Federal Jurisdiction

Federal Bar Association Utah Chapter Newsletter Summer 2016

by Scott Young

President's Message

Namaste. I was supposed to repeat the word and conclude my yoga session at the FBA's inaugural Zen in Zion event at the Southern Utah Symposium, but, contorted as I was, I couldn't quite pull it off. Instead, I collapsed to the ground and took in the crimson cliffs soaring into the sky across the Virgin River. This was my inauspicious conclusion to a very insightful weekend.

Our Chapter has had an eventful and impactful spring. On April 19th, we hosted the Schoolhouse to Courthouse Event, which brought 7th and 8th graders to federal court to observe hearings and question Judge Kimball, Judge Parrish, and former Magistrate Judge Sam Alba about their respective paths to the federal bench. There is an article in this newsletter describing the impact this event had on these students.

The Southern Utah Law Symposium where I failed so miserably at yoga featured panels and presentations by 13 of our federal judges, United States Attorney John Huber, Federal Defender Kathy Nester, SEC Director Richard Best, and Salt Lake Tribune reporter Tom Harvey. It also featured three fantastic keynote presentations. Attorney General Sean Reyes presented on human trafficking and his involvement in a sting operation in Colombia. SCOTUSBlog Founder Amy Howe discussed the current cases pending before the Supreme Court and the impact the death of Justice Antonin Scalia has had on the Court. And Mark Curriden, an author and reporter, took the audience to Chattanooga, Tennessee circa 1906 when a wrongfully convicted African-American man's habeas corpus petition triggered a series of events that led to the only criminal trial conducted by the United States Supreme Court. It was a heartbreaking and riveting tale that reminded each of us of the power in taking up a just cause. An article on this event is also included in this newsletter.

One week later, our criminal law seminar brought together prosecutors and judges to discuss emerging issues in criminal practice, including analysis of *Johnson v. U.S.*, 135 S.Ct. 2551 (2015), and a presentation on The CSI Effect by the Honorable Donald Shelton, the Director of the Criminal Justice Studies program at the University of Michigan Dearborn.

These events have helped us fulfill the mission of the Federal Bar Association to strengthen the federal legal system and administration of justice by serving federal practitioners, the federal judiciary, and our community. Who cares if I had to pull a few muscles along the way. *Namaste*.

In This Issue

by David J. Holdsworth

Witnessing The Iconic Civil Rights Marches Of The 1960's

In commemoration of the 50 year anniversary of the passage of the Voting Rights Act, the FBA Utah Chapter and 100 guests spent a delightful evening on March 8, 2016, with Pastor France Davis of Salt Lake City's Calvary Baptist Church. Pastor Davis' subject was "Witnessing the Iconic Civil Rights Marches of the 1960s."

Pastor Davis began his remarks by telling the audience a little bit about himself, recounting that he had been born and reared in Georgia during the Plessy v. Ferguson era, when "separate but equal" was the law of the land. He recalled with some fondness about going to "colored" schools and about the closeness of the African American communities in the segregated South of his youth.

He then described (with some humor) his year at the Tuskegee Institute and then his life in the military (he served in Thailand during the Vietnam War).

Pastor Davis then explained how it came about that he came to reside in Utah and how he has lived and worked in Utah for the past 44 years.

After giving the audience this background, Pastor Davis recounted how he had become involved in the march for the Voting Rights Act in Selma, Alabama, in 1965. He also told the audience how he had participated in the August 28, 1963, march on Washington, D.C., during which Dr. Martin Luther King. Jr., gave his famous "I have a dream" speech.

Pastor Davis explained that, while that speech is justly famous, his favorite of Dr. King's speeches was Dr. King's "how long, not long" speech, which he delivered on the steps of the State Capitol in Montgomery, Alabama, at the conclusion of the Selma to Montgomery march (March 25, 1965).

He then posed the question: "Where are we in 2016?" He answered by observing the economic inequality in our communities and encouraged those assembled to look for ways to help the homeless, veterans, the under privileged, and the immigrants and refugees in our midst.

Pastor Davis then asked for questions from the audience and addressed such topics as the effect of desegregation on the African American communities in the south, the behind-the-scenes preparation for the Selma march and how the organizers tried to use the northern press as a tool to achieve their objectives.

Pastor Davis ended his remarks with the exclamation, "The march is over, but we still have some marching to do."

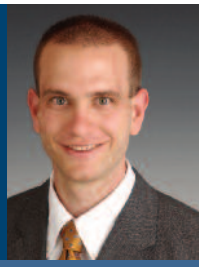
The FBA salutes Pastor Davis for his courage and contributions to our community and thanks him for his willingness to share his memories of participating in the iconic civil rights marches of the 1960s.

For those looking for more information about the civil rights revolution, I recommend:

- *An American Dilemma*, Myrdal, Gunner (1994)
- *Turn Away Thy Son, Little Rock: The Crisis That Shocked The Nation*, Jacoway, Elizabeth (2007)
- *Ghosts of Mississippi*, Vollers, Maryanne (1995)
- *Like a Mighty Stream: The March On Washington August 28, 1963*, Bass, Patrick Henry (2002)
- *My Soul Is Rested: The Story Of The Civil Rights Movement in the Deep South*, Raines, Howell (1977)
- *Protest At Selma: Martin Luther King, Jr., And The Voting Rights Act Of 1965*, Garrow, David J. (1978)
- *Free At Last. The Civil Rights Movement And The People Who Made It*, Powell, Fred (1991)
- *The Trilogy: Parting The Waters, America In the King Years: 1954-1963*, (1988), *Pillar of Fire. America In The King Years: 1963-1965*, (1998), *At Canaan's Edge. America In The King Years: 1965-1968*, Branch, Taylor (2006)
- *Carry Me Home Birmingham Alabama, The Climactic Battle Of The Civil Rights Revolution*, McWhorter, Diane (2001)
- *The Race Beat. The Press, The Civil Rights Struggle And The Awakening Of A Nation,* Roberts, Gene and Klibanoff, Hank (2006)

Of particular interest to lawyers would be:

- *Crusaders In the Courts. How A Dedicated Band of Lawyers Fought For the Civil Rights Revolution*, Greenberg, Jack (1994)
- *Unlikely Heroes. The Dramatic Story Of The Southern Judges Who Translated The Supreme Court's Brown Decision Into A Revolution For Equality*, Bass, Jack (1981)

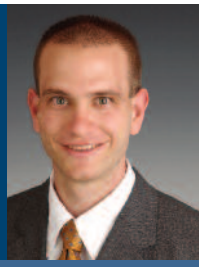


by Scott Young

From the Schoolhouse to the Courthouse

On April 19, 2016, the Utah Chapter of the Federal Bar Association hosted 55 students from Westlake Junior High School in its inaugural Schoolhouse to Courthouse event. This event was part of the FBA's National Community Outreach Project, in which chapters across the country scheduled events in April to serve their communities. The Schoolhouse to Courthouse event brought a diverse group of junior high students to the federal courthouse where they observed a change of plea and a sentencing before Judge Kimball. They then had the opportunity to hear Judge Kimball, Judge Parrish, and former Magistrate Judge Sam Alba describe their career paths and what it is like to be a judge. The students then ate lunch with the judges and asked the judges questions about life and the law. The questions ranged from procedural ("How did you become a judge?"), to practical ("How much do judges get paid?"), to political ("Why are they called illegal 'aliens'?"). In addition to the judges, Roula's Café played a starring role, providing a delicious lunch that had two kids asking, "How do they make those brownies? They were delicious." Ah, Junior High, ah humanity!

The mission of the FBA is "to strengthen the federal legal system and administration of justice by serving the interests and the needs of the federal practitioner, both public and private, the federal judiciary and the public they serve." The Schoolhouse to Courthouse event served our community by showing the Westlake students how to pursue a legal career. The unique perspectives provided by Judge Kimball, Judge Parrish, and former Magistrate Judge Alba showed the students that such careers are not out of reach, a critical step in ensuring diversity and inclusion in the Utah legal community. Assistant Principal Josh Moore commented that the students "had a great time," and several teachers asked if the FBA would be hosting the event again. We look forward to events like this where we can reach out to the community and show them the good that is done in our legal system by devoted counselors and judges every day. If you have ideas for other community outreach projects, please contact me at 801.322.9123 or sy@scmlaw.com.



by Scott Young

Midyear Meeting Review

On April 2, 2016, over 160 Federal Bar Association members met in Washington, D.C. for the 2016 Midyear Meeting. Our own Mark Vincent presided over the meetings in his role as National President. Utah was also represented by Jon Hafen (Tenth Circuit Vice President and National Membership Committee Chair), Rob Clark (Past Chapter Board President and Past National President), and myself.

The meeting began with a collaborative discussion on law student engagement that featured speakers from the national Law Student Division and the Kansas and Western District of Missouri. One of the primary goals for the FBA, and each of its chapters, is to engage law students while in school and as they transition into practice.

The morning meeting was followed by a panel discussing "Policing the Police, from Rodney King to Ferguson: How Federal Authorities Review Alleged Police Misconduct and Enforce Civil Rights." This session featured Dr. Cedric Alexander, Police Chief in DeKalb County, Georgia, Barry Kowalski, Former Special Litigation Counsel for the Criminal Section of the Department of Justice, Carole Rendon, an Assistant U.S. Attorney from the Northern District of Ohio, and Steven Rosenbaum, Chief of the Special Litigation Section for the Civil Rights Division of the Department of Justice. This panel presented an array of viewpoints on the intersection of civil rights and police work, including the use of body cameras and policing in the Youtube world.

The National Council of the Federal Bar Association met in the afternoon, and President Mark Vincent announced that the charters for two new chapters – Nebraska and the Southern District of Illinois – had been approved by the Board of Directors. The next National Council will take place on September 14-17, 2017, in Cleveland at the 2017 Annual Meeting and Convention.

by Amber Mettler

Southern Law Symposium

The highlights from the FBA's 9th Annual Southern Utah Law Symposium in St. George, Utah, on May 13, 2016, were many and would take too many pages to describe in detail. However, here are a few highlights:

Reflections on the Downwinders case. The Honorable Judge Jenkins shared his thoughts about the Downwinders case, *Allen, et al. v. United States*, 588 F. Supp. 247 (D. Utah 1984), the most memorable case of his judicial career and possibly one of the most important cases ever to have been tried in the District of Utah. The case – involving 1,192 named plaintiffs – was filed in 1979. A bellwether bench trial was held over the course of 13 weeks in 1982. Judge Jenkins recounted that there were 98 witnesses, 7,000 pages of testimony, and 1,691 documentary exhibits! Judge Jenkins issued his 489-page opinion in 1984. Shortly after the opinion issued, Judge Jenkins traveled to Nigeria and Liberia where people were simply shocked that he had entered judgment against the United States government. The contrast of the tyranny in those countries with the liberty and judicial process in the United States could not have been starker. Justice, however, can be a slow moving beast. Twenty-three years after the case was filed, Congress finally passed legislation providing compensation to the plaintiffs and other victims.

Advocacy Tips in Bankruptcy Court. We were fortunate to hear from all four of our bankruptcy judges with various tips and thoughts on bankruptcy practice. Judge Mosier wisely advised the group that if you practice before the bankruptcy court you need to know what you're doing and if you don't know, don't say you don't know! He reminded practitioners to check the local rules and that things move fast in bankruptcy court. Judge Thurman recapped recent changes to the bankruptcy landscape brought about by the United States Supreme Court's decision in *Stern v. Marshall*, 542 U.S. 2 (2011). Judge Marker reminded practitioners to log onto PACER to get information on a debtor's other possible bankruptcies, and to check if your client has a bankruptcy pending. Judge Anderson gave a very interesting presentation on student loans and bankruptcy, explaining, among other things, that because student loans are not dischargeable and cannot be given a preference, debtors typically exit bankruptcy owing more on their student loans than when they entered bankruptcy.

Keynote Presentation-Supreme Court Update by Amy Howe, SCOTUSblog. Ms. Howe reported on important decisions from the 2015 term, many of which were viewed as victories by liberals, including the same-sex marriage case, the decision upholding the Affordable Care Act, and the 5-4 decision upholding a disparate impact cause of action under the Fair Housing Act. The expectation at the conclusion of the 2015 term was that the Court would likely swing back. So far this term, however, liberals are breathing a sigh of relief. The Court gave consumer rights advocates victories in a 6-3 decision in *Campbell-Ewald Company v. Gomez*, holding, in relevant part, that an unaccepted settlement offer or offer of judgment does not moot a plaintiff's case, and in a 6-2 decision in *Tyson Foods, Inc. v. Bouaphakeo*, holding that the district court did not err in certifying a class of employees who alleged that their employer's failure to pay them for putting on protective gear violates the Fair Labor Standards Act. In *Evenwel v. Abbott*, the Court ruled unanimously (8-0) that a stay or locality may draw its legislative districts based on total population – a decision that is being viewed as a victory for voting rights. And labor unions were pleased with the 4-4 split in *Friedrichs v. California Teachers Association*, following Justice Scalia's passing, affirming the ruling of the Ninth Circuit that leaves in place a system of "agency fees" for non-union teachers in California.

In looking ahead to the next term, Ms. Howe thinks we might be in for a change. So far, the Court has granted review in very few cases and in cases that are less sexy and interesting than the cases of late. We don't know whether or not this is related to Justice Scalia's death and the resulting vacancy, or just part of the normal course.

Recent Changes to the Federal Rules of Civil Procedure. Magistrate Judges Warner and Furse updated practitioners on recent changes to the Federal Rules of Civil Procedure, emphasizing that the new rules emphasize cooperation, proportionality, and accelerated timing. So, for example, service of a complaint is now required to occur within 90 days of filing – not 120 days. In addition, a scheduling order will issue within 90 days of service or within 60 days of filing an answer. In other words, if you want a stay of discovery deadlines during a pending motion to dismiss, you will need to seek such permission from the Court.

Jury Trials and Judicial Vacancies. Judge Shelby gave an impassioned talk on jury trials and judicial vacancies. As every practicing lawyer knows, jury trials are quickly becoming a thing of the past. In 2013, there were 27 jury trials in the District of Utah. That number slipped to 22 in 2014 and rebounded slightly to 24 in 2015. So far in 2016, there have been 11 jury trials. In Judge Shelby's experience, our juries work very hard, they are conscientious, they enjoy it, they pay attention, they follow the law, they recognize the importance of what they're doing, and, perhaps most importantly, they would want all of us to know that they heard us the first time. While praising the virtues of the jury system, Judge Shelby bemoaned the number of judicial vacancies across the

country, which vacancies include Judge Stewart's spot – vacant since he took senior status in September 2014.

Three Perspectives on White Collar Cases. Richard Best, Regional Director of the SEC, Brett Tolman, Ray Quinney & Nebeker, and Tom Harvey, Salt Lake Tribune, gave their perspectives on white collar cases. With respect to challenges in white collar cases, Mr. Tolman described the immense power of federal prosecutors and how overwhelming it can be for defendants. Mr. Harvey observed that it's challenging to find victims willing to be interviewed since they are often too embarrassed to speak out. Mr. Best emphasized the challenge of trying to get out ahead of the fraud and to stop it from happening in the first place; he noted that many, many victims do not understand affinity fraud.

RISE and Re-entry Courts. Magistrate Judge Wells described the history of the RISE and re-entry courts in the District of Utah, including Magistrate Judge Pead's recent initiative bringing re-entry courts to Tribal Lands, and a diversion program to be supervised by Judge Shelby. Magistrate Judge Braithwaite reported on his recent training to learn about re-entry courts and his effort to start such a court in St. George, Utah.

Federal Criminal Law Practice: The Roles of Prosecutor, Defense Counsel, and Judge. John Huber reported on updates from the United States Attorneys' Office and Kathy Nester described the role of the Utah Federal Defender Office. Both had competing video presentations and while Ms. Nester's experienced some technical difficulties, her sense of humor more than made up for it. The presentation and the day concluded when Judge Nuffer exercised his judicial authority to end the symposium a few minutes early.

Southern Law Symposium

Southern Law Symposium


Southern Law Symposium

Southern Law Symposium

by Nathan Crane

A Review Of The FBA'S 10th Annual Criminal Law Seminar

"10 gavels!" proclaimed Travis Thompson of the National Association of Federal Criminal Law Seminars, Conferences, and Miscellaneous Events.

"The seminar grabs a hold of you like a lobster trying to be put back in the sea." David Hendricks from the Midmorning To Late Afternoon Post, seminar, conference, and food reporter.

"It was a slow news day so I attended the Utah FBA Criminal Seminar." said Marcus Walton Salt Lake Trout Magazine.

The above is just a sampling of the rave reviews that the FBA's 10th Annual Criminal Law Seminar received on opening night. The Seminar started off with a scrumptious breakfast buffet highlighted by freshly squeezed orange juice. This wasn't the made from concentrate stuff that is sometimes passed off as fresh juice at other seminars. The presenters and the juice were the real deal.

Judge Dale Kimball and Judge Paul Warner

What followed the breakfast was a feast of information relevant to the practice of criminal law in federal court. We gorged ourselves on generous helpings of information from federal judges, federal prosecutors, a brilliant law professor, and prominent defense attorneys. We cracked open and dipped in succulent case law as broken down by the Supreme Court play by play callers Scott Wilson and Jeannette Swent. It was like watching Jon Gruden and Mike Tirico dissect a 4-3 cross-fire zone read blitz.

Public Defender Kathy Nester and U.S. Attorney John Huber

Just when the seminar could not get any better, the staff at the Hotel Monaco brought out the dessert plate's. At most seminars you spend the entire seminar talking about the Constitution and the freedoms that we enjoy and then they take away your freedom when it comes to the most important part of the day, your dessert selection. But not at the FBA's 10th Annual Criminal Law Seminar. The Seminar stands up and says this is America and you have a choice. Served was a large platter filled with a variety of the most taste tempting, tantalizing, indescribably delicious collection of sweets that would make the Sweet Tooth Fairy envious.

During the afternoon, the attendees sat in awe as the law duo of Public Defender Kathy Nester and U.S. Attorney John Huber entertained and delighted the audience with their legal knowledge and witty banter. It was what I would imagine a CLE presentation by Abbot and Costelo would be like. The seminar was book ended by Judge Dale Kimball and Judge Paul Warner who provided valuable insight into their perspectives on judicial approaches to criminal law issues.

"The FBA in Utah has done it again. We may never see such a collection of prominent attorneys in one place in our life time" declared Michael Jordan (not *that* Michael Jordan). Plans are already underway for the FBA's 11th Annual Criminal Law Seminar. As usual the organizers have been tight lipped on what they have planned for the Spring of 2017, but my inside source tells me that organizers have sent out a bid request to jugglers, balloon animal makers, and plate spinners, with priority going to those who can perform all three at once.

Immediately following the seminar, the organizers took the production on tour. Seminars have already sold out in Bronson, Missouri and Fargo, North Dakota. We look forward to seeing you in 2017.

Events Calendar

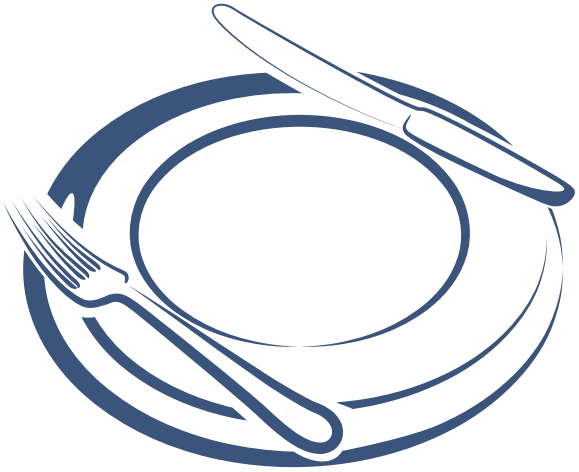
Tenth Circuit Bench and Bar Meeting, Colorado Springs, CO	*August 31-Sept. 3, 2016*
FBA National Convention, Cleveland, OH	*Sept. 15-17, 2016*
FBA Tri-State Seminar (UT, WY, and ID), Sun Valley, ID	*October 13-15, 2016*
Annual Ronald N. Boyce Seminar, SLC, UT	*October 24, 2016*
FBA Annual Awards Dinner, SLC, UT	*November 9, 2016*

Presented by the Idaho Chapter, Federal Bar Association

https://www.sunvalley.com/trip-planner/groups/ICFT

SAVE THE DATE!

November 9, 2016



Federal Bar Association, Utah Chapter Annual Awards Dinner

by Scott Wilson

Notable Decisions

Criminal Cases

United States v. Marceleno No. 15-2074 (10th Cir. April 11, 2016).

Defendant wished to withdraw plea based on actual innocence, that is, that he entered the United States under duress. A defendant's assertion of innocence is one of the (seven) factors a district court considers in determining whether a defendant can show a "fair and just" reason to withdraw his guilty plea. A defendant's assertion of innocence must be credible in order to weigh in favor of permitting him to withdraw his plea.

The district court determined that the defendant's account of being threatened by an alien-smuggling operation was not credible. Court of Appeals rejects defendant's argument that a district court must accept a defendant's version of events as true to evaluate whether his assertion of innocence is credible. The district court may evaluate the credibility of the defendant's story in determining whether he has made a credible assertion of innocence. There is a dissent: since defense counsel told defendant before the plea that duress was not a defense to the charge and since defendant said nothing in the plea that contradicts his duress-version of events, he ought to have been allowed to change his plea and go to trial.

McCormick v. Parker 14-7095 (10th Cir. May 3, 2016).

Certified sexual assault nurse examiner (SANE nurse) was a member of the prosecution team for Brady purposes. The prosecution was therefore obliged to disclose to the defense the fact that the nurse was not a certified SANE nurse when she testified that she was at defendant's trial (and a number of other defendants' trials as well). Nurse was a member of the prosecution team because she acted at the behest of law enforcement in the pre-arrest investigation of a crime. The court does NOT hold that any medical professional treating a victim of sexual assault is a member of the prosecution team for Brady purposes. Nor does the court opine on whether any expert who does not have a pre-charge investigatory role is a member of the prosecution team for Brady purposes. The evidence was material because the nurse offered the only corroborating evidence of victim's testimony that a sexual assault had taken place and prosecution relied on her testimony in closing. Two jurors testified in void dire that corroborating evidence of the victim's account would be important to them in determining whether to convict.

United States v. von Behren No. 15-1033 (10th Cir., May 10, 2016).

After he completed the sentence for his child pornography distribution conviction, a new condition was added to defendant's supervised release. The condition required him to successfully complete a sex offender treatment program, which in turn required him to answer questions about uncharged sexual crimes. He was also required to sign an agreement with the treatment provider acknowledging that the provider would report any sexual crimes thus admitted to the authorities. For a communication to qualify for Fifth Amendment privilege it must be testimonial, incriminating, and compelled. There is no doubt here that the statement was testimonial. It was also incriminating because answering a number of the proposed questions would have constituted admissions to felonies. The confessions would be enough for a "lead" or a link in the chain of evidence needed for prosecution, and that is enough for the statement to be incriminating. Moreover, propensity evidence is permitted in sex crimes and so the admissions could be used in another prosecution to show propensity. A witness is compelled as soon as the government threatens him with a substantial penalty. The compulsion analysis is not affected by whether one succumbs to the threat or stands on the Fifth Amendment right. Threatening to revoke supervised release unless a defendant answers incriminating questions is compulsion.

United States v. Villanueva, No. 14-6081 (10th Cir. May 2, 2016).

Court breaks new ground by applying the good-faith exception to the question of whether the magistrate signing the warrant was functioning as the neutral and detached magistrate required by the Fourth Amendment. The judge who signed the warrant had a rather extensive history with the defendant, having prosecuted him on a drug charge in earlier days, refused to accept a negotiated plea for the defendant once he had ascended to the bench, and recused himself in the defendant's son's paternity case. The court does not ask whether in fact the judge was neutral and detached, but instead proceeds directly to good faith analysis. Evidence obtained based upon a warrant signed by a non-neutral judicial officer must be suppressed only if the officer seeking or executing the warrant "could have, or should have, reasonably known about any alleged bias." Here there was "no outward appearance of any impropriety" and so the officer had no reason to know of any possible bias. Even if the judge were in fact biased under such circumstances, good faith would save the warrant. It doesn't help the defendant's argument that the Court goes on to find that there is probable cause to support the warrant.

by Kathlene Abke

Civil Cases

Shaw v. Patton, No. 15-6106, May 18, 2016 (W.D. Okla.)

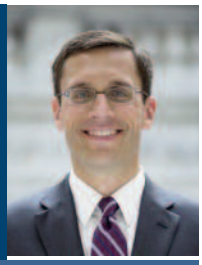
Plaintiff was convicted of sexual assault in Texas. Ten years after his conviction, he moved to Oklahoma where he was required by Oklahoma law to register as a sex offender for the decade-old conviction. The registration statutes were different than those that were in effect at the time of plaintiff's conviction and the 1998 registration requirements would have expired by the time plaintiff moved to Oklahoma in 1998. The plaintiff filed suit claiming that, as applied to him under the circumstances, Oklahoma's registration statutes constituted retroactive punishment in violation of the ex post facto clause of the U.S. Constitution.

The Tenth Circuit affirmed the trial court's determination that the registration statutes were not "punishments" and thus were not in violation of the ex post facto clause. Because Oklahoma's regulations were not intended to be punitive, the regulations could only constitute punishment if the plaintiff showed "clearest proof" that the regulations had a punitive effect. The Court found that the reporting and residency requirements do not resemble traditional forms of punishment such as probation or banishment, are not sufficiently harsh to constitute a punitive restraint, serve purposes other than deterrence and/or retribution, and are reasonable and rationally related to non-punitive public safety goals.

Tooele County v. United States, No. 15-4062, May 3, 2016 (D. Utah)

The Utah Attorney General (AG) and Toole County sued the federal government seeking to quiet title in favor of the State to hundreds of rights of way in Tooele County. Several environmental groups were allowed to intervene in opposition to the State's suit. At approximately the same time, the Southern Utah Wilderness Alliance ("SUWA") filed suit in state court arguing that the Utah AG lacked authority to prosecute the quiet-title action in federal court. The State obtained a TRO enjoining SUWA from prosecuting the state court case. SUWA appealed, arguing that the federal district court did not have the power to enjoin the Utah state court.

The Tenth Circuit agreed with SUWA and found that the federal district court did not have authority to enjoin the Utah state court and that the TRO violated the Anti-Injunction Act, which generally prohibits federal courts from enjoining state-court suits. An exception exists when an injunction is "in aid of" the federal court's exercise of its jurisdiction. The Court found that this exception did not apply because only the federal quiet-title action was an in rem or quasi in rem proceeding. The state case was not because it did not seek a determination of anyone's interest in property.



by Tyler R. Green

U.S. Supreme Court Litigator Kannon Shanmugam Addresses Utah FBA Chapter for CLE Lunch

What does Justice Antonin Scalia's untimely death mean for the U.S. Supreme Court—not just this Term, but going forward? What's it like to practice before the Court, and how might that practice differ now that Justice Scalia is gone? On April 7, 2016, Kannon Shanmugam—one of Justice Scalia's former law clerks—shared his thoughts on those issues during a CLE lunch co-sponsored by the Utah Federal Bar Association and the Utah State Bar's Appellate Practice and Government & Administrative Law Sections at Salt Lake City's Alta Club.

Shanmugam—who served as an assistant to the U.S. Solicitor General after his Scalia clerkship, and now practices as a partner at the D.C. law firm Williams & Connolly—recalled that Justice Scalia was always the life of the party and a true friend to his colleagues. The interpersonal dynamic among the Justices will never be the same; Scalia's replacement will cast a ninth vote, but—regardless of who it is—cannot duplicate Scalia's gregarious, larger-than-life personality, which the other Members of the Court knew and loved for thirty years.

Until Scalia's successor is confirmed, restoring the Court to a full complement of Justices, the eight-member Court faces two distinct challenges: votes in currently pending cases and votes to fill its docket. With respect to the first challenge, Shanmugam noted that a 4-4 split vote—which affirms the lower-court judgment without a precedential opinion—is now a possibility in every pending case. In fact, the Court had already split 4-4 in Friedrichs v. California Teachers Association, concerning whether mandatory contributions to public-sector unions violate the First Amendment.

According to Shanmugam, the non-precedential affirmance in Friedrichs is not particularly noteworthy because it merely preserves the long-existing status quo ante. But he cited three pending cases, presenting relatively new issues, to watch for 4-4 splits: (1) *Zubok v. Burwell*, concerning religious objections to certain contraception requirements in the Affordable Care Act; (2) Whole *Woman's Health v. Hellerstedt*, concerning new Texas regulations of abortion facilities; and (3) *United States v. Texas*, concerning the President's recent action on deferring certain immigration actions. Shanmugam said that avoiding 4-4 splits in these cases is important to avoid disarray in lower courts on these and similar high-profile issues.

Filling next Term's docket is the second challenge resulting from an eight-member Court. At the time of Shanmugam's presentation, the Court had granted certiorari in only eight cases for its Term beginning October 2016, and had granted certiorari in only three cases in the nearly two months since Justice Scalia died. Shanmugam suggested a few reasons for the slower pace: With only eight Justices, there are now fewer voters to persuade to get four votes in favor of certiorari review. And the Court may be cognizant that—because of the current political climate—it may operate with only eight Justices well into the next Term, with the continuing possibility of 4-4 splits.

Although Justice Scalia's absence does indelibly change the Court, practicing before the Court remains the same in many important ways. The Justices all take their jobs quite seriously—they are all very smart and very well prepared. And oral argument—which could be a sleepy affair before Justice Scalia arrived; Justice Brennan would occasionally go weeks or months without asking a question—looks to remain a lively affair, said Shanmugam. For that reason, Shanmugam always does at least one moot court, and usually two moots, to prepare for oral argument in a Supreme Court case. Moots are invaluable preparation, he said; they help an advocate to think through a case "backward and forward" and try to anticipate the questions the Justices will ask.

And according to Shanmugam, the much-discussed possible change in the Court's conservative/liberal ideological make-up is an important issue, but one that can be overstated. He said that the public narrative about the Court's deciding contentious issues by a 5-4 vote (with a conservative majority) is not always true. For example, Shanmugam won the case of Maryland v. King, concerning the state's collection of DNA for unrelated crimes, by a 5-4 vote, with Justice Scalia dissenting (joined by Justices Ginsburg, Sotomayor, and Kagan). Thus, it can be hard to predict ideological outcomes—particularly in lower-profile cases, where the Court does much of its work on "run-of-the-mill" statutory-interpretation issues.

Shanmugam's presentation ended with a question-and-answer session. One anecdote should reassure both new and seasoned lawyers. He stated that even after arguing nearly twenty cases before the Court, he still gets nervous when he argues, though not as nervous as during his first argument. That occurred when he was an assistant to the U.S. Solicitor General. Sitting with him at counsel table was Michael Dreeben, a long-time lawyer in the Solicitor General's office who recently argued his 100th case before the Court. Shanmugam recalled that before his first argument, Dreeben noticed that Shanmugam was nervous, and said to him, "if you're going to throw up, throw up on opposing counsel." Shanmugam called that is the best advice he's gotten to this day.

Utah Chapter of the FBA
Board

R. Scott Young,
Snow Christensen & Martineau
President

Amber Mettler,
Snell & Wilmer
FBA President-Elect for 2016

Shane D. Hillman,
Treasurer

Peggy Hunt,
Dorsey & Whitney
Immediate Past-President

The Honorable Dale A. Kimball,
U.S. District Court

Kathleen Abke,
Strong & Hanni

Kristen R. Angelos,
Utah Federal Defender's Office

Stephen H. Bloch,
Southern Utah Wilderness Alliance

Nathan A. Crane,
Snow Christensen & Martineau

Dave Dibble,
Ray Quinney & Nebeker

Aida Neimarlija,
Burbidge Mitchell & Gross

Parker Douglas,
Utah Attorney General's Office

Karin M. Fojtik,
U.S. Attorney's Office

Kelly Latimer
Department of the Interior

Tyler Green,
Utah Attorney General's Office

Jonathan O. Hafen,
Parr Brown Gee & Loveless

Blake R. Hamilton,
Durham Jones & Pinegar

David J. Holdsworth,
Law Office of David J. Holdsworth

David L. Mortensen,
Stoel Rives LLP

David H. Leigh,
Ray Quinney & Nebeker

Erik A. Olson,
Marshall Olson & Hull

Michael D. Stanger,
Callister Nebeker & McCullough

Erik Strindberg,
Strindberg & Scholnick, LLC

Jenifer L. Tomchak,
Parr Brown Gee & Loveless

Jory L. Trease,
Jory L. Trease, Inc.

Roger Y. Tsai,
Holland & Hart

Mark K. Vincent,
U.S. Attorney's Office

Jessica Wilde,
Jones Waldo

Analise Wilson,
Kirton & McConkie