September 26 - 28, 2019

Dollar Mountain Lodge

Sun Valley, Idaho

Agenda

Thursday, September 26, 2019

5:30 – 7:00 p.m.	**Welcome Reception**	Dana Herberholz, Parsons Behle & Latimer; President, Idaho Chapter, FBA	**Dinner on your own (reservations recommended)**

Friday, September 27, 2019

8:30 a.m.	**Breakfast & Registration**	Welcome by Dana Herberholz and update from Bruce Moyer, Counsel for Government Relations, Federal Bar Association	
9:00 a.m.	**Public Lands**	Judge Candy Wagahoff Dale Bill Myers (Moderator) Judge Kelly H. Rankin Judge Richard C. Tallman	As a unanimous Supreme Court held, "multiple use management" of public lands "is a deceptively simple term that describes the enormously complicated task of striking a balance among the many competing uses to which land can be put." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 58 (2008). That enormously complicated task falls to myriad federal agencies whose decisions are often challenged in court. Consequently, public land law and federal administrative law are inexorably bound together. The Supreme Court issued several administrative law decisions this term which caused quite a stir among the dissenting justices and public land law practitioners. Foremost among those decisions was *Kisor v. Wilkie* in which the Court addressed the proper judicial deference owed to federal agencies interpreting their own regulations – the so-called "*Auer* Doctrine." The panel will discuss the vitality of the doctrine after *Kisor*, how the lower courts might apply *Kisor* in public land cases, and the decision's impacts on related canons of judicial deference under the *Chevron* and *Skidmore* doctrines. Relatedly, the panel will discuss the Court's invitation in *Dept of Commerce v. New York* to examine evidence outside the administrative agency's record to determine if the agency is acting on a contrived or actual basis.
10:00 a.m.	**Bankruptcy Myth Busting**	Judge Joseph M. Meier Judge Casey D. Parker Judge William T. Thurman	You should not fear wading into the deep waters of bankruptcy! This presentation will dispel 10 common myths about bankruptcy, trying cases in bankruptcy courts and bankruptcy procedures.

Agenda (continued)

11:00 a.m.	**Morning Break**		
11:15 p.m.	**Criminal Law Panel**	Wendy J. Olson Judge Paul M. Warner	U.S. Magistrate Judge Paul Warner and Boise attorney Wendy Olson, both former U.S. Attorneys with extensive experience as prosecutors, will discuss criminal justice reform at the federal level, from various DOJ policies to the First Step Act, including how these policies work in practice and the impact on federal spending for prisons and inmate care.
12:00 p.m.	**Exemplary Service Award**	Presented to Mahmood U. Sheikh	
12:15 p.m.	**Chief Judges' Panel**	Dana Herberholz (Moderator) Judge David C. Nye Judge Robert J. Shelby Judge Scott Skavdahl	Chief Judges David Nye (Idaho), Robert Shelby (Utah), and Scott Skavdahl (Wyoming) will provide an overview of their specific chambers' requirements and address pressing and practical issues faced by federal court practitioners in their everyday practices.
1:15 p.m.	**Federal Law Clerk Panel**	Kelley Anderson Anneliese Booher Daniel Gordon Annie Henderson Dave Metcalf (Moderator)	*"Best Practices"* -- The panel will discuss the best practices of attorneys; chambers' policies; key Federal and Local Rules; and various other topics, including answering any questions and listening to any recommendations.
2:15 p.m.	**Afternoon Break**		
2:30 p.m.	**U.S. Attorneys' Panel**	First Assistant Jared C. Bennett Bart M. Davis Rafael Gonzalez (Moderator) Mark A. Klaassen	"*So, You Want to be a United States Attorney, and Other Stories*" Plan on participating in a lively discussion with the Tri-State's United States Attorneys. After brief introductory comments on emergent civil and criminal issues facing today's U.S. Attorney's Offices, to include public lands conflict, the impact of recent Supreme Court cases *Rehaif* and *Davis* on workload, recruiting and retaining capable employees, and working with Washington, D.C., the U.S. Attorneys will take questions from the audience. The panel will be moderated by Rafael Gonzalez, First Assistant U.S. Attorney for the District of Idaho, and Vice President of the FBA Idaho Chapter.
3:30 p.m.	**Hemp and Cannabis Law**	Judge Mark L. Carman Judge Dale A. Kimball Elijah Watkins (Moderator)	"*Hemp and Marijuana: Interstate Commerce, Preemption, and State Police Powers*" The 2018 Farm Bill legalized industrial hemp on a national level, opening up the agriculture industry to a multibillion-dollar global market of natural textiles, pharmaceuticals, and CBD products, or so people thought. What happens when the federal government designates a crop as an "agricultural commodity," but a state views the same crop as a Schedule 1 controlled substance? What happens when law enforcement lacks the testing necessary to determine whether something is illegal or not? Who bears the risk? Hear from judges and practitioners who will lay out the current legal landscape and how the issue is being addressed in their states, including Yellowstone National Park, a federal enclave.

4:30 p.m.	**Dinner - On Your Own**		**Various Locations (reservations recommended)**

Saturday, September 28, 2019

8:30 a.m.	**Breakfast**		
9:00 a.m.	**Standard of Review**	Judge Dee Benson Judge Ronald E. Bush (Moderator and Panelist) Judge N. Randy Smith	The panel will discuss the significance of the standard of review in evaluating cases. It will examine its effect with respect to federal district and magistrate judges, and court of appeal judges. The panel will also discuss what effect the standard ought to have when lawyers are filing cases and appeals.
10:00 a.m.	**Civility and Decorum: Maintaining an Even Keel in the Indecorous Fray**	Judge Nancy D. Freudenthal Judge Bruce S. Jenkins Judge Ryan D. Nelson Judge N. Randy Smith Juliette Palmer White (Moderator) Judge B. Lynn Winmill	In the face of increasingly contentious public discourse and growing concerns about the loss of civility in American public life, have the courts remained a refuge from the indecorous fray? After all, the legal profession is no stranger to rules of professional conduct and the struggle to remain civil in the heat of battle. Have we managed to keep an even keel, or are we also facing a growing problem with civility and decorum? This program will explore these questions, with a focus on practices and strategies that have worked to preserve civility and decorum in the legal profession—both recently and over the long term. We will review recent legal opinions, discuss the respective rules of civility for each of the three jurisdictions, and encourage a lively, respectful discussion regarding best practices for preserving civility and decency.
11:00 a.m.	**Executive Power, Significant Supreme Court Cases, and Their Relevance**	Dean Erwin Chemerinsky	This is a transitional time in the U.S. Supreme Court. Hear about the major cases that were decided in the October 2018 Term. Dean Chemerinsky will provide an overview of what lies ahead in the October 2019 Term, and what we should expect from the high Court in the longer term.
12:00 p.m.	**Closing Remarks**	President-Elect Wendy J. Olson	

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Judge Candy Wagahoff Dale
Bill Myers (Moderator)
Judge Kelly H. Rankin
Judge Richard C. Tallman

Judge Candy Wagahoff Dale

Judge Candy Wagahoff Dale began her appointment as United States Magistrate Judge on March 30, 2008, and served as Chief Magistrate Judge from October of 2008 through September of 2015. Among her other duties, she is Chair of the Local Civil Rules Advisory Committee and serves on the planning committee for the annual Teachers Institute. She was appointed by Chief Justice John Roberts to serve a two-year term as the Magistrate Judge Observer to the Judicial Conference of the United States, and will serve in that capacity from October 2017 through September 2019. Judge Dale also is a member of the Committee on Workplace Environment and the Fairness Committee for the Ninth Circuit, and a past Chair of the Magistrate Judges Executive Board for the Ninth Circuit.

Judge Dale is a judge liaison of the Governing Board of the Idaho Chapter of the Federal Bar Association and a member of the Idaho Legal History Society. She is an Emeritus member of the Richard C. Fields American Inn of Court, where she previously served as President; an Emeritus member of the Advisory Council for the University of Idaho College of Law; and a member of the Board of Trustees of the College of Idaho, where she served as Chair of the Board from 2012 – 2014. Judge Dale was awarded the Honorary Degree of Doctor of Laws, LL.D., from the College of Idaho in May 2017. She received the 2016 Faculty Award of Legal Merit from the University of Idaho College of Law, the 2014 Justice for All Award from the Diversity Section of the Idaho State Bar, and the 2010 Kate Feltham Award from the Idaho Women Lawyers.

A native of Boise, Judge Dale obtained a Bachelor of Science degree, with honors and as a Gipson Scholar, from the College of Idaho in 1979, and a Juris Doctorate from the University of Idaho College of Law in 1982, where she served as Editor-in-Chief of the Idaho Law Review. Before her appointment to the federal bench, she was a trial lawyer for over 25 years in Idaho and a member of numerous professional and community organizations.

Bill Myers (Moderator)

Bill Myers provides seasoned and effective representation to clients in energy, natural resources, and public land law.

He draws from a depth of experience including his service as the Solicitor of the U.S. Department of the Interior.

As Solicitor, Bill was the chief legal officer and third-ranking official in the Department. He supervised an office of more than 300 attorneys in 19 locations nationwide. He advised the Secretary and other officials on appellate and trial matters as well as policy and administrative issues. He also worked closely with the Department of Justice and other federal agencies. Interior's jurisdiction covers approximately 20 percent of nation's surface estate and a significant amount of the nation's minerals.

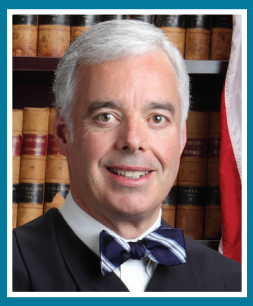
Bill also served as Deputy General Counsel for Programs at the U.S. Department of Energy. He directed the work of agency attorneys in the areas of international energy, civilian nuclear energy, DOE contracts, and regulatory intervention. Prior to DOE, he served as an Assistant to the Attorney General in the United States Department of Justice. Bill began his tenure in Washington, D.C. as legislative counsel to U.S.

Senator Alan Simpson of Wyoming, specializing in energy and natural resources issues. Prior to that, he practiced law in Wyoming.

Bill frequently publishes and speaks on issues related to energy, natural resources, and public lands.

Judge Kelly H. Rankin

Kelly Rankin is the Chief Magistrate Judge for the District of Wyoming. Prior to his appointment in 2012 he served in the U.S. Attorney's Office as an assistant, criminal chief, and as the presidentially appointed United States Attorney. Kelly also served in the Lincoln County Attorney's Office, as the twice elected Park County Attorney, and counsel to former Governor Dave Freudenthal. Kelly also worked in private practice in Cody. He obtained both his undergraduate and law degrees from the University of Wyoming. Kelly lives in Cheyenne.



Judge Richard C. Tallman

Judge Richard C. Tallman currently serves as a senior United States Circuit Judge on the Ninth Circuit Court of Appeals, with chambers in Coeur d'Alene, Idaho. Judge Tallman was nominated by President William J. Clinton on October 21, 1999, unanimously confirmed by the United States Senate on May 24, 2000, and appointed by the President on May 25, 2000. He entered on duty on June 30, 2000. From 2007 to 2011, Judge Tallman served as the Chair of the Advisory Committee on Criminal Rules for the Judicial Conference of the United States. On January 27, 2014, he was appointed by Chief Justice John G. Roberts to also serve a seven-year term as a judge on the Foreign Intelligence Surveillance Court of Review in Washington, D.C.

After receiving his J.D. from Northwestern University School of Law in 1978, Judge Tallman began his legal career as a law clerk to United States District Judge Morell E. Sharp, Western District of Washington. From 1979 to 1983, he served as a federal prosecutor, first with the Criminal Division of the United States Department of Justice in Washington, D.C., and then as an Assistant United States Attorney in Seattle. From 1983 to 1989, he was an associate and later a partner at Schweppe, Krug, Tausend & Beezer, P.S. He was a member of Bogle & Gates, P.L.L.C., from 1990 to 1999, where he chaired the White Collar Criminal Defense Practice Group. He founded and practiced in the Seattle firm of Tallman & Severin LLP from 1999 to 2000. At all three firms, he handled complex commercial litigation involving business issues collateral to white collar criminal matters. In his twenty-two years of legal practice prior to his judicial service, Judge Tallman tried more than three dozen civil and criminal cases and argued fifteen cases on appeal.

Friday, September 27th – Bankruptcy Myth Busting

Judge Joseph M. Meier
Judge Casey D. Parker
Judge William T. Thurman

Judge Joseph M. Meier

Joseph M. Meier is an United States Bankruptcy Judge for the District of Idaho. Prior to his appointment to the bench in 2018 he practiced law for over 32 years representing creditors, debtors, committees and trustees in cases and adversary proceedings under most chapters of the United States Bankruptcy Code. He has frequently been asked to speak to attorneys, state court judges, business and professional groups on bankruptcy and real property issues. He is a member of the Commercial and Bankruptcy Law Section of the Idaho State Bar and the American Bankruptcy Institute. Mr. Meier is a past chair of the Commercial and Bankruptcy Law Section of the Idaho State Bar (1999-2000) and sat on the Governing Board of that Section from 1995 to 2001. Commencing in 2003 he served as a lawyer representative to the United States District Court for the District of Idaho and in July 2008 completed a three-year additional term as the chairperson of the Lawyer Representative Coordinating Committee (L.R.C.C.) for the Ninth Circuit Conference of the United States Courts. Judge Meier also served a three-year term of the Conference Executive Committee of the Ninth Circuit that plans and implements the annual Ninth Circuit Judicial Conference attended by all Judges in the Circuit as well as lawyer representatives in all 15 districts.

Judge Meier is a fellow in the American College of Bankruptcy. He received his BA degree from the University of Oregon and JD degree from Willamette University. He also has been an adjunct professor at the University of Idaho College of Law, where, with Bankruptcy Judges Jim D. Pappas and Terry L. Myers, he taught the fall bankruptcy course since 2010 as well as the advanced bankruptcy course at that institution.

He is particularly honored to have received the following awards: 2017 Professionalism Award presented by the Idaho State Bar; 2008 Exemplary Service Award presented by the Idaho Chapter of the Federal Bar Association; 2005 Denise O'Donnell-Day Pro Bono Award presented by the Idaho State Bar and the 2003 Professionalism Award presented by the Commercial Law and Bankruptcy Section of the Idaho State Bar.

Judge Casey D. Parker

Judge Cathleen (Casey) Parker was sworn in as Chief Bankruptcy Judge of the United States Bankruptcy Court for the District of Wyoming in June 2015. Prior to her appointment, she was an attorney with the Wyoming Attorney General's Office for 16 years. She primarily represented the Wyoming Departments of Revenue and Audit in front of administrative tribunals, the Wyoming State Courts, and the Wyoming Supreme Court. At the time of her appointment, she was the supervisor of the Revenue Section of the Civil Division and was the head of the Attorney General's Bankruptcy Unit. Prior to joining the Office of the Attorney General, Judge Parker worked as an attorney in private practice in Colorado handling both civil and criminal matters. She attended the University of Wyoming School of Law and and received her J.D. in 1998.

Friday, September 27th – Bankruptcy Myth Busting (continued)

Judge William T. Thurman

Judge Thurman has served as a Bankruptcy Judge in the District of Utah since 2001. He served as its chief judge and is a former member and chief judge of 10th Circuit Bankruptcy Appellate Panel. He currently serves as a member of the United States Judicial Conference's Code of Conduct Committee and is a former member of the United States Judicial Conference's Financial Disclosure Committee. He has been active in the National Conference of Bankruptcy Judges, serving on its board and has chaired several of its committees. He has also been a frequent speaker with other national and local organizations focusing on legal and judicial education and is a Fellow of the American College of Bankruptcy.

Prior to his appointment, he was in private practice in Salt Lake City with McKay, Burton & Thurman for 27 years with a focus on bankruptcy law and served as a panel chapter 7 trustee. He received his B.A. and J.D. degrees from the University of Utah.

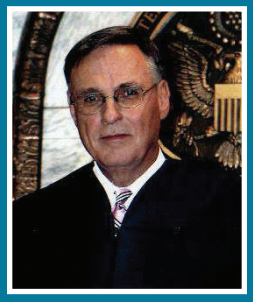
Friday, September 27th – Criminal Law Panel

Wendy J. Olson
Judge Paul M. Warner

Wendy J. Olson

Wendy J. Olson, former U.S. Attorney for the District of Idaho, is a partner in Stoel Rives' Litigation practice. She focuses her practice on government investigations, white collar criminal defense and civil litigation.

Wendy has over two decades of experience prosecuting white collar crime cases along with criminal civil rights violations, child sexual exploitation cases and Idaho's only federal death penalty case. She served as an Assistant U.S. Attorney for 13 years and served as U.S. Attorney for the District of Idaho for seven years until joining Stoel Rives in 2017. Prior to joining the U.S. Attorney's Office, Wendy was a trial attorney in the Criminal Section, Civil Rights Division, U.S. Department of Justice in Washington, D.C. for four and one-half years. She also served as assistant to the legal director of the National Church Arson Task Force. Prior to joining the Department of Justice, Wendy served as a law clerk for U.S. Chief District Court Judge Barbara Rothstein in Seattle from 1990 to 1992.



Judge Paul M. Warner

Paul Michael Warner is the Chief United States Magistrate Judge for the District of Utah. He was appointed on February 19, 2006. He received his Bachelor of Arts degree in English from Brigham Young University in 1973. He graduated in the Charter Class of the J. Reuben Clark Law School at BYU in 1976. In 1984, he received a Masters degree in Public Administration from the Marriott School of Management at BYU.

Judge Warner served as a trial lawyer in the Judge Advocate General Corps of the United States Navy following graduation from law school. Thereafter, he worked in the Utah Attorney General's office where he served as Chief of the Litigation Division, and later as Associate Chief Deputy to the Attorney General. In 1989, he joined the United States Attorney's Office for the District of Utah where he served as First Assistant United States Attorney, interim United States Attorney, and Chief

Friday, September 27th – Criminal Law Panel (continued)

of the Criminal Division. Judge Warner was appointed United States Attorney for the District of Utah on July 29, 1998, by President Bill Clinton. He was retained and reappointed by President George W. Bush, and again confirmed by the U.S. Senate for a second term four-year term on August 1, 2003. After almost eight years of service, Judge Warner resigned as United States Attorney in February 2006 when he was appointed to the federal bench in Utah. Judge Warner also served as a Colonel in the Judge Advocate General Branch of the Utah Army National Guard. He is a past president of the Utah National Guard Association. He retired in September 2006 as the State Staff Judge Advocate, after 31 years of commissioned service. In 2010, he created the first federal veteran's treatment court in the nation.

Friday, September 27th – Exemplary Service Award

Mahmood U. Sheikh

Presented by Dana Herberholz

Friday, September 27th – Chief Judges' Panel

Dana Herberholz (Moderator)
Judge David C. Nye
Judge Robert J. Shelby
Judge Scott Skavdahl

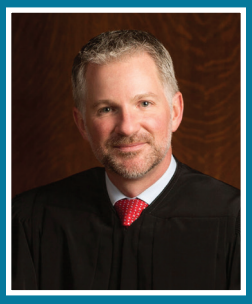
Dana Herberholz (Moderator)

Dana M. Herberholz is an intellectual property lawyer who advises clients in technology disputes involving patents, trademarks, copyright, and trade secrets. With particular emphasis on patent litigation, Dana maintains a national practice and regularly serves as lead counsel in patent disputes in various courts across the United States, including the Federal Circuit Court of Appeals and the Patent Trial and Appeal Board. His patent litigation practice spans diverse technology areas including consumer electronics and hardware, computer software, image processing, wireless communication devices, laboratory equipment, medical devices, and internet technologies, among others. Dana also has extensive experience defending companies against claims of patent infringement asserted by non-practicing entities.

Active in numerous bar associations and committees, Dana has served as the President of the Idaho Chapter of the Federal Bar Association and as the chair of the Intellectual Property Law Section of the Idaho State Bar. He also serves on various firm committees and chairs Parsons Behle & Latimer's Intellectual Property Practice Group.

Judge David C. Nye

Chief District Judge David C. Nye was sworn in as a United States District Judge for the District of Idaho on August 1, 2017, after having been nominated by both President Barack Obama and President Donald Trump. Judge Nye was the first Article III judge to be sworn into office in Idaho in over twenty years. In 2007, Judge Nye was appointed by Idaho Governor Otter to serve as a District Judge for the State of Idaho. He served in that capacity from 2007 to 2017 and served as Administrative District Judge for the Sixth Judicial District from 2009 to 2012. Prior to serving as a judge, he practiced law in Pocatello, Idaho from 1987 to 2007. He also served as a law clerk to Judge George G. Granata from 1986 to 1987. He graduated from Brigham Young University in 1982 and from Brigham Young University, J. Reuben Clark Law School in 1986.



Judge Robert J. Shelby

Nominated by President Barack Obama, Judge Shelby was confirmed by the United States Senate with unanimous consent on September 22, 2012. Since October 1, 2018, he has served as Chief United States District Judge for the District of Utah. Before his appointment to the bench, Chief Judge Shelby enjoyed a diverse and varied private practice with an emphasis on complex commercial litigation. Following law school, he served as a law clerk for United States District Judge J. Thomas Greene in the District of Utah. He then practiced law in Salt Lake City until his appointment to the bench. A graduate of Utah State University and the University of Virginia School of Law, Chief Judge Shelby is a former President of the Salt Lake County Bar Association and the David K. Watkiss – Sutherland Inn of Court. He served by appointment on the Utah Supreme Court's Advisory Committee on the Utah Rules of Civil Procedure, and the Utah Supreme Court's Ethics and Discipline Committee. He is a Fellow of the American Bar Foundation. Chief Judge Shelby served on active duty with the Utah Army National Guard during Operation Desert Storm before receiving an Honorable Discharge in 1994.

Judge Scott Skavdahl

Scott W. Skavdahl was born and raised in Western Nebraska. He received his B.S. in political economics from the University of Wyoming in 1989 and law degree in 1992.

He began private practice in 1992 with the Casper, Wyoming law firm of Brown, Drew & Massey, LLP as an associate attorney. In 1994, Judge Skavdahl accepted a three year law clerk position with the Honorable William F. Downes, United States District Judge for the District of Wyoming. Thereafter he joined the law firm of Williams, Porter, Day & Neville, P.C. in Casper, Wyoming where his practice focused on civil litigation.

In December of 2001, Judge Skavdahl was appointed a Part-Time United States Magistrate Judge for the District of Wyoming. In July 2003, Judge Skavdahl retired from private practice when he was appointed by Governor Dave Freudenthal to the Seventh Judicial District as a State District Court Judge where he served until his appointment as the Chief Magistrate Judge for the District of Wyoming on February 1, 2011. In February 2011 he was nominated by President Barack Obama to the Federal District Court for the District of Wyoming, filling the vacancy upon the retirement of William F. Downes. On November 3, 2011, his nomination was confirmed by the United States Senate. Judge Skavdahl presides in Casper, Wyoming, where he also resides with his wife Cidne (Sidney).

Friday, September 27th – Federal Law Clerk Panel

Kelley Anderson
Anneliese Booher
Daniel Gordon
Annie Henderson
Dave Metcalf (Moderator)

Kelley Anderson

Kelley Anderson graduated from the University of Wyoming College of Law in 1993. In 1994, after spending a short time in private practice, she accepted a term clerkship position with newly-appointed U.S. District Judge William F. Downes, District of Wyoming, as one of his first two law clerks (the other being Scott Skavdahl). That term position ultimately evolved into a career position with Judge Downes in which she served until 2007 (less a few years in the middle after the birth of her second child). Kelley then spent two years in private practice with the law firm of Gifford & Brinkerhoff, filled a temporary clerkship vacancy in the Chambers of the Honorable Terrence L. O'Brien, U.S. Court of Appeals for the Tenth Circuit, and eventually returned to the U.S. District Court for the District of Wyoming in 2010 to serve as a career law clerk to the Honorable Clarence A. Brimmer, U.S. Senior District Judge. Kelley later joined the chambers of the Honorable Scott W. Skavdahl upon his appointment as a United States District Judge for the District of Wyoming, where she presently serves as a career law clerk.

Kelley and her husband, Rusty, enjoy spending time with their two grown children and two golden retrievers, particularly at their cabin in Ryan Park, Wyoming.

Anneliese Booher

Anneliese Booher has served as Chief Judge Robert J. Shelby's career law clerk since he took the bench in 2012. Before that, she was the Director of Professional Development at the University of Utah College of Law and a litigator at the Salt Lake City law firm of Christensen & Jensen. Anneliese received her law degree in 2001 from the University of Utah College of Law.

Daniel Gordon

Daniel Gordon is a Career Staff Attorney with Chief U.S. Magistrate Judge Ronald E. Bush, District of Idaho.

After graduating from UC Davis School of Law in 1999, Dan practiced commercial litigation in Boise, Idaho with Stoel Rives, LLP and Greener, Banducci, Shoemaker, P.A. In 2007, he joined the federal courts as a Career Staff Attorney with U.S. Magistrate Judge Larry M. Boyle, before joining Judge Bush in 2008.

Annie Henderson

Anne E. Henderson is a term law clerk to the Hon. Lynn B. Winmill at the U.S. District Court, District of Idaho. Prior to clerking for Judge Winmill, she served for approximately two years as term clerk to the Hon. Candy W. Dale. Anne graduated from the University of Idaho College of Law in 2017, where she served as Editor-in-Chief of the Idaho Law Review. While in law school, Anne was a member of the National Moot Court Team, served as President of the Environmental Law Society, worked as a Teaching Assistant for Legal Research and Writing courses, and worked as an intern to the Office of Legal Counsel for the Nez Perce Tribe. Anne is a member of Idaho Women Lawyers and the Access to Justice Idaho Fundraising Campaign Leadership Committee. Anne also serves as a Law Student Attorney Mentor as part of the Federal Bar Association's mentorship program.

Friday, September 27th – Federal Law Clerk Panel (continued)

Dave Metcalf (Moderator)

David L. Metcalf has been the Senior Staff Attorney for Chief Federal District Court Judge B. Lynn Winmill since 1995. Before that, he was the Senior Staff Attorney for Federal District Court Judge Marion J. Callister for 14 years; an associate attorney in the Boise, Idaho, firm of Langroise, Sullivan & Smylie (now Holland & Hart); and a law clerk for Idaho Supreme Court Justice Allan G. Shepard.

Mr. Metcalf received his B.A. degree in economics, with honors, from the University of California at Davis, and his J.D. degree from the University of California at Los Angeles. He is a member of the Idaho State Bar (ISB # 2555), and its Litigation Section, as well as the California State Bar.

Friday, September 27th – U.S. Attorneys' Panel

First Assistant Jared C. Bennett
Bart M. Davis
Rafael Gonzalez, Moderator
Mark A. Klaassen

First Assistant Jared C. Bennett

Jared C. Bennett graduated Order of the Coif from the University of Utah College of Law in 2001, earned a Certificate in Environmental and Natural Resources Law, and a Master of Public Administration from the University of Utah. From 2001-2002, Jared clerked for the Honorable Pamela T. Greenwood on the Utah Court of Appeals. In 2002, Jared was hired as an Honor's Program Attorney for the Solicitor's Office in United States Department of the Interior.

In 2005, Jared was fortunate enough to be hired by the United States Department of Justice as an Assistant United States Attorney at the United States Attorney's Office for the District of Utah. He was the Civil Division Chief from August 2013 to August 2017. In the Civil Division, Jared dealt with all types of civil cases but handled many natural resources cases and defended land-use decisions of federal land management agencies. Jared has also served as an environmental crimes prosecutor since 2006. In August 2017, United States Attorney John W. Huber appointed Jared to serve as the First Assistant United States Attorney for the United States Attorney's Office, District of Utah.

As an AUSA, Jared also teaches trial advocacy to prosecutors in Latin America. Jared has taught in the Dominican Republic, Colombia, El Salvador, Mexico, and East Timor. In 2013, Jared testified before the Mexican Senate Judiciary Committee regarding draft legislation for Mexico's criminal procedure code. Since 2004, Jared has also taught at the University of Utah in the field Environmental Law, Environmental Crimes, Constitutional Law, Natural Resources and Public Lands, and Administrative Law. In June 2019, Wolters Kluwer published Jared's law school textbook entitled Environmental Crime: Pollution and Wildlife Enforcement.

Bart M. Davis

Bart M. Davis was appointed United States Attorney on September 21, 2017. At the time of his appointment, Mr. Davis was serving his eighth term as Idaho Senate Majority Leader. He had been a member of the Idaho Senate since 1998 and Majority Leader since 2002. Mr. Davis actively serves on the following three Attorney General Advisory Council subcommittees and working groups: Native American Issues Subcommittee, Border and Immigration Subcommittee, and Marijuana Working Group.

Mr. Davis graduated with a B.A. from Brigham Young University in 1978 and went on to complete his J.D. at the University of Idaho College of Law in 1980. Following his graduation from law school, he began his legal career in Idaho Falls practicing commercial, construction, business, real property, and bankruptcy law. He is admitted to practice before the Supreme Court of the State of Idaho, United States District Court, District of Idaho and District of Arizona, Ninth Circuit Court of Appeals, and United States Supreme Court. He was co-counsel on a tax case before the United States Supreme Court in 1990. Mr. Davis has been awarded the prestigious "AV Preeminent" rating from Martindale-Hubbell, the highest peer review rating in legal ability and ethical standards.

In 2001 Mr. Davis became a commissioner to the National Conference of Commissioners on Uniform State Laws (NCCUSL). He served on the Committee on Relations with other Organizations, Committee on Federalism and State Law, and History Committee. He was also the past chairman for The Council of State Governments (CSG). As a member of the CSG and CSG-WEST, Senator Davis' service included: CSG Chair, CSG-West Chair, Governing Board & Executive Committees, 21st Century Foundation, Committee on Suggested State Legislation, Co-Chair - International Committee, Chair - Futures Committee, Chair - Toll Fellows Selection Committee, Chair - Legal Task Force (12 member "Federalism" national task force to determine amicus curiae participation before the US Supreme Court), National Governance Working Group (organic instruments), and CSG-West Working Group Chair. In 1999, he was awarded the Toll Fellowship. Mr. Davis was also a past Trustee of the Museum of Idaho.

Rafael Gonzalez (Moderator)

Mr. Gonzalez began his federal career as an AUSA in the Eastern District of Michigan in 1991, after serving as a deputy prosecuting attorney in Detroit for four years. He joined the Idaho office in 1995. He served as a unit supervisor from 2001-2005, Criminal Chief from 2005-2010, and has been the First Assistant U.S. Attorney since 2010. He served as the Acting U.S. Attorney following U.S. Attorney Wendy J. Olson's resignation in February 2017, and until U.S. Attorney Bart Davis' investiture in September 2017. Mr. Gonzalez serves or has served in almost every capacity in the office. From District Office Security Manager, Ethics Officer and FOIA Coordinator to Lead OCDETF attorney, PSN coordinator, ATAC, appellate coordinator, and now, acting Administrative Officer. He is a former member of the Attorney General's Criminal Chiefs Working Group and has served on various other committees for the Attorney General and the Director of the Executive Office of United States Attorneys. Presently, he serves on the Ninth Circuit's Jury Trial Improvement Committee and is the Vice President of the Federal Bar Association, Idaho Chapter. Mr. Gonzalez attended Michigan State University and Wayne State University Law School, graduating in 1987. He is married and has two grown children.

Friday, September 27th – U.S. Attorneys' Panel (continued)

Mark A. Klaassen

Mark A. Klaassen was sworn in as United States Attorney for the District of Wyoming on November 21, 2017.

Mr. Klaassen was nominated by President Donald Trump on July 21, 2017, and was confirmed by the Senate on November 9, 2017. As U.S. Attorney, Mr. Klaassen is the chief federal law enforcement official in the District of Wyoming. The office is responsible for prosecuting federal crimes occurring in the district, including crimes related to public corruption, child exploitation, firearms, and narcotics. The office also defends the United States in civil cases and collects debts owed to the United States.

Prior to his nomination, Klaassen served for almost nine years as an Assistant United States Attorney for the District of Wyoming, where he worked on affirmative civil and financial litigation cases. During that time, he was also elected to the Board of Trustees for Laramie County School District Number One.

Before joining the United States Attorney's Office, Klaassen was appointed by President George W. Bush to serve as Chief of Staff to the General Counsel for the Department of Homeland Security from 2007 to 2009. Prior to that appointment, Klaassen worked as General Counsel for the U.S. House Committee on Homeland Security from 2003 to 2007.

Klaassen began his career in Cheyenne as a law clerk for the Honorable Wade Brorby of the United States Court of Appeals for the Tenth Circuit, and later joined the law firm of Latham & Watkins LLP. He received his B.S. in Finance, summa cum laude, from Oral Roberts University and his J.D., magna cum laude, from Notre Dame Law School.

Friday, September 27th – Hemp and Cannabis Law

Judge Mark L. Carman
Judge Dale A. Kimball
Elijah Watkins, Moderator

Judge Mark L. Carman

Judge Carman received his B.S. in Wildland Hydrology from Colorado State University in 1978 and his J.D. in 1981 from the University of Wyoming. During his legal career he worked as a prosecuting attorney for District Attorney's Offices in Casper, Wyoming and California. Judge Carman practiced both plaintiff and defense civil litigation as a shareholder with Williams, Porter, Day and Neville, P.C. and Balzer Carman Murdock, L.L.C. from 1988 to 2005. In 2005, he formed Carman Law Office, P.C. in Billings, Montana, a litigation firm representing clients in Wyoming and Montana and was *Of Counsel* with Brown, Drew & Massey, L.L.P. of Casper. Judge Carman's practice focused on personal injury, class action oil and gas litigation and aviation law. Judge Carman enjoyed an AV rating and was listed in the Bar Register of Preeminent Lawyers. He taught Aviation Law as an adjunct professor for Rocky Mountain College in Billings, Montana. During his career Judge Carman has been admitted to the practice of law in Wyoming, Montana, California and Colorado. Mark Carman was sworn in as United States Magistrate Judge in February 2013 with his chambers in the Yellowstone Justice Center in Yellowstone National Park. In addition, Judge Carman regularly handles the criminal docket in

Jackson and presides over civil matters in Casper and Cheyenne, as well as New Mexico and Colorado.

Judge Carman and Nancy Thornton Carman have enjoyed over 33 years of marriage and are the proud parents of three daughters. Judge Carman holds a private pilot certificate with instrument and multiengine ratings. He owns a Cessna 340 which he uses in his travels between courts. Judge Carman enjoys equestrian competition, fox hunting, fishing, scuba diving and tennis. He has served on various non-profit boards, including Ronald McDonald House of Billings, Warfield Equestrian Park, Wyoming Symphony Orchestra and the Wyoming Medical Center Foundation. He is the past-president of Ronald McDonald House Charities of Montana.

Judge Dale A. Kimball

Judge Kimball grew up on a dairy farm in Draper, Utah. In 1964, Judge Kimball graduated magna cum laude from Brigham Young University with a Bachelor of Science in Political Science. In 1967, he received his Juris Doctor from the University of Utah College of Law, graduating Order of the Coif and serving as Case Note Editor of the Law Review. Judge Kimball practiced law at Van Cott, Bagley, Cornwall & McCarthy in Salt Lake City, Utah until 1974 when he became a full-time law professor at BYU's J. Reuben Clark Law School. In his second year as a full-time professor, Judge Kimball co-founded the law firm now known as Parr, Brown, Gee & Loveless. Judge Kimball continued to teach part-time at BYU from 1976 to 1980. From 1975 until his appointment as a United States District Judge in 1997, Judge Kimball maintained a full-time legal practice, primarily in commercial litigation. In 1996, the Utah State Bar named Judge Kimball the Distinguished Lawyer of the Year. After twelve years as a full-time federal district court judge, Judge Kimball took senior status on November 30, 2009. Judge Kimball currently maintains a sixty percent case load and has resumed teaching part-time at BYU's J. Reuben Clark Law School. In 2010, Judge Kimball was honored by the Federal Bar Association, Salt Lake Chapter with the Distinguished Service Award. In 2013 Judge Kimball was honored by Jordan High School as the Alumnus of the Year. Judge Kimball is a Master of the Bench in American Inn of Court I, is a Fellow of the American Bar Foundation, and is currently serving on the Judicial Conference Committee on Criminal Law. Judge Kimball also serves as a Member of the Board of the Utah Chapter of the Federal Bar Association. During his legal practice Judge Kimball chaired three Utah State Bar committees and served on several boards including a founding board member of the Alta View Hospital, a board member and chairman of Pioneer Theatre Company, and a board member and executive committee member of the Deseret News Publishing Company. Judge Kimball and his wife, Rachel, have six children, twenty-four grandchildren, and eleven great grandchildren.

Elijah Watkins, Moderator

Elijah is a trial attorney, handling complex business litigation in both state and federal courts. He regularly represents companies in consumer and unlawful trade practices actions, intellectual property disputes, products liability matters (with an emphasis on drug and medical device litigation), commercial contract disputes, and real property issues. He routinely defends loan servicers in mortgage-related litigation. Elijah has appeared in state and federal courts across the country, including Idaho, Illinois, California, Utah, Texas, Florida, Kentucky and Wyoming. Clients point out that "Elijah has presence before a jury" and call him "guilelessly engaging" before the court, according to *Chambers USA*. He works with public and privately held businesses in several industries, including insurance, technology, healthcare, agriculture, construction, manufacturing, consumer products and financial services.

Friday, September 27th – Hemp and Cannabis Law (continued)

In addition to his extensive commercial client work, Elijah regularly provides pro bono counseling to domestic violence victims, political asylees, endangered children and incarcerated persons. Prior to moving back home to his native Idaho, Elijah practiced at Latham & Watkins, LLP in Chicago.

Saturday, September 28th – Standard of Review

Judge Dee Benson
Judge Ronald E. Bush, Moderator and Panelist
Judge N. Randy Smith

Judge Dee Benson

Dee V. Benson is a judge at the United States District Court for the District of Utah. He was a member of the charter class of the J. Reuben Clark Law School at Brigham Young University, where he was an editor on the Law Review, and graduated in 1976. That same year he played professional soccer with the Utah Golden Spikers of the American Soccer League.

After graduating from BYU law school, Judge Benson spent approximately 8 years practicing with the Salt Lake City law firm of Snow, Christensen & Martineau. Thereafter, from 1984 through 1989, Judge Benson served in various government posts in Washington, D.C., including: Legal counsel to the Senate Judiciary Committee (1984 – 1986); Chief of Staff to Senator Orin Hatch (1986-1988); Legal Council to the Iran-Contra Congressional Investigating Committee (1987); and Associate Deputy Attorney General of the United States (1988 – 1989).

In 1989, Judge Benson returned to Utah as the United States Attorney for the District of Utah. He held this post until 1991 when he was appointed as a United States District Judge by President George H.W. Bush.

In May 2004, then-Chief Justice William Rehnquist of the United States Supreme Court appointed Judge Benson to serve a seven-year term as a Judge on the Foreign Intelligence Surveillance Court.

Judge Benson currently serves as the district court representative on the Judicial Conference of the United States.

Judge Benson also holds adjunct law school professorships at the J. Reuben Clark Law School at Brigham Young University and the S.J. Quinney College of Law at the University of Utah and teaches courses on criminal trial practice and evidence.

Judge Ronald E. Bush (Moderator and Panelist)

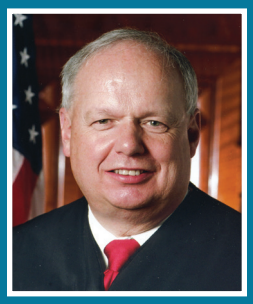
Chief U.S. Magistrate Judge Ronald E. Bush began service as a United States Magistrate Judge on October 1, 2008. Previously, he served as a state District Judge in the Sixth Judicial District, and prior to that he practiced law for 20 years in both the Pocatello and Boise offices of the law firm of Hawley Troxell Ennis & Hawley, LLP.

Judge Bush is an honors graduate of the University of Idaho, and received his Juris Doctor degree from George Washington University. In his career as a practicing lawyer, he authored or co-authored numerous articles on Idaho civil litigation, Idaho tort law, and Idaho media law.

Saturday, September 28th – Standard of Review (continued)

Judge Bush served as a Lawyer Representative to the United States District Court for the District of Idaho and to the Ninth Circuit Court of Appeals. He was an organizer and the first president of American Inn of Court No. 130, in Boise, Idaho. He was a member of the governing board of the Federal Public Defender Program for Eastern Washington and Idaho. He received awards for his legal and community service from the Idaho State Bar Association, the Idaho Press Club, the Bannock Health Care Foundation, and the Southeastern Idaho United Way.

As a fifth-generation Idahoan, Judge Bush enjoyed his work as a former member and chairman of the Idaho State Historical Society Board of Trustees. He was an organizer and first president of the Idaho Legal History Society, and continues on its board.



Judge N. Randy Smith

Judge N. Randy Smith was appointed by President George W. Bush to serve on the United States Court of Appeals for the Ninth Circuit. He was unanimously confirmed by the United States Senate and thereafter sworn in on March 19, 2007. Judge Smith took senior status on the court on August 11, 2018. In addition to his duties as a Ninth Circuit Court of Appeals Judge, he has been appointed to hear Federal District Court and Bankruptcy cases in the states of Idaho and Montana.

Judge Smith now serves as a member of the Judicial Council of the Ninth Circuit and as a member of the Ninth Circuit Bankruptcy Committee. Judge Smith has served on the Ninth Circuit Executive Committee; as Administrative Judge of the Northern Area of the Ninth Circuit; as Conference Chairman, Program Chairman, and member of the Executive Committee of the Ninth Circuit Judicial Conference; and as a member of the Ninth Circuit ADR Committee. He was also appointed by Supreme Court Chief Justice Roberts as a member of the Judicial Conference Committee on the Administration of the Bankruptcy System, where he served as Vice Chair.

Judge Smith has served as the Chairman of Appellate Judges Conference of the American Bar Association, Chair of the ABA Judicial Division Ethics Committee, on the ABA Judicial Division Executive Committee, Chairman of the Appellate Judges Educational Institute (AJEI), and now serves on the AJEI planning committee.

Judge Smith was inducted into the Idaho Hall of Fame. He has also received the Idaho State Bar's Distinguished Jurist Award, the Idaho "Statesman of the Year" award, the Idaho Judiciary's George G. Granata, Jr. Outstanding Jurist of Idaho award, the Idaho State University's Outstanding Teacher award, and the Outstanding Service Award from the Idaho State Bar Board of Commissioners.

Saturday, September 28th – Civility and Decorum

Civility and Decorum: Maintaining an Even Keel in the Indecorous Fray

Judge Nancy D. Freudenthal
Judge Bruce S. Jenkins
Judge Ryan D. Nelson
Judge N. Randy Smith
Juliette Palmer White (Moderator)
Judge B. Lynn Winmill

Judge Nancy D. Freudenthal

Nancy Freudenthal was born and raised in Cody, Wyoming and earned both a bachelor's degree and a juris doctorate from the University of Wyoming. From 1980-1989, she served as Attorney for Intergovernmental Affairs under former Wyoming Governors Ed Herschler and Mike Sullivan. Governor Sullivan then appointed her to the State Tax Commission and Board of Equalization in 1989, where she served as Chairman until 1995. In 1995, she joined the law firm of Davis & Cannon and became a partner at the firm a few years later. On June 1, 2010, following her appointment by President Barack Obama and confirmation by the U.S. Senate, Judge Freudenthal was sworn in as U.S. District Court judge for the District of Wyoming. She is the first woman appointed to the federal bench in Wyoming, and only the seventh federal district judge in the State's history. Judge Freudenthal was Chief Judge of this District from 2011-2018.

Judge Freudenthal and her husband Dave have lived and raised their four children in Cheyenne, and are proud grandparents of two beautiful girls, Albany and Emma and three handsome boys, Cody, Pierce and Grayson.

Judge Bruce S. Jenkins

Born May 27, 1927, in Salt Lake City, Utah, to Joseph Jenkins, an educator, and Bessie Iverson Jenkins, a court reporter and homemaker.

Married Margaret Watkins of Great Neck, New York in 1952. Four children: 2 girls, 2 boys. Ten grandchildren.

Attended public schools in Salt Lake City, Utah. Bachelor of Arts, University of Utah, 1949, *magna cum laude*. Phi Beta Kappa, Phi Kappa Phi.

Juris Doctor, University of Utah College of Law, 1952. Member, Board of Editors, *Utah Law Review*. Order of the Coif, 1975.

At age 25, became a member of the Utah State Bar and the Bar of the United States District Court, District of Utah. Thereafter, became a member of the Bar of the United States Court of Appeals, Tenth Circuit, and the Bar of the United States Supreme Court.

Served as a Research Clerk for a member of the Supreme Court, State of Utah; an Assistant State Attorney General; a Deputy Prosecutor for Salt Lake County. Engaged in private practice 1952-65.

At age 31, appointed a member of the Utah State Senate and was twice re-elected by wide margins. Minority Leader of the Utah State Senate, and at age 37 elected President of the Utah State Senate. Author and sponsor of legislation dealing with the management of public monies (resulting in millions of dollars of non-tax revenue), civil rights, securities. Authored the bill which created the Little Hoover Commission, the report of which resulted in the modernization of the Executive Branch of state government.

In 1965, appointed Bankruptcy Judge, United States District Court, District of Utah, and thereafter twice reappointed.

In 1978, nominated as United States District Judge by President Jimmy Carter and confirmed by the United States Senate. One of five persons recommended for the position by a Bi-Partisan Merit Selection Committee. Became Chief Judge, December 20, 1984. Stepped aside as Chief Judge on May 28, 1993, having served an additional year-and-a-half beyond seven-year term as Chief Judge at

the unanimous request of colleagues. During his tenure as Chief Judge, the Court twice compiled, revised and published local rules; automated and computerized the court's administrative, recordkeeping, and research functions; reorganized the clerk's office and probation department and began and completed a major remodeling of the Federal Courthouse in Salt Lake City.

Assumed present status as United States Senior District Judge on September 30, 1994.

Judge Ryan D. Nelson

Judge Nelson was confirmed to the Ninth Circuit in October 2018, as the the youngest Circuit Judge to serve from Idaho and he has chambers in his hometown of Idaho Falls. Prior to his confirmation, Judge Nelson served for nine years as General Counsel of Idaho Falls-based Melaleuca, Inc., a consumer goods company. He previously worked in Washington, DC, where he served in all three branches of the federal government, including as Special Counsel for Supreme Court nominations to the Ranking Member of the Senate Judiciary Committee; Deputy General Counsel to the White House Office of Management and Budget; Deputy Assistant Attorney General in the Environment and Natural Resources Division of the United States Department of Justice; and a law clerk to Judge Henderson of the United States Court of Appeals for the D.C. Circuit. He has argued in most of the federal courts of appeals and worked on dozens of Supreme Court briefs. He started in the Washington, DC office of Sidley Austin as an appellate lawyer, after clerking for Judges Mosk and Brower of the Iran-U.S. Claims Tribunal at The Hague, and for now-Judge Tom Griffith, then-Senate Legal Counsel, during the impeachment trial of President Clinton. Judge Nelson earned his B.A. from Brigham Young University and his J.D., with honors, from BYU Law School.

Judge N. Randy Smith

(Bio information listed under Session I)

Juliette Palmer White (Moderator)

Juliette White is a shareholder in the litigation and intellectual property departments at Parsons Behle & Latimer. She is a skilled trial lawyer with broad experience and a focus on intellectual property litigation.

In her intellectual property practice, Ms. White regularly represents clients in patent, trademark, false advertising, copyright and trade secret litigation throughout the United States. In addition, she assists clients with trademark clearance, protection, use and enforcement strategies. Ms. White also has extensive experience advising clients regarding advertising practices and litigating false advertising disputes. Her clients span a wide range of industries from nutritional supplements to day planners, from artists' estates to universities and from bakeries to online mattress retailers.

Ms. White's general litigation expertise is extensive and includes, for example, disputes between physicians and hospitals involving claims for antitrust law violations, breach of hospital bylaws and related claims; nationwide consumer class action defense; defamation and related tort claims on behalf of both individuals and companies; and representing plaintiffs in sexual assault and abuse cases. Ms. White also regularly serves as a faculty member and presenter for the Utah State Bar's Trial Skills Academy.

Saturday, September 28th – Civility and Decorum (continued)

Judge B. Lynn Winmill

Judge B. Lynn Winmill graduated from Idaho State University in 1974 with a degree in American Studies. He graduated from Harvard Law School in 1977. He practiced law in Denver, Colorado (1977-1979), and in Pocatello, Idaho (1979-1987). Judge Winmill was appointed a district judge for the Sixth Judicial District of the State of Idaho by Governor Cecil D. Andrus in 1987. In 1995, Judge Winmill was appointed by President Bill Clinton to serve as District Judge in the United States District Court for the District of Idaho. He served as Chief District Judge in the District of Idaho from 1999 to 2018.

As adjunct faculty at Idaho State University and the University of Idaho College of Law, Judge Winmill has taught courses in criminal procedure, legal history and complex civil litigation. Judge Winmill has served on the Board of Visitors for the J. Reuben Clark School of Law at BYU, and has lectured at a variety of law schools, including BYU, the University of Idaho, the University of Utah, and the University of Michigan. He has also been extensively involved in international outreach programs and provided training for judges from Russia, Jordan, the United Arab Emirates, Indonesia, Thailand, Afghanistan, and Namibia.

Judge Winmill has served on the Information Technology Committee for the Judicial Conference of the United States and currently serves as Chair of the Ninth Circuit Information Technology Committee. He has also served as President of the Ninth Circuit District Judges Association and is on the Board of Directors for the Federal Judges Association.

Saturday, September 28th – Keynote Speaker

Executive Power, Significant Supreme Court Cases, and Their Relevance

Dean Erwin Chemerinsky

Erwin Chemerinsky became the 13th Dean of Berkeley Law on July 1, 2017, when he joined the faculty as the Jesse H. Choper Distinguished Professor of Law.

Prior to assuming this position, from 2008-2017, he was the founding Dean and Distinguished Professor of Law, and Raymond Pryke Professor of First Amendment Law, at University of California, Irvine School of Law. Before that he was a professor at Duke University from 2004-2008, and from 1983-2004 was a professor at the University of Southern California Law School.

He is the author of eleven books, including leading casebooks and treatises about constitutional law, criminal procedure, and federal jurisdiction. His most recent books are, *We the People: A Progressive Reading of the Constitution for the Twenty-First Century* (Picador Macmillan) published in November 2018, and two books published by Yale University Press in 2017, *Closing the Courthouse Doors: How Your Constitutional Rights Became Unenforceable and Free Speech on Campus* (with Howard Gillman). He frequently argues appellate cases, including in the United States Supreme Court.

In 2016, he was named a fellow of the American Academy of Arts and Sciences. In January 2017, National Jurist magazine again named Dean Chemerinsky as the most influential person in legal education in the United States.

Saturday, September 28th

Closing Remarks by President-Elect Wendy J. Olson

Additional Biographies

Bruce Moyer, Counsel for Government Relations, Federal Bar Association

Bruce Moyer is Counsel for Government Relations to the Federal Bar Association. In that capacity, Bruce has represented the interests of the Federal Bar Association for in Washington for the past two decades and is a long-time veteran of the public policy arena. His *Washington Watch* column appears regularly in the *Federal Lawyer* magazine.

Bruce is an attorney and registered lobbyist and serves as principal of The Moyer Group, a public policy consulting firm. He received his law degree from the George Washington University and a bachelors degree with honors from Juniata (pronounced JUNE-E-ATA) College in Pennsylvania.

Clerks of Court

Stephen Kenyon
Idaho

Mark Jones
Utah

Stephan Harris
Wyoming

NOTES

Federal Bar Association
Tri-State Seminar
Public Lands Panel
Sun Valley, Idaho
September 27, 2019

What's it all about, Auer?:
Judicial Deference to Administrative Action

I. Introduction - - Bill Myers, Moderator, Holland & Hart

- Public land law: the alphabet soup of statutes: FLPMA, NEPA, ESA, NFMA, APA
- *Kisor*: The APA is the Constitution of the Administrative State
    - Arbitrary or capricious or otherwise not in accordance with law
- Typical litigation scenario:
    - Land management agency takes an action affecting federal lands
    - Commercial Permittee or ENGO dislikes the action
    - Plaintiff unsuccessfully exhausts administrative remedies
    - Plaintiff challenges the final agency action in federal district
    - Entity supporting the agency action intervenes to support the agency action
    - The agency compiles the facts from its files in an Administrative Record
    - Court decides the merits, and if necessary, the remedies on cross-motions for summary judgment
    - Losing party appeals to the Circuit Court
- *Norton v. SUWA*: Multiple use is a deceptively simple term for the enormously complicated task of determining the uses to which the land may be put.

- What deference does the agency deserve when deciding if its action was in accordance with law?
    - For its recitation of its decision-making process in the Administrative Record?
    - For its factual analysis including its scientific expertise employed in its decision?
    - For its legal analysis of its organic statutes and its regulations?
    - For its administrative adjudication of the dispute?

- The Supreme Court issued several decisions on last days of this past term that have caused quite a stir among the citizens of the Administrative State regarding deference accorded by a court to an agency.
    - *Kisor v. Wilkie*, 139 S.Ct. 2400 (2019)
    - *Dep't of Commerce v. New York*, 139 S.Ct. 2551 (2019)

- Here to discuss the where the courts have been, are now, and where they are headed are three distinguished jurists:
    - Judge Dale, to discuss where the courts have traditionally been on these issues
    - Judge Rankin, to discuss the Supreme Court's decisions
    - Judge Tallman, to foretell the future

II. Summary of Pre-*Kisor* Deference - - Judge Candy W. Dale

- **Judicial Deference**
    - Generally, judicial deference is a judge-made aid of interpretation, applied when a court must decide whether agency actions fall within the scope of their enabling statutes. Through the years, Chevron, Skidmore and Auer deference are the most commonly used terms as briefly summarized below. In advance of the Kisor decision, many articles and blogs were written in anticipation that the Auer glass for judicial deference was running out.

- ***Chevron* Deference**
    - Considered one of the most important principles in administrative law, *Chevron* deference is coined after a landmark decision, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 468 U.S. 837 (1984), referring to the doctrine of judicial deference given to administrative actions. In *Chevron*, the Supreme Court set forth a legal test as to when a court should defer to the agency's interpretation, holding that judicial deference is appropriate where the agency's interpretation of an ambiguous statute is not unreasonable, so long as the Congress has not spoken directly to the precise issue in question. When legislative delegation to an

administrative agency on a certain issue or question is not explicit, but rather implicit, a court may not substitute its own interpretation of the statute for a reasonable interpretation made by the administrative agency, often expressed in an implementing regulation. As Justice Stevens wrote in *Chevron*, when the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's action was based on a permissible construction of the statute. The *Chevron* deference doctrine first requires that the administrative interpretation in question was issued by the agency charged with administering the statute being construed; interpretations by agencies not in charge of the statute in question are not owed any judicial deference. Also, the implicit delegation of authority to an administrative agency to interpret a statute does not extend to the agency's interpretation of its own jurisdiction under that statute. Generally, to be accorded *Chevron* deference, the agency's interpretation of an ambiguous statute must be permissible, which the Court has defined to mean "rational" or "reasonable."

- ***Skidmore*** **Deference**

    - In cases after *Chevron*, the Supreme Court narrowed the scope of judicial deference, holding that only the agency interpretations reached through formal proceedings with the force of law, such as adjudications, or notice-and-comment rulemaking, qualify for *Chevron* deference. Interpretations contained in opinion letters, policy statements, agency manuals, etc., that do not carry the force of law, do not warrant full *Chevron* deference. Instead, a less deferential standard applies where the court gives the agency's interpretation persuasive value. *Skidmore* deference was developed in the 2000 case (FLSA) of *Christensen v. Harris County*, 592 U.S. 576, and named for the Supreme Court decision (also FLSA) in *Skidmore v. Swift & Co*., 323 U.S. 134 (1944). Unlike *Chevron* deference, which requires a federal court to defer to an agency's interpretation of an ambiguous statute if the interpretation is considered reasonable, *Skidmore* deference allows a federal court to determine the appropriate level of deference for each case based on the agency's ability to support its position. A federal court exercising *Skidmore* deference is not required or compelled to defer to an agency's interpretation of an ambiguous statute; instead, the court determines the appropriate level of deference in each case based on the extent to which the agency demonstrates its interpretation is based on sound reasoning. The Supreme Court reaffirmed Skidmore deference in *United States v. Mead Corporation*, 533 U.S. 218 (2001), where the Court held a tariff classification by U.S. Customs was not entitled to *Chevron* deference. In Justice Scalia's dissent in *U.S. v. Mead*, he wrote that "the majority's approach compounds the confusion it creates by breathing new life into the anachronism of *Skidmore*, which sets forth a sliding scale of deference owed an agency's interpretation of a statute" and would lead to uncertainty and increased litigation.

- ***Auer* Deference**

    - Named after the 1995 case *Auer v. Robbins*, 519 U.S. 452, with the unanimous opinion written by Justice Scalia, the *Auer* deference doctrine rests on the premise that agencies have more expertise in the subject covered by a law than do the courts and are better suited to interpret both gaps in federal law and their own regulations. In *Auer*, the Supreme Court pronounced a deferential doctrine similar to *Chevron*, but even more deferential, for application when the court considers agency interpretations of their own regulations. In brief, agency interpretations of their own regulations are entitled to judicial deference unless the interpretation is plainly inconsistent with regulatory text. If the statute or regulation is ambiguous, the court must yield to the agency's interpretation if it was reasonable or rational. The *Auer* doctrine is sometimes called *Seminole Rock* deference, after the 1945 case, *Bowles v. Seminole Rock & Sand Co*., 325 U.S. 410.

- **Public Lands Application**

    - The Ninth Circuit decision issued June 24, 2019, in *Center for Biological Diversity, et. al. v. Ilano*, 928 F.3d 774, provides a good example of how courts apply *Auer* deference, without necessarily stating they are doing so, upon judicial review of agency actions involving public lands. In this case, the trial court was faced with battling experts regarding whether the U.S. Forest Service appropriately employed a categorical exclusion from NEPA's procedural requirement for preparation of an environmental impact statement (EIS) when approving the Sunny South Project in California in the fall of 2015. In brief, the project authorized tree thinning and prescribed burning across 2,700 acres of the Tahoe National Forest. This land was encompassed within 5.3 million acres of lands in California that the Chief of the Forest Service had designated as landscape-scale area under amendments to the Healthy Forests Restoration Act (HFRA) that were enacted as part of the 2014 Farm Bill. In essence, the amendments "created a two-step process to combat insect infestations and diseased forests." The first step set forth categories for designating land as "landscape-scale area," and the second step provided that treatment projects to combat issues such as bark beetle infestations could be categorically excluded from the requirements of NEPA. After initiating the planning for the Sunny South Project, biologists completed an evaluation of the project's potential environment effects on sensitive species, including the California spotted owl, concluding that the project "may affect individuals, but is not likely to result in a trend toward federal listing or loss of viability for the California spotted owl." In the decision memo approving the project, the Forest Service concluded that the project was categorically excluded from NEPA analysis under the HFRA, because "no extraordinary circumstances" prevented application of the categorical exclusion under NEPA. In its holdings, the Ninth Circuit concluded that designation of landscape-scale areas under the HFRA does not trigger a NEPA analysis; the Forest Service's designation of landscape areas did not require an EIS or EA under NEPA; and the Forest Service's finding that the Sunny South Project did

not involve extraordinary circumstances was not arbitrary or capricious. In this last holding, the Court wrote that "an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." The decision of the lower court was affirmed.

III. *Kisor v. Wilkie* & *Dep't of Commerce v. New York* - - Judge Kelly Rankin

- **Background**
    - The final stretch of the Supreme Court's past term featured major news in administrative law certain to impact those practicing in environmental law and matters involving public lands.
    - The buildup to the Court's recent decisions presented questions of the legitimacy of the administrative state. Conservative stakeholders want to take it down a notch or two. Liberal stakeholders want to shore it up.
    - In a one-two punch, the justices delivered several highly anticipated decisions that disappointed conservative and liberal critics alike.
    - First, in *Kisor v. Wilkie*, the Court refused to overturn the Auer standard, a contentious doctrine that directs judges to defer to agency interpretations of their own rules.
    - Then, in *Dep't of Commerce v. New York*, the Court held the Secretary of the Department of Commerce did not violate the Census Act in deciding to reinstate a citizen question on the 2020 census questionnaire, but that the district court was warranted in remanding the case back to the agency where the evidence tells a story that does not wholly match the Secretary's explanation for his decision.
    - In the end, legal commentators suggest both cases likely came with a silver lining for their critics, at least for now.

- ***Kisor v. Wilkie, Secretary of Veteran Affairs***
    - This is a long and fragmented opinion (80 pages!).
    - Facts: James Kisor is a Vietnam veteran who applied for benefits for his post-traumatic-stress disorder. The Department of Veterans Affairs agreed with Mr. Kisor that he suffers from PTSD but rejected his request for benefits dating back to 1983. When Mr. Kisor appealed the VA's decision to the U.S. Court of Appeals for the Federal Circuit, the court of appeals deferred to the VA's interpretation of its own regulation and sided with the agency.

- Last year, Mr. Kisor asked the Supreme Court to hear is plight. The Supreme Court gave him a partial victory. The majority declined to overrule a longstanding line of cases instructing courts to defer to an agency's interpretation of its own regulation – a doctrine sometimes known as "Auer deference." It was sent back to the Federal Circuit for it to take another look.

- But through Justice Kagan, the Court made clear that the doctrine does have limits, and it will not apply in every scenario in which an agency is interpreting its own rules. Justice Kagan added that the principle of stare decisis weighs "strongly" against overruling the Auer doctrine.

- Justice Gorsuch, on the other hand, complained that the majority's ruling had left the doctrine a "paper tiger" and warned that the Court would almost certainly have to address the issue again sometime soon. He describes "new and nebulous qualifications and limitations on *Auer.*" "It should have been easy for the Court to say goodbye to *Auer v. Robins*." He was quite critical of the Court's decision not to overrule Auer, which he described as "more a stay of execution than a pardon."

- In the end the Court boomeranged Kisor's case back to the Federal Circuit for it to take another look at whether the doctrine should apply there. Justice Kagan said the lower court both "jumped the gun in declaring the regulation ambiguous" and "assumed too fast that Auer deference should apply in the event of genuine ambiguity."

  Stay tuned . . .

- ***Dep't of Commerce v. New York***

  - This high-stakes case probably received as much publicity as any other during this past term.

  - In another fragmented and even longer opinion (92 pages!) the Court held the Secretary of the Department of Commerce did not violate the enumeration clause or the Census Act in deciding to reinstate a citizenship question on the 2020 census questionnaire; but the district court was warranted in remanding the case back to the agency.

  - Facts: The dispute began last year when the Secretary of Commerce announced that the 2020 census would include a question about citizenship. The government wanted to ask everyone about their citizenship on the 2020 census to obtain data that would help the Department of Justice to better enforce federal voting-rights laws.

- The Secretary's announcement drew an immediate legal challenge from many governmental entities and NGOs. They were concerned about inaccurate results, the loss of billions in federal funding, and lost seats in Congress.

- Chief Justice Roberts joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan found that the justification the government offered at the time for including the citizenship question was just a "pretext." They also said the Secretary "was determined to reinstate a citizenship question from the time he entered office; instructed his staff to make it happen; waited while Commerce officials explored whether another agency would request census-based citizenship data; subsequently contacted the Attorney General himself to ask if DOJ would make the request; and adopted the Voting Rights Act rationale late in the process."

- The majority said courts should be "deferential" when reviewing an agency's action but added that "we are not required to exhibit a naiveté from which ordinary citizens are free." And here, when "the evidence tells a story that does not match the explanation the Secretary gave for his decision," judicial review calls for "something better than the explanation offered for the action taken in this case."

- Justice Thomas, joined by the remaining justices, filed an opinion concurring in part and dissenting in part saying the Court's "only role in this case is to decide whether the Secretary complied with the law and gave a reasoned explanation for his decision." Because the "Court correctly answers these questions in the affirmative," Thomas argued, that "ought to end our inquiry."

- Justice Thomas warned that the court's holding could have much broader implications for administrative law because it "reflects an unprecedented departure" from the Court's normal practice of deferring to discretionary decisions by federal agencies.

- In the end, the decision left open the possibility that the Trump administration could try again to add the citizenship question.

  Again, stay tuned . . .

IV. Where to from Here? - - Judge Richard C. Tallman

- Professor John Yoo, in a short article in *The Atlantic* this July, reflected on the Supreme Court's decisions during the past term in *Department of Commerce v. New York*, *Kisor v. Wilkie*, and *Gundy v. United States* (a decision addressing the nondelegation doctrine). Professor Yoo predicts that we are facing, if not "the beginning of the end" of the administrative state, at least "the end of the beginning."

- In Yoo's view, "The judiciary is unlikely to see much of a change . . . because this new world probably won't increase the quantity of litigation in federal courts. It will just mean that deciding any one case will take a little more work."

- Speaking as one of the affected judges, if we truly are facing the end of the administrative state, I'm not sure I share Professor Yoo's cheerful assessment that there will be minimal impact upon the judiciary, especially when it comes to the often complicated and technical issues that arise in environmental and public lands cases.

- But despite what commentators such as Professor Yoo may read into the past term's decisions, it's very difficult for me to imagine that courts will actually back away from relying on agency expertise in these kinds of cases.

- After all, while *Auer* deference may be on life support with conservative judges, for now it still survives. As Judge Rankin has explained, *Kisor* set forth what Justice Gorusch, in his concurrence, describes as "new and nebulous qualifications and limitations on *Auer*." 139 S. Ct. at 2425. I'm not convinced, at least when it comes to highly technical cases, that the inquiry *Kisor* mandates is any different from what courts have already been doing, and will continue to do moving forward. As you've heard, under *Kisor*, before a court can defer to an agency's construction of its own regulations, it must:

    - First determine, using all its standard tools of interpretation, that the regulation is genuinely ambiguous. That is, a court must carefully consider the text, structure, history, and purpose of a regulation.

    - Then, if genuine ambiguity remains, the court must ask whether the agency's reading is reasonable, that is, does it "come within the zone of ambiguity the court has identified after employing its interpretive tools?"

    - Third, the court must ask whether the character and context of the agency interpretation entitles it to controlling weight? To answer this question, the court asks:

        - Is the interpretation at issue the agency's "authoritative" or "official position" or is it just an ad hoc statement not reflecting the agency's views?

        - Next, does the interpretation implicate the agency's substantive expertise? That is, does the agency have comparative expertise in resolving the regulatory ambiguity?

            - To me, this factor carries the laboring oar in the court's analysis. After all, how likely are we, as judges, to conclude that the EPA or the Department of Transportation, for example, are not comparatively better qualified to assess whether fine particulate matter qualitative hotspot analyses meet the Clean Air Act's

requirements if the data comes from an existing air quality monitor in a location similar to the project area but not a location in the immediate vicinity of the project area? That was the question facing the Ninth Circuit in *Natural Resources Defense Council, Inc. v. U.S. Department of Transportation*, 770 F.3d 1260 (9th Cir. 2014). Unsurprisingly, the court applied *Auer* deference to the EPA's interpretation of its own regulations on that topic as embodied in its joint guidance document published with the DOT. I suspect the court would come out the same way again after following the steps outlined in *Kisor*.

- Under *Kisor*, the last step in determining whether an agency's interpretation of its own regulations is entitled to controlling weight is to ask whether the agency's position reflects fair and considered judgment, rather than simply a litigating position or a post hoc rationalization. As part of this step, courts are to ask whether the agency's position is "new," otherwise creates "unfair surprise" to regulated parties, or conflicts with a prior agency construction. Again, using the example of the *Natural Resources Defense Council* case from 2014, courts are already assessing this factor, whether or not they explicitly state that they are doing so. In the *Natural Resources* case, the guidance document upon which the court relied was issued in 2006, well before the conformity determination at issue. And it clearly reflected fair and considered judgment and was not a post hoc rationalization.

- In my view, the most likely change in the wake of *Kisor* is that courts will be very careful to explicitly articulate each step of the *Kisor* analysis before concluding that *Auer* deference is appropriate. But courts will almost always continue to defer to administrative agencies when they take technical actions relying on complicated records and conflicting expert opinions because those agencies almost always will possess comparative expertise.

- What would a practical alternative look like? To give you another example from the Ninth Circuit, in a NEPA case, how should a court decide whether, when considering the cumulative effects of other timber sales and grazing in a Forest Service management project, the Forest Service may consider those past impacts in the aggregate or must individually catalog each prior timber sale and grazing activity in the Project area? To answer that question, the court in *League of Wilderness Defenders-Blue Mountains Biodiversity Project v. United States Forest Service*, 549 F.3d 1211 (9th Cir. 2008), accorded *Auer* deference to the position, as expressed in a memorandum issued by the Chairman of the Council on Environmental Quality, that current aggregate effects of past actions are sufficient "without delving into the historical details of individual past actions." The Council on Environmental Quality was the agency charged with interpreting NEPA and which adopted the regulation at issue in the case. If the court had chosen not to defer to this agency guidance, would it have had to appoint a special master

or expert to advise it on how to distinguish between the aggregate or individual approaches to cumulative effects analysis?

- In Justice Gorusch's concurrence in *Kisor*, he states: "Every day, in courts throughout this country, judges manage these traditional tools to reach conclusions about the meaning of statutes, rules of procedure, contracts, and the Constitution." My point is that deciding a highly technical case is not the same as interpreting a statute, rule, contract, or the Constitution, and courts will be slow to back away from relying on comparative agency expertise.

- Turning briefly to *Department of Commerce v. New York*, I think the circumstances surrounding the case mean judges should not read too much into the Supreme Court's willingness to look at extra-record discovery in that instance.

- Justice Thomas, in his dissent, declared: "The Court engages in an unauthorized inquiry into evidence not properly before us to reach an unsupported conclusion." Justice Thomas also notes that a court is "ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record."

- While this latter point is well taken, it ignores that this was not an "ordinary" case. The majority concluded that a sufficiently "strong showing of bad faith or improper behavior" was made such that the district court was "ultimately justified" in ordering extra-record discovery. This is the first case in which the Supreme Court has invoked the exception to the general rule against "inquiring into the mental processes of administrative decisionmakers." One hopes it will not have cause to again invoke that exception any time soon, although it must be acknowledged that we currently live in unusual times.

- Only time will tell, but I think courts will be hesitant to, as Justice Thomas describes it, "open[] a Pandora's box of pretext-based challenges in administrative law." Rather, looking to extra-record evidence will be reserved for only the most unusual of cases, such as this one was.

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BANKRUPTCY MYTHS and Helpful Advice and Hints in Bankruptcy Court

Bankruptcy Judges Joseph Meier, D-Idaho, Casey Parker, D-Wyoming, William T. Thurman, D-Utah

1) The Bankruptcy Court operates under its own set of rules of civil procedure and evidence.

2) Trial experience is of little to no benefit in Bankruptcy Court.

3) Jury trials are not allowed in Bankruptcy Court and my client would benefit from a jury.

4) Bankruptcy courts frown upon comfort orders.

5) Since I don't practice bankruptcy regularly, I don't know the proper procedure.

6) I am at a disadvantage as a non-practicing attorney because the courts will give more deference to regular practitioners.

7) There are too many pleadings to keep track of.

8) The Chapter 13 Trustee decides whether a plan can be approved.

9) My practice is too far from the Bankruptcy Courts and I cannot afford to be there on a regular basis.

10) Bankruptcy court is informal.

11) Bankruptcy is a foreign language I do not understand.

12) Who or what is the U.S. Trustee? If I am representing a creditor, what can the U.S. Trustee do for me? Same as if a Debtor? How does a private chapter 7 Trustee figure in? Chapter 13 Trustee?

13) How and why do things move quicker in Bankruptcy Court?

14) Rumor has it that attorneys can get more pleading/argument and trial experience in Bankruptcy Court than any other court. True or False?

15) Is there really a difference between adversary proceedings and contested matters?

Criminal Justice Reform – Yes, Dorothy, we can get along

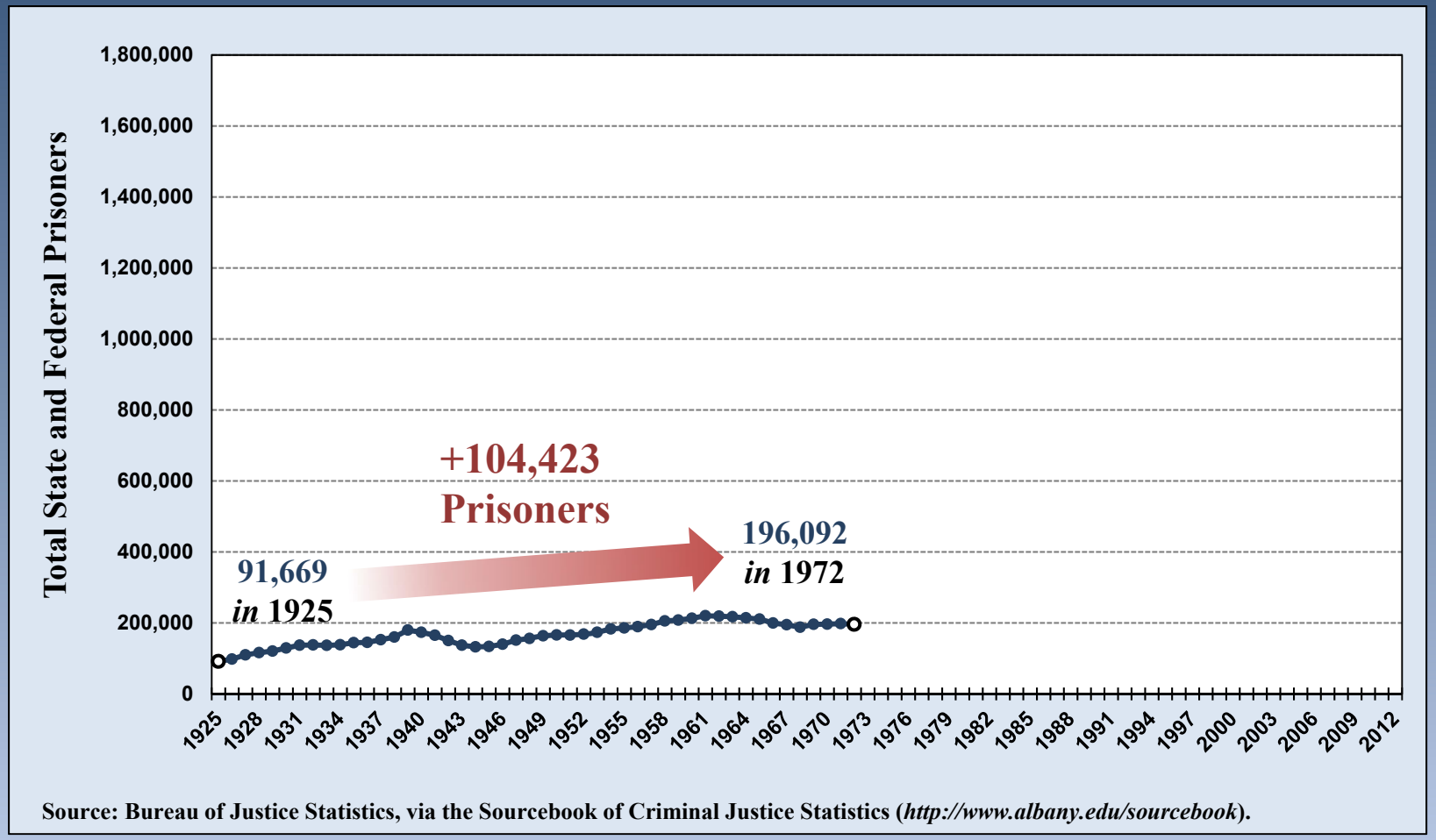
Paul Warner, U.S. Magistrate Judge and former U.S. Attorney, District of Utah

Wendy Olson, partner, Stoel Rives and former U.S. Attorney, District of Idaho

The Prison Story: Overall Prison Population in the United States

Total Sentenced State and Federal Prisoners

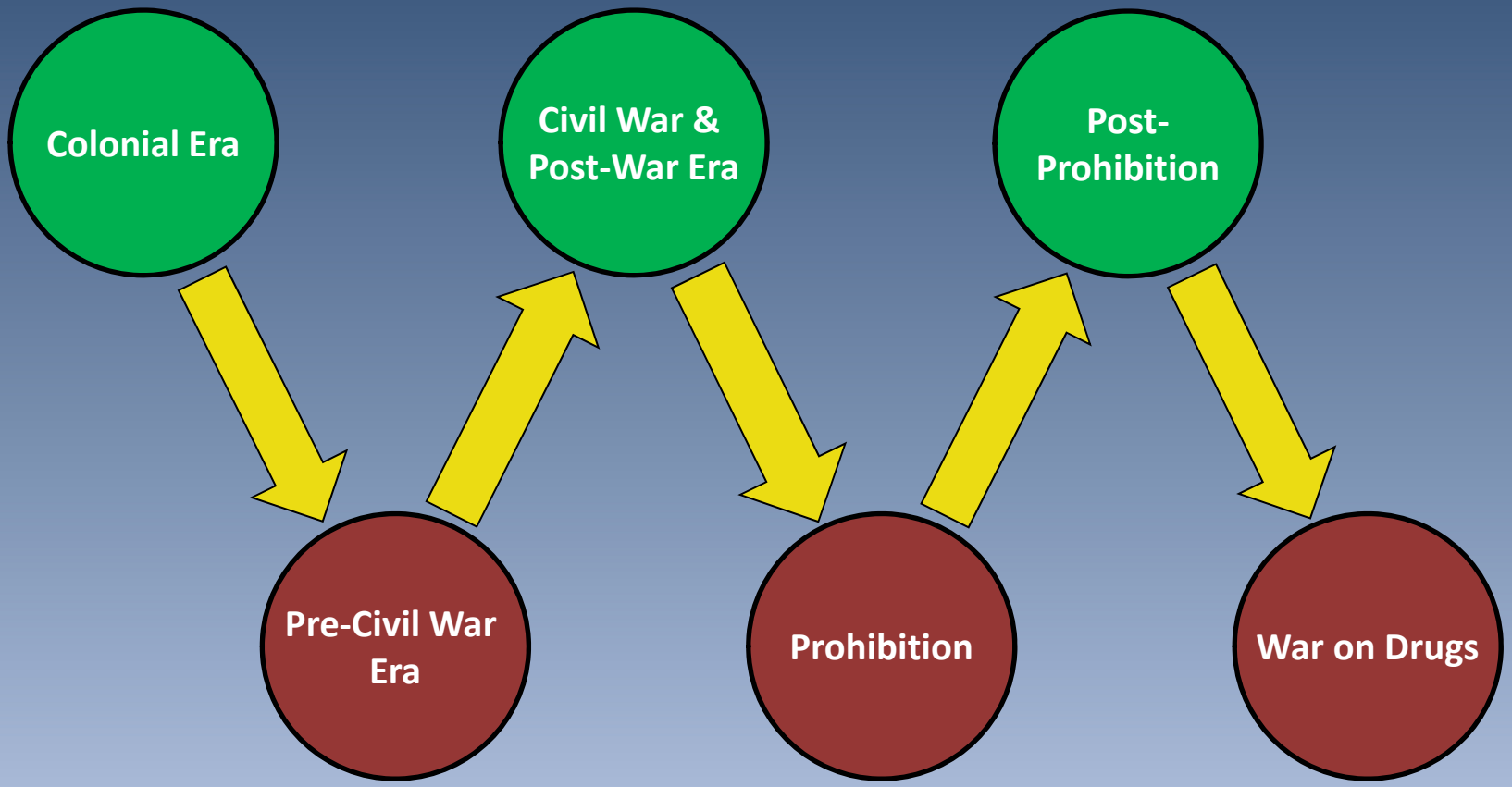
From 1925 to 1972, the prison population increased very slowly, with decreases & plateaus



Source: Bureau of Justice Statistics, via the Sourcebook of Criminal Justice Statistics (*http://www.albany.edu/sourcebook*).

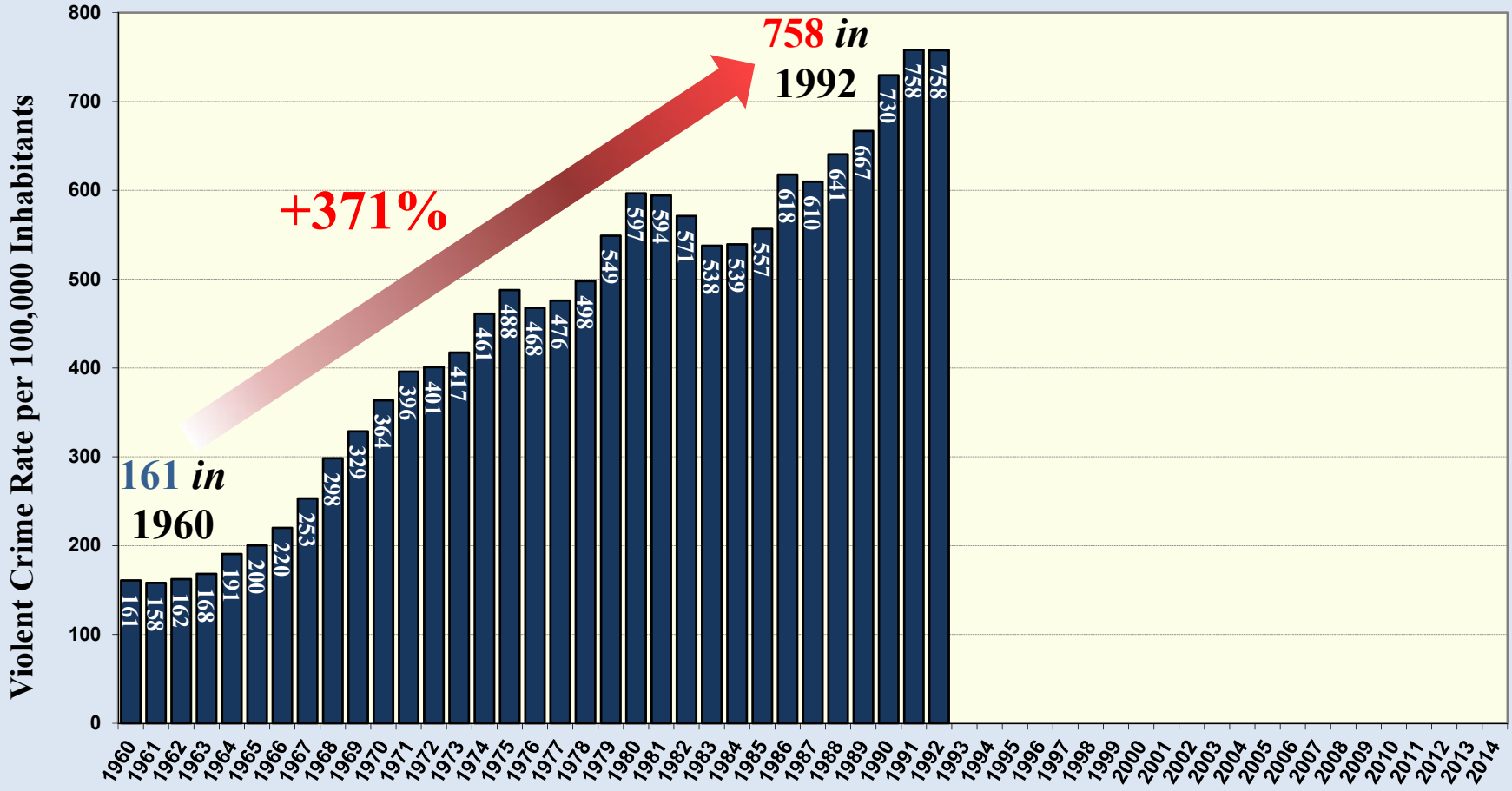
The Drug and Alcohol Abuse Story: *A History of Cycles*

U.S. history broken into cycles, with periods of permissiveness followed by temperance



U.S. National Violent Crime Rate per 100,000 inhabitants, 1960–2014

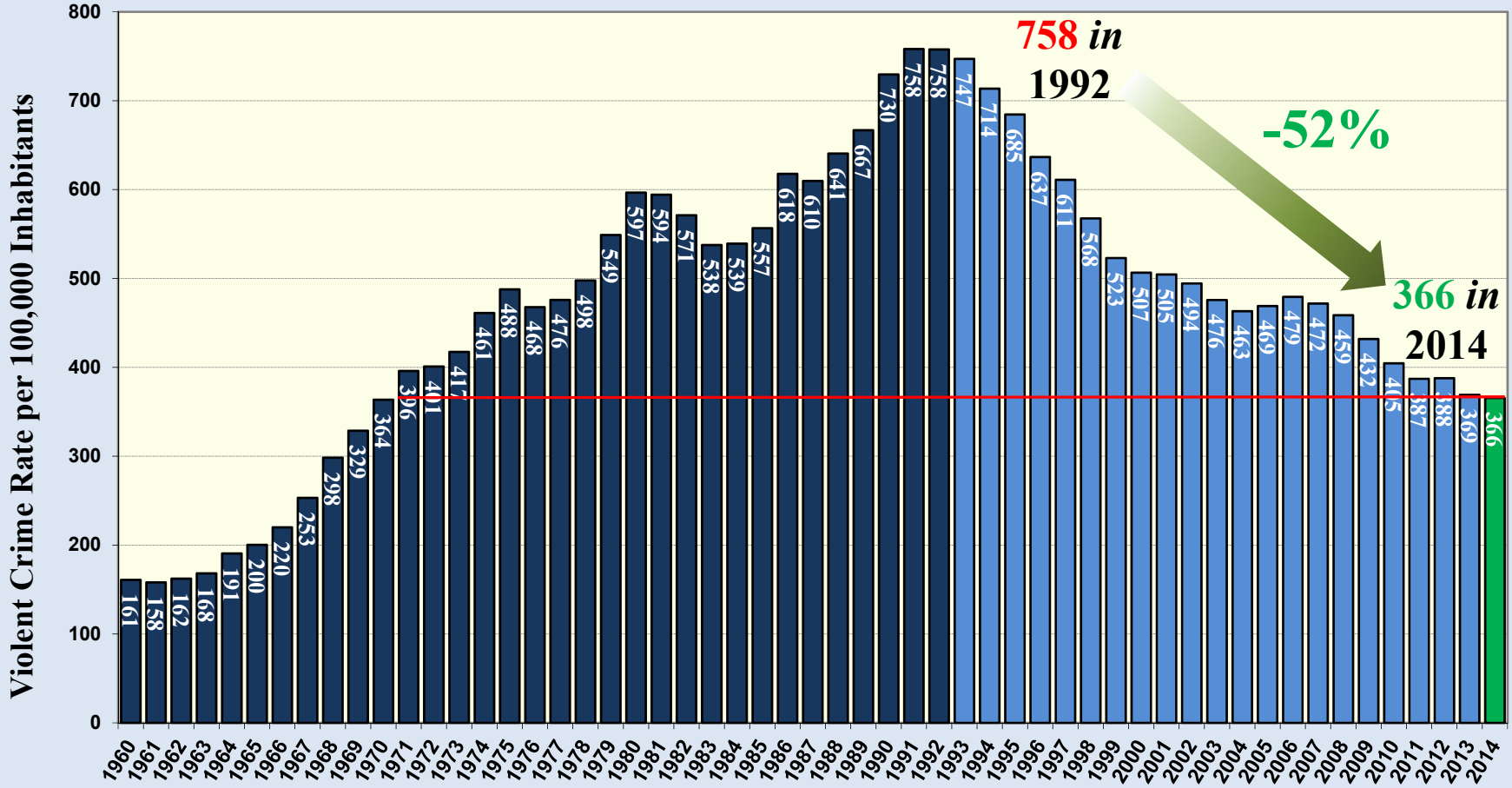
After 1960, the U.S. national violent crime rate increased rapidly by nearly 371%



Source: FBI Uniform Crime Reports. (*Violent Crime includes Murder, Rape, Robbery and Aggravated Assault*).

U.S. National Violent Crime Rate per 100,000 inhabitants, 1960–2014

From 1992 to 2014, violent crime plummeted dramatically, by more than half (to 1970-levels!)

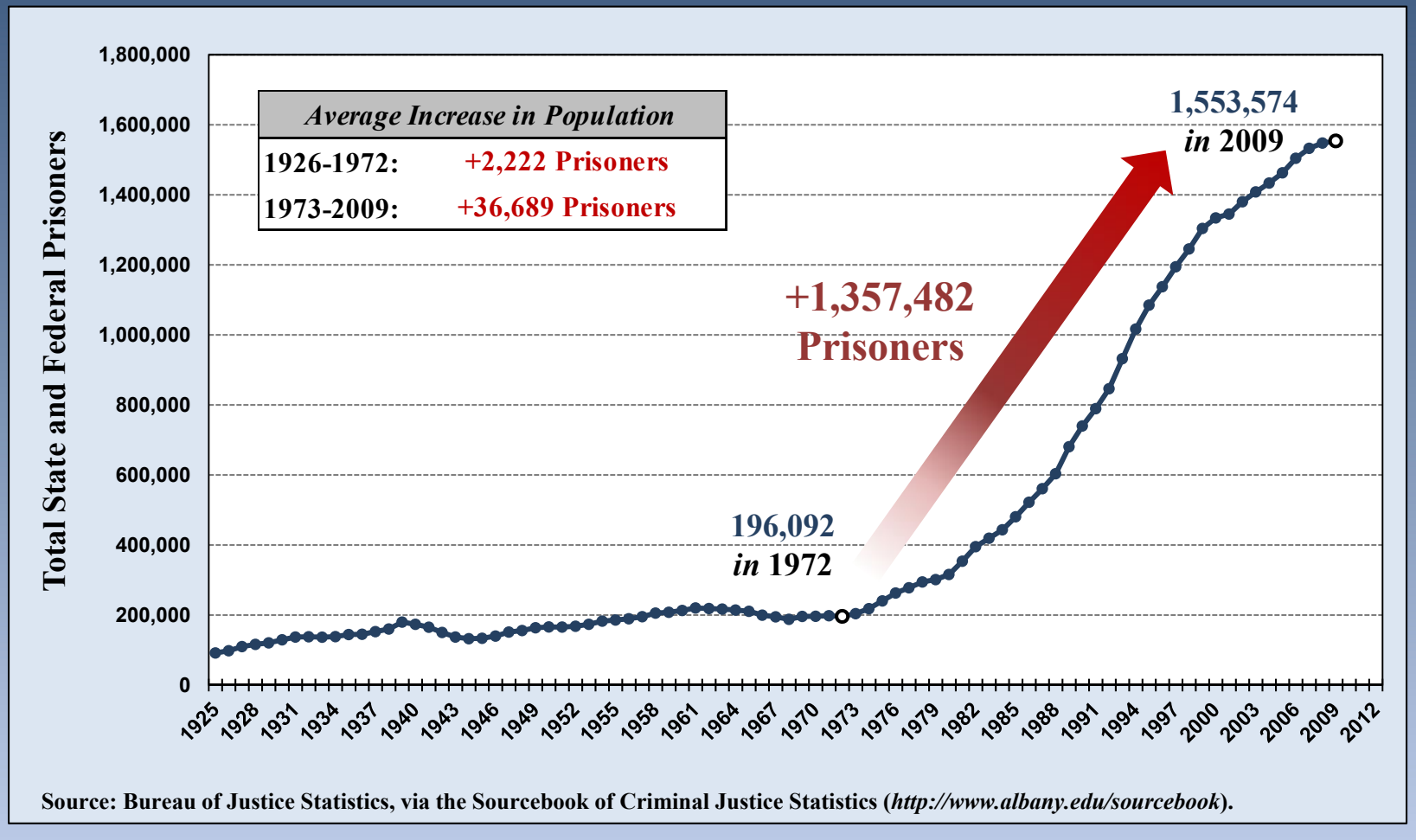


Source: FBI Uniform Crime Reports. (*Violent Crime includes Murder, Rape, Robbery and Aggravated Assault*).

The Prison Story: Overall Prison Population in the United States

Total Sentenced State and Federal Prisoners, 1925-2014

But from 1972 to 2009, total U.S. prison population increased rapidly, adding over **1.3 million** new prisoners

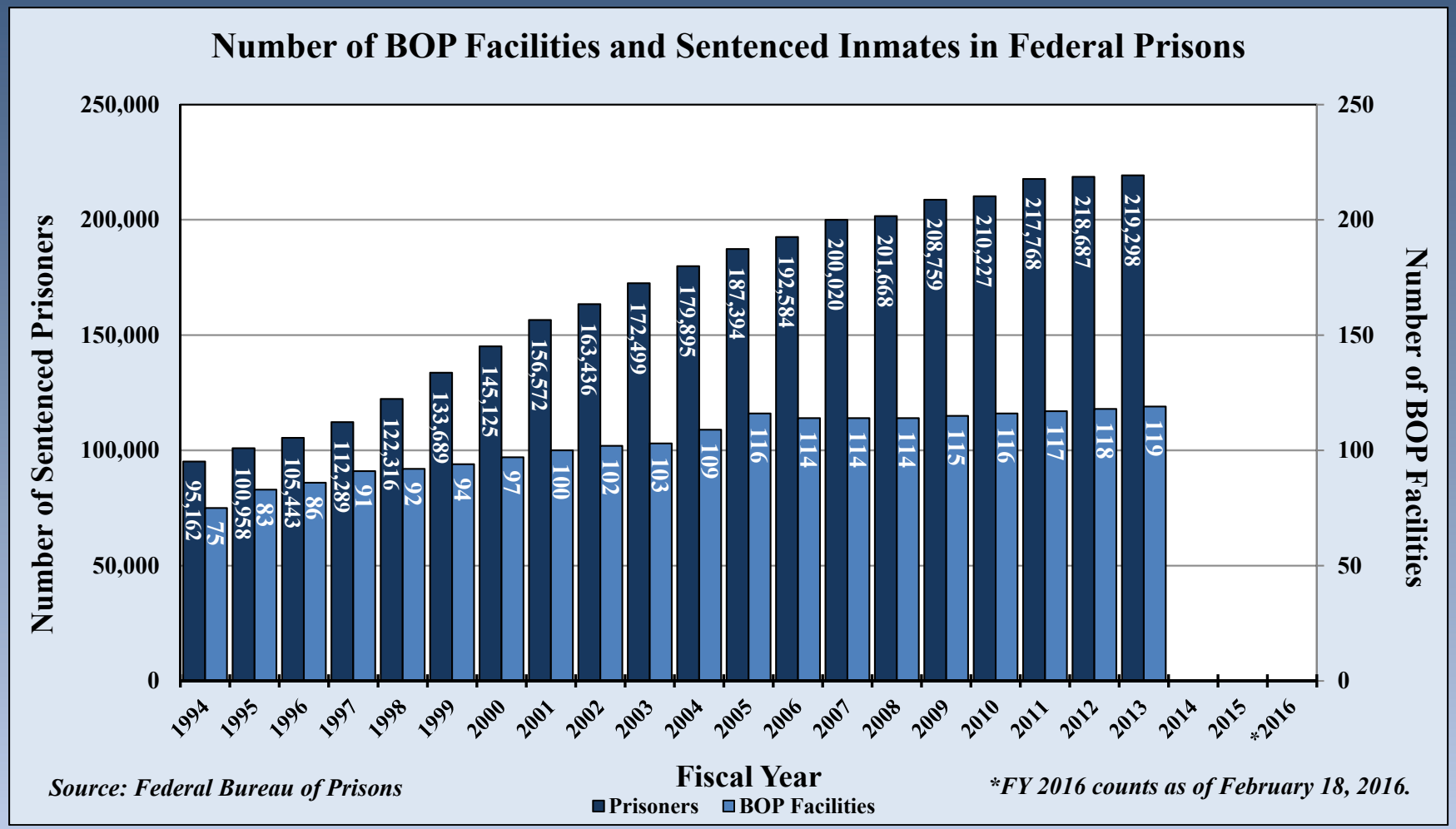


Source: Bureau of Justice Statistics, via the Sourcebook of Criminal Justice Statistics (*http://www.albany.edu/sourcebook*).

Where Do We Go from Here: The Previous Path was Unsustainable

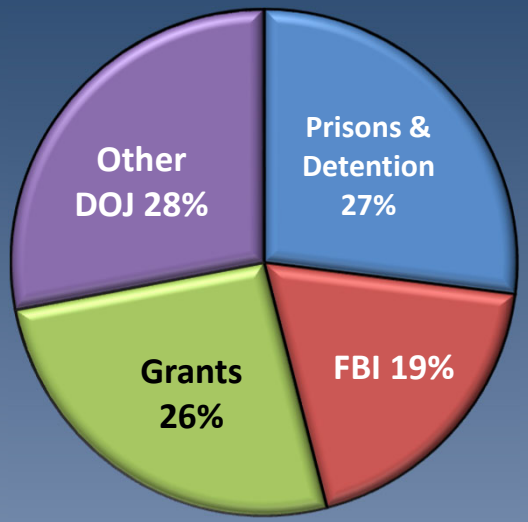
U.S. Federal Prison Population and BOP Facilities, Fiscal Years 1994 - 2013

Since FY 1994, the Federal prison population increased by as much as 130% while the number of BOP facilities increased by 63%;

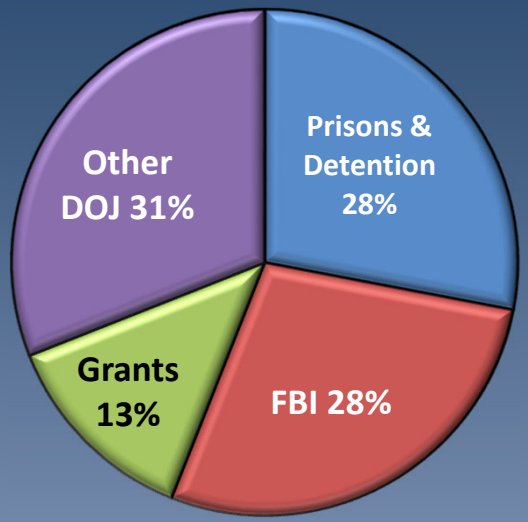


Breakdown of U.S. Department of Justice Budget by Category

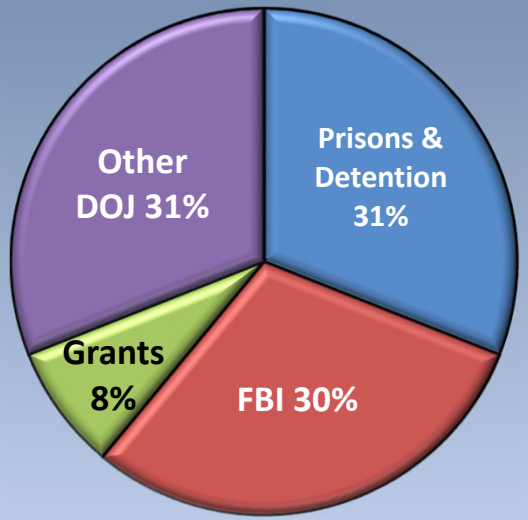
FY 2000



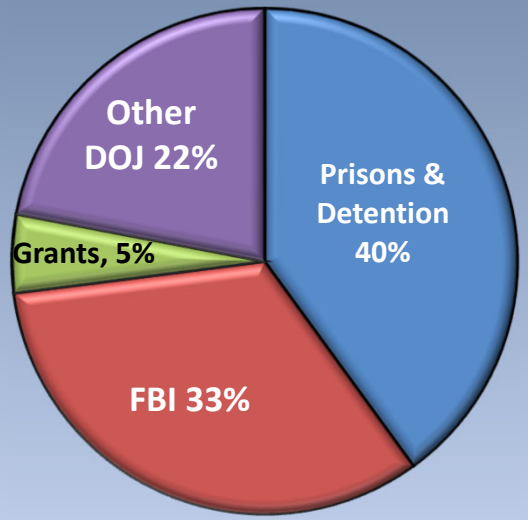
FY 2010



FY 2013



FY 2022



Who Supports Criminal Justice Reform

- Broad bipartisan support
  - Eric Holder
  - Koch brothers
  - Senators from both parties
- Some disagreement on some elements
  - Reentry
  - Mandatory Minimums (front end reform)
  - Forfeiture
  - Good time credit (back end reform)
  - Commutations, pardons

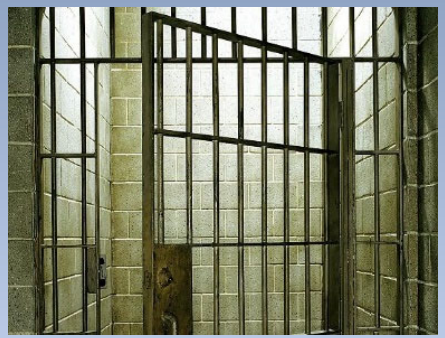
Criminal Justice Reform -- Holder

- Reentry
- Smart on Crime – announced in 2013
- Commutations
- Sentencing Commission
  - Reduce drug sentencing table by 2 levels, make retroactive

SMART ON CRIME

August 2013: DOJ identifies key reforms of the Federal criminal justice system to deter crime and reduce recidivism at a lower cost:

1. Reform sentencing to eliminate unfair disparities & reduce overburdened prisons
2. Pursue alternatives to incarceration for low-level, non-violent crimes
3. Improve reentry to curb repeat offenses and re-victimization
4. “Surge” resources to violence prevention & protecting most vulnerable populations



- Rebalanced approach to crime control
- Robust policing and targeted prosecution
- Mindful use of imprisonment
- Effective reentry
- Treatment
- Intervention
- Prevention

- Mandatory minimums – not for everyone
  - 851 enhancements – not for everyone
  - Most serious sentences used for most serious offenders

Commutations

April 23, 2014, then-DAG Jim Cole announces the clemency initiative

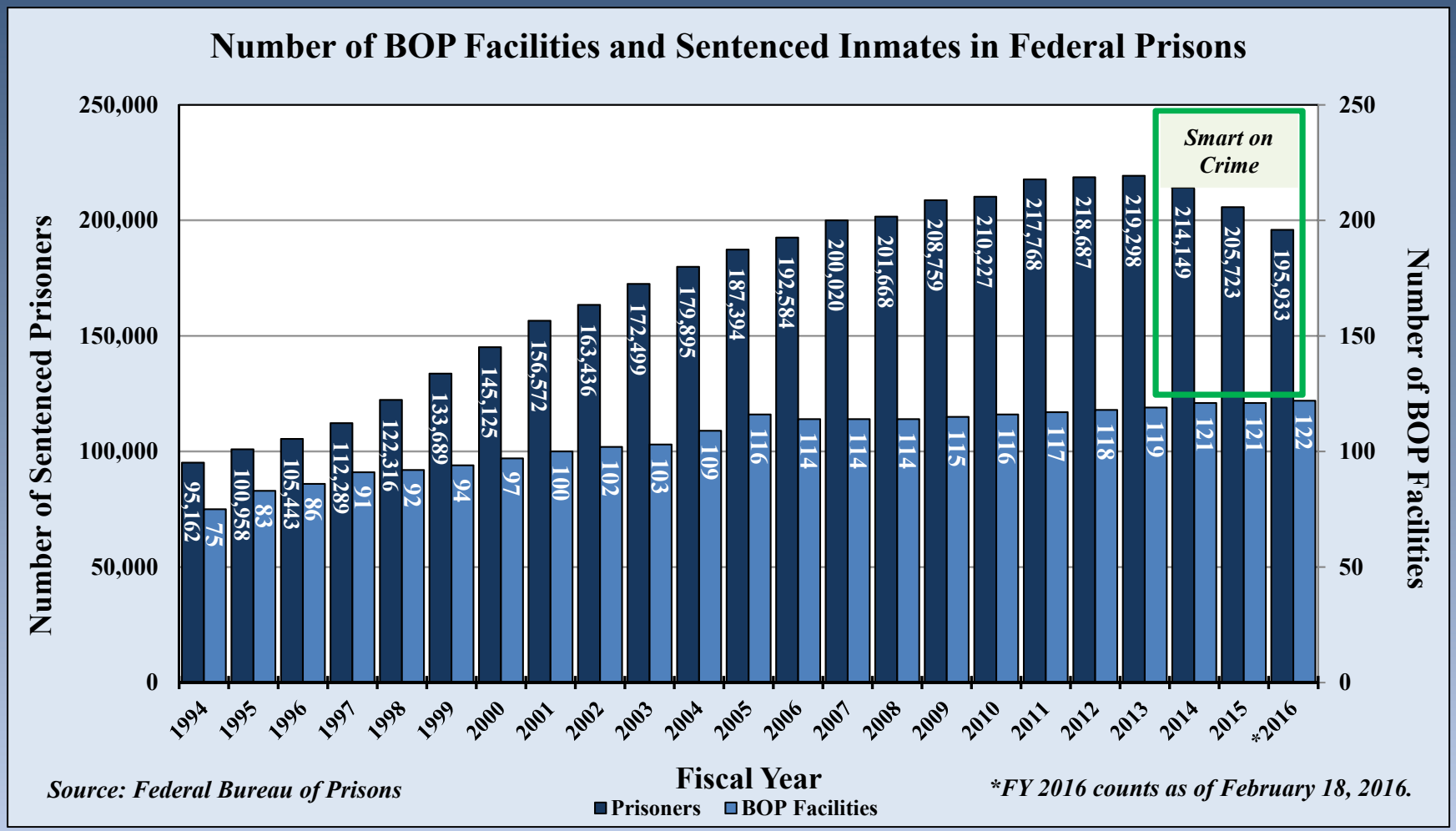
- "For our criminal justice system to be effective, it needs to not only be fair; but it also must be perceived as being fair. These older, stringent punishments that are out of line with sentences imposed under today's laws erode people's confidence in our criminal justice system."

Commutations

- Criteria
  - Currently serving a federal prison sentence that, by operation of law, likely would be lower today
  - Low-level, non-violent offenders (absent ties to gangs, criminal organizations)
  - Served at least 10 years
  - Have demonstrated good conduct in prison
  - No history of violence prior to offense for which incarcerated
- Statistics
  - 2014 – 9 commutations granted
  - 2015 – 79 commutations granted
  - 2016 – 583 commutations granted
    - 9,115 petitions pending
    - 11,628 received in 2016

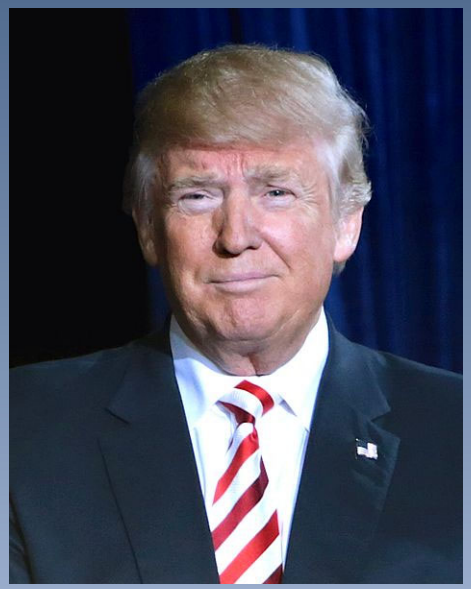
The Effect of "*Smart on Crime*" on the Federal Prison Population

In FY 2014, the Federal prison population began to decline for the first time in 30+ years (dropping nearly 11% from its peak in FY 2013); 2007 to 2017 reduced 3%, 6,100 inmates



Criminal Justice Reform Today

- Current administration – a bit more ad hoc



Pardons and Commutations

- Not as significant of a criminal justice reform tool
  - Often doesn't use Office of Pardon Attorney procedures, 28 CFR 1.1 through 1.11
  - Article II, section 2 of U.S. Constitution does not restrict authority of the President
- 2017-2019 – 6 commutations, 15 pardons granted
  - 92 commutations and 82 pardons denied

FIRST Step Act

Makes retroactive the 2010 Fair Sentencing Act

--eliminated disparity between crack and powder cocaine

Impact on Mandatory Minimums

--increases availability of safety valve

Increased good time credits

--from 47 to 54 days a year

Earned time credits for participation in programming – then early release to halfway house

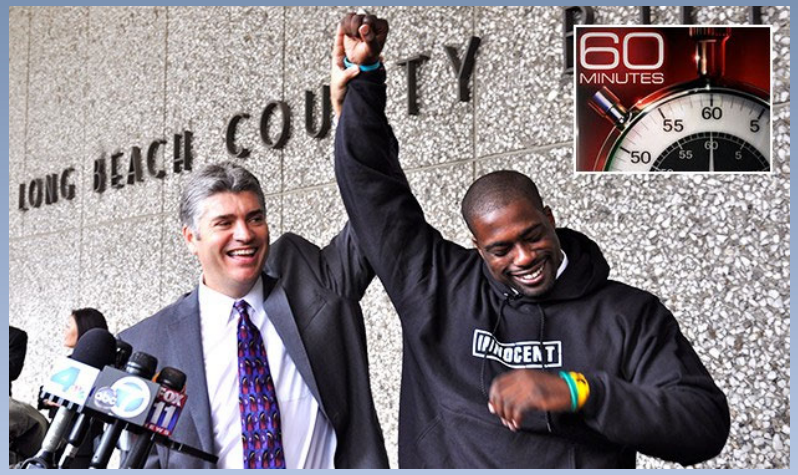
Restricts use of restraints on pregnant women

What's Next

- Second Step Act
  - Aimed at easing employment barriers
  - $88 million funding request for social reentry programs
- Next Step Act
  - Mandatory minimums
  - Reentry
  - Implicit bias and de-escalation training

State Reform/Influences

- Innocence Project
- Specialty Courts
- Mental Health Resources
- Collateral Consequences



Impact of Court Decisions

- *Apprendi, Blakely* (2004), *Booker* (2005), *Fanfan* (2005)
  - U.S. Sentencing Guidelines no longer mandatory
- *Alleyne* (2013)
  - Any fact that increases statutory mandatory minimum is an element of the crime – must be submitted to jury and proved beyond a reasonable doubt
- *Johnson* (2015)
  - Residual clause of ACCA unconstitutionally vague and in violation of due process
  - Residual clause is last part of definition of "violent felony": "or otherwise involves conduct that presents a serious potential risk of physical injury to another
  - Similar clause appears in other statutes

Impact on Federal Courts

- Impact on Judge's Exercise of Discretion
- Impact on Probation, USAO resources
- Impact on federal budget
- Impact on communities

Power Act

American Bar Association, September 26, 2018

ABA president applauds enactment of POWER Act to help domestic violence victims receive pro bono help

ABA President Robert M. Carlson applauded the signing Sept. 4 of the Pro Bono Work to Empower and Represent Act of 2018 (POWER Act), which will help victims of domestic violence gain access to pro bono legal services.

The legislation, P.L. 115-237 (S. 717), requires the chief judge in each judicial district to host at least one public event annually to promote free legal services to empower survivors of domestic violence, dating violence, sexual assault, and stalking. Within the next four years, the chief judges must hold two of these events in areas with high populations of Native Americans and Alaska Natives.

The new law also requires each chief judge to submit a report on each event to the director of the Administrative Office of the U.S. Courts, who will provide an annual compilation and summary of the reports to Congress.

"An underlying goal of this law is to let victims know that legal assistance is available to them and empower them to move forward with their lives," Carlson said in his statement. He emphasized that the ABA "has long promoted access to justice for victims of domestic and sexual violence and urges every lawyer to provide legal services to those who have limited ability to pay."

P.L. 115-237 cites the *ABA Model Rules of Professional Conduct* commentary stating that "every lawyer, regardless of professional prominence or professional workload, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer."

Carlson urged state and local bar associations across the county to work with the chief judges in their districts to facilitate annual implementation of the new law.

Sens. Dan Sullivan (R-Alaska) and Heidi Heitkamp (D-N.D.) sponsored the bipartisan legislation, noting that about 25 percent of women will experience domestic violence in their lifetime. They highlighted research showing that the success rate for a survivor obtaining a protective order

against an attacker increases by over 50 percent when the survivor is represented by an attorney.

“No victim of domestic violence should have to live in fear for their safety because they can’t afford legal protection,” Heitkamp said. “We can do better.”

The legislation was modeled after pro bono summits Sullivan held in Alaska when he was the attorney general for the state. Reps. Joe Kennedy (D-Mass.) and Don Young (R-Alaska) sponsored a companion bill, H.R. 1762, in the House.

Cover Sheet
For
Model Discovery Plan
Chief Judge B. Lynn Winmill

Guidelines for Counsel:

Guideline 1: The Court requires each case to be governed by a written Discovery Plan prepared pursuant to Rule 26(f)(3).

Guideline 2: The attached Model Discovery Plan is designed to help you draft your own Discovery Plan customized to the needs of your case. This Model Discovery Plan may contain provisions you do not need, and may be missing others that you do need. Add or delete provisions as you feel necessary. Your Discovery Plan might be 2 pages or 20 pages depending on the complexity of your case and the anticipated discovery.

Guideline 3: The Court expects you to expend real time, thought and energy in coming up with a workable Discovery Plan, and to draft realistic limits on discovery with an eye to avoiding unnecessary expenditures of time and money.

Guideline 4: All discovery in this case shall be conducted in accordance with Rule 1, which requires that the Rules "be construed, administered, and employed **by the court and the parties** to secure the just, speedy, and inexpensive determination of every action and proceeding."

Guideline 5: So long as counsel are acting in good faith, the Court will be very flexible in adopting agreements to change the Discovery Plan, or in imposing reasonable and necessary changes in the absence of an agreement of counsel.

Guideline 6: To facilitate this flexibility, the Court will schedule short status conferences with counsel, ranging from monthly conferences in complex cases and quarterly conferences in more garden-variety cases. One of the topics for those status conferences will be a report on the progress of discovery and whether the Discovery Plan requires modification.

Guideline 7: Discovery issues shall be analyzed by you – and, if necessary, resolved by the Court – using the proportionality factors set forth in Rule 26(b)(1): (1) The importance of the issues at stake in the action; (2) The amount in controversy; (3) The parties' relative access to relevant information; (4) The parties' resources; (5) The importance of the discovery in resolving the issues; and (6) Whether the burden or expense of the proposed discovery outweighs its likely benefit.

Guideline 8: Rule 26(g) requires the parties "to consider [proportionality] factors in making discovery requests, responses or objections." *See Advisory Committee Notes.*

Guideline 9: Proportionality "does not place on the party seeking discovery the burden of addressing all proportionality considerations." *See Advisory Committee Notes.*

Guideline 10: The Rules do not authorize boilerplate objections or refusals to provide discovery on the ground that it is not proportional – the grounds must be stated with specificity. *See Advisory Committee Notes.*

Guideline 11: Monetary stakes are only one factor in evaluating proportionality. A case seeking to "vindicate vitally important personal or public values" (like "employment [or] free speech" issues) "may have importance far beyond the monetary amount involved." *See Advisory Committee Notes.*

Guideline 12: Transparency in search methodology is crucial to instilling confidence in the production of ESI and other material. Thus, each party should reveal the search methodology they use in responding to requests for production of ESI and other material, to the extent possible given the protections afforded by the attorney-client privilege and the work product doctrine.

Guideline 13: To assist counsel, the Court has attached to the back of the Model Discovery Plan a checklist developed by the Northern District of California. Counsel are free to use it or ignore it.

Guideline 14: Pursuant to Rule 26(f)(2), the Discovery Plan is due 14 days after the meet-and-confer session discussed in Rule 26(f)(1). But in some cases that might be difficult because the parties have not had time to review voluminous initial disclosures or because those disclosures were late-filed or incomplete. The timing of initial disclosures is currently under consideration by the District's Local Rules Committee. In the meantime, the Rule 26(f)(2) deadline will apply but the

Court will work with counsel on a case-by-case basis to determine if that deadline needs to be modified.

Guideline 15: File your Discovery Plan on CM/ECF. The Court will incorporate the Discovery Plan's deadlines into the Court's Case Management Order so there will be a single Order with all deadlines to avoid any confusion.

Guideline 16: No party shall file a motion seeking to resolve a discovery dispute until first engaging in a mediation session with the Court. The Court makes these a top priority and can schedule them very quickly. The protocol for setting up a mediation session is discussed in each Case Management Order and at the Court's webpage at:

https://www.id.uscourts.gov/district/judges/winmill/discovery_disputes.cfm

DATED: September 18, 2019

B. Lynn Winmill
Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

Plaintiff, v. Defendants.	Case No. 0:0-CV-0000-BLW **(MODEL) DISCOVERY PLAN**

I. Preservation

a. **Preservation & Proportionality:** The parties have applied the proportionality standard in Rule 26(b)(1) to determine what information should be preserved and what information should not be preserved.

b. **Electronically Stored Information (ESI):** With regard to ESI, the parties agree that:

i. **Date Range:** Only ESI created or received between ____ and _____ will be preserved;

ii. **Scope of Preservation:** The parties agree to:

1. Preserve the Following Types of ESI

a. _____

2. From the Following Custodians or Job Titles:

a. _____

3. From the Following Systems, Servers, or Databases

a. _____

iii. **Preserved But Not Searched:** These data sources are not reasonably accessible because of undue burden or cost pursuant to Rule 26(b)(2)(B) and ESI from these sources will be preserved but not searched, reviewed, or produced:

1. *[E.g. backup media of [named] system, systems no longer in use that cannot be accessed, etc.]*_____.

iv. **Not Preserved:** Among the sources of data the parties agree are not reasonably accessible pursuant to Rule 26(b)(2)(B), and shall not be preserved, are the following:

1. *[E.g. voicemails, PDAs, mobile phones, instant messaging, automatically saved versions of documents, backup media created before _____, etc.]*.

v. **ESI Retention Protocols:** Going forward, the parties agree *[to modify/not to modify]* the document and ESI retention/destruction protocols of *[party]*.

1. *[if modified, describe modifications here]*

vi. **Cost Sharing:**

- ☐ *[The parties agree to share the cost of an electronic discovery vendor; shared document repository; or other cost saving measures]*

☐ *[The parties agree to bear their own costs for preservation of e-discovery]*

II. Initial Disclosures

a. *[if already provided]* Pursuant to Rule 26(a), initial disclosures were provided on the following dates:

- Plaintiffs: _____.
- Defendants: _____.

b. *[if not yet provided]* The parties agree to modify the deadlines in Rule 26(a) to allow initial disclosures to be provided on the following dates:

- Plaintiffs: _____.
- Defendants: _____.

c. *[change to form]* The parties agree to modify the form of the Rule 26(a) initial disclosures as follows: _____.

d. *[exempt]* The parties agree that this proceeding is exempt under Rule 26(a)(1)(B) from the requirement to provide initial disclosures.

III. Scope of Discovery

a. **Scope:** Discovery is necessary on the following subjects/issues:

- For Plaintiff:

1. _____;
2. _____;
3. _____.

4. _____;

5. _____;

- For Defense:

6. _____;

7. _____;

8. _____;

9. _____;

10. _____.

IV. Discovery Boundaries

a. **Limits:** The parties agree to limit the number of discovery tools as follows:

- ☐ Depositions: _____
- ☐ Interrogatories: _____
- ☐ Requests for Production: _____

V. ESI

a. ***Checklist:*** *The Court has attached the "Checklist" for ESI Discovery prepared by the Federal District Court for the Northern District of California to assist counsel in their meet-and-confer session.*

b. ***Proportionality****: Although not a hard and fast rule, a party from whom ESI has been requested in the typical case will not be expected to search for responsive ESI:*

- *from more than 15 key custodians;*
- *that was created more than 5 years before the filing of the lawsuit;*
- *from sources that are not reasonably accessible without undue burden or cost; or*
- *for more than 160 hours, inclusive of time spent identifying potentially responsive ESI, collecting that ESI, searching that ESI, and reviewing that ESI for responsiveness, confidentiality, and for privilege or work product protection. The producing party must be able to demonstrate that the search was effectively designed and efficiently conducted.*

c. **ESI File Format:** The parties agree to produce documents in the following file format[s] *[check any that apply]*:

☐ PDF;

☐ TIFF;

☐ Native; and/or

☐ Paper.

d. **ESI Production Format:** The parties agree that documents will be produced *[check any that apply]*:

☐ with logical document breaks;

☐ as searchable;

□ with load fields enabling review in common litigation databases such as Summation and Concordance;

□ with metadata, and, if so, in the following fields: _____.

e. **ESI Search Methodology**: The parties have agreed to use the following search methodology:

□ Predictive coding (or technology assisted review);

□ Keyword search;

□ Other: _____.

f. **Search Methodology – Transparency:** The parties agree that they will share their search methodology for responding to requests for production of ESI to the following extent: _____.

g. **General ESI Production vs. E-mail Production:** The parties agree that general ESI production requests under Federal Rules of Civil Procedure 34 and 45, or compliance with a mandatory disclosure order of this court, shall not include e-mail or other forms of electronic correspondence (collectively "e-mail"). To obtain e-mail parties must propound specific e-mail production requests.

h. **E-mail Custodian List Exchange:** On or before *[date]*, the parties agree to exchange lists identifying (1) likely e-mail custodians, and (2) a specific identification of the *[15]* most significant listed e-mail custodians in view of the pleaded claims and defenses.

i. **Discovery Re E-mail Custodians, Search Terms & Time Frames:** Each requesting party may propound up to *[5]* written discovery requests and take *[one]* deposition per producing party to identify the proper custodians, proper search terms, and proper time frame for e-mail production requests. The court may allow additional discovery upon a showing of good cause.

j. **Form of E-mail Production Requests:** E-mail production requests shall identify the custodian, search terms, and time frame. The parties shall cooperate to identify the proper custodians, proper search terms, and proper time frame.

k. **Limits on E-mail Production Requests – Custodians:** Each requesting party shall limit its e-mail production requests to a total of *[8]* custodians per producing party for all such requests. The parties may jointly agree to modify this limit without the court's leave.

l. **Limits on E-mail Production Requests – Keyword Search Terms:** Each requesting party shall limit its e-mail production requests to a total of *[10]* keyword search terms per custodian per party. The parties may jointly agree to modify this limit without the court's leave. The keyword search terms shall be narrowly tailored to particular issues. Indiscriminate terms, such as the producing company's name or its product name, are inappropriate unless combined with narrowing search criteria that sufficiently reduce the risk of overproduction.

m. **Liaison:** Each party *[has identified/will identify]* a Liaison who is responsible for, and knowledgeable about (or has access to a person knowledgeable about), that party's ESI. This includes the technical aspects of e-discovery, including the location, nature, accessibility, format, collection, search methodologies, and production of ESI in this matter. The parties will rely on the Liaisons, as needed, to confer about ESI and to help resolve disputes without court intervention.

VI. Deadlines

a. The deadline for the completion of fact discovery is: _____.

b. The deadline for completion of expert witness discovery is: _____.

VII. Phased or Issue-Specific Discovery

a. *[Phased Discovery]* The parties agree to conduct discovery in phases, focusing in the first phase on key information that is easily accessible. The parties will then use that the results of that initial phase of discovery to guide further discovery.

- **First Phase of Discovery**: During the first phase, the parties will conduct discovery on the following subject[s]:

  _____.

- **Scope of First Phase**: During the first phase of discovery, the parties shall take the following discovery:

  - Depositions: _____

- Interrogatories: _____
- Requests for Production: _____

- **Deadline for Completion of First Phase**: The parties shall complete the first phase of discovery on or before _____.
- **Further Discovery**: Following completion of the first phase of discovery, the parties will meet together to determine what discovery, if any, is needed in the next phase.

b. *[Issue-Specific Discovery]* The parties agree that discovery should be focused first on *[jurisdiction] [venue] [qualified immunity] [affirmative defenses that may be dispositive] [information necessary to engage in meaningful settlement discussions] [etc.]*.

- **Deadline for Completion of Issue-Specific Discovery**: The discovery on the issue of *[jurisdiction] [venue]][qualified immunity][affirmative defenses that may be dispositive][information necessary to engage in meaningful settlement discussions] [etc.]* will be completed on or before _____, at which time the parties will meet to determine what needs to be done next.

VIII. Documents Protected From Discovery

a. **Clawback:** Pursuant to Fed. R. Evid. 502(d), the parties request the Court to enter an Order that production of a privileged or work-product-protected document, whether inadvertent or otherwise, is not a waiver of privilege or

work-product protection in this case or in any other federal or state proceeding. The Court will enter such an order in its CMO unless the parties object or otherwise request that no such order be issued during the telephone scheduling conference.

b. **Quick Peek:** The parties

☐ *[agree that a "quick peek" process pursuant to Fed.R.Civ.P. 26(b)(5) is not necessary in this case]*

☐ *[agree to a "quick peek" process pursuant to Fed.R.Civ.P. 26(b)(5) as set forth herein: _____].*

c. **Post-Complaint Communications:** Communications involving trial counsel that post-date the filing of the complaint need not be placed on a privilege log. Communications may be identified on a privilege log by category, rather than individually, if appropriate.

IX. Protective Order

a. The parties have agreed to the terms of a Protective Order to protect *[trade secrets, proprietary material, personal information, etc]* and will submit that to the Court for its approval.

b. The parties understand that even if they agree to seal material filed with the Court, they must still file a motion to seal and obtain Court approval that the sealing meets with the Ninth Circuit standards for sealing. *See*

Kamakana v. City and County of Honolulu, 447 F.3d 1172, 1178 (9th Cir. 2006).

United States District Court
Northern District of California

CHECKLIST FOR RULE 26(f) MEET AND CONFER
REGARDING ELECTRONICALLY STORED INFORMATION

In cases where the discovery of electronically stored information ("ESI") is likely to be a significant cost or burden, the Court encourages the parties to engage in on-going meet and confer discussions and use the following Checklist to guide those discussions. These discussions should be framed in the context of the specific claims and defenses involved. The usefulness of particular topics on the checklist, and the timing of discussion about these topics, may depend on the nature and complexity of the matter.

I. Preservation

- ❒ The ranges of creation or receipt dates for any ESI to be preserved.
- ❒ The description of data from sources that are not reasonably accessible and that will not be reviewed for responsiveness or produced, but that will be preserved pursuant to Federal Rule of Civil Procedure 26(b)(2)(B).
- ❒ The description of data from sources that (a) the party believes could contain relevant information but (b) has determined, under the proportionality factors, is not discoverable and should not be preserved.
- ❒ Whether or not to continue any interdiction of any document destruction program, such as ongoing erasures of e-mails, voicemails, and other electronically-recorded material.
- ❒ The names and/or general job titles or descriptions of custodians for whom ESI will be preserved (e.g., "HR head," "scientist," "marketing manager," etc.).
- ❒ The number of custodians for whom ESI will be preserved.
- ❒ The list of systems, if any, that contain ESI not associated with individual custodians and that will be preserved, such as enterprise databases.
- ❒ Any disputes related to scope or manner of preservation.

II. Liaison

- ❒ The identity of each party's e-discovery liaison.

III. Informal Discovery About Location and Types of Systems

- ❒ Identification of systems from which discovery will be prioritized (e.g., email, finance, HR systems).
- ❒ Description of systems in which potentially discoverable information is stored.
- ❒ Location of systems in which potentially discoverable information is stored.
- ❒ How potentially discoverable information is stored.
- ❒ How discoverable information can be collected from systems and media in which it is stored.

IV. Proportionality and Costs

- ❒ The amount and nature of the claims being made by either party.
- ❒ The nature and scope of burdens associated with the proposed preservation and discovery of ESI.
- ❒ The likely benefit of the proposed discovery.
- ❒ Costs that the parties will share to reduce overall discovery expenses, such as the use of a common electronic discovery vendor or a shared document repository, or other cost-saving measures.

Revised December 1, 2015

- ❒ Limits on the scope of preservation or other cost-saving measures.
- ❒ Whether there is relevant ESI that will not be preserved pursuant to Fed. R. Civ. P. 26(b)(1), requiring discovery to be proportionate to the needs of the case.

V. Search

- ❒ The search method(s), including specific words or phrases or other methodology, that will be used to identify discoverable ESI and filter out ESI that is not subject to discovery.
- ❒ The quality control method(s) the producing party will use to evaluate whether a production is missing relevant ESI or contains substantial amounts of irrelevant ESI.

VI. Phasing

- ❒ Whether it is appropriate to conduct discovery of ESI in phases.
- ❒ Sources of ESI most likely to contain discoverable information and that will be included in the first phases of Fed. R. Civ. P. 34 document discovery.
- ❒ Sources of ESI less likely to contain discoverable information from which discovery will be postponed or avoided.
- ❒ Custodians (by name or role) most likely to have discoverable information and whose ESI
- ❒ will be included in the first phases of document discovery.
- ❒ Custodians (by name or role) less likely to have discoverable information and from whom discovery of ESI will be postponed or avoided.
- ❒ The time period during which discoverable information was most likely to have been created or received.

VII. Production

- ❒ The formats in which structured ESI (database, collaboration sites, etc.) will be produced.
- ❒ The formats in which unstructured ESI (email, presentations, word processing, etc.) will be produced.
- ❒ The extent, if any, to which metadata will be produced and the fields of metadata to be produced.
- ❒ The production format(s) that ensure(s) that any inherent searchablility of ESI is not degraded when produced.

VIII. Privilege

- ❒ How any production of privileged or work product protected information will be handled.
- ❒ Whether the parties can agree upon alternative ways to identify documents withheld on the grounds of privilege or work product to reduce the burdens of such identification.
- ❒ Whether the parties will enter into a Fed. R. Evid. 502(d) Stipulation and Order that addresses inadvertent or agreed production.

So You Want to be U.S. Attorney and Other Stories

Please join us for a lively discussion with the tri-state's U.S. Attorneys. After brief introductory comments on emergent civil and criminal issues facing today's U.S. Attorney's Offices, to include public lands conflict, the impact of recent Supreme Court cases *Rehaif* and *Davis* on workload, recruiting and retaining capable employees, working with Washington, D.C., the U.S. Attorneys will take questions from the audience. The panel will be moderated by Rafael Gonzalez, First Assistant U.S. Attorney for the District of Idaho, and Vice President of the FBA Idaho Chapter.

Format:

- A panel presentation.
- Each panelist will provide a brief opening statement on a topic of their choice.
- The moderator will then ask a question of each panelist, giving each an opening to talk about an emergent issue in their office.
- We will then open to the floor for questions.
- Questions may be submitted in advance to Mr. Gonzalez.

HEMP OR MARIJUANA: INTERSTATE COMMERCE, PREEMPTION, AND STATE POLICE POWERS

Hon. Dale Kimball (Dist. Ut)

Hon. Mark Carman (YSNP)

Elijah Watkins, Stoel Rives LLP

2018 FARM BILL

SEC. 297A. DEFINITIONS

- (1) Hemp. – The term 'hemp' means the plant ***Cannabis sativa L.*** and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a ***delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent*** on a dry weight basis.

COCKREL V. SHELBY CTY. SCH. DIST., 270 F.RD 1036, 1042 (6TH CIR. 2001)

- "Unlike marijuana, the industrial hemp plant is only compromised of between 0.1 and 0.4 percent THC, an insufficient amount to have any narcotic effect."

WHAT IS HEMP?

- Hemp is a plant of the *Cannabis sativa L.* variety
- Hemp contains high levels of CBD
- Cannot contain more than 0.3% THC.
- Grown outdoors to maximize size and yield
- No narcotic effect

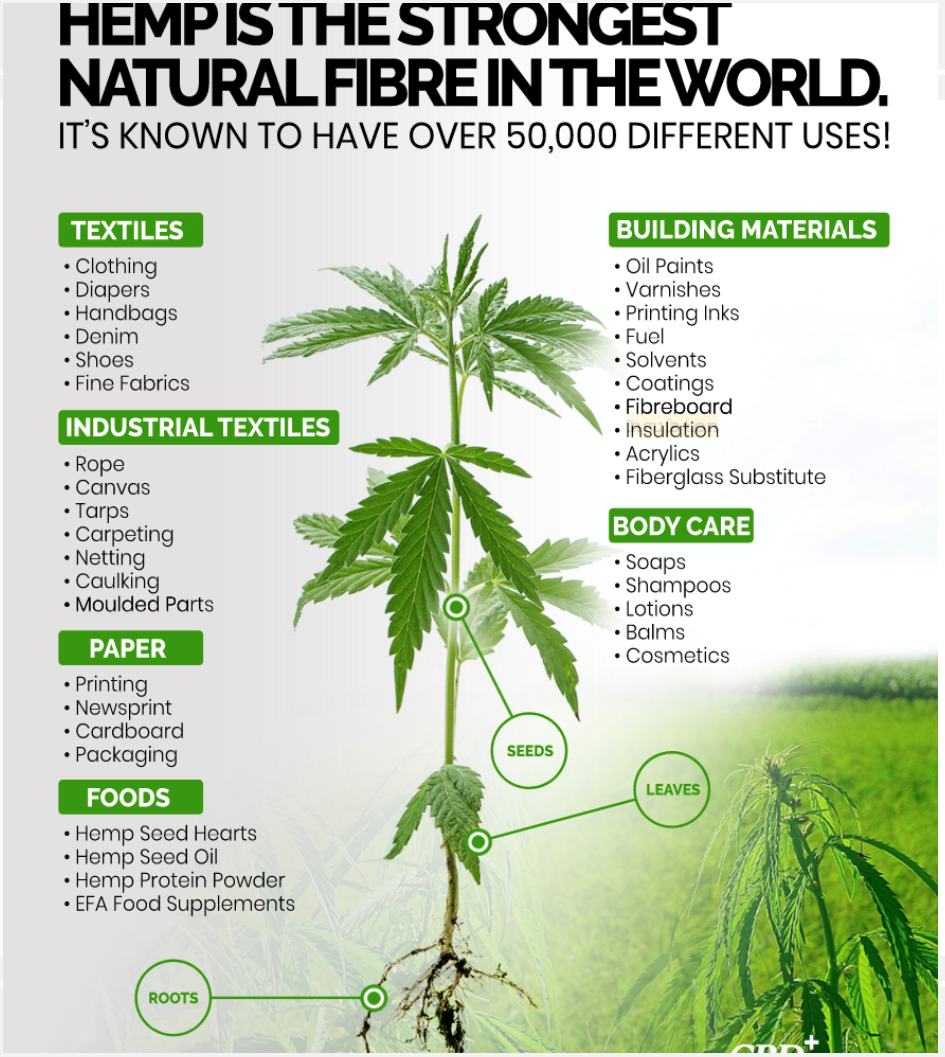
WHAT IS MARIJUANA?

- Marijuana is a plant of the *Cannabis sativa L.* variety.
- Marijuana contains low levels of CBD
- Marijuana can contain up to 30% THC
- Grown in controlled environments like greenhouses where temperature, lighting, and humidity are highly regulated.
- Used to get people high

Hemp and marijuana can look and smell the same, and both will test positive for THC.

WHY CONGRESS LIKES HEMP

The annual U.S. Hemp-derived CBD market, a subset of the overall hemp market, is expected to see retail sales grow from $490-$540 million in 2018 to ***$2.5-$3.1 billion*** in 2022.



2018 FARM BILL

- Signed into law December 2018
- Sec. 12619: Removes hemp from the Controlled Substances Act
- Sec. 11119: Redefines hemp as an "agricultural commodity" under the Federal Crop Insurance Act (7 U.S.C. 1518)
  - "Agricultural commodity", as used in this subchapter, means wheat, cotton, flax, corn, dry beans, oats, barley, rye, tobacco, rice, peanuts, soybeans, sugar beets, sugar cane, tomatoes, grain sorghum, sunflowers, raisins, oranges, sweet corn, dry peas, freezing and canning peas, forage, apples, grapes, potatoes, timber and forests, nursery crops, citrus, and other fruits and vegetables, nuts, tame hay, native grass, hemp, aquacultural species (including, but not limited to, any species of finfish, mollusk, crustacean, or other aquatic invertebrate, amphibian, reptile, or aquatic plant propagated or reared in a controlled or selected environment), or any other agricultural commodity, excluding stored grain, determined by the Board, or any one or more of such commodities, as the context may indicate.
- Crop insurance, research grants, federal research programs, research cost reimbursement (Secs. 7129, 7501, 11101, 11106, 11113

2018 FARM BILL

SEC. 10114. INTERSTATE COMMERCE

- (a) Rule of Construction. – ***Nothing*** in this title or an amendment made by this title ***prohibits the interstate commerce of hemp*** (as defined in section 297A of the Agricultural Marketing Act of 1946 (as added by section 10113)) or hemp products.

- (b) Transportation of Hemp and Hemp Products. – ***No state of Indian Tribe*** shall prohibit the ***transportation or shipment*** of hemp products produced in accordance with ***subtitle G*** of the Agricultural Marketing Act of 1946 (as added by section 10113) through the State or the territory of the Indian Tribe, as applicable.

SUBTITLE G HEMP

- SEC. 297B. STATE AND TRIBAL PLANS
- SEC. 297C. DEPARTMENT OF AGRICULTURE
- SEC. 297B(f):Effect. – Nothing in this section prohibits the production of hemp in a State or territory of an Indian tribe –

  "(1) for which a State of Tribal plan is not approved under this section, if the production of hemp is in accordance with section 297C ***or other Federal laws (including regulations)***; and

  "(2) if the production of hemp is not otherwise prohibited by the state or Indian tribe.

- Other Federal Laws = 2014 Farm Bill

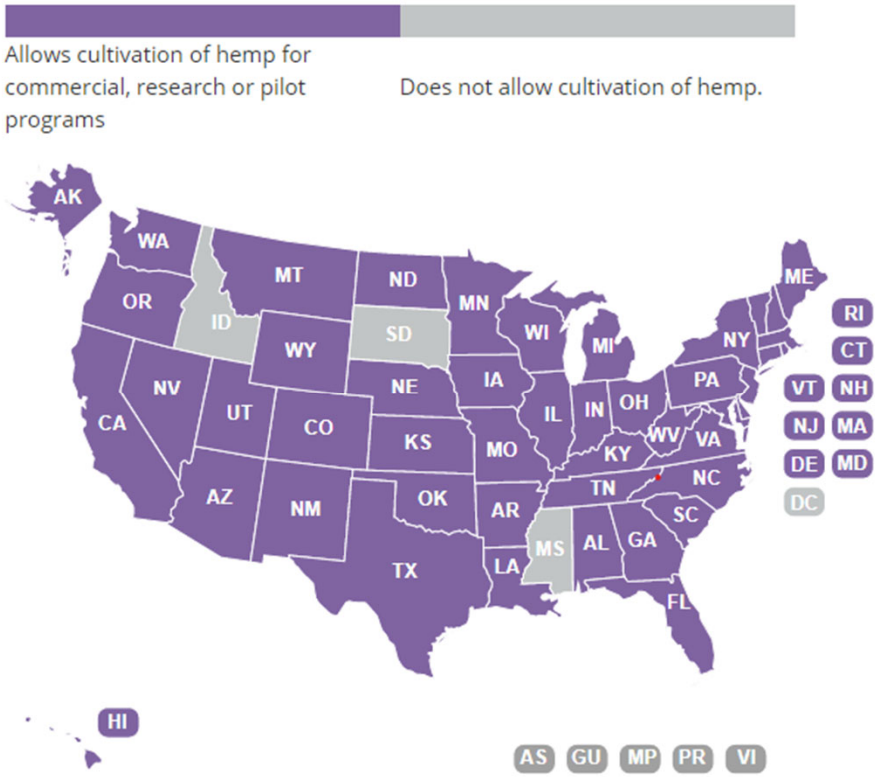
FEDERAL INTERPRETATION

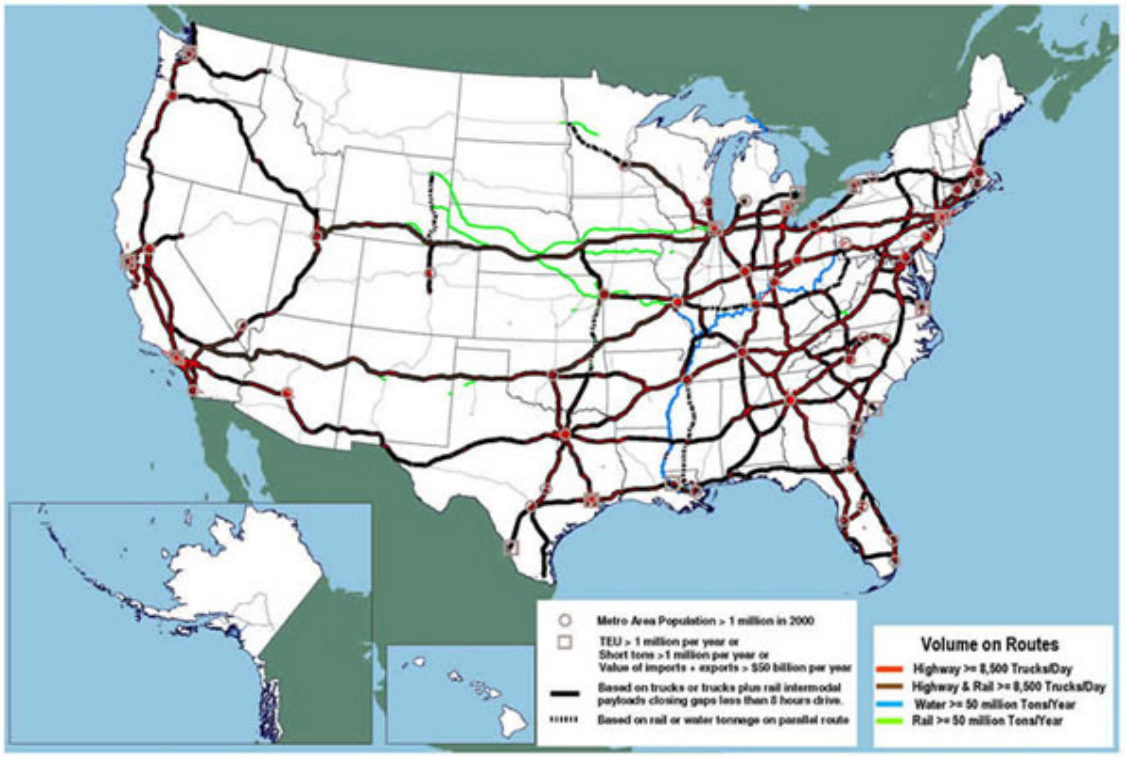
- May 28, 2019, USDA Legal Memorandum
  - "States and Indian tribes may not prohibit the interstate transportation or shipment of hemp lawfully produced under the Agricultural Act of 2014"

- June 6, 2019, USPS Publication 52 Revision, New Mailability Policy for Cannabis and Hemp-Related Products
  - "As a result of the 2014 Farm Bill, some products derived from industrial hemp are mailable….The mailability of hemp was also recently addressed by the Agricultural Improvement Act of 2018, Pub. L.115-334 ("2018 Farm Bill"). Among other things, this legislation:…Removed hemp from regulation under the Controlled Substances Act, 21 U.S.C. § 801 *et seq.*;…and Clarified that interstate commerce of hemp is permitted (2018 Farm Bill, §§ 10113, 10114, 12619)."

- *United States v. Mallory*, CV 3:18-1289, 2019 WL 1061677 (S.D.W.Va. Mar. 6, 2019)
  - "The 2018 Farm Bill expressly allows hemp, its seeds, and hemp-derived products to be transported across State lines."

STATE LEGALIZATION AND MAJOR FREIGHT CORRIDORS





*National Conference of State Legislators

PROBLEMS

United Cannabis

Treasure Valley Extraction

Cathryn

Big Sky Scientific

TESTING NIGHTMARE

- Lab tests can accurately report levels of THC, but levels of THC are not consistent from plant to plant, crop to crop, or product to product.
- Lab tests can be modified to represent levels of THC that are higher or lower – "dry weight basis"
- Tests used by police officers in the field for THC are like pregnancy tests. Tests are pass fail and can only identify the presence of THC and without identifying the levels of THC present.
- The DEA recently made a nationwide request for field tests that can identify THC levels.

CONSEQUENCES

- Hemp and marijuana are different by definition according to the THC levels.
- Field tests cannot reliably or accurately report the levels of THC and, if done improperly, lab tests can give different THC levels.
- Producers, consumers, and law enforcement cannot differentiate between the two products.
- State laws are varied
- Federal laws are incomplete
- Mistakes by consumers, producers, and law enforcement appear inevitable and frequent but present severe and expensive consequences.

STANDARD OF REVIEW:

A. Why is this important at all?

Few aspects more crucial to a successful case and especially to an appeal than the standard of review:

This dictates how rigorously a court will review the issue before it.

So what does this mean to you?

You ought to know these standards.

1. What issues you appeal?

2. How will you brief the issues?

3. How will you argue the issues in argument?
   de novo - same arguments as in district court

   discretion - different arguments

4. What are important issues at trial?

B. General Principles relating to district court decisions

Presumption of correctness
   Appellant has the burden of overcoming presumption
   Record and briefing are totally important - otherwise, dismissal

Affirm on any ground
   must have support in the record
   district court need not have considered, but must have a correct decision on some theory of the case
   Discretionary with the appellate court

C. What are the Standards?

1. Plain error.

Issue was not properly preserved for appeal, unless

(a) error; (b) that is plain; (c) affects substantial rights; (d) seriously affects the fairness, integrity, or public reputation of judicial proceedings

or error of law, when

(a) there are exceptional circumstances why the issue was not raised in the trial court
(b) new issue arises while the appeal is pending, based on a change of law
(c) error affects D's substantial rights

2. De novo review.

The appellate court independently makes its own decision as to the issue (as if no decision had been made in the underlying court)

Generally applied to purely or predominantly questions of law.

Examples:

- motions to dismiss
- motions for summary judgment
- motions for a directed verdict
- district court interpretations of federal statutes
- criminal motions to exclude evidence

3. Clear error

Appellate court must accept the district court decision **unless it has a definite and firm conviction that a mistake has been made**

Why?

We give deference to the trial court

- They were there to judge the witness's credibility
- Even when they are wrong in our view, they had sufficient evidence to do what

they did.

They are not reading a record; they were there; they are the experts

a. Findings of fact

Findings of fact, whether based on oral evidence or on written evidence, must not be set aside unless clearly erroneous

b. Bench trials

4. Abuse of discretion.

It must illogical, implausible, an unreasonable inference from the record

cannot be just because we would have reached a different result

must have applied an incorrect legal standard, misapplied the correct standard

a. Evidentiary rulings
Rulings to amend a complaint
Rulings on discovery
Rulings on class certification
Ruling on 54(b) certificates (ability to appeal an issue before the case is over)
Rulings on sanctions
Rulings on attorney fees
Dismissals for forum non conveniens
Voluntary dismissal
Rulings on equitable remedies
Rulings on sentencing (after meeting the procedural requisites)
Rulings on intervention
Rulings on a motion for a new trial
Rulings on 60(b) motions

b. Generally applicable to district court decisions involving case management or equitable powers
Discovery
Injunctions
Disqualification of judge

5. Harmless error.

Even if the district court got it wrong, it wouldn't change the result.
Will reverse only if error was prejudicial to the suit
Prejudice is presumed

Applies after considering the whole record

Errors in jury instructions
jury verdicts
request for jury trials

6. Substantial evidence

More than a mere scintilla

Jury verdict, including punitive damages

Motion for judgment as a matter of law

Agency decisions

1. in violation of the constitution

2. in excess of statutory jurisdiction

3. without observance of proper procedure

4. unsupported by substantial evidence

5. improper interpretation of statutes
   Chevron deference.
   Is it clear what Congress said about the issue? Unambiguous?
   Ambiguity - then give deference to agency as to interpretation

6. Arbitrary and capricious

Supreme Court Review; Supreme Court and Presidential Power

Tri-State Conference
September 28, 2019

Erwin Chemerinsky
Dean and Jesse H. Choper Distinguished Professor of Law
University of California, Berkeley School of Law

I. October Term 2018

Rucho v. League of Women Voters, 139 S.Ct. 2484 (2019). Challenges to partisan gerrymandering are non-justiciable political questions.

American Legion v. American Humanist Association; Maryland-National Capital Park and Planning Commission v. American Humanist Association, 139 S.Ct 2067 (2019). The establishment clause does not require the removal or destruction of a 93-year-old memorial to American servicemen who died in World War I solely because the memorial bears the shape of a cross.

Department of Commerce v. New York, 139 S.Ct. 2551 (2019). The secretary of the Department of Commerce did not violate the enumeration clause or the Census Act in deciding to reinstate a citizenship question on the 2020 census questionnaire, but the district court was warranted in remanding the case back to the agency where the evidence tells a story that does not match the secretary's explanation for his decision.

II. October Term 2019

A. Civil Rights Litigation

Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018) (en banc). Consolidated with *Bostock v. Clayton County, Georgia*, 723 Fed. Appx. 964 (11th Cir. 2018).
Whether the prohibition in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), against employment discrimination "because of . . . sex" encompasses discrimination based on an individual's sexual orientation.

R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission, 884 F.3d 560 (6th Cir. 2018).
Whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*.

Comcast Corp. v. National Association of African American-Owned Media
National Association of African American-Owned Media v. Comcast Corp., 743 F. Appx. 106 (9th Cir. 2019).
Whether a claim of race discrimination under 42 U.S.C. § 1981 fails in the absence of but-for causation.

B. Free exercise of religion

Espinoza v. Mont. Dep't of Rev., 393 Mont. 446 (2018)
Whether it violates the religion clauses or the equal protection clause of the United States Constitution to invalidate a generally available and religiously neutral student-aid program simply because the program affords students the choice of attending religious schools.

C. Deferred Action for Childhood Arrivals

Department of Homeland Security v. Regents of the University of California, 908 F.3d 476 (9th Cir. 2018); *Batalla Vidal v. Nielsen*, 291 F. Supp. 3d 260, 279–81 (E.D.N.Y. 2018); *Trump v. NAACP*, 298 F.Supp.3d 209 (D.D.C. 2018).
(1) Whether the Department of Homeland Security's decision to wind down the Deferred Action for Childhood Arrivals policy is judicially reviewable; and (2) whether DHS's decision to wind down the DACA policy is lawful.

D. Second Amendment

New York State Rifle and Pistol Ass'n, Inc. v. Cuomo, 804 F.3d 242 (2d Cir. 2015).
Whether New York City's ban on transporting a licensed, locked and unloaded handgun to a home or shooting range outside city limits is consistent with the Second Amendment, the commerce clause and the constitutional right to travel.

III. Presidential Power

Trump v. Hawaii, 138 S.Ct. 2392 (2017). President Trump's proclamation limiting immigration from eight designated countries is consistent with federal law and does not violate the Establishment Clause of the First Amendment.

Trump v. Sierra Club (July 26, 2019). The Court lifted a preliminary injunction that kept the Pentagon from transferring $2.5 billion in funds to build a border wall without congressional authorization.

Barr v. East Bay Sanctuary Covenant (September 11, 2019). The Court lifted a preliminary injunction that kept the federal government from implementing new asylum rules.