

Secession on Trial: The Treason Prosecution of Jefferson Davis

By **Cynthia Nicoletti**

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345 pages, \$99.99 (cloth), \$29.99 (paper).

Reviewed by **Henry Cohen**

On April 2, 1865, the Union army reached the Confederate capital of Richmond, Va., and the Confederate president, Jefferson Davis, fled. On May 10, he was captured and imprisoned. Abraham Lincoln had died on April 15, and his successor, Andrew Johnson, wanted to try Davis for treason. Lincoln would not have wanted to do so. After Davis' flight from Richmond, Lincoln reportedly told Gen. William Tecumseh Sherman, "I'm bound to oppose the escape of Jeff Davis, but if you could manage to have him slip out unbeknownst-like, I guess it wouldn't hurt me much!"

The problem with trying Davis for treason was that, to commit treason, one must have a duty of loyalty to the United States; a foreign nation "levying war against [the United States]" (the partial definition of "treason" in Article III, § 3 of the Constitution) does not commit treason. Lincoln had insisted that secession was unconstitutional,

so the Confederacy was never another nation, but was a group of insurrectionists. But the Supreme Court had never settled the question, and a prosecution of Davis would raise it. Davis would claim that the Southern states had lawfully seceded, and that he therefore no longer had a duty of loyalty to the United States. As Cynthia Nicoletti writes in *Secession on Trial: The Treason Prosecution of Jefferson Davis*, "His case had the potential to undercut the moral weight of the Union victory. ... If Davis' conviction would cement the righteousness of the Union cause and the perpetuity of the federal Union, his acquittal would signal the opposite."

In addition, a problem might arise if the government *won* its case against Davis: Reconstruction might be blocked. This was because, Nicoletti writes, "Maintaining a federal military presence in order to protect the rights of freedpeople in the former Confederate states seemingly transgressed the constitutional limits on federal authority over state affairs." Those who argued that it did not claimed that "Union victory entitled the federal government to treat the states of the former Confederacy like conquered provinces." But this argument implied that the former Confederate states had been a separate nation and therefore that secession was constitutional. Congressman Thaddeus Stevens, the leading proponent of "Radical Reconstruction," bought this argument and offered to represent Davis in his trial in order to vindicate secession and thereby strengthen Reconstruction. Abolitionists Horace Greeley, the founder and editor of the *New-York Tribune*, and Gerrit Smith, who had underwritten John Brown's 1859 raid on Harpers Ferry, also feared that treason prosecutions would halt Reconstruction.

Thus, government attorneys sought to avoid the issue of secession. Davis' attorneys did too, because, Nicoletti writes, "not only the principle of secession but also their client's life would be at stake." But Davis' attorney, Charles O'Connor, bluffed, challenging the government to test secession's constitutionality by trying Davis for treason. O'Connor did this because he knew, in Nicoletti's

words, "that the prosecutors feared an undesirable outcome even more than he did." By "suggesting that a judge or jury might decide that secession had been legally undertaken, O'Connor hoped to induce the prosecution to drop the case against Davis."

At the same time, O'Connor sought to persuade Davis' prosecutors that they had no need to try Davis and have a court declare secession illegal. The war itself had already answered the question, "in a forum," Nicoletti writes, "that resembled the medieval trial by battle." The government, therefore, O'Connor argued, had no reason to risk losing in court on the question of secession when it had already won on the battlefield. It could spare his client the ordeal of a trial.

Davis, however, wanted to go to trial, even if it resulted in his martyrdom, in order to vindicate the Confederate cause and the constitutionality of secession. He wrote to a friend, "The thought of my wife and little children left alone in the world and without the means of support bows my heart to the depths of sorrow, but I will at least leave them a name which truthfully cannot be tarnished. ..." His wife Varina disagreed with Davis about this, and Davis, in fact, Nicoletti writes, "never countermanded his attorney's instructions, nor even expressed dissatisfaction with O'Connor's strategy."

O'Connor had another argument up his sleeve, even if secession was found to be illegal. In the *Prize Cases* (1863), the Supreme Court had upheld President Lincoln's blockade of Southern ports, which could be authorized only under the president's Article II, § 2, war powers. Therefore, the blockade was constitutional only if the United States was at war and was not merely putting down an insurrection. The Court found that the Civil War was a war, and that, Nicoletti writes, "Under the law of war, the Confederacy was a separate entity—a belligerent power," regardless of whether it had legally seceded. On that basis, O'Connor could argue that Davis had no duty of loyalty to the United States and could not be charged with treason. A weakness in this argument was that it implied, Nicoletti writes, that "only small acts of treason would be punishable.

If the rebels were able to gather enough strength to require the U.S. government to strike back against them with the army, their treason would be excused.”

Then there was the question of whether to try Davis in a civil court for treason, or before a military tribunal for violating the laws of war. Gen. Benjamin Butler advised President Johnson that using a military tribunal would avoid the secession issue. How? If Davis advanced a pro-secessionist argument in his defense, Butler would answer: “All of us sitting here have fought four years to decide those questions in the negative, and therefore it would be useless to have them argued here.” This was, in effect, the “trial by battle” argument that Davis’ attorney used to try to persuade the government to drop the case. Butler assured Johnson that, if he put him in charge of a military commission, Davis would be convicted, and the Supreme Court would rubber-stamp the commission’s ruling.

Moreover, with a civil trial, the government would face a problem in addition to the risk of secession being found constitutional: Davis’ right to a jury. The reason that this would be a problem for the government was that the Sixth Amendment requires that trial be in “the state and district wherein the crime shall have been committed.” In Davis’ case, that meant a former Confederate state, in which it would be difficult to find 12 jurors who would convict, even if the judge instructed them that secession had been illegitimate, and that Davis could be found guilty of treason. Nevertheless, in January 1866, Attorney General James Speed decided that Davis would be tried in a civil court in Virginia. Speed thought that trying Davis before a military commission would be of questionable constitutionality and would be perceived as unfair. Speed’s paramount concern, Nicoletti writes, was “returning the legal system to normal and restoring the American people’s adherence to the rule of law.”

The government hired William Evarts as the lead prosecutor. (Prior to the organization of the Department of Justice in 1870, Nicoletti explains, few lawyers worked in the attorney general’s office, and the government frequently relied upon outside counsel.) Evarts hired Richard Henry Dana Jr., author of *Two Years Before the Mast*, to assist him. Dana, who, along with Evarts, had won the *Prize Cases* for the government, wrote to the attorney general that the *Prize Cases* had established secession’s *illegitimacy*, even though the Supreme Court had found the

Confederacy to be a belligerent power for international law purposes. In fact, as Dana had previously acknowledged, the *Prize Cases* had not addressed the question of secession’s legitimacy. But, if secession was illegitimate, then, because there was no doubt that Davis had levied war against the United States, Davis was guilty of treason. Nevertheless, Dana recommended to the attorney general that he drop the case because of the risk of jury nullification. Even Virginia jurors who had supported the Union might vote to acquit because of social pressure or fear of violent reprisal.

Davis’ trial was held before a federal circuit court on Dec. 3, 1868. Nicoletti explains, “The federal circuit courts at this time consisted of two judges—the district judge and a member of the Supreme Court assigned to each circuit.” For the Davis case, the district judge was John C. Underwood, and the Supreme Court justice was Chief Justice Salmon Chase, whom Lincoln had named to replace Roger Taney.

During the summer before the trial, Nicoletti writes, “Chase shared his thoughts ... with O’Conor’s deputy counsel, George Shea. Over tea, Chase became ‘very communicative,’ getting out his copy of the newly ratified Fourteenth Amendment to the Constitution. Chase read aloud from Section Three to Shea.” Section 3 provides that no person who, as a federal or state officer, had taken an oath to support the U.S. Constitution and had then “engaged in insurrection or rebellion against the same,” could again hold federal or state office. Chase then told Shea that he believed that § 3 precluded any other punishment for treason.

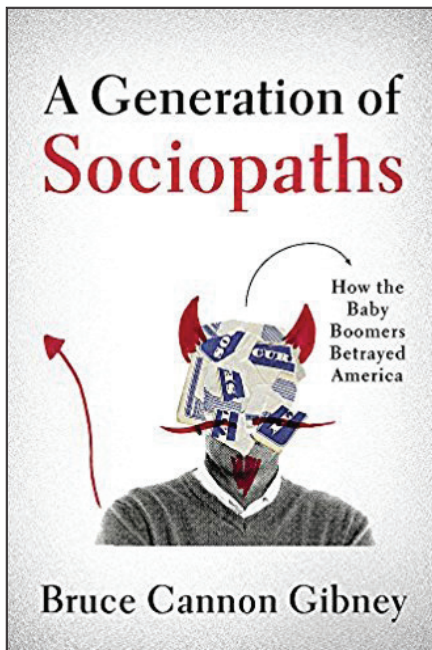
At trial, Davis’ counsel Robert Ould moved to dismiss because of the Fourteenth Amendment. Dana, arguing for the prosecution, responded, “Probably nothing would more surprise the people of the United States than to learn that, by adopting Amendment 14, they had repealed all the penalties against treason, insurrection, or rebellion.”

Chase ruled for the defense (his presidential aspirations might have played a role), but Underwood ruled for the prosecution. As a result, the question was certified to the Supreme Court for resolution. But, on Christmas Day 1868, President Johnson issued a proclamation granting amnesty to “every person who, directly or indirectly, participated in the late insurrection or rebellion.” The case became moot and the prosecution withdrew the indictment.

A few months later, in April 1869, in *Texas v. White*, the Supreme Court, in an opinion by Chase, held secession unconstitutional. The case involved Texas’ attempt to block payment on U.S. government bonds sold by the state during the Civil War, but the legal issue was jurisdictional: whether Texas, under military Reconstruction, was a state entitled to bring an original action in the Supreme Court. Chase’s pronouncement on secession was perfunctory. Nicoletti writes, “Chief Justice Chase ‘answered’ the secession question without really considering it because an answer that contradicted the outcome of the war would have been unbearable. Human sacrifice on such a large scale—700,000 deaths—*had* to hold meaning.”

Secession on Trial is an excellent work of scholarship, with extensive footnotes (rather than endnotes), yet Nicoletti’s clear writing makes it easy to read. Ironically, though appropriately, the book hardly mentions slavery, even though slavery was the cause of the Civil War, as the Southern states and their leaders (including Jefferson Davis) acknowledged when they seceded. The irony is that the Confederacy’s real evil was its attempt to preserve slavery; secession was merely a means to that end. If slavery had not been in the picture, and the Southern states had seceded over a different issue, one hopes that the North would have let them go rather than fight a war that resulted in 700,000 deaths. ☺

Henry Cohen was a legislative attorney with the Congressional Research Service, Library of Congress, from 1975 to 2010 and was the book review editor of The Federal Lawyer from 1989 to 2017.



A Generation of Sociopaths: How the Baby Boomers Betrayed America

By Bruce Cannon Gibney

Hachette Books, New York, 2017.

430 pages, \$27

Reviewed by J. Phillip Calabrese

I belong to Generation X—that cohort variously regarded as born between 1960 and 1981. We grew up as latch-key kids, watching TV after school, back when MTV used to play music videos, in an era of changing social morals and norms. Instead of free love and the sexual revolution, we got no-fault divorce and HIV/AIDS. Instead of Tim Leary's "turn on, tune in, drop out" drug culture, we had "Just Say No," while we lived through the crack epidemic and a wave of readily available heroin. Perhaps because of this upbringing, members of Generation X turned into independent and pragmatic adults who remain largely skeptical of authority. Society regarded Generation X as cynical, contrarian, and disaffected, and that image was corroborated by grunge, hip hop, and any number of urban portrayals in popular culture. The flannel shirts provided visual reinforcement for the stereotypes. Whatever others thought, we quietly went about our work, which we regard as an important part of our identity and how we derive meaning from life. Gen Xers founded Google, YouTube, Twitter, and Amazon.com, among

others, and entrepreneurship, perseverance, and adaptability mark this generation.

Gen Xers have spent their lives in the shadow of the Baby Boomers—the largest cohort in American history, at least until the Millennials recently surpassed them. Somewhere along the line, most Gen Xers have learned a few things about their predecessors, the Baby Boomers, of which we rarely speak, even in hushed tones among ourselves. We are reluctant to talk about it because Boomers control the major institutions of society. They run the government, most major corporations, the media, and are our employers. And in many cases, Boomers are our parents, family, and loved ones, and the betrayal hits close to home. So, it is easier not to discuss the painful lessons we have learned from the Baby Boomers. Simply put, Generation X knows that Boomers' have damaged the country.

The story I tell about Baby Boomers is one where they were born into a post-war era of prosperity, in which America was the richest and most powerful nation the world had ever seen. After two world wars, the world was at peace. To be sure, the United States and Soviet Union became nuclear powers and faced off in proxy contests in places like Iran, Guatemala, and Cuba. But the Cold War never became hot or materially interfered with the peace and prosperity of the era. At home, civil rights activists placed the end of Jim Crow, *de jure* segregation, and voting rights on the national agenda and achieved remarkable gains in the face of fierce, often violent, resistance. Although the Boomers continue to identify with—and often claim credit for—the Civil Rights movement, it largely preceded them. The Boomers grew up in the age that defined the American dream and promised limitless economic, technological, and social progress.

Then, the country—rightly or wrongly—told Boomers to defend real or perceived national interests in Vietnam. Although the numbers paled in comparison to the sacrifices of previous generations, Boomers balked. But they did not just resist the draft and protest, they engaged in wholesale rebellion, rejecting the legitimacy and authority of leaders and institutions around which society had long been organized. In the process, a president fell, riots engulfed cities from coast to coast, and the generation literally took protest to an art form at Woodstock, Altamont, and Monterey. In the process, Boomers defined deviance down. In the cul-

tural free-for-all that followed, licentiousness ruled the day. To a large extent, it still does. But at least bell bottoms, disco, and leisure suits did not last.

As the Boomers aged and entered the workforce, a funny thing happened. They discovered capitalism. Boomers took to capitalism with the same revolutionary zeal that marked their youth. So, America got the age of leveraged buyouts, barbarians at the gate, and Gordon Gekko proclaiming, "Greed, for lack of a better word, is good." In short, the Boomers embraced the "Don't Trust Anyone over 30" mantra and applied it ruthlessly to the business world for their benefit. And everything that could be monetized, marketed, or sold was. Absolutely everything. Woodstock, which defined the ethos of the generation, became another opportunity to profit.

As the Cold War ended and the United States defeated the Soviet Union and Communism, emerging as the world's only true super power, Boomers took control of government, business, and the institutions that run society. In the decade of peace and prosperity that followed, however, Boomer-run society opted to cash in rather than make hard choices that would address the structural deficits on the nation's balance sheet. The stock market boomed and business went global, but the Boomers replaced real economic growth with the mirage of a seemingly endless series of bubbles. First tech boomed then went bust, then housing, and now asset prices or something else we do not even see yet. Following Enron, WorldCom, and other major corporate frauds and failures that threatened the economy, the mantra of handing the reins to the next generation to bring fresh ideas and practices was replaced by a uniform push for gray hair and experience in the C-suite. All that experience yielded greater and more spectacular failures, which placed the entire financial system at risk in the Great Recession.

On the Boomers' watch, the richest and most powerful nation in the world became a debtor state, owing some \$20 trillion and counting, with no plan ever to regain solvency and crumbling physical and social infrastructure to show for all of that debt. Instead of uniting the country around solving even a small part of these problems, government under the Boomers' leadership has been unable to sustain attention on any particular project, whether on Iraq, climate change, health care, or simply paying the

nation's bills, without the threat of default. The "personal is political" zeal with which Boomers attack every aspect of life has left the country hopelessly divided in a cold civil war, demonstrated through the 2016 election and its resulting hysteria.

Bruce Cannon Gibney takes this broad narrative to a new level and turns it into a searing polemic against the Baby Boomers. Trained as a lawyer, and an early investor in some of the most successful and well-known young companies of the day (PayPal, Airbnb, Facebook, Spotify, Space X), Gibney applies the various tools developed in his training and experience to dissect nearly every facet of the Boomers' generational life and the collateral damage inflicted on the country. Gibney's work, however, is no mere screed. In extensive footnotes and charts throughout his work, he documents his claims and supports them with evidence ranging from government data to leading academic, social science, and economic works.

All this Gibney does with an effective and engaging rhetorical device around which he organizes his thesis. Each chapter illustrates a different trait the *Diagnostic and Statistical Manual of Mental Disorder* (DSM) associates with anti-social behavior, sociopathy, from a different time period or culturally significant aspect of the Baby Boomer generation. In essence, *A Generation of Sociopaths* applies the clinical criteria for a recognized mental disorder and makes the case that the Boomer generation, writ large, presents an easy case for diagnosis by displaying "moderate or greater impairments in personality function" due to:

1. ego-centrism; self-esteem derived from personal gain, power or pleasure; goal-setting based on personal gratification; absence of prosocial internal standards and associated failure to conform to lawful or culturally normative ethical behavior;
2. lack of concern for the feelings, needs or suffering of others . . . incapacity for mutually intimate relationships, as exploitation is a primary means of relating to others; and,
3. disinhibition [irresponsibility, impulsivity, risk taking] and antagonism [manipulativeness, deceitfulness, callousness, hostility].

Ultimately, one may question the propriety of the generational stereotyping underlying this work, or the validity of extrapolating the *DSM* from individual to group application,

but Gibney leaves little room to question his diagnosis and the effects on the country.

Gibney is open to criticism on at least three counts. First, much of his critique of the Boomers can be taken as frustration that Congress and a largely center-right nation have not adopted the sort of liberal policies a Silicon Valley entrepreneur favors. These policies have largely become the agenda of the Democratic party. Gibney makes compelling and sustained arguments that the degradation of the country's social, political, and physical infrastructure derives from the pathologies of the Boomers. Most of the policy examples to which he points (failing to raise taxes, calls for more spending on various infrastructure projects, more radical and immediate engagement on climate change, and criticism of the National Rifle Association and America's gun culture) open him to criticism that he is merely advancing the left's policies under a different cloak. But Gibney's thesis is so compelling and so well argued that he did not need to distract from it with thinly veiled political advocacy. And it would be a mistake to dismiss his argument on this basis.

Second, Gibney uses his book as a vehicle to relate thoughts and concerns on pressing issues that have, at best, only marginal relevance for his thesis. For example, Gibney raises the alarm about artificial intelligence. At minimum, he argues, the day is rapidly approaching when machines will displace millions of workers, if not endanger the majority of humanity. The author invested in early stage ventures developing the technology and has a better vantage point than most to assess its promises and perils. But that discussion has only marginal relevance to the larger critique of *A Generation of Sociopaths*. Gibney maintains that the Boomers' collective inability to understand technology or to plan, heightens the risks associated with artificial intelligence. But occasional observations and points such as these ultimately detract from the author's argument.

Third, though some may consider Gibney an alarmist blaming his elders for intractable problems and forces beyond anyone's control, if anything, he does not go far enough. Although he uses his insights about the Boomers to look into the future, Gibney does not discuss a key reality that most Gen Xers in the workforce have come to appreciate: the Baby Boomers will never retire. They will outlast their productivity and overstay their welcome in the workplace, blocking the

hopes for advancement and frustrating the career development of those behind them. Even worse, with their generational dying breath, Boomers will bypass loyal Gen Xers altogether and turn the reins over to the Millennials. The Boomers will say Millennials may not stick around the organization if they have to spend years paying their dues and learning the ropes, the way Gen Xers have. Although he briefly discusses the Millennials, Gibney fails to see them as the true children and heirs of the Baby Boomers.

All this suggests the Boomers will leave a bleak world as their legacy. Gibney, however, is hopeful. He does not see an America in decline, but a nation struggling to emerge from a long-standing stagnation that precedes the Great Recession, brought about by the Boomers' mortgaging of the future. And he does give credit where it is due. He praises the Boomers for presiding over the expansion of the Civil Rights movement to include advances for women and the LGBTQ community. But Gibney struggles to identify other successes and accomplishments.

There are benefits that will be derived from the Boomers' insatiable urge to stay healthy, active, and youthful well into old age. This hopeless struggle against inevitable mortality essentially makes the generation a massive experiment in developing and advancing medical treatments for the various ailments and afflictions of aging—a point which Gibney does not mention. For a generation that is not particularly giving, their selfishness in this regard may, ironically, provide some lasting benefit to others—albeit at an exorbitant cost that may bankrupt the nation. Compared to the carnage in their wake, this potential benefit is not much, but with the Boomers, you take what you can get.

Members of Generation X largely gave up faith in the Boomers long ago. What hope there is lies in members of my generation quietly undertaking the hard work and sacrifices necessary to right the ship without getting too caught up in the quest for personal or political gain or credit. In fact, however, the far-reaching damage wrought by the Boomers may be too great for a single generation to repair. And, even if Boomers do not pass over Gen Xers and hand off power to the Millennials, Gen Xers eventually will. Based on present impressions of the Millennial generation, that prospect appears darker even than living in the destructive, creeping shadow of the Boomers. Though

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Race and the Federal Justice System CLE

On Oct. 10, 2017, we were fortunate to have Hon. Marcia G. Cooke, Federal Public Defender Michael Caruso, and Acting U.S. Attorney Benjamin G. Greenberg as panelists for this CLE seminar discussing some of the most pressing legal issues of today, including criminal justice reform, the role of implicit bias (if any) in criminal justice, and Washington's impact on the day-to-day work of the court, prosecutors, and public defenders. It was moderated by Marissell Descalzo of Tache Bronis, and held at Holland & Knight. Important topics were discussed at length and with great candor, such as the impact of the Sessions Memo versus the Holder Memo, the effect implicit bias has on daily life and in the courtroom, and issues pertaining to sentencing guidelines. The conference room was full to capacity and our audience members engaged with the speakers on these very important topics as well.

A special thank you to our panelists, to our moderator, to the host law firm, and to all those who attended! ☺

FBA Boardroom Series Luncheon—US Secret Service

For our third Boardroom Series luncheon of the summer, the FBA was pleased to host South Florida's Secret Service's Assistant to the Special Agent in Charge Brian Deer. Agent Deer was a fascinating and engaging guest.



The Honorable Marcia G. Cooke, Federal Public Defender Michael Caruso, and Acting United States Attorney Benjamin G. Greenberg sit as panelists for the CLE: Race & the Federal Justice System seminar held at Holland & Knight.



FBA members and South Florida's Secret Service Assistant to the Special Agent in Charge Brian Deer gather to listen to Agent Deer discuss the history and origins of the Secret Service.

Agent Deer began by discussing the history and origins of the Secret Service, which stemmed from multiple currencies being issued by various states during the time of the Civil War and how these multiple currencies bred a culture for counterfeiting. Agent Deer then explained that given the Secret Service's success in this arena, the agency was later tapped to provide protective detail for presidents after three presidential assassinations in the latter part of the 19th century and the turn of the century.

Agent Deer explained that to this day these two missions are the focus of the Secret Service, but encompass a far wider swath than what they originally entailed. The Secret Service's protective detail requirement includes presidents, vice-presidents, their families, all candidates for president, former presidents, and all visiting foreign heads of state should they request protection. Agent Deer also shared with us how the Secret Service utilizes many methods and techniques to neutralize threats. As for the Secret Service's other mission of investigating financial crimes, identity theft, and other related crimes, Agent Deer gave

us tremendous insight into the agency's mission, dedication, and approach.

Agent Deer also shared with us his personal story, and how after 9/11, he was determined to be a federal law enforcement officer and the process he went through to become a Secret Service agent.

Agent Deer graciously answered many questions that we had, and for each one, took the time and care to provide true insider insight.

Thank you Agent Deer and thank you to everyone who attended! ☺

Maryland Chapter

Three members of the Maryland U.S. Attorney's office were nominated for and/or obtained significant positions in the Department of Justice (DOJ) during 2017. Former Maryland U.S. Attorney Rod J. Rosenstein, an FBA member and former Maryland Board of Governors member, was sworn in as DOJ deputy attorney general on April 26, 2017. James A. Crowell IV, FBA member and current Maryland Board of Governors member, was appointed acting director of the Executive Office of United States Attorneys on Dec. 6, 2017. Robert K. Hur, the Deputy Attorney General's principle deputy, was nominated by President Donald Trump to be the U.S. attorney for Maryland on Nov. 1, 2017. ☺



L to R: Former Maryland U.S. Attorney Rod J. Rosenstein, James A. Crowell IV, and Robert K. Hur, the Deputy Attorney General's principle deputy.

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the picture is not particularly hopeful or encouraging, Gibney's work makes a significant contribution to a badly needed cultural conversation that is long overdue. ☺

product liability cases. He is the president of the Northern District of Ohio Chapter of the Federal Bar Association. The views expressed here are his own.

J. Phillip Calabrese is a partner at Porter, Wright, Morris & Arthur LLP whose practice includes defending businesses in class action and