Federal Bar Association

Journal of the
Chattanooga Chapter
August 2015

FBA Honors Retiring Bankruptcy Judge John Cook & Magistrate Judge Bill Carter

Nicholas Whittenburg Appointed to Bench

Newly Appointed Bankruptcy Judge Nick Whittenburg

(Photo courtesy of Miller & Martin)

The Honorable John C. Cook, former Chief Bankruptcy Judge for the Eastern District of Tennessee, retired from the bench in March of this year.

Also retiring from the bench is the Honorable William Carter, who concludes sixteen years as Magistrate Judge for the Eastern District of Tennessee, and who will be replaced by Christopher Steger. (For more on Judge Carter's retirement and the event held in his honor, *see* pp. 8-9. The FBA will feature Magistrate Judge Chris Steger in its next journal issue.)

Judge Cook attended the University of Tennessee School of Law, and has a degree in philosophy and psychology from the University of Virginia. Prior to his time on the bench, Judge Cook served as a clerk for U.S. District Judge Frank Wiley Wilson, and then worked as an assistant U.S. attorney in Chattanooga for almost ten years. Judge Cook was first appointed as bankruptcy judge by the Sixth Circuit in 1987, and served as Chief Judge from 2000 to 2012.

Replacing Judge Cook is former Miller & Martin PLLC partner and AmSouth Bank assistant general counsel, Nicholas Whittenburg. The Sixth Circuit selected Judge Whittenburg from a list of lawyers submitted by a panel who interviewed candidates from across the country.

"It's is an honor to have been chosen by the United States Court of Appeals for the Sixth Circuit as a bankruptcy judge for the Eastern District of Tennessee," said Judge Whittenburg. "I hope that I can serve the residents of Tennessee as well as retired bankruptcy judge John Cook ."

Continued, p. 7

Judge Nick Whittenburg

At a Glance

- 50 years old; married with 2 children
- Originally From Crossville, TN
- J.D. from Emory; B.S. from Vanderbilt
- Former Partner at Miller & Martin
- Former Asst. Gen. Counsel, AmSouth
- Former Director, Mid-South Commercial Law Institute
- Appointed by Sixth Circuit to Succeed Judge Cook
- Sworn-in on June 5th, 2015

Inside this issue:

Unchecked Presidential Power, Tom Greenholtz	pp. 2,6-7
Blurred Lines, Autumn Witt Boyd	pp. 3-4
Message from FBA President, Donna Mikel	p. 3, 5
Civility and the Law, Janie Parks Varnell	p. 5
Magistrate Judge Bill Carter's Retirement	pp. 8-9
Clerk's Corner, Katharine Gardner & Kara West	p. 10
FBA Chattanooga 2015 Board Members	p. 11

Upcoming FBA Events:

Chattanooga Chapter's Sixth Circuit Review Seminar

September 18, 2015 (Chattanooga, TN)

National Annual Meeting & Convention

September 11-12, 2015 (Salt Lake City, UT)

Eastern District of TN Admission Seminar

October 15, 2015 (Chattanooga, TN)

Inaugural FBA Federal Litigation Conference

October 27, 2015 (Washington, DC)

First Steps to Unchecked Presidential Power?

Tom Greenholtz, Esq.

In 1936, John Allard and Clarence Webster were indicted, with others, for conspiring to sell fifteen machine guns to Bolivia, which was then in the midst of a war with Paraguay. Their conduct was alleged to violate a Proclamation issued by President Roosevelt that prohibited the sale of arms to this region. Although this Proclamation was issued pursuant to a Joint Resolution of Congress, the defendants argued that the Proclamation was an unconstitutional delegation of legislative authority to the President.

On appeal, however, the Supreme Court sustained the indictment. In writing for the Court, Justice George Sutherland recognized that, while the Constitution limits the powers of the national government in internal affairs, the national government is not so limited in the area of foreign affairs.

Although Justice Sutherland could have stopped there to emphasize the proper exercise of joint power by both the legislative and executive branches, he went further. Citing arguably questionable authority, Justice Sutherland declared that the validity of the Proclamation did not depend upon the Congressional Joint Resolution. With respect to foreign affairs, he recognized that the President had inherent authority that could not be limited by Congress, as the Constitution "must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved." See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936). In so doing, Justice Sutherland expressly recognized a "plenary and exclusive power of the President as the *sole organ of the federal government in the field of international relations*—a power which does not require as a basis for its exercise an act of Congress . . . ." *See id.* (emphasis added).

Predictably, presidents from both parties have often cited Justice Sutherland's rationale to justify broad and exclusive executive powers in areas touching upon foreign affairs. Thus, *Curtiss-Wright* has been used, in part, to justify initiating foreign military actions[1] and to refuse notifying Congress of covert operations.[2] The decision has also been used to support controversial actions such as the NSA's intelligence collection programs,[3] the invocation of broad executive privilege with respect to foreign affairs,[4] and the military detention of American citizens.[5] These invocations, of course, have been made by presidents of both political parties.

In point of fact, and despite the language of Curtiss-Wright*, the Supreme Court has never recognized that the president enjoys unchecked Constitutional authority in any area of foreign affairs...That is, until June 8, 2015.*

Taken to its logical conclusion, the rationale of *Curtiss-Wright* would imply a power inconsistent with the structure of the Constitution and its careful separation of powers. Indeed, with rare exception—and the president's pardon power and, arguably, the congressional impeachment powers come immediately to mind—the Constitution's structure usually requires the action of at least two branches, or parts thereof, to accomplish any task. Recognition of unchecked presidential authority would be significant, as no systemic means would (or could) exist to prevent or remedy the abuse of that power.

Perhaps this is why a broad reading of *Curtiss-Wright*, and its notion of unchecked presidential power in foreign affairs, has been rejected by the Supreme Court in later decisions. These later cases have characterized *Curtiss-Wright* as an example of how presidential power is exercised consistently with an act of Congress and not as one allowing a unilateral exercise of executive authority. For example, in his famous concurring opinion in the *Steel Seizure* Case, Justice Robert Jackson limited *Curtiss-Wright* by noting that the case "intimated that the President might act in external affairs without congressional authority, but *not that he might act contrary to an Act of Congress.*" *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 n.2 (1952) (Jackson, J., concurring) (emphasis added).

In point of fact, and despite the language of *Curtiss-Wright*, the Supreme Court has *never recognized* that the president enjoys unchecked Constitutional authority in any area of foreign affairs.

That is, until June 8, 2015.

Unchecked Power, cont. pp. 6-7

BlurredLines

Substantial Similarity in the *Feel* of a Song

"Blurred Lines" was a huge hit pop song in the summer of 2013, breaking radio and download records and earning the artists who created it, singers Robin Thicke and Pharrell Williams and rapper Clifford "T.I." Harris, Jr., millions of dollars.

Warning: if you search the Internet for the song, its video is definitely not safe for work!

Thicke and Williams may not get to enjoy these fruits of their labor, because a jury recently found their contributions to "Blurred Lines" infringed the copyright in Marvin Gaye's 1977 hit song "Got to Give It Up."

The jury awarded the Gaye family $7.3 million in copyright damages after a trial in the United States District Court, Central District of California in March 2015.

Autumn Witt Boyd, Esq.

However, it found T.I.'s rap did not infringe the original song. The case began shortly after the song hit the radio waves, with the three artists "reluctantly" filing a declaratory judgment action against Gaye's family requesting a finding they did not infringe "in the face of multiple adverse claims . . ."

Unsurprisingly, the Gaye family filed counterclaims for copyright infringement.

Proving infringement without verbatim copying

To establish a claim for copyright infringement, the plaintiff must show that: (a) he owns a valid copyright in the work that allegedly has been infringed; and (b) the defendant copied protected elements of the plaintiff's work. *Brown Bag Software v. Symantec Corp*., 960 F.2d 1465, 1472 (9th Cir. 1992).

"Because direct evidence of copying is not available in most cases, [a] plaintiff may establish copying by showing that defendant had access to plaintiff's work and that the two works are 'substantially similar' in idea and in expression of the idea." *Smith v. Jackson*, 84 F.3d 1213, 1219 (9th Cir. 1996).

***Blurred Lines*, cont. p. 4**

Message from the FBA Chattanooga President: *Loss of Respect for the Federal Judiciary*

Donna Mikel, Esq.

The past couple weeks have been very emotional for the Chattanooga Chapter. As members of the community and as a bar, we have joined in the grief, angst, and unity inspired by the brutal murder of five service members on July 16, 2015 in our very own city. We deeply appreciate the dedication of our soldiers and police home and abroad and applaud our community for the bravery and leadership demonstrated in the wake of these events.

The Chapter has had a steady year of activities and programs for our members and community and is looking forward to an even busier second half of 2015. We launched the year with our Annual Meeting, held in February at the Trade and Convention Center. Approximately 80 members and practitioners enjoyed Judge Mattice's delivery of the "State of the Judiciary" address and the keynote speech conveyed by Mayor Andy Berke, who focused on Chattanooga's violence reduction initiative and the role of the federal judiciary.

In early Spring, the Chapter focused on FBA activities on a national level. I enjoyed attending the March mid-year meeting in Arlington, Virginia and voting on the National Council. I was inspired by the activities of our sister chapters and proud of the work we accomplish in Chattanooga, despite our relatively-small chapter size (approximately 125 members). President-Elect Lynzi Archibald travelled to Arlington the following month for FBA leadership training and Capitol Hill Day. Our Chapter is well represented and respected on a national level.

In 2015, the Chapter has continued to offer valuable programs for our members. Our Spring federal practice seminar enjoyed an excellent turnout, followed by a welcome social for new admittees at Clyde's. In June, we hosted a "brown bag lunch" with Judge Carter so that he could impart his seasoned wisdom upon our members prior to his July retirement. On June 30, summer law clerks partook in a Chapter-sponsored luncheon to meet the judges, law clerks, and court professionals and hear tips for new practitioners. Judge Collier, likewise, organized two lunches for attorneys with less than three years of experience and we were excited to offer this treasured opportunity to our membership.

FBA President Message, cont. p. 5

***Blurred Lines*, cont. from p. 3**

The Gaye family did not claim that "Blurred Lines" exactly copied part of the melody or chorus in "Got to Give It Up." Rather, they argued "Blurred Lines" copied "distinctive and important elements from the musical composition," because it had essentially the same overall sound and feel as the 1977 recording.

The Gaye family did not claim that "Blurred Lines" exactly copied part of the melody or chorus in "Got to Give It Up." Rather, they argued "Blurred Lines" copied "distinctive and important elements from the musical composition," because it had essentially the same overall sound and feel as the 1977 recording. Complicating matters for the "Blurred Lines" artists were interviews Thicke gave to *GQ* and *Billboard* magazines shortly after the song became a hit, in which he admitted he admired Gaye, and "Got to Give It Up" was an inspiration for "Blurred Lines."

Thicke tried to explain these interviews away during trial by testifying that he was drunk and high on Vicodin both when recording the song, and when he spoke with reporters. He also testified that he lied in interviews about how much of a role he played in writing "Blurred Lines" (probably not the best way to impress a jury).

Substantially similar?

Perhaps the strangest twist during a trial that focused on substantial similarity in the overall sound and feel of the two songs was the judge's decision not to let the jury hear the original recording of "Got to Give It Up" during the trial.

This was a consequence of the governing 1909 Copyright Act, which provided federal protection only to a musical composition as expressed in sheet music, but not any sound recordings that captured a performance of the song. Most sound recordings made after February 15, 1972 are now protected under federal copyright law. Some pre-1972 sound recordings are protected by common law or state statutory copyrights, but only federal infringement claims were included in this lawsuit.

Instead, the jury heard a stripped-down version of "Got to Give It Up," with Gaye's vocals played over a bass line and keyboard chords played by their musical expert. This should have worked in favor of the "Blurred Lines" artists, since many of the similar elements between the two songs (hi-hat, cowbell, back-up vocals, percussion, bass, certain vocal melodies, keyboards) were not contained in the sheet music for "Got to Give It Up." Since these elements were not part of the copyrighted composition, the jury did not hear them. The fact that the jury found infringement even though it was not able to hear the similarities between the original recording of "Got to Give It Up" and "Blurred Lines" proves the point that anything can happen in a jury trial.

Fair use defense

Interestingly, the "Blurred Lines" artists did not present a fair use defense. This defense is codified in the Copyright Act: "the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, is not an infringement of copyright." 17 U.S.C. § 107. In evaluating this defense, the judge or jury can consider whether the latter use is commercial, the type of work that was copied, how much of the original work was copied, and the effect on the market for or value of the original work. In practice, fair use is highly subjective. Whether a use is fair seems to boil down to the judge or jury's feelings about the value of the work at issue. It is impossible to know whether a fair use defense might have saved the "Blurred Lines" artists from being found liable for copyright infringement, or persuaded the jury to award lower damages if it did find infringement. The decision not to pursue the fair use defense was certainly a strategic choice, one the artists and their lawyers have not spoken about it publicly.

The case is far from over; Thicke and Williams have filed a motion for judgment as a matter of law and for a new trial, which is still pending.

Similar facts, different outcome

Another songwriting dispute played out quite differently earlier this year. Pop artist Sam Smith agreed to give singer-songwriter Tom Petty and Petty's collaborator Jeff Lynne a songwriting credit for Smith's 2014 hit song "Stay with Me." The Smith song's chorus contains a similar melody to the chorus in Petty's 1989 hit "Won't Back Down."

By giving Petty and Lynne the credit, Smith will be sharing revenues from the song. As opposed to the confrontational stance taken by the "Blurred Lines" artists, Smith quickly settled the matter amicably after Petty's representatives reached out to him about the similarities. Petty released a statement saying, "I have never had any hard feelings toward Sam. All my years of songwriting have shown me these things can happen. Most times you catch it before it gets out the studio door but in this case it got by. Sam's people were very understanding of our predicament and we easily came to an agreement. The word lawsuit was never even said and was never my intention . . ."

It's unlikely Petty would have been so generous if Smith had sued him for a declaration of non-infringement.

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The Law Office of Autumn Witt Boyd helps creative entrepreneurs take care of their intellectual property and business headaches so that they can spend more time doing what they love.

Civility in the Law

Janie Parks Varnell, Esq.

Left to Right: Brittany Thomas, Alex McVeagh, Judge Curtis Collier, Janie Parks Varnell and Eliza Epps

This spring, I enjoyed the opportunity to have lunch with United States District Court Judge Curtis Collier and three fellow attorneys: Brittany Thomas with Grant, Konvalinka, & Harrison, P.C.; Alexander McVeagh with Chambliss, Bahner, & Stophel, P.C.; and Eliza Epps with Luther Anderson, PLLP. We met Judge Collier for lunch and engaged in conversation about civility amongst members of the Bar, technology and its effect on the practice of law, and adequate preparation.

Judge Collier spoke about how respect amongst local attorneys has come a long way since he first located to Chattanooga. Earlier in his career, Judge Collier was asked to serve on a committee that sought to promote greater collegiality in the regional Bar. He was pleased to hear that each of the young lawyers at the table had found the local Bar to be a welcoming group.

The table also discussed technology and how it effects the practice of law. In the digital age, sometimes lawyers forget how effective and efficient they can be by simply picking up the phone or having a face-to-face conversation with other attorneys and with clients.

Judge Collier also expressed the importance of coming prepared to court. As many federal attorneys have experienced, Judge Collier likes to, as he puts it, engage lawyers as they are making arguments in his court room. He is known for asking difficult questions and posing hypotheticals. Adequate preparation is what makes this potentially intimidating experience a rewarding and educational experience.

Speaking for the four of us, I found it refreshing to be able to sit down with Judge Collier, a man with a brilliant career, and have a casual conversation about the practice of law. Judge Collier's respect for the law and for the legal profession is both obvious and contagious. Being given the opportunity to learn from someone like him is the best experience a young lawyer can have.

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Janie Parks Varnell is an attorney at Davis & Hoss, P.C., representing clients in both state and federal court..

***FBA President's Message*, cont. from p. 3**

On July 24, 2015, we bid farewell to a dear member of the Chattanooga Chapter, United States Magistrate Judge William B. Mitchell Carter. He will be dearly missed at our Courthouse and we wish him the best in his retirement.

On September 18, we will hold the biennial Sixth Circuit Review Seminar. The program, first launched in 2013, will highlight recent Sixth Circuit cases and will be packed with the presence of numerous federal judges from a variety of jurisdictions within the Sixth Circuit. Do not miss your chance to sign up for this event (more details are found on the back cover of this issue).

Our Chapter's mission is to strengthen the federal legal system and administration of justice by serving the interests and the needs of the federal practitioner, both public and private, the federal judiciary and the public they serve. At Judge Collier's suggestion, we have recently begun working on a project that falls squarely within our purpose and is of tremendous importance. Recent research indicates that public respect for the judiciary is at an all-time low. Unlike other branches of government, the court is uniquely dependent upon the respect of the public because its lacks the power of the purse or the sword in order to effectuate its decisions. Over the next year, we will are soliciting quarterly meetings with community leaders in order to begin planning a program to address this concern. If this topic is of particular interest to any of you, please contact us at chattanoogafba@gmail.com.

If you are not a member of the FBA, I urge you to join today. Nowhere else will you find CLEs and activities uniquely tailored for professionals who practice in the Chattanooga division of the Eastern District of Tennessee. Nowhere else will you find resources to significantly develop your knowledge of and skill at federal court practice. For more information about membership, please visit http://www.fedbar.org/Membership.aspx. We hope to see you this summer or fall and invite you to join our bar!

Unchecked Power, cont. from p. 2

With Zivotofsky's functional analysis favoring a single national voice in foreign policy and diplomacy, though, claims of exclusive presidential authority can now always be systemically favored against claims that particular constitutional powers are (or should be) shared with Congress.

On that day, and near the end of this last Supreme Court term, an important opinion addressing presidential powers was issued quietly and with no significant attention from the national media. In *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015), the Supreme Court addressed a seemingly simple issue: whether the President could disregard a statute requiring that a passport indicate Israel as the place of birth when a person, born in the city of Jerusalem, requested the designation.

Concealed within this modest passport question, though, is a struggle over how the Constitution allocates foreign policy powers among the branches. The case arose when Mr. Zivotofsky, who was born in Jerusalem, requested that the State Department issue a passport listing his place of birth as "Israel" as required by the Foreign Relations Authorization Act, Fiscal Year 2003. The State Department declined to do so, citing "longstanding" executive branch policy that the United States does not recognize any country as having sovereignty over Jerusalem. In arguing before the Supreme Court, the President stated, among other things, that the statute was unconstitutional under *Curtiss-Wright*'s rationale because the President has "exclusive authority to conduct diplomatic relations," along with "the bulk of foreign-affairs powers."[6]

In siding with the President, a six-to-three majority of the Supreme Court declared the Foreign Relations Authorization Act unconstitutional as violating the President's *exclusive* authority to conduct diplomatic relations. Writing for the Court, Justice Anthony Kennedy recognized that "functional considerations" favored the President and reasoned that:

> *[T]he President alone [makes] the specific decision of what foreign power he will recognize as legitimate, both for the Nation as a whole and for the purpose of making his own position clear within the context of recognition in discussions and negotiations with foreign nations. Recognition is an act with immediate and powerful significance for international relations, so the President's position must be clear. Congress cannot require him to contradict his own statement regarding a determination of formal recognition.*

See Zivotofsky, 135 S. Ct. at 2090 (emphasis added).

To its credit, the Court rejected a broad invocation of *Curtiss-Wright*, noting that the case "after all, dealt with congressionally authorized action, not a unilateral Presidential determination." *See id.* at 2090. However, in superficially dismissing *Curtiss-Wright* on one level, the Court nevertheless enshrined the rationale of *Curtiss-Wright* by favoring the nation's speaking "with one voice" and emphasizing that this "voice must be the President's." *See id.* at 2079. As the Court recognized, "only the Executive has the characteristic of unity at all times." *See id.* at 2086.

Previously, executive invocations of *Curtiss-Wright*'s "sole organ" language could rightfully be dismissed as exuberance: the President's Proclamation there was plainly not an exercise of inherent executive authority. With *Zivotofsky*'s functional analysis favoring a single national voice in foreign policy and diplomacy, though, claims of exclusive presidential authority can now *always* be systemically favored against claims that particular constitutional powers are (or should be) shared with Congress.

For the first time in the history of the Republic, we have recognized an exclusive presidential authority in foreign affairs that *constitutionally disables other branches* from participating in aspects of international diplomacy. It remains to be seen how this rationale favoring "functional considerations" will be used to justify unilateral executive actions abroad relating to military operations, intelligence collection, and covert missions. But, given the executive branch's past use of the dubious *Curtiss-Wright* reasoning in these contexts, we can reasonably predict that *Zivotofsky* will assume a central and important role. *Zivotofsky*'s rationale, then, is far more than a small presidential "win" on a passport issue—let us hope that it is not also a significant defeat for separation of powers.

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Tom Greenholtz is a shareholder with Chambliss, Bahner & Stophel, where he practices in the areas of criminal, governmental, business, and employment law. Also, as an adjunct professor at the University of Tennessee at Chattanooga, he has taught classes and given speeches involving constitutional law and executive powers.

Footnotes:

1. *See The President's Constitutional Auth. to Conduct Military Operations Against Terrorists & Nations Supporting Them*, 2001 WL 34726560, at *6 (O.L.C. Sept. 25, 2001) ("Conducting military hostilities is a central tool for the exercise of the President's plenary control over the conduct of foreign policy. There can be no doubt that the use of force protects the Nation's security and helps it achieve its foreign policy goals.").

2. *See The President's Compliance with the "Timely Notification" Requirement of Section 501 (b) of the Nat'l Sec. Act*, 10 U.S. Op. Off. Legal Counsel 159, 164 (Dec. 17, 1986) ("It follows inexorably from the *Curtiss-Wright* analysis that congressional legislation authorizing extraterritorial diplomatic and intelligence activities is superfluous, and that statutes infringing the President's inherent Article II authority would be unconstitutional.").

Judges Cook, Whittenburg, cont. from p. 1

Originally from Crossville, TN, Judge Whittenburg has practiced bankruptcy law in Tennessee and Georgia for over two decades. Whittenburg was sworn-in as judge by U.S. District Judge Harry Mattice on June 5.

Craig Smith, Judge Whittenburg's former partner at Miller & Martin, expressed his appreciation to the man that he considered a mentor. "[Whittenburg] will be missed very much here, but Miller & Martin's loss is certainly the federal judiciary's gain."

Smith praised Whittenburg's experience, patience, humor and diligence, and said that "Judge Whittenburg will be served well by his inherent curiosity about how the law works and how one section of it would impact another. He was very cognizant about the practical realities of the law—that it doesn't work simply in a vacuum—another characteristic which will serve him well as a judge."

Other local bankruptcy attorneys weighed in on Judge Cook's retirement and the appointment of Judge Whittenburg.

"I have had the privilege of practicing before Judge Cook for close to three decades and have always held him in the highest regard," stated attorney Eron Epstein. "Judge Cook has that rare combination of a depth of legal knowledge and judicial temperament that makes for a lasting legacy. It's no accident that he was always at the top of the Bar Association polls when many of the lawyers who voted only practiced before him occasionally."

Richard L. Banks, of Richard Banks & Associates, PC, recounted his experience of being the first and last lawyer to appear before Judge Cook. Banks remembers Judge Cook's first day on the bench, when Cook worried that he had much to learn about bankruptcy law. "Well, it certainly didn't take him long, as his level of professionalism and knowledge of the bankruptcy code became unparalleled," said Banks. "I, and the many attorneys who appeared before him, will forever remember his great service to the Court, and wish him all the best in his retirement."

Bruce Bailey, a shareholder at Chambliss Law Firm, expressed a similar sentiment, saying "Judge Cook is a tremendous legal scholar who regularly found authorities that the parties had not," said Bailey. "He rigorously questioned the counsel appearing before him on their position and the legal basis for it, starting with the Bankruptcy Code and Rules. But he also grasped the reality of the factual situations presented to him and often applied common sense and logic."

Bailey served as one of the members of the panel who interviewed and submitted candidates to the Sixth Circuit for Judge Cook's replacement. "I fully expect Judge Whittenburg will match Judge Cook's industry and scholarship, but it will take him several years to match Judge Cook's efficiency. Given Judge Whittenburg's abilities, however, I expect that he will master his new position while dealing fairly and impartially with all the clients and attorneys appearing before him." Bailey concluded by saying that "I am quite confident that Judge Whittenburg will do an outstanding job for the Eastern District, but he will probably never match Judge Cook's musical talents!"

Footnotes (*Unchecked Power*) cont.:

3. *See Legal Authorities Supporting the Activities of the Nat'l Sec. Agency Described by the President*, 2006 WL 6179901, *7 (O.L.C. Jan. 19, 2006) ("As the Supreme Court has explained, '[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.' In this way, the Constitution grants the President inherent power to protect the Nation from foreign attack, and to protect national security information." (citations omitted)).

4. *See Assertion of Executive Privilege for Documents Concerning Conduct of Foreign Affairs with Respect to Haiti*, 1996 WL 34386606, at *2 (O.L.C. Sept. 20, 1996) ("Since Congress may only investigate into those areas in which it may potentially legislate or appropriate, it cannot inquire into matters which are within the exclusive province of one of the other branches of the Government. . . . However, the conduct of foreign affairs is an *exclusive prerogative* of the executive branch." (emphasis added; citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (the President is "the sole organ of the federal government in the field of international relations")).

5. *Applicability of 18 U.S.C. § 4001(a) to Military Det. of United States Citizens*, 2002 WL 34482988, at *9 (O.L.C. June 27, 2002) ("We do not lightly assume that Congress has acted to interfere with the President's constitutionally superior position as Chief Executive and Commander in Chief in the areas of foreign affairs and national security . . . . As the [Supreme] Court has repeatedly emphasized, the President's foreign affairs power *necessarily exists independently of* Congress . . . ." (emphasis added; citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319, 320 (1936)).

6. The Administration's arguments before the Supreme Court mirrored the positions advanced by the previous president as well. When signing the Foreign Relations Authorization Act into law, and in language echoing *Curtiss-Wright*, President George W. Bush issued a signing statement challenging the constitutionality of the provision at issue in *Zivotofsky*:

> Section 214, concerning Jerusalem, impermissibly interferes with the President's constitutional authority to conduct the Nation's foreign affairs and to supervise the unitary executive branch. Moreover, the purported direction in section 214 would, if construed as mandatory rather than advisory, impermissibly interfere with the President's constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states.

See Presidential Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003 (Sept. 30, 2002).

FBA Celebrates Magistrate Judge

United States Magistrate Judge William B. Mitchell Carter attended the University at North Carolina at Chapel Hill from 1961 to 1964 and graduated with a degree in economics. He attended Vanderbilt Law School from 1965 to 1968.

After graduating law school, he entered the family rug manufacturing business of Carter Brother, Inc., from 1968 through 1972, during which time he also received an MBA from the University of Tennessee at Chattanooga.

Bill Carter's Tenure and Retirement

In 1972, Judge Carter began practicing law with partner John Tallman, and later practiced in the Chattanooga firm of Carter, Mabee, and Paris until he was appointed as United States Magistrate in 1999. He served in that capacity until July 29, 2015. In September 2015 he will begin working in recall status for the Second Circuit in the Northern District of New York.

The FBA thanks Judge Carter for his years of service to the local bar and to the federal judiciary, and also thanks him for serving as the FBA's judicial liaison. We wish him and his wife Wiki a very happy retirement!

THE CLERK'S CORNER

Working for Bill Carter as his law clerk for the past 16 years has been an honor and a pleasure every day. I loved watching how Judge Carter interacted with lawyers. He truly enjoys people and, in particular, he loves lawyers and "lawyering" and understands the pressures lawyers face. "Being a lawyer is hard enough without me making it more difficult," he used to tell me. Every lawyer left Judge Carter's chambers following a motion hearing with their dignity and pride intact. He loved watching lawyers at work, "making sausage," he called it. And of course, Judge Carter's humor is legendary. He mischievously called his robe a frock. His quick and good natured humor was sprinkled throughout each day. He took a genuine interest in his staff's families and was generous with time to allow us to be fully involved in our children's lives. Knowing that a windowless office could be depressing sometimes, he took us for coffee across the street. Lawyers joked they could set their watches by our 3 pm coffee excursions. He is universally beloved by *everyone* in the courthouse. Where have the past 16 years gone? It really is true that time flies when you're having fun.

- Katharine Gardner

There have been a lot of changes in the Bankruptcy Court for the Eastern District of Tennessee, including the retirement of the Honorable John C. Cook. It was with a sad heart that the bankruptcy bar wished him farewell earlier this year. It was an absolute pleasure to practice in front of Judge John Cook. He decided each matter with thoughtful consideration of the facts and applicable law, while keeping in mind the importance of economy and practicality in the bankruptcy field. If a practitioner did not know the presiding law over an issue - you could bet that Judge Cook did. And, his careful questions would lead a practitioner to understand the critical issues and law that needed to be further addressed. Judge Cook helped eliminate much of the stress with litigation and promoted scholastic dialogues to effectively and efficiently resolve matters.

Additionally, Judge Cook presided over his court with decorum and patience, and he expected the same level of civility from those who appeared before him. Although highly intelligent and vested with the power of the federal judiciary, Judge Cook approached his tasks humbly and with an appropriate amount of reserve. He is the epitome of a public servant. I can say with certainty that he will be missed; however, I understand that he is seeking a second career in music - so, rock on Judge Cook, rock on.

-Kara West

Congratulations to the Chattanooga Chapter of the FBA!

The Chattanooga Chapter of the FBA was recently recognized as the winner of the **2015 Ilene and Michael Shaw Public Service Award** for our upcoming program *Restoring Confidence in the Federal Judiciary*. We were also named winner of the **2015 Meritorious Newsletter Award** (for the third year in a row!)

In addition, the FBA awarded the Chattanooga Chapter the **2015 Chapter Presidential Achievement Award**.

The awards will be presented at the Federal Bar Association's Annual Meeting and Convention in Salt Lake City, Utah on September 12.

Federal Bar Association—Chattanooga Chapter 2015 Board Members

Donna Mikel, President

Lynzi Archibald, President-Elect

Aaron Love, Treasurer

Jeff Granillo, Secretary

Gary Henry, Past President

Board of Governors,

- **Michael Alston**
- **Harry Cash**
- **Sheri Fox**
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