

ON THE MERITS

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FIRST CHAIR: PRESIDENT'S MESSAGE

BY: JEFFREY T. COX, ESQ.
FARUKI IRELAND & COX P.L.L.

"Time is neutral and does not change things. With courage and initiative, leaders change things." - Rev. Jesse Jackson



*Jeffrey T. Cox, Esq. – Faruki
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President Dayton Chapter,
Federal Bar Association*

As I write this column, I am recently returned from the FBA Mid-Year Meeting in Arlington, Virginia, where FBA chapter, section, division, and circuit leaders from across the country gathered to share ideas, initiatives and opportunities -- all with the goal of enhancing the practice of law in our federal courts. Having had occasion to attend several FBA national meetings over the last few years, I was reminded of Rev. Jackson's statement above. Change does not occur by virtue of time's passage; change is the result of how we spend our time, not for ourselves but for the benefit of others. Certainly on a national level, the FBA is driven by courage and initiative, and effective leadership, and the result of those efforts are reflected in membership growth, expanded programming, hard-won respect on Capitol Hill, and appreciation and cooperation with federal court leadership -- in judicial chambers across the country as well as at the Administrative Office of the United States Courts in Washington, D.C.

Like any national organization, the FBA efforts at the national level tell only a fraction of the story. Indeed, the FBA's growing success is more a story of the sum of its many parts; the good work occurring in its sections and divisions, and importantly its chapters. Nowhere is the chapter energy and activity and good work more evident than right here in our home chapter, thanks to the motivated leadership of the Dayton FBA Board and membership. It is a humbling experience to work alongside so many outstanding attorneys here in southwest Ohio, all dedicated to growing our chapter, serving our federal bench, and developing outstanding events and programming for our members.

In 2014, FBA National recognized Dayton FBA as one of two "Chapter of the Year" recipients, along with the Chicago Chapter. Our 2013-14 efforts were, indeed, a watershed experience for our chapter. The challenge we set for ourselves for 2014-15 was to meet or exceed our prior year's experience: no small feat. I am happy to report that through the collective efforts and courageous initiative of many of you, as documented in this newsletter, 2014-15 has been and continues to be an exciting and productive year for our chapter.

First Quarter 2015 featured our February 27 State of the Court Luncheon with newly-appointed S.D. Ohio Chief Judge Edmund Sargus visiting from Columbus and speaking to over 120 attorneys and judges.

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CLEVELAND WILL ROCK AT 2016 ANNUAL MEETING

BY: GLEN MCMURRY, ESQ.
DUNGAN & LEFEVRE

Preparations are underway for what promises to be one of the best attended FBA Annual Meetings in recent memory. Your 2016 Annual Meeting & Convention will take place in Cleveland, Ohio on September 15 – 17, 2016 at the Westin Hotel & Cleveland Convention Center. The 2016 Annual Meeting is being co-sponsored by both the Cleveland and Dayton Chapters of our organization. This combined effort creates an incredible opportunity to gain positive exposure for the Dayton Chapter. This effort also creates numerous individual opportunities for our chapter members to volunteer and participate in the planning of the premier annual event of our national organization.

The most significant evening to look forward to at the 2016 Annual Meeting will be the Presidential Installation Banquet taking place on September 17th where our very own Magistrate Judge Michael J. Newman is scheduled to be sworn in as the 89th National President of the Federal Bar Association. This historic occasion will mark the first time that a Dayton Chapter member has held this position.

The 2016 Annual Meeting will also include notable speakers from a diverse array of federal practice areas. The 2016 Planning Committee is also exploring the possibility of inviting one of our U.S. Supreme Court Justices to provide the keynote address.

In addition to providing programming and speakers directed toward our professional development, the 2016 Annual Meeting will also be fun! Beginning Wednesday, September 14th and continuing through the Presidential Installation Banquet on September 17th, participants will have the option to attend a wide variety of excursion events and banquet receptions, including events at the Rock-N-Roll Hall of Fame as well as the various Cleveland sporting venues.

Your Dayton Chapter is actively participating in the planning of all components of this convention, with a focus on the following aspects:

- **Presidential Installation Banquet**
The Dayton Chapter's 2016 Planning Committee is primarily responsible for the planning and implementation of all aspects of the 2016 Presidential Installation Banquet, including management of the venue, entertainment, menu, presenters, and the invitation of honored guests.
- **Dayton Chapter Participation**
We want you there! This component of our Planning Committee is dedicated to exploring methods to boost Dayton Chapter participation, including advertising, discounted participation, and transportation.

CLERK'S CORNER –

SOUTHERN DISTRICT OF OHIO NAMES A NEW CLERK

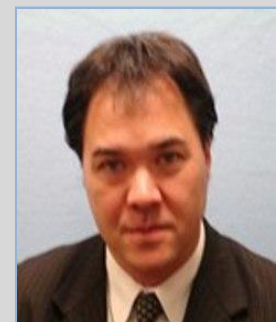
BY: MICHAEL N. RHINEHART, ESQ.

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On February 1, 2015, Rich Nagel became the Clerk of Court for the United States District Court for the Southern District of Ohio, succeeding John Hehman, who served as Clerk of Court since July 2012. Before being named Clerk of Court, Rich served the Court as Chief Deputy Clerk and as the Human Resources Manager.

Having spent his career in public service, Rich also worked over a combined eighteen years for the State of Ohio (the Ohio Department of Public Safety, Ohio Department of Rehabilitation and Correction, and the Ohio Senate) and the State of Florida (Florida Department of Health). His education includes a Master's Degree in Public Administration (M.P.A.) and Bachelor's Degree in Criminology (B.A.) from the Ohio State University.

Although Rich will work mainly from the Joseph P. Kinneary U.S. Courthouse in Columbus, he will spend a significant amount of time in Dayton, where he was born (at Wright Patterson Air Force Base) and members of his family still reside in Beavercreek. Please join the Court in congratulating and welcoming Rich to his new position as Clerk of Court.



*Richard Nagel, Clerk of Court,
U.S. District Court for the
Southern District of Ohio*

(Pres. Message cont. from p. 1)

March activities included our chapter co-sponsoring the 2015 Gilvary Symposium on Religion, Law and Social Justice, with the University of Dayton School of Law; over 150 people attended this event focusing on research and sentencing trends in child pornography cases, and featuring an international panel of legal and psychological scholars and experts. Special thanks, again, to Judge Walter Rice for identifying this issue and encouraging chapter efforts to work with the law school to tackle this issue, and to Chapter Vice President Steve Justice for his tireless efforts to bring this program together.

Our active Young Lawyers Committee, headed by Jeremy Smith, co-sponsored two Habitat for Humanity build days in the Dayton-area (March 21 and April 19). Thanks to the initiative of Jeremy, who submitted a proposal to the FBA Foundation, our chapter was one of four chapters nationwide to receive the Foundation's Community Outreach Grant! The \$3,000 grant will support this summer's Clemency Project Gala, currently slated for July 9 in Dayton, to be held in conjunction with our annual mid-summer social. We will be joined by Cynthia Roseberry, the Director of the National Clemency Project in Washington, D.C. (Keep an eye on our social media postings and email blasts for more information about this exciting event.)

This year we will also feature our May 19 Federal Practice and Admissions CLE, and a half-day CLE to be held at the Federal Courthouse: "Anatomy of a Civil Jury Trial in the Southern District of Ohio." Still in the planning stages, this program is sure to be a sell-out; more details to follow, and thanks to Chapter Membership Chair Tim Pepper for spearheading this program.

As this column reflects, the hard work and initiative of many make my role as President an easy one and I thank them all. A special thanks, too, to my predecessor presidents, Judge Newman and Glen McMurry, both soon to be elected National FBA officers; to Tom Whelley, Chapter Treasurer, for his financial oversight and good counsel; to Erin Rhinehart, Chapter Secretary and PR/Social Media guru, who is ALWAYS (and, thankfully) on message, and to Judge Tom Rose, whose presence, thoughtful guidance and enthusiastic support as a member of our Executive Committee is so important.

We realize that there are many demands on the time of attorneys and judges. It is our chapter's goal and expectation to provide real value to our members. For three years in a row, we have experienced over 10% per year growth in our chapter membership, and, recently, the birth of a new affiliated student chapter at the University of Dayton School of Law. Help us spread the word of the great energy of the Dayton FBA so we can continue to welcome new members and enhance our offerings to bench and bar. In close, to quote the inimitable Donald Trump, "[y]ou have to think anyway, so why not think big?" I agree, join us, volunteer, and help Dayton FBA "think big."



*FBA & University of Dayton School of Law
volunteers rebuild home for
Regina Shearer and her son, Levon*

DAYTON FBA GIVES BACK

BY: JEREMY SMITH, ESQ.
BUSINESS LITIGATION ASSOCIATE AT THOMPSON HINE LLP

The Dayton Chapter sponsored two Habitat for Humanity projects organized by the University of Dayton School of Law on March 21, 2015, and April 11, 2015.

Both build projects will help several Dayton residents have affordable and necessary housing. One house is for Tamara Daniels, a lifelong Dayton resident and city employee for 22 years. Tamara has had difficulty finding affordable housing with the necessary equipment to keep her warm during the Ohio winters. The other house is for Regina Shearer and her son, Levon (Lee). Lee has a dual handicap (developmentally delayed and Dwarfism) and Regina, Lee's primary caregiver, has struggled to find housing that is handicap accessible. Their new home contains amenities specifically designed for Lee's handicap.

The Dayton Chapter provided t-shirts for the event, and several members—including Michael Rhinehart, Jeremy Smith, Michael Mayer and Christopher Hollon—volunteered alongside students from the University of Dayton.



Chief Judge Edmund Sargus delivers 2015 State of the Court Address



*lower row: Judge Michael Merz, Judge Sharon Ovington, Judge Guy Humphrey, Chief Judge Sargus
top row: Judge Timothy Black, Judge Walter Rice, Judge Thomas Rose, Judge Michael Newman*

STATE OF THE COURT LUNCHEON

BY: ZACHARY HECK, ESQ.
FARUKI IRELAND & COX P.L.L.

On February 27, 2015, over one hundred Federal Bar Association members of the Dayton Chapter gathered together to watch Chief Judge Edmund Sargus, Jr. deliver his State of the Court address. The ceremony, held at the Schuster Center, began with introductory remarks by FBA Dayton Chapter President Jeff Cox. Mr. Cox acknowledged and thanked Judge Michael Merz, Judge Sharon Ovington, Judge Timothy Black, Judge Walter Rice, Judge Thomas Rose, Judge Michael Newman, and Judge Guy Humphrey for their attendance.

The Honorable Thomas Rose next took the stage to honor and introduce Chief Judge Sargus. Judge Rose detailed the Chief Judge's path to the judiciary: Chief Judge Sargus is a graduate of Brown University and the Case Western Reserve University School of Law. Chief Judge Sargus served as Special Counsel to the Ohio Attorney General from 1979 through 1993, until he became the United States Attorney for the Southern District of Ohio. In 1995, Judge Sargus was nominated by President Bill Clinton to serve on the bench for the United States District Court for the Southern District of Ohio.

Chief Judge Sargus began his remarks and offered some insight into his role as Chief Judge in the Southern District of Ohio. He reminded us that the district includes 48 of Ohio's 88 counties, and his job as Chief Judge involves preparing budgets and reports to the national judiciary, while maintaining his docket as a federal judge. Chief Judge Sargus explained that he welcomes the new responsibilities because of the professional atmosphere displayed by the local federal bar. The Chief Judge announced that the Southern District is on the right track, and that the courts are running both effectively and efficiently. Reflecting on our courts, Chief Judge Sargus remarked that the courts in our district run smoothly because of its dedicated staff. He also mentioned that a large contributing factor to the Southern District's effectiveness is the congeniality of its attorneys. Chief Judge Sargus encouraged all of us to continue to work hard and keep the Southern District a wonderful place to practice law.

FBA COMMUNITY OUTREACH GRANT AWARDED TO DAYTON CHAPTER

BY: JEREMY SMITH, ESQ.
BUSINESS LITIGATION ASSOCIATE AT THOMPSON HINE LLP

In March, the Dayton Chapter was awarded a Federal Bar Association Community Outreach Grant. The Community Outreach Grant Program provides grants to chapters for the purpose of promoting community service or addressing the need for legal services in the community.

The Dayton Chapter will be using this grant to host an event for Cynthia Roseberry, the Project Manager of the Clemency Project 2014. The Clemency Project assists prisoners in submitting petitions to commute their sentences. Under criteria released by the Justice Department, prisoners are eligible for this petition if they are serving a federal sentence that, if imposed today, would be substantially shorter, have a non-violent history, have served at least ten years, have no significant prior convictions, and have demonstrated good conduct in prison. Mrs. Roseberry will discuss the Clemency Project's goals and progress, and highlight volunteer opportunities for attorneys.

FEDERAL CONTRACTS & CAMPAIGN CONTRIBUTIONS- BUT WHO IS A CONTRACTOR?

BY: BILL WELLS

MR. WELLS IS AN ATTORNEY WITH THE DEPT. OF THE AIR FORCE AT WRIGHT-PATTERSON AFB IN DAYTON, OHIO. THE VIEWS EXPRESSED HERE ARE HIS OWN, AND DO NOT REPRESENT THE OFFICIAL POSITION OF THE U.S. AIR FORCE.

On March 30, 2015, the Federal Election Commission (FEC) issued a Notice of Availability seeking comments on a Petition for Rulemaking submitted by Public Citizen seeking to expand the federal prohibition on campaign contributions by federal government contractors to parent and subsidiary companies found in Part 115 of the FEC’s regulations . This notice can be found at 80 CFR 16595.



Bill Wells is an attorney with the Dept. of the Air Force at WPAFB in Dayton, Ohio

As currently written, Part 115 prohibits federal contractors from making contributions or expenditures to any political party, political committee, or federal candidate, or to any person for any political purpose or use. 11 CFR 115.2(a); see also 52 U.S.C. 30119(a)(1) (formerly 2 U.S.C. 441c(a)(1)). Part 115 further prohibits any person from knowingly soliciting a contribution from any federal contractor, 11 CFR 115.2(c); see also 52 U.S.C. 30119(a)(2) (formerly 2 U.S.C. 441c(a)(2)). In the past, the FEC has interpreted this s prohibition to apply only to a specific legal entity that hold a federal contract, and not to parent or subsidiary organizations.

Public Citizen’s petition submitted on November 18, 2014 requested that the FEC revise its regulations to “to provide a more accurate assessment, in conformity with well-established legal precedent, of whether nominally separate entities of the same corporate family constitute a single contractor subject to the restrictions against campaign contributions from federal contractors.” Public Citizen Petition, which can be found at <http://sers.fec.gov/fosers/search.htm> by searching for 2014-09 in the “Search for REG Number” field.

Not surprisingly, most defense contractors and the lawyers and law firms that represent them do not see these issues in the same light as Public Citizen. See, e.g., “FEC Solicits Comments on Expanding Prohibition Against Political Contributions and Expenditures by Federal Contractors” by Caleb P. Burns and Tracye Winfrey Howard, Wiley Rein LLP, Apr. 02, 2015 at <http://tinyurl.com/m3trsbu> .

The Commission will not consider the petition’s merits until after the comment period closes on May 29, 2015. If the Commission decides that the petition has merit, it may begin a rulemaking proceeding which will be announced any in the Federal Register.

GILVARY SYMPOSIUM

BY: MICHAEL N. RHINEHART, ESQ.



Michael Rhinehart is a career law clerk at the United States District Court for the Southern District of Ohio

On March 19th and 20th, experts from three countries travelled to the University of Dayton School of Law (“UDSL”) to discuss issues facing legal practitioners, judges, pretrial and probation officers and law enforcement in child pornography prosecutions at the 2015 Gilvary Symposium on Law, Religion & Social Justice -- a Symposium held regularly by the law school to honor the memory of the late James J. Gilvary, former Montgomery County Common Pleas Judge. The 2015 Symposium, titled *Just Pictures? Recent Trends in Research and Sentencing in Child Pornography Cases* -- co-sponsored by the Dayton Chapter of the Federal Bar Association -- explored psychiatric and psychological issues, as well as sentencing concerns, in this concerning area of the law.

The Symposium began with a cocktail reception and dinner on Thursday, March 19, to meet and greet the featured international speakers and Symposium attendees. The dinner featured remarks from Dayton Chapter President Jeff Cox, UDSL Law Professor James Durham, and the Honorable Walter H. Rice, whose idea inspired the discourse of this year’s symposium. The opening evening ended with an impassioned speech by Christy Muncy, an Assistant United States Attorney for the Southern District of Ohio, who set the tone for the extensive dialogue to follow throughout the Symposium.

On Friday morning, the Symposium began with opening remarks from Paul E. McGreal, UDSL Dean. Steven Grocki, Esq., who serves as Deputy Counsel for the United States Department of Justice’s Child Exploitation and Obscenity Section (“CEOS”) in Washington, D.C., followed the opening remarks with the first substantive presentation of the morning, titled *Issues Related to Prosecution and Sentencing for Child Pornography Offenses*, which included a discussion of rapidly advancing technology used by offenders to avoid law enforcement detection and prosecution.



MESSAGE FROM THE UDSL FBA LAW STUDENT DIVISION

BY: NADIA KLARR

Another academic year is coming to a close for the Student Division. We have seen tremendous growth this year, both in student membership and opportunities for student involvement in the Dayton Chapter. The Student Division was honored to participate in hosting the 2015 Gilvary Symposium, "Just Pictures? Recent Trends in Research and Sentencing in Child Pornography Cases." We appreciate the overwhelming support we received from the University of Dayton School of Law, the Dayton Chapter, and the numerous attendees.

With the close of the academic year for students, the Student Division must say goodbye to some of its members. The Student Division would like to express its sincerest gratitude to Tessie Smith for her exceptional leadership as Student Division President. Her dedication to both her fellow students and the Federal Bar Association led to the creation and growth of the Student Division and her presence will truly be missed next year. The Student Division would also like to recognize Michael Sivore for his service as Executive Vice President. Both Tessie and Michael are exemplar leaders and have proven to be individuals whom others seek to follow. The Student Division would also like to show its appreciation for Joseph Latas, Treasurer, Markus Moll, Secretary, and Kaelynn Smith, Vice President of External Affairs. The growth and success of the Student Division is in large part owed to the hard work and outstanding contributions of our board members. Their willingness to go above and beyond is well-known and the Student Division is fortunate to benefit from their efforts to make our organization a great success! Please join the Student Division in thanking the graduating members of our outgoing board for all their accomplishments!

With a new academic year comes a transition of executive board officers. The Student Division is very excited to introduce its new executive board, which has several exciting events planned for the upcoming year. Please look forward to further details regarding these and other Student Division events in the near future. The new executive board would like to express their excitement and thank the Dayton Chapter for its interest and overwhelming support. We look forward to an outstanding year ahead!

FBA UDSL Student Division Executive Board 2015-2016

- *Nadia Klarr, *President*
- *Anthony Graber, *Executive Vice President*
- *Bethany Walker, *Vice President of Administration and Marketing*
- *Travis Butchello, *Treasurer*
- *Timothy Campbell, *Secretary*

DAYTON CHAPTER MEMBERSHIP UPDATE

From December 2013 to February 2015, the Dayton Chapter's membership increased from 97 to 124. This 28% increase is the result of three things: (1) the Chapter's increasingly attractive programming, (2) the Chapter's renewed emphasis on membership development, and (3) YOUR word-of-mouth recruiting efforts. Programming and Chapter-level outreach may enhance "brand awareness" of our Chapter, but your one-on-one conversation with a prospective member closes the sale. Please keep it up -- the bigger we get, the better we are able to deliver value to our members.

DAYTON REPRESENTS AT NATIONAL MID-YEAR MEETING

On Friday, March 27, 2015, Judge Michael Newman and FBA Dayton Chapter President Jeff Cox traveled to Washington D.C. for the FBA National Mid-Year Meeting. Judge Newman and President Cox represented the Dayton Chapter and are working to keep building on the successes of our chapter.

(pictured left to right) West Allen, Judge Michael J. Newman, FBA President-Elect Mark Vincent, and FBA President Matthew Moreland



(Gilvary continued from page 5)

Next, Ethel Quayle, Ph.D., a senior lecturer in clinical psychology at the University of Edinburgh in Scotland, presented on the topic of *Child Pornography Offenders: Making Sense of Psychological Research*. Dr. Quayle's dialogue not only educated attendees about her research, but also included a discussion about differences in sentencing methodology and severity between courts in the United States and the United Kingdom.

Fred S. Berlin, M.D., Ph.D., founder of The Johns Hopkins Sexual Disorder Clinic and Director of the Sexual Behaviors Consultation Unit -- who has testified as an expert in well-known cases, including the trial of serial killer Jeffrey Dahmer -- ended the morning session with a presentation titled *The Paraphilias; With an Emphasis on Pedophilia and Viewers of Child Pornography*. Among other issues, Dr. Berlin spoke concerning his opinion about the need for flexibility in child pornography sentencing to account for those offenders who only look at images and present no history or risk of child contact offenses.

Following a lunch break -- which featured a discussion of the United States Sentencing Guidelines by Raquel Wilson, Esq., Acting Director for Office of Education and Sentencing Practices at the United States Sentencing Commission -- Angela Eke, Ph.D., Coordinator of the Research Unit within the Behavioral Sciences and Analysis Services ("BSAS") at the Ontario Provincial Police in Canada, presented the topic concerning *The Relationship Between Child Pornography Offending and Contact Sex Offending Against Children*.

Following a question and answer session with Drs. Quayle, Berlin, and Eke, attendees were treated to the final presentation by Carissa Hessick, Esq., Professor at the University of Utah S.J. Quinney College of Law, who spoke on the topic of *Exercising Discretion in Child Pornography Cases*. Dr. Hessick spoke concerning federal appellate review of child pornography sentencing, as well as factors judges could consider in exercising sentencing discretion in such cases.

Following the Symposium's closing remarks, UDSL held a reception for attendees to speak with and bid farewell to the featured speakers. Thereafter, UDSL hosted a goodbye dinner at the Dayton Racquet Club, attended by many of the Symposium's featured speakers and members of the Dayton Chapter Executive Committee and Board. Attendees were introduced to incoming UDSL Dean Andrew Strauss and the Honorable Thomas M. Rose presented final remarks by thanking the speakers for their contributions in making the 2015 Gilvary Symposium a world class event. The 2015 Symposium's success can be attributed to number of Dayton Chapter members, including Judge Rice, Judge Rose, Judge Newman, as well as UDSL Professors James Durham and Susan Elliott. The Dayton Chapter gives special thanks to Chapter Vice President Steven Justice for his contribution in planning, organizing, and ensuring a successful Symposium.



Dr. Fred Berlin,
Johns Hopkins University



Raquel Wilson,
U.S. Sentencing Commission



Professor Ethel Quayle (left),
University of Edinburgh

Professor Carissa Hessick
(right),
University of Utah S.J.
Quinney College of Law



SUNSHINE REFORM ON THE HORIZON

BY: CHRIS HOLLON

In February, a pair of bipartisan bills were introduced in Congress to provide greater access to federal agency records under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. Both the FOIA Improvement Act (S. 337) and the FOIA Oversight and Implementation Act of 2015 (H.R. 653) would (1) codify the so-called "presumption of openness" policy of the Obama Administration, (2) limit the applicability of the FOIA exemption that protects certain privileged records – including records that reflect an agency's deliberative process – from disclosure, (3) promote electronic access to agency records, (4) limit the use of search and duplication fees, and (5) strengthen the authority of the Office of Government Information Services ("OGIS") and each agency's Chief FOIA Officer. If enacted, these measures would constitute the most significant FOIA reforms in decades.

Let's look at what the bills actually propose. The "presumption of openness" is somewhat of a misnomer, since FOIA already requires federal agencies to "disclose agency records to any person under § 552(a), unless they may be withheld pursuant to one of the nine enumerated exemptions listed in § 552(b)." U.S. Dept. of Justice v. Tax Analysts, 492 U.S. 136, 150-151, 109 S. Ct. 2841 (1989). Under the existing statute, the "strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents." U.S. Dept. of State v. Ray, 502 U.S. 164, 173 (1991). Instead of altering that presumption, the "presumption of openness" would narrow the applicability of FOIA's exemptions by allowing agencies to withhold information under an exemption only when (1) an agency reasonably foresees that disclosure would harm an interest protected by an exemption, or (2) disclosure is otherwise prohibited by law. In other words, an agency would be unable to rely solely on the fact that a record meets the definition of an exemption to withhold a record; the agency also would need to assess any harm caused by disclosure. Whether this reform would actually decrease the use of FOIA exemptions is far from certain. Although the Obama Administration voluntarily adopted the "presumption of openness" in 2009, it substantially increased the government's reliance on FOIA exemptions at the same time.

In another attempt to rein in the use of exemptions, each bill would narrow the scope of FOIA's Exemption 5, which protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency[.]" 5 U.S.C. § 552(b)(5). Courts have interpreted this exemption to "exempt those documents * * * that are normally privileged in the civil discovery context," NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975), including documents protected by the broad "deliberative process privilege," Judicial Watch, Inc. v. U.S. Dept. of Justice, 365 F.3d 1108, 1113 (D.C. Cir. 2004). That privilege protects "confidential intra-agency advisory opinions and materials reflecting deliberative or policy-making processes." *Id.* (internal quotation marks and citation omitted). Each bill would impose a 25-year sunset on the use of Exemption 5. In addition, the House bill would clarify that the exemption does not cover "records that embody the working law, effective policy, or the final decision of the agency."

Looking to other provisions in the legislation, each bill would promote electronic access to agency records by (1) requiring agencies to maintain certain records in an electronic format, including records that have been requested at least three times, and (2) creating a single website for requesting records from all federal agencies. The bills also would limit the use of search and duplication fees. The Senate version provides that agencies would not be able to impose such fees when they fail to meet certain time requirements, unless a request would require the production of more than 50,000 pages. The House version would allow agencies to charge such fees after failing to meet certain time requirements, but only upon providing written notice of the circumstances justifying those fees. Finally, the bills would strengthen OGIS and each agency's Chief FOIA Officer by requiring them to consider and formulate policies that promote the disclosure of agency records.

Although nearly identical bills passed the House and Senate last year with widespread support, they died when Congress adjourned before the bills were reconciled. However, given early, swift moves in both chambers to revive the legislation, the prospect of significant FOIA reforms in the near future looks promising.



Chris Hollon is a business and commercial litigation associate at Faruki Ireland & Cox P.L.L.

"The 'presumption of openness' is somewhat of a misnomer, since FOIA already requires federal agencies to 'disclose agency records to any person under § 552(a) unless they may be withheld pursuant to one of the nine enumerated exemptions listed in § 552(b).'"

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Go to www.fedbar.org today.***



Zachary Heck is a business and commercial litigation associate at Faruki Ireland & Cox P.L.L.

PROTECTION OR PROFIT? CALLS FOR CIVIL FORFEITURE REFORM GROW

BY: ZACHARY HECK, ESQ.

Thanks to increased notoriety fueled by political debate and a scathing critique by HBO’s John Oliver, federal civil asset forfeiture has caught the nation’s attention like never before. Civil forfeiture is a legal mechanism that permits state and federal law enforcement, under 18 U.S.C. §981 et seq., to seize property suspected to have been involved in criminal activity. Here is the catch: the owner of the property does not need to be guilty of any crime or even suspected of being guilty of a crime. This is because civil forfeitures are *in rem* proceedings: the government charges the *property* with a crime. For example, if police believe that your son’s friend is using your house to sell illegal drugs, law enforcement may seize your house because of its involvement with the criminal activity. The police do not need to charge you, your son, or your son's friend with a crime. Because the charge is against the property itself, cases like this have seemingly ridiculous names such as *United States v. 22,050.00 U.S. Currency*, 595 F.3d 318 (6th Cir. 2010) or *United States v. Thirty-Five Firearms*, 123 Fed.Appx. 204, 206-07 (6th Cir. 2005).

Proponents argue that civil forfeiture is an efficient method to thwart criminal organizations. Civil forfeiture allows law enforcement to seize property being used by criminal enterprises to commit crimes, and also seize the fruits of those crimes such as money, automobiles, firearms, and real property. After a seizure, the government will file suit against the property and provide notice for any claimants to the property to come to court and defend the property—arguing that it, indeed, was not a part of any criminal activity. If the government proves by a preponderance of the evidence that the property is indeed “guilty,” then the federal government chooses how to make use of the property. In some cases, if the rightful owner of the property was a victim, it may be returned to the victim. In other cases, the property may be sold at auction with a percentage of the proceeds going to local law enforcement departments that assisted with the seizure in accordance with the “equitable sharing” provision of the federal civil forfeiture statute.

Critics argue that, accordingly, civil forfeiture is ripe for abuse. Many argue that the equitable sharing provision provides local law enforcement with a financial incentive to aggressively seize assets suspected of being involved in criminal activity. As a result, police departments across the country have been criticized for predatory investigations focused on seizing property in an effort to supplement state police budgets.

Apparently, the federal government is taking notice. In January 2015, U.S. Attorney General Eric Holder barred local and state police from using federal law to seize cash and other property without warrants or criminal charges, unless federal authorities were directly involved in the case. Two months later, Holder announced that federal authorities will only seize bank accounts in serious cases beyond alleged “structuring,” the practice of intentionally limiting the size of bank transactions to avoid taxes or hide ill-gotten funds. Federal prosecutors must develop clear evidence of probable cause that a crime, other than simply structuring, has occurred. And before a bank account can be seized, a supervisor must approve the action.

(continued on page 10)

UPCOMING EVENTS – MARK YOUR CALENDAR!

- MAY ADMISSIONS CLE & SWEARING-IN CEREMONY MAY 19, 2015
- CLEMENCY EVENT & SUMMER ASSOCIATE COCKTAIL RECEPTION JULY 9, 2015
- DAYTON CHAPTER ANNUAL LUNCHEON & MEETING OCTOBER 2015

* * *

DON'T FORGET TO "LIKE" THE CHAPTER'S FACEBOOK PAGE, FOLLOW US @DAYTONFBA & CHECK OUT THE CHAPTER WEBSITE TO STAY CURRENT ON ALL FBA EVENTS THROUGHOUT THE YEAR!

(fba annual meeting continued from page 2)

- **City of Dayton Visibility**
This event may be taking place in Cleveland, but we want participants to feel like they are in our backyard. Accordingly, this subcommittee is devoted to exploring ways to increase Dayton's presence at this convention, including Dayton-centric gift bags and promotional materials for participants, as well as invitations to Dayton legislators and business leaders.
- **Fundraising**
The Dayton Chapter will be responsible for raising money to cover the Presidential Installation Banquet, which will require the assistance of our members, our law firms, and our local businesses. This is no small task. This subcommittee is already staffed by numerous chapter members, but we can always use more. To the extent our efforts are successful, we will also be able to defray the cost of participation for our Dayton Chapter members.

Your Dayton Chapter 2016 Planning Committee is working hard to make the 2016 Annual Meeting and Convention one of the best and the standard for which other annual meetings should strive. To accomplish this goal, we need your help. If you are interested in supporting the Dayton Chapter's 2016 Planning Committee, please contact Glen McMurry, the Committee Chair, at gmcmurry@dunganattorney.com.

(civil forfeiture continued from page 9)

These policy shifts indicate that perhaps the federal government is willing to reform its civil asset forfeiture laws to avoid abuses. However, recently-confirmed U.S. Attorney General, Loretta Lunch, testified before the Senate Judiciary Committee that she supports the federal forfeiture law, and offered no ideas for reform. Her support of civil forfeiture drew criticism from civil libertarian groups and presidential candidates such as Senator Rand Paul.

Thus, the nation is faced with a choice. If we want to reform civil forfeiture to curb the abuses reported across the country, then Congress needs to draft legislative reforms. Relying upon the executive branch to only enforce a subset of civil forfeiture laws under certain conditions is only a temporary fix. This year we enter yet another political election season where this issue is sure to come up time and again. Keep an eye on candidates as the issue of civil asset forfeiture reform grows.

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Jeremy Smith, Esq.

Jeremy Smith is an associate attorney at the law firm of Thompson Hine LLP. Jeremy primarily practices business litigation and is an active member of the FBA's Dayton Chapter. Over the past few months, Jeremy organized the Dayton Chapter's volunteer efforts with Habitat for Humanity, and he is currently actively involved with supporting the Clemency Project. Thank you Jeremy for all of your hard work. Keep it up!

ABOUT THE DAYTON CHAPTER

The mission of the Dayton Chapter of the FBA is to advance the profession and science of jurisprudence and to promote the welfare, interests, education, and professional growth and development of the members of the Federal legal profession.

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