



# The Massachusetts Chapter of The Federal Bar Association

Matthew C. Baltay - Editor

NEWSLETTER • APRIL 2011

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## President's Column

*by Christopher P. Sullivan*



Wow! What a winter! One of the snowiest ever is finally coming to a close. Take heart, spring is here. Opening day for the Red Sox is here, so we have officially survived another New England winter. The snow didn't slow our chapter down one bit. We were busy sponsoring and co-sponsoring many programs as well as planning some very important upcoming events.

We just held our Annual Judicial Reception on Tuesday April 5 at the Boston Harbor Hotel. We honored Chief Judge Sandra Lynch of the First Circuit Court of Appeals for her outstanding contributions to the legal community. We had a fantastic turnout and great show of support for Chief Justice Lynch.

This winter also marked a time of great change for our District Court. Judge Denise Jefferson Casper was sworn in, Judge Nancy Gertner announced her retirement from the bench and Judge Ponsor will soon be taking senior status. The chapter has contacted Senator John Kerry and offered our assistance in helping to find outstanding candidates for the newly created vacancies.



Chief Judge Lynch receiving the FBA Award on April 5



Chief Judge Sandra Lynch at the Judicial Reception

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In January, I had the opportunity to meet with Chief Judge Mark Wolf to discuss ways the Court and the FBA could work together to promote a greater sense of openness at the courthouse. Judge Wolf wants to make the courthouse more welcoming to all members of our community so that everyone who enters the courthouse feels a sense of belonging. The FBA supports that goal and will work with Judge Wolf to achieve it.

Our chapter has created a pro bono mediation program where attorneys volunteer to represent pro se litigants in the a mediation of their case. The volunteer attorney files a notice of limited appearance for purposes of the mediation only. If the mediation is successful, the case is over. Should the mediation fail to resolve the matter, the volunteer attorney files a notice of withdrawal and has no further involvement in the case. FBA immediate past presidents Eve Stacey and Chris Kenney worked with Chief Magistrate Judge Judith Dein to create the program. Chapter vice president Matthew Moschella serves as the administrator of the program and chapter liaison. On January 19, 2011 Magistrate Dien and Matt Moschella put on a training session for all volunteer attorneys who wanted to be on the Pro Se Mediation Panel. More than 250 volunteer attorneys attended the training program, which was an outstanding success. Magistrate Judge Leo Sorokin chose the first case and FBA Executive Board member Bill Rocha has agreed to represent the first pro se litigant in the program.

FBA members Raquel Ruano and Ally Alland volunteered to lead our chapter's award winning Job Interviewing Skills Workshop for participants in the court's CARE and RESTART programs. Raquel and Allie have been working with Judges Hillman & Sorokin the next workshop scheduled for Wednesday May 4. There will also be a clothing drive to help these workshop participants to get proper interview apparel. They are very interested in men's clothes – mostly shirts and ties. This workshop will be co-sponsored with the Massachusetts Black Lawyers Association. Speaking of the MBLA, it held its Annual Gala last month and our chapter sent a letter of congratulations to the organization and its honoree award recipients for the annual event.

Our chapter's "Breakfast with the Judge" series run by president-elect Mary Jo Harris continues to be a big hit with both bench and bar. Recently, Judge Douglas Woodlock spoke at a breakfast event that explored the disclosure obligations of prosecutors. This program, well attended by prosecutors and defense attorneys, provided a lively, interesting and highly informative discussion. The frank exchange of views allowed all sides to hear the perspective of the others participants in the process. In the next of the series, Judge William Young led a discussion on the Effective Use of Experts on March 24. That program was well-delivered and received. Executive Board members Jack Schecter and Bill Rocha are working with Mary Jo Harris on planning a breakfast regarding patent claim construction, which will be announced shortly.

On March 9, the FBA co-sponsored a seminar with the BBA on evidence-based practice in community corrections on March 9. Assistant U.S. Attorney John Wortman lead the program. Our chapter also co-sponsored a two-day seminar on the False Claims Act with Suffolk University Law School on March 24 and 31. Our chapter is also co-sponsoring a seminar on Trade Secrets with the Boston Patent Law Association on April 7. This program will be held at Fish & Richardson. We are also co-sponsoring an event with the Massachusetts Bar Association on May 4 at 4:30 p.m. with Judge Ponsor and Magistrate Judge Neiman at the Courthouse in Springfield.

Our Young Lawyers Division, under the able leadership of YLD President Alex Henlin, is hard at work planning some really great events to follow up on the outstanding programs the YLD has already sponsored. To find out more, read Alex's report on the YLD in this newsletter.

Plenty more is happening in the chapter this year, but time and space won't allow me to continue. I guess all that snow this winter didn't slow us down at all!

### List of Chapter "Chairs"

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## FBA Judicial Reception April 5



*Bill Erickson, James Harrington, Chris Sullivan, Anthony Froio, Lisa Furnald*



*Judge Lynch, William Lee, Chief Magistrate Judith Dein*



*John Donovan, J.W. Carney, Jr., Charles Rankin, Judge O'Toole*



*Michael Collora, Judge Stearns*



*Judge Woodlock, Bob Kaler, Stephen Hall, Jennifer Itzkoff*



*Judy Levinson, Judge Hinkle, Sandra Moody, Judge Lynch, Mary Ryan*



## **Ginny Hurley Appointed New Court Liaison to Federal Bar Association**

The FBA is pleased to announce that Ginny Hurley of the United States District Court for the District of Massachusetts Clerk's Office has been appointed as the Court's Liaison to the Federal Bar Association, Massachusetts Chapter. Ms. Hurley replaces Michelle Rynne, who ably served in that role since 2007.

Ginny Hurley's connection to the Federal Court and the Boston legal scene is in her DNA. Her grandfather, Joseph Hurley (after whom a Boston elementary school is named), served as an Assistant US Attorney in the 1930s and her father, Walter Hurley, a well-known Boston lawyer and later Boston Municipal Court Judge, started his legal career clerking for federal judge William T. McCarthy. Ginny fondly recalls visits as a child to the McCormack Courthouse while her father clerked there. Ginny started her career with the Federal Court in 1976 and specifically recalls her first day in August of that year was the day that Hurricane Belle hit Boston.

Ginny has served in the Clerk's Office since 1976 in many roles in operations, systems and presently in education and outreach. As Education and Outreach Coordinator for the Court, Ginny regularly arranges and participates in educational programs for the community and bar, helps arrange visits by judicial figures from other jurisdictions (most recently a delegation from the Ukraine) and the like.

Ginny's experience with and knowledge of the Federal Court will prove invaluable in her role as Court Liaison to the FBA. She has already become immersed in FBA matters and has led an FBA breakfast session on ecf electronic filing and participated in a presentation on federal court practice with the FBA's Young Lawyers Division.

We welcome Ms. Hurley and look forward to a productive working relationship.

## **Membership Update**

*BY JACK C. SCHECTER, SUNSTEIN KANN MURPHY & TIMBERS LLP*

The Massachusetts Chapter of the Federal Bar Association would like to acknowledge our new members who have joined the Chapter in the first quarter of 2011. Please extend a warm welcome to the following:

- **Brian P. Bialis**, Foley Hoag LLP
- **Michael S. Caccese**, K&L Gates
- **Dennis C. Carter**, Carter & Doyle, LLP
- **Daniel Ciccariello**, Law Office of Daniel Ciccariello
- **John J. Commisso**, LibbyHoopes, P.C.
- **L. David Ferrari**, Law Office of L. David Ferrari
- **Nancy Frankel Pelletier**, Robinson Donovan PC
- **Jason Toby Green**
- **Elissa Harrison Daniel Ciccariello**, Law Office of Daniel Ciccariello
- **Stephen L. Rossetti Jr.**, Cetrulo & Capone LLP
- **Trayne Saxton Wheeler**, K&L Gates LLP

We encourage all our members to spread the word about the benefits of membership in the FBA and the Massachusetts Chapter. Members have the opportunity to participate in the activities and events our chapter offers, including our "Breakfast With the Federal Bench" series of educational talks, with upcoming meetings focused on expanding the dialogue between the federal bench and bar. In addition to substantive programs on civil and criminal topics, our members also enjoy social events throughout the year, and we are currently planning a gathering to explore "The Law of Wine," including a brief lecture on wine-related legal issues followed by a wine tasting. Our section events provide excellent opportunities to learn more about the FBA, and we encourage you to invite your colleagues considering membership to attend.

The FBA's online application form can be accessed through the following url: <https://members.fedbar.org/eWeb/DynamicPage.aspx?WebCode=FBAAddMemberAccount1>.

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## **Report from the FBA National Mid-Year Meeting**

*By Susan Weise, City of Boston Law Department*

Over the weekend of March 18-19, 2011, I was pleased to represent the Massachusetts Chapter at the Federal Bar Association's annual Mid-Year Meeting in Alexandria, Virginia as the National Delegate. I was joined by Scott P. Lopez from the Executive Board.

The meeting was hosted by the current FBA president, Ashley L. Belleau from New Orleans, Louisiana. After welcoming all the chapter delegates, she began by stating that the FBA currently has over 16,000 members and that over ninety percent of all federal judges belong to the FBA, and many are serving in different capacities; either on their Chapter's board or as Chapter officers or as members or officers of National. Other items of note were: this year the FBA filed amicus briefs in the areas of attorney client privilege, veterans benefits and judges' salaries. The FBA also has been very committed to persuading congressional leaders to move judicial nominations along as there is a larger than average backlog of pending nominations. Indeed, the FBA co-sponsored in February with the Brookings Institution a program to address the concerns of the number of judicial vacancies and ideas on how to promote movement in the nomination process. The Vice-Presidents of the Circuits are going to the Hill at the end of April to lobby for this cause.

Judge Jay C. Zainey of the Eastern District of Louisiana then gave a very passionate speech about a program he has initiated in Louisiana, SOLACE, which is a bank of contacts that may lead to aid or assistance for a member of the legal community in need such as finding someone with a connection to a medical transport helicopter to transport a lawyer and his family from South Africa. He urged other chapters to become part of this program.

The delegates from the different chapters then discussed with each other their best practices and ideas from their chapters and also gave a brief report to the attendees of some of those ideas. For instance, I spoke about our chapter's breakfast series allowing for a limited number of participants to meet with a judge on a particular topic in the judges dining room which allows for some important face time with the judges. Some other ideas from other chapters included brown bag luncheons, yearly breakfasts with the chapter's U.S. Senators and free admission for one year for new admittees to the Circuit.

A luncheon followed at Noon with an entertaining speech by General William K. Suter, the Clerk of the United States Supreme Court since 1991. He shared many memorable anecdotes about the goings-on behind the scenes at the Court.

The National Council held their meeting in the afternoon. There was a very spirited discussion about amendments to the FBA's Constitution as well as reports from several of the divisions and sections. This was followed by a cocktail reception.

The Annual Conference will take place from September 8-10, 2011 in Chicago.

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## **Young Lawyers' Division Starts Active 2011**

*by Alexander G. Henlin, Edwards Angell Palmer & Dodge LLP*

The Massachusetts Chapter's YLD opened what it plans to be an active 2011 with an entertaining event on January 13. Co-sponsored by the Massachusetts Criminal Bar Association, the YLD hosted "The Art of Storytelling: Practical Advice on Opening Statements and Closing Arguments in Federal Court." YLD Secretary Lisa Skehill Maki (City of Boston Law Department) was the lead organizer for the YLD. Panelists for the ninety-minute program were US Magistrate Judge Marianne Bowler, US Magistrate Judge Timothy Hillman, Assistant US Attorney Rachel Splaine Rollins, and Attorney Joseph Oteri. The forty attendees received useful advice from both bar and bench, and were treated to some rhetorical theatrics at the end of the discussion.

The YLD next hosted a program to compare and contrast the experience of practicing in federal court with Massachusetts state court. An eager group gathered in US District Judge Richard Stearns' courtroom on March 10 to hear some practical perspectives from the bench. Joining Judge Stearns on the panel were Ms. Virginia Hurley from the Federal District Court Clerk's Office (and FBA Liaison), Attorney Michelle Schaffer, and Attorney William Rocha. Participants at the hour-long program had time to ask questions and talk with the panelists following the discussion.

On March 24, young lawyers from the Massachusetts Bar Association and the Federal Bar Association participated in a fun and productive session of speed networking. Over 30 attorneys attended the event. The "speed networking" format provided participants with an opportunity to meet briefly with 10 different attorneys to discuss their practice areas, career goals, and prospects for future collaboration. The MBA generously provided a cocktail reception after the event.

The YLD has additional programs in the works, including a planned summer event for current law students, in the form of a job-skills interviewing workshop.

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## **Judge Woodlock Discusses Prosecutors' Discovery Obligations at FBA Breakfast**

*by Scott P. Lopez, Lawson & Weitzen, LLP*

On January 19, 2011, the Massachusetts chapter of the FBA hosted one of its "Breakfast with the Bench" series featuring the Honorable Douglas P. Woodlock. Judge Woodlock facilitated a discussion with the attendees concerning prosecutors' discovery obligations in criminal cases.

Judge Woodlock began the discussion by highlighting the seriousness of the issues to be discussed and distributing a recent article from *The New Yorker* written by Jeffrey Toobin concerning the unsuccessful prosecution of Senator Ted Stevens and the subsequent suicide of one of the prosecutors involved in the case whose role was being investigated by the Office of Professional Responsibility at the time of his untimely death.

Judge Woodlock next discussed the Memorandum for Department Prosecutors issued by Deputy Attorney General David W. Ogden in January 2010 and its impact over the past year. Judge Woodlock noted that while the Memorandum provides useful guidance to federal prosecutors concerning their discovery obligations, he expressed his belief that in the District of Massachusetts, the Local Rules concerning discovery in criminal cases have resolved, for the most part, many of the Brady issues discussed in the Memorandum. Judge Woodlock also commented that Brady issues are most likely to arise in the context of federal sentencing and, in particular, during evidentiary hearings at the time of sentencing.

Judge Woodlock also discussed the First Circuit's recent decision in *United States vs. Prochilo*, 629 F.3d 264 (1st Cir. Jan. 13, 2011), wherein the Court reversed a district court order requiring the government to disclose all cooperator-related material in its possession. Noting that the defendant's discovery motions were general and speculative in nature, the 1st Circuit held that the district court's order shifted from the government to the defendant the primary authority to assess whether material in the government's possession must be disclosed, and in so doing endorsed a broad rule of discovery in criminal cases that is not permitted by Brady. Judge Woodlock suggested that *Prochilo* will require defense counsel to be more diligent and selective when requesting Brady material.

After discussing the *Prochilo* case, Judge Woodlock asked the attendees for their input. Because the attendees included federal prosecutors and defense counsel, there was a candid discussion about discovery in criminal cases and the Brady issues that may arise. In particular, two of the prosecutors discussed how they handle Brady issues and what they do when specific requests for information are received. Also discussed was the burden that Brady places on defense counsel and the strategic decisions that can be involved. Finally, Judge Woodlock ended the program by informing the attendees that if they have constructive and specific suggestions for a change to the Local Rules, they can write to Judge Saylor, who is the current Chair of the Rules Committee.

## Supreme Court Round-Up



### The Supreme Court Extends Title VII's Retaliation Protections to Third Parties

by Ian P. Prior, City of Boston Law Counsel

In a January 24, 2011 9-0 decision written by Justice Scalia, with a concurrence from Justice Ginsberg, the Supreme Court held in *Thompson v. North American Stainless* that employers could be liable to third parties who were terminated based on a relationship with a co-worker that had engaged in the protected action of filing a complaint with the EEOC.

The Petitioner, Eric Thompson ("Thompson"), and his fiancée, Miriam Regalado ("Regalado"), both worked for the Respondent, North American Stainless, LP ("NAS"). In February 2003, the EEOC informed NAS that Regalado had filed a charge alleging sex discrimination. Three weeks later NAS terminated Thompson. After initially filing a charge with the EEOC, he filed a Title VII lawsuit against NAS in the United States District Court for the Eastern District of Kentucky. The District Court granted NAS's motion for summary judgment on the grounds that Title VII did not protect third parties from retaliation. The Sixth Circuit Court of Appeals, sitting en banc, affirmed the District Court on the grounds that Thompson had not engaged in protective action and thus could not maintain a retaliation claim. The Supreme Court granted certiorari and addressed two questions: (1) was NAS's termination of Thompson an unlawful retaliation, and (2) does Title VII grant Thompson a cause of action.

With respect to the first question, the Court determined that NAS unlawfully retaliated against Thompson by terminating him. The Court relied in part on Title VII's anti-retaliation provision, which "prohibits any worker action that well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." The Court concluded that a reasonable person might be dissuaded from engaging in protected activity if she knew her fiancée would be fired, thus NAS's action constituted unlawful retaliation in violation of Title VII.

The Court then addressed the more difficult question of whether Thompson had a cause of action. The Court declined to follow earlier dictum that indicated that a person that has standing to sue under Article III of the U.S.

Constitution also has standing under Title VII. Rather, the Court found that the better test for Title VII standing was to only allow lawsuits from employees that fall within the “zone of interests sought to be protected by the statutory provision whose violation forms the legal basis for his complaint.” The Court found that Thompson fit within that “zone of interests” and reversed the judgment of the Sixth Circuit and remanded for further proceedings.

Justice Ginsberg concurred by noting that the Court’s judgment accords with the longstanding view of the EEOC, which counsels in its manual that Title VII “prohibits retaliation against someone so closely related to or associated with the person exercising his or her statutory rights that it would discourage or prevent the person from pursuing those rights.”

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## **A Dose of Their Own Medicine: Vaccine Manufacturers Held Immune from State Law Design Defect Claims**

*by Joseph Lucia, Foley Hoag LLP*

On February 22, 2011, the United State Supreme Court issued a 6-2 decision in the case of *Bruesewitz v. Wyeth LLC*, holding that the National Childhood Vaccine Injury Act of 1986 (NCVIA) preempts all design-defect claims against vaccine manufacturers brought by plaintiffs who seek compensation for injury or death caused by vaccine side effects.

The NCVIA was enacted in response to rising concerns among public health officials that, as more and more litigants encountered difficulty in obtaining compensation for legitimate vaccine-inflicted injuries, parents across the country would begin declining vaccinations for their children in greater numbers, a phenomenon that threatened the efficacy of vaccines altogether. In enacting the NCVIA, Congress intended to stabilize the vaccine market and facilitate compensation for vaccine-related injuries. Under the Act, a person injured by a vaccine may file a petition for compensation in the United States Court of Federal Claims, naming the Secretary of Health and Human Services as the respondent. Within 240 days, a special master is required to make an informal adjudication of the petition, objections to which are reviewed by the Court of Federal Claims, which then enters final judgment. A claimant may choose to accept the Court’s judgment and forego a traditional tort suit for damages, or the claimant may reject the judgment and seek tort relief from the vaccine manufacturer.

Claimants who show that a listed injury – that is, an injury reasonably expected to occur as the result of a known side effect – first manifested within the time frame for which such injuries are reasonably expected to occur are

entitled to compensation, no questions asked. Unlike in tort suits, claimants are not required to show that the administered vaccine was defectively manufactured, labeled or designed. In exchange for this benefit to vaccine consumers, the federal statute provides significant tort-liability protection for vaccine manufacturers in the form of immunity from design-defect claims.

The Court in *Bruesewitz* addressed this quid pro quo provision of the statute in the context of a claim brought on behalf of a young girl in Pennsylvania named Hannah Bruesewitz. Born on October 20, 1991, Hannah was administered doses of the diphtheria-tetanus-pertussis (DTP) vaccine according to the Center for Disease Control’s recommended childhood immunization schedule. Within 24 hours of her April 1992 vaccination, Hannah began to experience seizures, suffering over 100 of them within a single month. Her doctors eventually diagnosed her with “residual seizure disorder” and “developmental delay.”

In April 1995, Hannah’s parents filed a vaccine injury petition in the U.S. Court of Federal Claims, alleging that Hannah suffered from listed injuries. A Special Master denied their claims, an unfavorable judgment that Hannah’s parents ultimately rejected. They then filed suit in Pennsylvania state court alleging that the defective design of the DTP vaccine caused Hannah’s disabilities and that the vaccine’s manufacturer, Lederle Laboratories (now owned by the defendant, Wyeth LLC), was subject to both strict liability and liability for negligent design under Pennsylvania common law.

Upon removal to federal court, the U.S. District Court for the Eastern District of Pennsylvania granted summary judgment in the defendant’s favor, reasoning that the Pennsylvania law providing relief for the causes of action alleged was preempted by the NCVIA. On appeal, the U.S. Court of Appeals for the Third Circuit affirmed that judgment.

The United State Supreme Court agreed to hear the case on further appellate review to address the question of whether the preemption provision contained within the NCVIA did in fact bar state-law design defect claims against vaccine manufacturers. The Court held that it did.

The specific statutory language at issue reads, “No vaccine manufacturer shall be liable in a civil action for damages arising from a vaccine-related injury or death associated with the administration of a vaccine after October 1, 1988, if the injury or death resulted from side effects that were unavoidable even though the vaccine was properly prepared and was accompanied by proper directions and warnings.”

The Court reasoned that the language of this provision suggests that the design of a vaccine is “a given, not subject to question in a tort action.” According to the

Court, “What the statute establishes as a complete defense must be unavailability (given safe manufacture and warning) with respect to the particular design. Which plainly implies that the design itself is not open to question.” (emphasis in original)

Perhaps of most interest in this case is the Court’s discussion of Comment k to the Restatement (Second) of Torts, § 402A. According to the Court, the NCVIA’s use of the term “unavoidable” does not invoke any understanding attendant to the term of art “unavoidably unsafe products” as used in that Comment. Nevertheless, the Court takes the time to enumerate in a footnote a litany of court decisions in which that Comment has been applied in a parallel context to immunize from strict liability prescription drug manufacturers whose products’ side effects caused injuries to consumers.

The United States Court of Appeals for the First Circuit presently has pending before it an appeal out of New Hampshire involving precisely this issue – injuries to a consumer caused by the known side effects of a prescription drug. It will be interesting to watch how the First Circuit adjudicates that appeal and specifically whether or not it takes any cues from the Supreme Court’s most recent decision in this area of the law.

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## Supreme Court Sides with Broader Transparency Under FOIA

by *Brian K. Wells, Robins, Kaplan, Miller & Ciresi L.L.P.*

In two recent decisions, the United States Supreme Court examined the scope of two separate exemptions under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. FOIA requires that federal agencies make government records available but exempts nine categories from disclosure. These rulings illustrate that these exemptions are to be construed narrowly based on each exemptions’ plain wording.

On March 7, 2011, the Court held in *Milner v. Department of the Navy* that Exemption 2, allowing for the withholding of documents “related solely to the internal personnel rules and practices of an agency,” 5 U.S.C. § 552(b)(2), only exempted documents that “relate to issues of employee relations and human resources.” In doing so, the Court rejected the Navy’s argument that this exemption encompassed “predominately internal matters” whose disclosure would “significantly risk circumvention of agency regulations or statutes.”

Glen Milner requested the documents-at-issue from the Navy in 2003 and 2004. Specifically, he requested documents relating to Explosives Safety Quantity Distance (“ESQD”) information relating to Indian Island base in

Puget Sound, Washington. ESQD prescribes the minimum distance for explosives which the Navy utilizes to safely store explosives “to prevent chain reactions in case of detonation.” The Navy refused to produce this data, relying upon Exemption 2, because disclosure would threaten the security of the base.

The District Court of Washington sided with the Navy, and the Court of Appeals for the Ninth Circuit affirmed its decision. These courts relied upon an expansive interpretation of Exemption 2 that included documents that are “predominantly used for [an] internal purpose” where disclosure would “risk circumvention of the law.” This broad interpretation was in conflict with other Circuits and a result the Court granted certiorari to rule on Exemption 2’s meaning.

To ascertain Exemption 2’s scope, the Court started with its plain language. The Court noted that the key word in “related solely to the internal personnel rules and practices of an agency” was personnel. Personnel means “the selection, placement, and training of employees and the formulation of policies.” Exemption 2, as well as other parts of FOIA, used personnel in this way. Thus, the Court concluded that personnel in Exemption 2 limited the exemption to documents relating to “the selection, placement and training of employees.” In doing so, it rejected the argument that Exemption 2 also covered “predominately internal matters” whose disclosure would “significantly risk circumvention of agency regulations or statutes.”

The Court observed that the narrow interpretation of Exemption 2 would effectuate Congress’ purpose for FOIA, i.e. broad disclosure of government documents. Further, it noted that Exemption 2’s ambiguous legislative history could not be used to change the plain meaning of “personnel” where the statutory language was clear. Thus, relying on the plain language and FOIA’s overall purpose, the Court adopted this narrow interpretation. Applying this interpretation, the Court rejected the Navy’s withholding of the ESQD documents under Exemption 2.

The Court also explicitly addressed the Navy’s alternative readings of Exemption 2. First, the Court discredited the Navy’s contention that the legislative history compelled a broader reading of Exemption 2 because a broad interpretation ignored the clear statutory text. Second, the Navy contended that the broad interpretation had been relied upon for 30 years since the Court of Appeals for the District of Columbia interpreted it as such in *Crooker v. Bureau of Alcohol, tobacco & Firearms*, 670 F. 2d 1051 (1981). In rejecting this argument, the Court astutely observed that previous courts ignoring statutory language cannot provide it the basis for continuing to ignore such language. In sum, the Court reaffirmed in

Milner that when interpreting FOIA exemptions, it will construe such exemptions narrowly based on the plain words found in the statute.

In a similar case, the Court held on March 1, 2011, in *Federal Communications Commission v. AT&T Inc.*, that corporations were not protected by Exemption 7(C). This exemption allowed the withholding of “records or information compiled for law enforcement purposes” that “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(7)(C). At issue was the whether “personal privacy” applied to corporations.

The FOIA request was submitted by CompTel, an association of AT&T’s competitors, requesting that the Federal Communications Commission (the “FCC”) produce “all pleadings and correspondence” relating to an investigation of AT&T. AT&T objected to this request; partially under Exemption 7(C). The FCC agreed with AT&T to the extent it sought to exempt production of documents that would “constitute an unwarranted invasion of personal privacy” of individuals. The FCC, however, found that this exemption did not apply to corporations such as AT&T. AT&T sought review in the Court of Appeals for the Third Circuit.

The Third Circuit overruled the FCC and held that Exemption 7(C) applied to corporations. It reasoned that Congress defined “person” to include corporations. 5 U.S.C. § 551(2). It stated that though “personal” was undefined, it was an adjective derived from “person.” It noted that “[i]t would be very odd indeed for an adjectival form of a defined term not to refer back to that defined firm” to conclude that “personal” covered corporations. The FCC appealed.

In an opinion that would delight a wordsmith, the Court disagreed with the Third Circuit’s reasoning because adjective do not always reflect the meaning of the corresponding noun. It provided colorful examples to illustrate as such: crabby does not necessarily reflect the meaning of crab (the crustacean or type of apple); the meaning of corny has little to do with corn (the food); and, cranky does not perfectly reflect the meaning of crank. Summing these observations up, the Court rejected this argument because “a noun and its adjective form may have meanings as disparate as any two unrelated words.”

Rather, the Court gave the undefined term “personal” its ordinary meaning. “Personal,” it noted, “ordinarily refers to individuals.” It emphasized this fact by observing, “[w]e do not usually speak of personal characteristics, personal effects, personal correspondence, personal influence, or personal tragedy as referring to corporations or other artificial entities.” The Court gave a more pithy observation that a company spokesman generally would not respond

to a question seeking business information with “that’s personal.” Overall, the Court found that the plain meaning of “personal” did not include corporations.

To further bolster this interpretation, the Court noted that personal was found in the term “personal privacy.” Personal privacy is “a type of privacy evocative of human concerns,” and not corporations. The Court noted that “personal privacy” did not apply to corporations a t common law. Finally, it relied upon other sections of FOIA that used “personal” in a manner that referred to individuals. Thus, it concluded, because Exemption 7(C) protects the “unwarranted invasion of personal privacy,” this exemption does not apply to corporations. AT&T, therefore, could not withhold documents under this exemption.

And for those readers worried about AT&T’s feelings in light of this decision, they would be wise to appreciate Justice Roberts’ wry, perhaps even tongue-in-cheek, conclusion: “We trust that AT&T will not take it personally.”



*Lisa Tittmore, Elizabeth Bostwick, Jack Schecter at the Judicial Reception*



*The Law Clerks: Katherine Wagner for Judge Woodlock, Connie Wu for Judge Stearns, Floriane Lavaud for Judge Woodlock at the Judicial Reception*

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