs of litigation—would be unfair to other participants, forcing plan administrators to raise premiums or cut benefits, or may even make health benefit plans insolvent.

United Policyholders counters that because state law historically limited reimbursement rights, plan administrators have no experience in calculating reimbursements. Thus, United Policyholders contends that future reimbursements are too remote for courts to consider as a factor for setting plan rates. Moreover, because reimbursement funds will not flow to a plan’s assets, United Policyholders argue that there is no evidence indicating that allowing courts to change plans terms will lead to higher premiums or insolvency.

**Legal Arguments**

**McCutchens**

McCutchens argues that courts have the authority to determine what constitutes “appropriate equitable relief” within the meaning of ERISA Section 502(a)(3) and are not required to enforce express insurance plan terms. US Airways maintains that the term “appropriate” in ERISA Section 502(a)(3) refers to the requirement that the type of “equitable relief” a plaintiff seeks be suitable under the circumstances to enforce the benefit plan and, thus, does not grant courts unbridled discretion to rewrite contractual terms.

**Compliance with Congressional Intent**

McCutchens argues that Congress purposely limited courts to granting “appropriate equitable relief” in Section 502(a)(3) because the purpose of ERISA is not to enforce plan terms, but to protect plan administrators and beneficiaries. McCutchens supports this assertion by noting that ERISA Section 502(a)(1)-(B) allows beneficiaries to sue to enforce plan terms, but specifically bars fiduciaries from recovering under the same provision. Thus, McCutchens maintains that the plain language of Section 502(a)(3) overrides any policy requiring the strict enforcement of plan terms.

US Airways maintains that appropriate equitable relief should be used to enforce the express terms of the health plan and cites to the Supreme Court’s decision in Curtiss-Wright Corp. v. Schoonejongen and 29 U.S.C. § 1132(a)(1). In Curtiss-Wright, the Supreme Court held that ERISA’s statutory framework relies on written plan documents and was not intended to facilitate beneficiaries’ efforts to amend plan terms. Moreover, 29 U.S.C. Section 1132(a)(1) authorizes plan administrators to file suit to enforce their rights under the terms of the plan. US Airways argues that the language of Section 1132(a)(1) indicates that Congress intended courts to grant Section 1132(a)(1) claims to enforce, rather than override, explicit contractual language.

**Courts’ Discretion to Determine Equitable Relief**

McCutchens argues that the Third Circuit’s application of equitable principles reflects a proper reading of Supreme Court precedent because the term “appropriate” is a term of limitation that restrains the availability of relief based upon traditional equitable principles. McCutchens cites to numerous Supreme Court opinions supporting the court’s discretion in applying equitable rules instead of legal rules in ERISA cases. McCutchens relies heavily on the Supreme Court’s decision in CIGNA Corp. v. Amara that determined courts should exercise discretion to determine “appropriate” relief for 502(a)(3) claims. The Third Circuit applied the CIGNA holding in this case to determine that plans may be subject to modification or equitable reformation under Section 502(a)(3).

US Airways contends that the Third Circuit’s holding was based on a mistake of law because the court applied equitable principles pertaining to an equitable lien imposed to avoid unjust enrichment to US Airways’ equitable lien by agreement. In Sereboff v. Mid Atlantic Medical Servs., Inc., the Supreme Court distinguished an equitable lien from an equitable lien by agreement, which the parties establish when forming an agreement with the purpose of enforcing the agreement. The Sereboff Court concluded that a reimbursement provision creates an enforceable equitable lien by agreement. US Airways argues that, since the Plan’s subrogation provision creates an enforceable equitable lien by agreement, McCutchens must fully reimburse the Plan with his third-party recovery.
Conclusion

In this case, the Supreme Court will consider the meaning of “appropriate equitable relief” within the meaning of ERISA Section 502(a)(3) to determine whether the act authorizes courts to use equity to rewrite health-benefit plan contracts. McCutchen argues that the term “appropriate” grants courts the discretion to override the contractual provisions of health plans in situations where strictly enforcing a plan’s terms would be inequitable to one of the parties. US Airways contends that the term “appropriate” relates only to whether or not a claim is appropriate to enforce the terms of the benefit plan and does not grant courts broad discretion to rewrite benefit plan terms. This case may have significant implications for both plan beneficiaries and plan administrators because it may affect the frequency of ERISA litigation, the financial viability of health benefit plans, and further define the legal rights of employers and employees participating in these plans.

Written by Nathan Taylor and Cristina Quinones-Betancourt. Edited by Brandon Bodnar. Acknowledgments: The authors would like to thank Professor Emily Sherwin for her insights into this case.

LOS ANGELES CNTY. FLOOD CONTROL DIST. V. NATURAL RES. DEF. COUNCIL, INC. (11-460)

Appealed from the U.S. Court of Appeals for the Ninth Circuit
Oral argument: Dec. 4, 2012

Questions Presented


“The questions presented by this petition are:

“1. Do “navigable waters of the United States” include only “naturally occurring” bodies of water so that construction of engineered channels or other man-made improvements to a river as part of municipal flood and storm control renders the improved portion no longer a “navigable water” under the Clean Water Act?

“2. When water flows from one portion of a river that is navigable water of the United States, through a concrete channel or other engineered improvement in the river constructed for flood and stormwater control as part of a municipal separate storm sewer system, into a lower portion of the same river, can there be a “discharge” from an “outfall” under the Clean Water Act, notwithstanding this Court’s holding in South Florida Water Management District v. Miccosukee Tribe of Indians, 541 U.S. 95, 105 (2004), that transfer of water within a single body of water cannot constitute a “discharge” for purposes of the act?”

Issue

If water from an interstate river travels through a human-engineered stormwater channeling system before it returns into a lower portion of the same river, does the addition of polluted stormwater constitute a “discharge” from an “outfall” as defined under the Clean Water Act, even though the Supreme Court has previously decided that there can be no “discharge” when water is transferred within a single body of water?

Background

Under the Clean Water Act, the federal government controls the discharge of pollutants into navigable waters. A person or entity seeking to discharge pollutants must comply with the National Pollutant Discharge Elimination System (NPDES), which requires obtaining permits that limit the type and quantity of pollutants that can be discharged. The Clean Water Act imposes numerous requirements on permit holders, including that the permit holders comply with water quality standards, water monitoring obligations, public reporting obligations, and discharge requirements. In California, the interconnected network of MS4s (MS4) channels stormwater to rivers including the Los Angeles River, the San Gabriel River, the Santa Clara River, and Malibu Creek. Between 2002 and 2008, the monitoring stations for the four waterways identified hundreds of violations of water quality standards.

In 2008, Natural Resources Defense Council and Santa Monica Baykeeper (collectively, NRDC) filed a citizen-enforcement action against the district and county in the Central District of California, alleging a violation of the NPDES permit and a violation of the Clean Water Act. The court denied motions for summary judgment because evidence did not show whether the waterways below the monitoring stations are distinct bodies of water from the MS4 above the monitoring stations and thus, failed to establish whether there had even been a “discharge” from a “point source” within the statutory meanings of those terms. The district court granted summary judgment for the district and county on all the Watershed Claims.

The Court of Appeals for the Ninth Circuit reversed in part, finding that NRDC was entitled to summary judgment on its claims pertaining to the Los Angeles and San Gabriel Rivers because the monitoring stations are located within the MS4. The Ninth Circuit affirmed the other two grants of summary judgment for the district and county because the monitoring stations for the Santa Clara River and Malibu Creek were located within the waterways, meaning that NRDC had not linked the presence of water quality violations in the waterways to the MS4’s discharge of pollutants.

The Supreme Court granted the district’s petition for writ of certiorari, limiting its review to Question 2.

Implications

The parties dispute whether the Clean Water Act (CWA), whose permit system regulates the addition of pollutants, imposes liability on the district as principal permit-holder for exceeding allowed pollution levels. The district argues that it has not violated its permit because it did not “add” pollutants under the term as it is defined in the CWA. In opposition, NRDC argues that because the district’s self-monitoring of its MS4 has shown consistent permit violations, the CWA imposes liability on the district.

Impact on Municipal Decision-Making

The district maintains that if the Supreme Court finds that the NPDES permit system applies to engineered improvements in a river, municipalities will face increased costs of flood control planning, regulatory compliance, and potential liability for alleged pollutant discharges. According to the
International Municipal Lawyers Association (IMLA), if a municipality can be held responsible for pollutants found in improved portions of a river, regardless of whether the municipality has added the pollutants or just transported them, it will bear significant costs and face uncertainty about its liability.

NRDC counters that the district exaggerates the costs it would incur to achieve compliance under the NPDES permit program if the Court finds the district liable. In support of NRDC, Heal the Bay asserts that green infrastructure represents a cost-effective, efficient stormwater management option that is a worthwhile investment for municipalities seeking to comply with permit restrictions. Further, Heal the Bay notes, municipalities may subsidize permit compliance costs by funding implementation of green infrastructure through bond issues, general fund allocations, and state and federal loans.

Interpreting Lawmakers’ Intent

The National Governors Association (NGA) contends that if the Supreme Court imposes liability on the district for permit violations under the federally-enacted CWA, it will disrupt the partnership that Congress intended to create between federal and state regulation of water quality and water use. NGA notes that the CWA purposely delegates to states the authority to oversee their own management of water pollution and does not require states to implement the NPDES permit program. To impose liability under the CWA for permit violations would undermine the authority that Congress has intentionally delegated to the states.

In opposition, the National Wildlife Federation (NWF) argues that the Supreme Court will override congressional intent if it fails to impose liability on the District under CWA. NWF reasons that if the District may defend itself against liability by challenging the terms of its NPDES permit, other permit-holders will attempt to raise similar defenses to their own permit violations. The result of challenges by permit-holders, according to NWF, is delayed compliance with water quality standards and further damage to wildlife habitats, public health, and safe use of national waters.

Legal Arguments

Petitioner, Los Angeles County Flood Control District argues that this case is resolved by the Supreme Court’s decision in South Florida Water Management District v. Miccosukee Tribe of Indians, which recognized that transferring water within a single water body does not add anything. Respondents, National Resource Defense Council and Santa Monica Baykeeper (NRDC), argue that Miccosukee does not apply because the district’s NPDES permit presupposes that the district discharges pollutants.

South Florida Water Management District v. Miccosukee Tribe of Indians

The district argues that it does not “discharge” any pollutants into the San Gabriel and Los Angeles Rivers pursuant to the statutory definition of “discharge” in the CWA. The district asserts that the CWA defines “discharge” as “any addition of any pollutant to navigable waters from a point source.” Here, the district contends that the lower court did not actually find the addition of pollutants at a point source. Also, the district argues that the rationale discussed in Miccosukee, where the Supreme Court held that the transfer of water from one part of a water body through an engineered improvement to another portion of the same water body does not “add” anything, is applicable in the present case. The district asserts that the channelized portion of a river is navigable like the rest of the river, and thus, they are a single body of water. Therefore, the district claims that its channels do not discharge into waters of the United States, but “are waters of the United States.”

NRDC responds that Miccosukee does not apply because the District already has a NPDES permit which regulates the District’s discharge of pollutants. NRDC asserts that Miccosukee does not prevent the CWA from regulating discharges from MS4s. Moreover, NRDC contends that the issue is not whether the district discharged pollutants, but whether the district is liable based on data from monitoring stations required by the EPA permit system. NRDC disputes the district’s claim that compliance can only be measured at an outfall. Instead, NRDC claims that citizens and the government can enforce the permit system by comparing the samples at monitoring stations to the particular pollution limits in a permit-holder’s permit. NRDC asserts that the district’s permit includes a self-monitoring system that prohibits discharges that exceed water quality standards. Further, NRDC claims that samples from the District’s instream stations in the Los Angeles and San Gabriel Rivers show more than 140 samples exceeding the district’s permitted limits.

Conclusion

In this case, the Supreme Court will determine whether water that flows from a river into a man-made channel and back into the river can be a “discharge” as defined pursuant to the Clean Water Act. This decision will clarify the

How to Establish “Discharge” Under the CWA

The district argues that an NPDES permit alone without proof that the permit-holder “added” a pollutant does not constitute a discharge in violation of the CWA. To establish a CWA violation, the district contends that a plaintiff must show discharge from a point source. The district claims that the court mistakenly found discharge by reasoning that concrete channels in a river can be a point source. However, the district contends that its channels in the Los Angeles and San Gabriel Rivers are part of those rivers, and thus, not point sources. The district further argues that a plaintiff, to prove discharge, would have to show the addition of pollutants from one of the district MS4 outfalls.

NRDC responds that the excess pollutant levels recorded at the monitoring stations required by the EPA permit system are sufficient to show a CWA violation. The NRDC disputes the district’s claim that compliance can only be measured at an outfall. Instead, NRDC claims that citizens and the government can enforce the permit system by comparing the samples at monitoring stations to the particular pollution limits in a permit-holder’s permit. NRDC asserts that the district’s permit includes a self-monitoring system that prohibits discharges that exceed water quality standards. Further, NRDC claims that samples from the District’s instream stations in the Los Angeles and San Gabriel Rivers show more than 140 samples exceeding the district’s permitted limits. NRDC concludes that even though the district’s monitoring stations are “not located directly at the district’s discharge points,” under the EPA’s regulatory scheme permitting representative sampling, these samples prove that the district violated its permit.
relationship between the Environmental Protection Agency's National Pollutant Discharge Elimination System and the Supreme Court's recent decision in South Florida Water Management District v. Miccosukee Tribe of Indians, which recognized that the transfer of water between two points in a single water body does not “add” anything under the Clean Water Act. The Court’s decision will impact parties who face water management issues, including state and local government agencies, environmental groups, and water suppliers. ⓚ

Written by Alexandra Covden and Chawoo Park. Edited by Jenny Liu.

CHAFIN V. CHAFIN
Appealed from the U.S. Court of Appeals for the Eleventh Circuit
Oral argument: Dec. 5, 2012

Jeffrey Lee Chafin, an American, prevented his separated Scottish wife, Lynn Hales Chafin, from leaving the United States with their daughter, E.C. Mrs. Chafin successfully obtained a return order from the U.S. District Court for the Northern District of Alabama pursuant to the International Children Abduction Remedies Act, an act passed by Congress as a result of the Hague Convention of the Civil Aspects of International Child Abduction. Mr. Chafin appealed the return order, but the Eleventh Circuit declared the case moot because Mrs. Chafin and E.C. had already returned to Scotland. On appeal to the Supreme Court of the United States, Chafin argues that a court’s inability to enforce its judgment does not render a case moot. Mrs. Chafin counters that allowing an appeal after a return order would conflict with the purposes of the Hague Convention. This decision implicates issues of comity between nations, and rights of American parents. Full text is available at www.law.cornell.edu/supct/cert/11-338. ⓚ

Written by Belinda Liu and Sarah O’Laughlin. Edited by Judah Druck.

DECKER, ET AL., V. NORTHWEST ENVIRONMENTAL DEFENSE CENTER (11-338)

GEORGIA-PACIFIC WEST, ET AL., V. NORTHWEST ENVIRONMENTAL DEFENSE CENTER (11-347)

Appealed from the U.S. Court of Appeals for the Ninth Circuit

The Environmental Protection Agency (EPA) has interpreted the Clean Water Act (CWA) in such a way so that certain logging activities that cause polluted water to run off of forest roads and into ditches, culverts, or pipes are exempt from the permit process. Relying on §1365 of the CWA, the Northwest Environmental Defense Center (NEDC) brought a citizen’s lawsuit in federal district court in an attempt to eliminate the exemption from the permit process. The petitioners argue that a citizen’s lawsuit was impermissible in this case because of § 1369 of the CWA. The parties also do not agree on the level of deference that the EPA should have been given in interpreting its regulations. Furthermore, the NEDC takes issue with the way EPA interprets several key phrases in the CWA, which affects the substance of the EPA’s decision. The Supreme Court’s decision can clarify the ability of citizens to bring an action to change the EPA’s course of action under the CWA. These procedural and administrative questions could ultimately have an effect on the environment and water quality as well as the procedures loggers must follow to ensure they comply with the CWA. Full text is available at www.law.cornell.edu/supct/cert/11-338. ⓚ

Written by Michaela Dudley and Allison Nolan. Edited by Brooks Kaufman.

GENESIS HEALTHCARE CORP. V. SYMCZYK (11-1059)
Appealed from the U.S. Court of Appeals for the Third Circuit

In a putative collective action, Laura Symczyk alleged that Genesis Healthcare Corporation violated the Fair Labor Standards Act by automatically deducting break time from her and other employees’ pay, regardless of whether they performed compensable work during their breaks. Before any other plaintiffs joined the action, Genesis made an offer of judgment for full relief of Symczyk’s claims. Symczyk did not accept the offer, but the district court dismissed the case because the offer of judgment left Symczyk without a personal stake in the litigation. Symczyk argues that she continues to have a personal stake and that the interests of plaintiffs yet to join the action creates jurisdiction. Genesis argues that a complete offer to satisfy a lone plaintiff’s claim renders the case moot. In resolving the ques-
tion presented, the Supreme Court will decide whether an unaccepted offer of judgment can render a case moot and whether courts may consider the interests of unnamed, hypothetical parties in determining whether the parties have a personal stake in the litigation. The decision will affect collective-action trial practices for both plaintiffs and defendants, including plaintiffs’ use of the discovery process to join class members and defendants’ use of individual offers of judgment to forestall or avoid collective actions. Full text is available at www.law.cornell.edu/supct/cert/11-1059.

Written by Thomas Santoro and Stephen Wirth. Edited by Brandon Bodnar.

HENDERSON V. UNITED STATES (11-9307)
Appealed from the U.S. Court of Appeals for the Fifth Circuit
Oral argument: Nov. 28, 2012

Petitioner Armarcion Henderson pled guilty in district court to being a felon in possession of a firearm. The district court judge gave Henderson a longer sentence than required to ensure that he could participate in a drug treatment program and Henderson did not object to the sentence. The district court denied Henderson’s later motion to correct his sentence and he appealed to the Fifth Circuit. The Fifth Circuit reviewed the district court’s decision for plain error under Federal Rule of Criminal Procedure 52(b) and, finding no substantial mistake by the district court, upheld the district court’s sentencing. Henderson now argues that the Fifth Circuit should have reversed for plain error because, following Henderson’s trial, the Supreme Court decided that judges cannot base a sentence on a defendant’s rehabilitative needs. The United States argues that because the law pertaining to sentencing was not settled at the time of his trial and the defendant did not object to his sentence, Henderson’s claims do not meet the Rule 52(b) standard. The Supreme Court’s decision in this case will affect criminal defendants who use Rule 52(b) to appeal trial court decisions and will also impact judicial efficiency. Full text is available at www.law.cornell.edu/supct/cert/11-9307.

Written by Sherry Jarons and Z. Lu. Edited by Judah Druck.

SEBELIUS, SEC. OF HEALTH AND HUMAN SERVICES V. AUBURN REGIONAL MEDICAL CENTER
Appealed from the U.S. Court of Appeals for the D.C. Circuit
Oral argument: Dec. 4, 2012

Since 1983, hospitals have received reimbursement for treating Medicare patients with the option of receiving additional compensation for treating low-income individuals. It was recently discovered that the Center for Medicare and Medicaid Services (CMS) miscalculated rates in the 1990s, causing certain hospitals to receive less than they were entitled to receive. Several hospitals challenged these underpayments under 42 U.S.C. 1395oo(a)(3), arguing that the 180-day deadline for challenging payments should be “equitably tolled,” or extended for reasons of fairness. Although the agency that receives these challenges, the Provider Reimbursement Review Board (PRRB), concluded that the 180-day deadline for challenging payments was beyond its authority, the United States Circuit Court of Appeals for the D.C. Circuit held that this deadline may be extended. Here, Petitioner Sebelius of the Department of Health and Human Services contends that Congress intended to give her the authority to decide when to toll a statute and that this is not one of those cases. In contrast, Respondents Auburn Regional Medical Center, et al., argue that a court may extend this filing deadline. If hospitals are able to challenge underpayments beyond the 180-day deadline, the caseload of PRRB may drastically increase and thereby slow down the process of compensating hospitals. Full text is available at www.law.cornell.edu/supct/cert/11-556.

Written by Jonathan Goddard and Zachary Glantz. Edited by Lisa Schmidt.

VANCE V. BALL STATE UNIVERSITY
Appealed from the U.S. Court of Appeals for the Seventh Circuit
Oral argument: Nov. 26, 2012

Petitioner Maetta Vance contends that Saundra Davis, a catering specialist, had made Vance’s life at work contentious through physical acts and racial harassment. Vance sued her employer, respondent Ball State University, for workplace harassment by a supervisor. To win a lawsuit for co-worker harassment under Title VII of the Civil Rights Act of 1964, it is necessary to show that the employer is negligent in responding to complaints about harassment; however, to win a lawsuit for harassment by a supervisor, the employer does not have to be negligent because Title VII imputes the supervisor’s acts to the employer. Vance asserted that Davis was a supervisor although Ball State claimed Davis was not actually Vance’s supervisor. The district court and Court of Appeals for the Seventh Circuit determined that Davis was not Vance’s supervisor because Davis did not have the power to direct the terms and conditions of Vance’s employment. If Vance wins, the definition of supervisor under Title VII will expand to include more than just those who can hire, fire, demote, promote, or discipline an employee. If Ball State wins, the definition of supervisor under Title VII may expand; however, it would likely be limited to persons who actually control an employee’s daily activities. Full text is available at www.law.cornell.edu/supct/cert/11-1231.

Written by Dillon Horne and Matthew Soares. Edited by Charlotte Davis.
**LINCOLN’S CODE: THE LAWS OF WAR IN AMERICAN HISTORY**

**By John Fabian Witt**


**Reviewed by Burrus M. Camahan**

John Fabian Witt believes that the law of war has played a crucial, but neglected, role in United States history. In *Lincoln’s Code*, which is a well-written book, based on impressive research, he redresses that neglect, concentrating on the period between the Revolutionary War and World War I.

The “code” referred to in the title is the U.S. Army’s General Orders No. 100, “Instructions for the Government of Armies of the United States in the Field,” dated April 24, 1863. Drafted principally by Dr. Francis Lieber of Columbia University, it was a summary of the laws and usages of war as they existed at the time, and is commonly referred to as the “Lieber Code.” For reasons explained later in this review, Witt believes it should more properly be called “Lincoln’s Code,” hence the title of the book.

From the Revolutionary War to the Civil War, American diplomats, politicians, and lawyers urged international acceptance of rules intended to protect civilians and prisoners of war from mistreatment. Witt demonstrates, however, that they concentrated most of their efforts on protecting private property from seizure or destruction in both land and sea warfare. Protecting neutral property in naval warfare was of particular concern to American politicians and jurists, and was a purported basis for the War of 1812.

The dark side of this policy was its application to protecting slave property. During the negotiation of the Treaty of Ghent, ending the War of 1812, the head of the U.S. delegation, John Quincy Adams, argued that British commanders had acted improperly when they promised freedom to American slaves who fled their masters and took refuge with the British. Adams insisted that the peace treaty include a clause requiring the return of the slaves, and later, as secretary of state and President, Adams sought compensation from Great Britain for the slaves’ owners. Witt accuses Adams of doing more than anyone else “to associate the United States with the view that civilized nations sheltered slavery from war’s destruction” and then reversing course while serving in Congress. This is a bit unfair, since it was Adams’ duty, when serving as a U.S. official, to represent the interests of all American citizens, including slaveholders, whatever his personal views on slavery and the law of war.

According to Witt, a great reversal of America’s positions on the law of war came in April 1863, when the U.S. War Department issued General Orders No. 100. In 157 articles (set forth in an appendix to *Lincoln’s Code*), this General Order summarized the law of land warfare for the guidance of U.S. officers and soldiers. And guidance was needed. At the end of 1860, the United States Army consisted of slightly more than 16,000 officers and men. By 1865, almost a million men would be serving under arms. Almost all the officers in the Civil War had been appointed from civilian life, and had no knowledge of the laws and customs of war. General Orders No. 100 would fill this gap in their knowledge.

Witt, however, sees more radical motives behind General Orders No. 100. He believes there is a tension in American thought on the law of war between humanitarian idealism, on the one hand, and the desire for justice, on the other. This tension arises, he argues, from the temptation to discard humanitarian principles in order to fight more effectively for causes believed to be just, most notably the abolition of slavery, during the Civil War. Witt argues that Dr. Lieber succumbed to that temptation in drafting General Orders No. 100, although the “humanitarian” principle he discarded was the right to property—specifically, property in slaves.

President Lincoln had issued his final Emancipation Proclamation on Jan. 1, 1863, thereby recognizing the immediate freedom of all slaves held in territory controlled by the Confederacy. In drafting the General Orders, Lieber reversed the pre-war U.S. policy of protecting slave property in war and instead codified the Emancipation Proclamation as permanent policy in Articles 42 and 43 of the orders. In response to the Confederacy’s refusal to treat African-American soldiers as prisoners of war, but instead to send them into slavery or to execute them, Lieber declared that international law “knows no distinction of color,” and that it was a violation of the law of war to deny prisoner of war status on the basis of race (Articles 57 and 58). In Witt’s opinion, therefore, “it was Lincoln’s Emancipation Proclamation that required [the General Orders’] production,” and “once we see the Union’s instructions as arising out of the crucible of slavery, the order is better thought of as Lincoln’s Code” than as Lieber’s code. The demands of justice for slaves and colored soldiers had triumphed over the previous generation’s ideal of protecting property.

Witt also argues that the Union’s pursuit of justice triumphed over the customary usages of war in much of the rest of General Orders No. 100 as well. It was not really a codification of existing rules and state practice, he believes, but rather an “unsettling critique of the orthodox laws of war” that approved General Sherman’s
indiscriminate artillery bombardment of Atlanta in 1864. Witt repeatedly refers to General Orders No. 100 as a “fierce” document.

This view of General Orders No. 100 centers on Lieber’s adoption of military necessity as a legal principle. Witt notes Lieber’s admiration for his fellow Prussian Carl von Clausewitz, who viewed war as a means to gain political ends, and Witt believes that this influenced Lieber’s treatment of military necessity. Article 14 of General Orders No. 100 defined military necessity as “the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.” Critics of Article 14, including Confederate officials during the Civil War, often fail to understand the significance of the final clause in Lieber’s definition. If there is an existing rule or usage forbidding a practice, then “military necessity” will not justify violating that rule. Military necessity, for example, could not justify torture, or “the infliction of suffering for the sake of suffering or for revenge,” or the use of poison (Article 16). Military necessity thus serves as a gap-filling legal principle, to be applied only where established rules and usages do not exist.

Perhaps Witt is correct, and Lieber deliberately drafted a document that put fewer restraints on the U.S. Army than other legal scholars would have recognized, because he believed that the United States government was fighting a just war to end slavery and restore the Union. Witt is certainly right that Lieber stretched the contemporary usages of war when he asserted that “if a person held in bondage ... be captured by or come as a fugitive under the protection of the military forces of the United States, such person is immediately entitled to the rights and privileges of a freeman” (Article 43). Earlier in the Civil War, Union commanders had often returned slaves to their owners or refused to grant them sanctuary. It is true that during the Napoleonic Wars and the colonial wars of the 18th century, Great Britain, France, and Spain had frequently granted freedom to enemy slaves, but the practice was not universal and a slave’s right to freedom depended on specific declarations issued by the military authorities concerned.

However, as to the remainder of General Orders No. 100, Lieber may have done little more than what the War Department asked of him—restating the contemporary laws and usages of war based on empirical evidence of belligerent practice. If the order was really a “fierce” and “unsettling critique of the orthodox laws of war,” it is hard to understand why, as Witt himself points out, “humanitarian reformers” in Europe welcomed it as heralding “a new epoch of moral progress” that would “ameliorate the horrors of war.”

Lieber wrote at a crucial time in the development of Western international law. Legal philosophy was turning away from the natural law tradition of the 18th century towards positivism, the theory that law could be based only on rules issued or recognized by sovereign states. For international law, positivism meant reliance on treaties and customary rules.

Lieber was ideally suited to write a concise, positivist, restatement of the law of war based on the actual practice of belligerent states. Born in Prussia, he was a combat veteran of the final campaign of the Napoleonic Wars, and was badly wounded at the battle of Namur. His oldest son died fighting for the Confederacy, while his two younger sons joined the Union army, and one lost an arm at the battle of Ft. Donelson. The law of war was not a purely academic matter for Lieber.

Earlier in his academic career Lieber had written a work called Manual of Political Ethics, part of which dealt with the law of war. In preparation for this work, Lieber amassed a vast file of international state practice, which he used again to draft General Orders No. 100. If that document was “fierce,” it may be because in the mid-19th century the accepted laws and usages of war were fierce, and not because Lieber deliberately altered them to help the Union army.

Nor did Lieber need to consult Clausewitz in order to conclude that military necessity should be measured by the purpose of a war. Twenty-five years earlier, Henry Wheaton, the first American to write a treatise on international law, began his chapter on the law of war with the following language:

In general, it may be stated, that the rights of war, in respect to the enemy, are to be measured by the object of the war. Until that object is attained, the belligerent has, strictly speaking, a right to use every means necessary, to accomplish the end for which he has taken up arms.¹

This sounds very much like Article 14 of General Orders No. 100, which defined military necessity as “the necessity of those measures which are indispensable for securing the ends of the war.”

General Orders No. 100 remained the Army’s official guidance on the law of war for the next 50 years. It even had some impact on the Army’s practices during the Indian wars. Its influence broke down during the Philippine Insurrection in the early 20th century, when many officers resorted to torturing Filipino guerrillas for information. Witt notes, ironically, that when the Army finally issued a new manual on the law of war in 1914, it was drafted by an officer who had actively used torture in the Philippines.

Whether or not one agrees with all of Witt’s conclusions, he has clearly proven his central thesis, that law of war issues had a significant impact on 19th-century American history. This is a major work that deserves to be read by anyone interested in the origins of the modern law of war and its role in U.S. history.

Endnote

Abraham Lincoln always hated slavery, but he believed that the Constitution protected it in the states where it existed. On March 4, 1861, in his first inaugural address, he said that “the only substantial dispute” between the North and the South was whether slavery ought to be extended into the territories. “I have no purpose,” he said, “to interfere with the institution of slavery in the States where it exists.” Nevertheless, the Southern states seceded, announcing their secession documents that they were doing so to protect the institution of slavery. On April 12, 1861, the South fired on Fort Sumter, starting the Civil War. Later that same month, an anti-slavery activist wrote, “The first gun fired at Fort Sumter rang out the death-knell of slavery.” “The conviction is permeating the mind of the North,” noted another writer, “that in some way or other Slavery is to go down in this struggle to its final death.”

Lincoln’s secretary John Hay observed, “What we could not have done in many lifetimes the madness and folly of the south has accomplished for us. Slavery offers itself more vulnerable to our attack than at any point in any century.”

Whether these men revealed foresight or wishful thinking, they were right, and slavery started to fall even before Lincoln issued the Emancipation Proclamation on Jan. 1, 1863. In May 1861, three slaves who were being transported to aid secession forces in Virginia escaped to Union lines. General Benjamin Butler decided that the Fugitive Slave Act of 1850 did not apply to foreign countries, which Virginia considered itself to be. In addition, the law of war allowed the capture of contraband property, and Virginia considered these three men to be property. Butler, therefore, hoisting the slave holders on their own petard, would not return the slaves, and his ingenious idea became Union policy. Congress codified Butler’s policy in the Confiscation Acts of 1861 and 1862, and many more slaves turned themselves into contraband.

“Through the summer and fall of 1861,” writes Louis Masur in Lincoln’s Hundred Days, “discussions of emancipation saturated newspaper columns, lecture halls, and Congress. ... [I]ntellectuals and activists ... seized on the issue of war power and military necessity to try to persuade Lincoln’s administration that it could legally take action against slavery.” One reformer wrote that, when a proclamation of emancipation “has been widely scattered and proclaimed, and the slaves understand it—as they would marvelously soon—we have a nation of allies in the enemies ranks. There is a foe in every Southerner’s household.”

Through the first half of 1862, however, Masur writes, “Lincoln was willing to accept slavery ... in order to end the war and preserve the Union.” At this point, the only step that he took toward emancipation was to offer the border slave states that had remained in the Union—Delaware, Maryland, Kentucky, and Missouri—compensation if they would gradually free their slaves. Even this, however, was recognized as, for the first time, placing the federal government on the side of freedom. Persuading the border states to begin to emancipate their slaves would also help to win the war, because it would end the danger of their seceding.

Even the abolitionist senator Charles Sumner was willing to support compensated emancipation, although he viewed it as ransom. “Never,” he said, “should any question of money be allowed to interfere with human freedom.” But the border states rejected Lincoln’s proposal, causing him to realize that “emancipation of the slaves in the rebel States must precede that in the border States.”

Sumner and other abolitionists urged Lincoln to emancipate the slaves regardless of the Constitution. “The Rebels have gone outside the Constitution to make war upon their country,” Sumner said. “It is for us to pursue them as enemies outside the Constitution. ...” Secretary of the Navy Gideon Welles believed that the rebels “could not at the same time throw off the constitution and invoke its aid.” But Lincoln never recognized the legality of secession. He considered the Confederate states to be in the Union and entitled to the protections of the U.S. Constitution.

Lincoln finally decided, however, that, under his power as commander in chief of the Army and Navy, he could, as a military necessity, free the slaves in the states that were in rebellion. After all, the slaves were being forced to assist the Confederate war effort, and many of them would be willing to fight for the Union. On Sept. 22, 1862, Lincoln issued the preliminary Emancipation Proclamation, which stated that, on Jan. 1, 1863, all persons held as slaves within any state then in rebellion, “shall be then, thenceforward, and forever free.” Lincoln did not realize at the time that Jan. 1 was exactly 100 days after Sept. 22, but that fact gives Louis Masur’s book its title. Lincoln’s Hundred Days, however, is divided into three parts, with only the second part devoted to those 100 days. The first part discusses the period leading up to the preliminary Emancipation Proclamation, and the third part discusses the reactions to the final Emancipation Proclamation, which Lincoln did sign on Jan. 1, 1863.

What distinguishes Lincoln’s Hundred Days from other books on the Emancipation Proclamation is that it does not focus on Lincoln or his cabinet so much as on other people’s views of and reactions to the preliminary and final Emancipation Proclamations: soldiers, lawyers, clergymen, diplomats, members of Congress, slaves, newspaper editorialists, foreigners, and others. Masur has done an impressive amount of research in digging up obscure sources, and he has deftly organized it into a gripping narra-
tive. We read of the opinions of, among many observers, Polish émigré Count Adam Gurowski (whose diary survives), former Supreme Court justice Benjamin Curtis, Harvard professor Theophilus Parsons, New York attorneys including George Templeton Strong (another diarist), and Boston lawyer John Codman Ropes. We also hear from more famous personalities, including Karl Marx and Ralph Waldo Emerson, both of whose remarks during the 100 days Masur quotes.

In an article for the Viennese daily Die Presse published on Oct. 12, 1862, Marx noted that Lincoln’s “most redoubtable decrees ... all look like, and are intended to look like, routine summonses sent by a lawyer to the lawyer of the opposing party. ... His latest proclamation, which is drafted in the same style, the manifesto abolishing slavery, is the most important document in American history since the establishment of the Union, tantamount to the tearing up of the old American Constitution.” Thus, Richard Hofstadter was not entirely original when he compared the Emancipation Proclamation to a bill of lading.

Emerson recognized that the preliminary Emancipation Proclamation changed the purpose of the war from mere reunion of the states to a moral crusade: “This act makes that the lives of our heroes have not been sacrificed in vain. It makes victory of our defeats. Our hurts are healed; the health of the nation is repaired.” As Masur notes, union was a restorative idea, but emancipation was a transformative one. The Emancipation Proclamation “made the abolition of slavery a means, and, in doing so, it became an end.”

Emerson added that the preliminary Emancipation Proclamation “is not a measure that admits of being taken back,” but he need not have feared, because Lincoln said that “he would rather die than take back a word of the Proclamation of Freedom.” As Masur discusses, Republican defeats in the 1862 elections did not deter Lincoln. On Dec. 12, 1862, Harriet Beecher Stowe reported to Charles Sumner that “Everybody I meet in New England says to me with anxious earnestness—Will the President stand firm to his Proclamation?” But a Philadelphia newspaper reminded its readers that “Mr. Lincoln is a man of deliberate mind, slow to form a judgment, patient in hearing all sides and investigating facts; but once having arrived at a conclusion, and convinced himself of its rectitude, no power can swerve him from it.”

“For many soldiers,” Masur writes, “the experience of war turned them against slavery.” When their units moved into the South, many of them witnessed slavery for the first time, “[a]nd the flood of contrabands into Union lines certainly helped to humanize slaves for the soldiers. ...” Even though some soldiers deserted rather than fight for the slaves, most of them, even those who were unhappy with the Emancipation Proclamation, understood that “the army was not a democracy and it was their job to support the orders of the commander-in-chief.” Some did not care to fight side by side with freed slaves, but concluded, “if Old Abe thinks it’s the best thing to do, all right; we will stand by him. Lincoln is solid with the boys all right.” Masur writes, “In many cases the soldiers, black and white, literally carried the Emancipation Proclamation with them,” to distribute to slaves. Abolitionist and railroad magnate John Murray Forbes, his son reported, “had 1,000,000 copies printed on small slips, one and a half inches square, put into packages of fifty each, and distributed among the Northern soldiers at the front, who scattered them among the blacks, while on the march.”

Silas Shearer, a private with the 23rd Iowa, wrote to his wife, “Since I have got down here and seen what Slavery was ... it has changed me considerable. ... When I was at home I was opposed to the meddling of Slavery where it then Existed but since the Rebs got to such a pitch and it became us as a Military necessity ... to abolish Slavery and I say Amen to it and I believe the Best thing that has been done Since the War broke out is the Emancipation Proclamation.” Lincoln said exactly the same thing, if in a more polished manner. As Lincoln grew, so grew the nation. ☞


Endnote
1. In the June 2012 issue of The Federal Lawyer, in the second paragraph of my review of Emancipating Lincoln, by Harold Holzer, I mistakenly wrote that the preliminary Emancipation Proclamation was an implementation of the Confiscation Act of 1862. In fact, like the final Emancipation Proclamation, it was based on the President’s power as commander in chief of the Army and Navy.

EXECUTIVE EMPLOYMENT LAW: PROTECTING EXECUTIVES, ENTREPRENEURS AND EMPLOYEES
BY JOTHAM S. STEIN
Reviewed by V. John Ella

According to an article in the Sept. 18, 2000, issue of Lawyers Weekly, “there are three types of entities in the workplace—employers, employees, and executives.” Since reading the article, I have consciously devoted part of my law practice to “executive law,” including the negotiation of executive contracts, restrictive covenants, and severance agreements. I therefore found myself searching Amazon.com on my I-pad late one night to see if any recent books had been written on the topic of executive employment law. Jotham S. Stein’s treatise seemed to fit the bill. The $225 price tag being almost shockingly steep, I
V. John Ella is of counsel to the national workplace law firm Jackson Lewis LLP in its Minneapolis office.

Endnote
1. The algorithms at Amazon.com also thought I might want to buy Executive Employment Agreements Line by Line, by Arthur F. Woodward, a partner at Kaye Scholer LLP in New York City, so I did. This is a slimmer volume, which breaks down a typical agreement (as promised in the title) line by line, but I discovered no particular insights in its pages.

THE 10 STUPIDEST MISTAKES
MEN MAKE WHEN FACING DIVORCE AND HOW TO AVOID THEM
BY JOSEPH E. CORDELL
Reviewed by Caroline Johnson Levine

The 10 Stupidest Mistakes Men Make When Facing Divorce and How to Avoid Them is written in a caring and empathetic manner to the man who is facing divorce. Its advice, however, could apply to either gender, as it is, essentially: protect your legal rights! That can be difficult to remember at a time when emotion tends to prevail over logic and good old-fashioned business sense.

One wonders why Cordell has devoted his entire practice to representing men in divorces, thereby losing 50 percent of his potential clientele. But this book is not an autobiography; it is a “how to” book for men who seek a divorce—particularly those who need an aggressive attorney to protect their rights. Cordell advises, for example: “Sometimes the advantage in filing [for divorce] first, as any number of classic texts about real military battles agree, comes from surprise. She intends to file for divorce. She never anticipates that her husband—the poor schmuck—will file first.” In this book, every husband is a saint and every wife a sinner, and men are advised to approach divorce with a military-style strategy designed to defeat the enemy. Cordell believes that the law tends to assume that mothers are better custodians of children and that they require perpetual financial support after the dissolution of a marriage. His goal in this book “is to undercut those assumptions and take away her advantages.”

Cordell provides many stories of his clients, whom he portrays as successful professionally but kindly dunces in their personal lives. One such client was an architect who provided his college sweetheart with a comfortable lifestyle. He woke the children every morning, dressed them, packed lunches and backpacks, chauffeured them to school and made sure to read them bedtime stories. The sweetheart, by contrast, spent her time “playing tennis and shopping and having lunch with her friends,” while leaving the children at grandma’s house and disappearing for hours. One night, the sweetheart announced that she wanted a divorce because the architect simply did not make her happy anymore. She insisted that the architect move out immediately, because, if he did not, she would “call the police. I’ll tell them you hit me. They’ll take you away in handcuffs. And I will apply to either gender, as it is, essentially: protect your legal rights! That can be difficult to remember at a time when emotion tends to prevail over logic and good old-fashioned business sense.

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 residence may defeat a wife’s otherwise powerful argument: “He moved out and left us.” Cordell advocates that, if a man does move out, he should move back in immediately. One wonders how the wife will react when she arrives home to find her husband relaxing in the recliner in his boxer shorts with a bag of cheese puffs.

Cordell lists important actions that a husband must take in order to survive the divorce process with some shred of dignity. In addition to filing for divorce first, he should maintain positive contact with the children, keep accurate financial records, refuse to speak to his wife, refrain from revealing too much on the Internet, and meticulously prepare his testimony. The husband should also itemize the property at home—“the longer and more valuable the list, the better for you when negotiating a financial settlement.” He advises husbands that, if your wife goes to court saying that she needs money from you to buy furniture or dishes, but “you have an inventory, with photos, showing ... a well-stocked house ... , she won’t get far with those arguments.”

Cordell advises that a man should hire a lawyer “the very second that the thought of divorce first occurs. ... Maybe it’s the first time they have an argument and she says ‘I can’t live like this anymore.’ Maybe it’s before she actually says or does anything,” but he realizes that they’re drifting apart. Cordell advocates this aggressive approach so that a man and his attorney can begin to formulate a strategy if the divorce ever begins. Given the fees of a divorce attorney, however, this advice may reveal more concern for the family law bar than for the husband, who might have difficulty explaining to his wife the disappearance of thousands of dollars from a joint bank account. If a husband should hire a divorce attorney every time that his wife complains or seems unhappy, then it might be best to do so immediately after the vows are exchanged.

To do the most damage control, Cordell should consider offering this book at courthouse offices issuing marriage licenses or on wedding websites. Perhaps naïve lovebirds should be required to read this book prior to receiving a marriage license. Of course, that might result in the end of marriage in our nation. This book would certainly scare the proverbial pants off of any affianced male.

Although Cordell illustrates well the problems and frustrations that men may face if they wait too long to retain a divorce attorney, he should recognize that marriages waver and vacillate through the seasons. Like a tree in autumn, whose leaves turn brown and fall gradually, divorce is a slow process, laden with the memory or promise of its glorious springtime greenery. The frequently slow evolution from marriage to divorce prevents people from aggressively and single-mindedly chopping down a tree that took many years to grow.

I have two criticisms of this book: its promotion of Cordell’s law firm and it unrelenting bitterness to women in divorce cases. As for the first, the book occasionally appears to be an advertisement for the Cordell & Cordell, P.C. Cordell offers excellent advice to a man in choosing a divorce lawyer: consider the lawyer’s experience, price, empathy, availability, and exclusive dedication to representing men in family law cases. In doing so, however, Cordell skillfully weaves in comments such as, “Our firm offers our clients an online calendaring program that they can access from anywhere—home, work, on the road—to record events.” He leads the reader to believe that, in order to have a fighting chance, one must hire Cordell’s firm.

The 10 Stupidest Mistakes Men Make When Facing Divorce and How to Avoid Them views a wife as an exotic creature who is cute and loveable when you first meet her, but who turns into a mischievous reptile with sharp teeth and claws. Cordell tells so many horror stories of women that he leaves the impression that they perpetually engage in cruelty against unsuspecting and ill-equipped men. It is surprising that the book’s cover does not portray Linda Blair in “The Exorcist.”

It is possible that Cordell’s myopic view developed from his long experience in protecting the legal rights of men. It is one thing to warn in the book’s title that men can make stupid mistakes when facing divorce, but it is quite another to write an entire book portraying women as aggressively attempting to destroy men so that there is nothing left for the buzzards to pick over. A better title for this book might have been: The 10 Stupidest Mistakes Men Make When Divorcing a Woman, Who Will Surely Become an Enemy Combatant.

In fairness, though, one should note that Cordell employs many female attorneys because he believes that there can be a psychological advantage in the courtroom to having a female attorney representing men in divorce cases.

These criticisms aside, The 10 Stupidest Mistakes Men Make When Facing Divorce and How to Avoid Them conveys Cordell’s passion for family law and does an excellent job of presenting the issues that anyone contemplating or engaging in divorce should consider.

Caroline Johnson Levine is a graduate of the Florida State College of Law. She worked as a criminal prosecutor for 10 years and now practices civil litigation trial and appellate work in Tampa, Fla.

AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY
BY AKHIL REED AMAR
Reviewed by Jon Blue

All of us in the legal trade know that there’s more to constitutional law than the Constitution. The foundation stones of the modern constitutional edifice—from Marbury v. Madison to Brown v. Board and beyond—could not possibly have been created by reference to the four corners of the constitutional text alone. History, policy considerations, and judicial precedent have all played vital roles in building the law. Virtually every constitutional decision, major or minor, made by every judge in the land, requires reference to some extratextual source.

But once a judge leaves the constitutional text, what sources should guide his or her decisions? There, as Hamlet would say, is the rub. Confine yourself too tightly to the four corners of the document, and you’ll never be able to decide anything. Stray too far from those confines, and you’ll be making a decision based on your personal preferences—which no judge wants to do (and certainly no judge wants to be seen as doing).

Of course, if you’re a lower-court
judge, you can do your best to read the tea leaves of Supreme Court decisions. But what if you're on the Supreme Court? There things are a little different. You work against the backdrop of more than two centuries of Supreme Court jurisprudence. You have eight colleagues nominated by different Presidents and a squadron of clerks to consult if you're so inclined. But the Constitution is ultimately in your hands to construe as you see fit. So, once again, exactly what authority should guide you?

This is the great question that Akhil Reed Amar seeks to address in his ambitious work, America’s Unwritten Constitution. He gives it a good try, but it is not clear that he succeeds, and it’s less clear that he could succeed. One problem facing any scholar attempting to capture our “unwritten constitution” is that constitutional law has been shaped by so many forces over so many years that a comprehensive description becomes impossible.

Amar’s new book is a sequel to his well-received America’s Constitution: A Biography (2005). At the end of that book, he noted, “I … do not believe that all of American constitutionalism can be deduced simply from the document. At key points the text itself seems to gesture outward, reminding readers of the importance of unenumerated rights above and beyond textually enumerated ones.” Amar picks up on this theme in the introduction to America’s Unwritten Constitution: “The written Constitution itself invites recourse to certain things outside the text—things that form America’s unwritten Constitution. When viewed properly, America’s unwritten Constitution supports and supplements the written Constitution without supplanting it.”

The notion that constitutional law has been shaped by extratextual forces is hardly new. Amar’s great contribution is to relate some of the great thematic developments of constitutional history to the words of the Constitution itself. The scope of his work is almost as broad as the Constitution itself, but his technique can be illustrated by discussing a couple of representative (and controversial) chapters.

Chapter 6, entitled “Honoring The Icons: America’s Symbolic Constitution,” provides a good example of Amar’s ambitious agenda. “America’s symbolic Constitution,” he contends, “surely includes (but is not limited to) the Declaration of Independence, Publius’s The Federalist, the Northwest Ordinance, Lincoln’s Gettysburg Address, the Warren Court’s opinion in Brown v. Board, and Dr. King’s ‘I Have a Dream’ speech.”

Four members of this remarkable catalogue will strike most legal analysts as intuitively obvious, while two others appear, at first blush, to be admissible but misplaced. The Declaration of Independence, The Federalist, and the Northwest Ordinance all, to some degree, reflect the views of the founding generation, and Brown v. Board is one of the most celebrated Supreme Court decisions of all time. To say that these documents are integral parts of the fabric of our unwritten constitution makes perfect sense. But what about the Gettysburg Address and the “I Have a Dream” speech? Everyone admires these icons, but how are they part of our unwritten constitution?

Amar provides a series of textual answers. He points out that the Gettysburg Address explicitly invokes the Declaration of Independence. (“Four score and seven years ago.”) Similarly, Dr. King explicitly rooted his dream in the Declaration’s creed “that all men are created equal.” But Amar also grounds these iconic speeches in the words of the Constitution itself. Lincoln’s vision of a “new birth of freedom” was realized five years later in the Fourteenth Amendment, which granted citizenship to “all persons born … in the United States.” Dr. King’s famous quotation from the Declaration of Independence—all men are created equal—also reflects the Fourteenth Amendment’s central vision of birth equality.

Chapter 7, entitled “Remembering the Ladies: America’s Feminist Constitution,” provides another example of Amar’s creative approach. The Nineteenth Amendment, ratified in 1920, famously granted women the right to vote. But does the amendment implicitly extend beyond the realm of suffrage itself? Its text grants no more than “[t]he right … to vote,” and a proposed amendment explicitly designed to invest women with broader constitutional rights (the Equal Rights Amendment) later failed of ratification. But Amar views the Nineteenth Amendment as representing what he calls “The Suffrage Revolution.” That revolution, which extended the franchise more than any preceding amendment, provides the occasion for the courts and the people to realize broader gender rights inherent in the broader constitutional text. Amar points out that the principle of popular sovereignty underpins the entire constitutional document. The First Amendment says nothing about voting, but the freedom of speech is designed for a democracy in which citizens have the right to vote. The Fifteenth Amendment was deemed necessary because it was unthinkable that men (at least) could be free yet excluded from the franchise. We know that the First Amendment and the Reconstruction amendments have had effects going far beyond suffrage itself. Why not the Nineteenth Amendment?

Amar argues that the Nineteenth Amendment had “surprising ramifications for women’s personal lives.” For example, a married woman could vote differently from her husband. She could have different ideas and even a different domicile. In addition—here Amar echoes John Hart Ely—the Nineteenth Amendment had clear implications for the legitimacy of previously enacted legislation affecting the lives of women. The Connecticut anti-contraception law invalidated in Griswold v. Connecticut and the Texas anti-abortion law invalidated in Roe v. Wade were enacted prior to the
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Nineteenth Amendment by legislatures in which women were entirely unrepresented. Add to this the fact that the key command of the already existing Fourteenth Amendment is that of birth equality. If we take these considerations seriously, Amar asks, should we not use the Nineteenth Amendment as the occasion to make constitutional amendments to women?

Perhaps Amar’s questions are rhetorical. His conclusions are certainly open to question.

For example, the fact that the Gettysburg Address and the “I Have a Dream” speech may reflect constitutional ideas does not by itself insert them into the constitutional pantheon. These speeches are particularly famous, but many speeches—just like many books and law review articles—reflect constitutional ideals, and no one would claim that, by virtue of that fact alone, they become part of our unwritten constitution.

As for the “feminist Constitution,” Amar is undoubtedly on to something when he contends that the Nineteenth Amendment resulted in cultural change. But some of his examples appear to be a stretch. The Nineteenth Amendment hardly created the concept of separate domiciles for married women. The Supreme Court had allowed separate domiciles more than 60 years earlier, in Barber v. Barber (1859), at least for women “under a judicial sentence of separation from bed and board.” In addition, Amar argues that Roe v. Wade can be justified by the fact that the law it struck down was passed prior to the Nineteenth Amendment by an all-male legislature. But this argument fails when one considers that Roe’s companion case, Doe v. Bolton, struck down a George abortion law enacted in 1968, decades after ratification of the Nineteenth Amendment. And, of course, plenty of women today oppose Roe, just as many men today support it.

Notwithstanding these quibbles, the idea of an unwritten constitution should not itself be controversial. Eight decades ago, in Principality of Monaco v. Mississippi (1934), the Supreme Court told us that, “Behind the words of the constitutional provisions are postulates which limit and control.” The trick of applying the Constitution in any era is to identify and articulate just what those postulates are. In his rooted explanation of grand constitutional themes such as birth equality, feminism, and fundamental fairness, Amar does a commendable job.

Amar contends that his work explains, among other things, “how to make proper constitutional arguments—how to think constitutional law and how to do constitutional law.” In spite of this claim, it is not clear that his book will find its most natural home in the libraries of practitioners. Attorneys litigating constitutional cases will want to read it but, to actually win your cases, it will probably be more productive to cite the latest Supreme Court precedents than the Gettysburg Address.

America’s Unwritten Constitution is not a treatise intended to guide legal practitioners or political scientists. Its aim is the more majestic one of articulating some of the grand underlying themes of American constitutional law and grounding them in the constitutional text. It aspires to be what Thucydides called “a possession for all time,” and it succeeds. Readers today, as well as those of future generations, will read it to their profit.
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