

# President's Message

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## Continuity and Change

**T**HE TWIN IDEAS of the rule of law and judicial independence are much in the news today. The recent disturbances in Pakistan prompted me (along with other bar association leaders) to issue statements regarding the rule of law and to reaffirm our beliefs therein.

It is very easy to dismiss such statements as nothing more than self-serving declarations of the obvious. However, after releasing the statement, I began to wonder what exactly the “rule of law” is.

The earliest references to the concept of the rule of law appear in the writings of Plato (in *Statesmen and Laws*) and Aristotle (in *On Politics*). Aristotle noted that the rule of law implies both the obedience to positive law and limitations on magistrates and rulers. One of the more famous assertions of the latter limitation was Bracton's statement that the king (that is, the government) should be “Non sub homine, sed sub Deo and lege.” (The full statement is “Rex non debet sees sub homine, sed sub Deo et lege”—The king ought not to be under man, but under God and the law.) Over time, this limitation has also come to encompass the concepts of judicial independence and separation of powers.

In our own heritage, John Adams drafted perhaps the most famous and succinct statement of what has become the American belief in the rule of law when he defined the separation of powers for the Massachusetts Constitution in Article 30:

In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; The executive shall never exercise the legislative and judicial powers, or either of them; The judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws and not of men.

Today one of the better definitions is found on the U.S. Department of State's Web site ([usinfo.state.gov/dhr/democracy/rule\\_of\\_law.html](http://usinfo.state.gov/dhr/democracy/rule_of_law.html)):

The rule of law is a fundamental component of democratic society and is defined broadly as the principle that all members of society—both citizens and rulers—are bound by a set of clearly defined and universally accepted laws. In a democracy, the rule of law is manifested in an in-

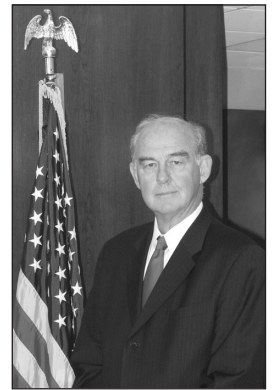
dependent judiciary, a free press and a system of checks and balances on leaders through free elections and separation of powers among the branches of government.

In many aspects this interpretation mirrors the so-called social compact theory of law: that we are all bound together by a set of rules that we have agreed upon and have agreed to abide by. U.S. citizens consider this idea to be so fundamental as to be trite. So why should we, as lawyers, and in particular as federal practitioners, be concerned about the meaning of the rule of law?

We should be concerned for the simple reason that, whether it be in this country or elsewhere in the world, the rule of law implies an independent judiciary. The recent rhetoric about “reining in” or otherwise limiting the judiciary is as dangerous to our form of government today as it was at the beginning of the republic. The legislative and executive branches of our government must understand and respect this independence, and the public as a whole needs to do so as well.

The recent trend to introduce state referendums to either limit or review the decision-making power of the judiciary is alarming. In addition, attempts by certain members of Congress to call judges to account personally for their sentences or rulings raises serious questions about the separation of powers that the country's founders envisioned.

As members of the bar, we should be ever-vigilant to protect the judiciary from these incursions. The reality is that the federal judiciary has no voice other than the one provided by its practitioners. We must support the judiciary and make it known that attempts to improperly limit the authority of that branch will not be tolerated. (This is not to imply that legislation limiting the jurisdiction of the courts is not proper; indeed, this is the proper province of the legislature. Rather, the more personal attacks and the attempts to



**MESSAGE** *continued on page 19*

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**MESSAGE** *continued from page 3*

police the third branch outside of such legislation are a matter of concern.)

Similarly, we need to renew our efforts to obtain fair and just compensation for federal judges. The fact that judges are again leaving the bench for other employment opportunities that offer higher salaries should concern all federal practitioners. Whatever is determined to be a fair level of compensation should be established and not made dependent upon changes to the compensation of members of political branches.

Only in this manner can we continue to ensure that we have an independent judicial body that enjoys the confidence of the country as a whole. **TFL**



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**INSIGHT** *continued from page 17*

riods) the owner's registration can be canceled.

**Don't Use Your Mark in a Generic Sense**

Trademark owners also need to be aware that, under the provisions of 15 U.S.C. § 1127, use of a mark in a generic sense could be deemed to be abandonment of the mark. Generic use of the mark may result in abandonment when the mark becomes so heavily used or associated with a general category or type of goods that the mark no longer indicates the source or quality of the goods and services associated with the mark.<sup>8</sup> Therefore, trademark owners should refrain from using their marks in a generic sense. Although current trademark law does not provide any real recourse by which to prevent generic usage of a mark by the media or other noncommercial third parties, owners should at least send such a user a cease-and-desist letter and suggest proper usage, which, if needed, can be cited as evidence of the strength of a mark.<sup>9</sup>

**Contest Third-Party Usage**

Finally, uncontested usage of a trademark by third parties who use the mark without the owner's consent or in a confusingly similar manner can weaken the strength of the mark and can even cause the mark to become generic. In order to prevent such use by third parties, a trademark owner should monitor applications and registrations as well as general use of the mark and take steps to protect the owner's rights in the mark. Such steps may take the form of litigation to halt an infringing use, an opposition proceeding to prevent an offending application from becoming a registration, or a cancellation proceeding to nullify an existing offending registration.

Although there are numerous ways by which a trademark owner can lose trademark rights, trademark owners can diligently protect these rights by continuing to use the mark properly, by being cautious with the licensing and transfer of such rights, by following the filing requirements set by the Patent and Trademark Office, and by carefully monitoring potential in-

fringement of their rights in the mark. **TFL**

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**Endnotes**

<sup>1</sup>*ITC Ltd. v. Punchgini Inc. et al*, 482 F.3d 135, 148 (2nd Cir. 2007).

<sup>2</sup>See, for example, *Exxon Corp. v. Humble Exploration Co.*, 695 F.2d 96, 99 (5th Cir. 1983); *Seidelmann Yachts Inc. v. Pace Yacht Corp.*, 14 U.S.P.Q. 2d 1497 (D.Md. 1989).

<sup>3</sup>See *EH Yacht LLC v. Egg Harbor LLC*, 84 F. Supp. 2d 556, 566 (D.N.J. 2000).

<sup>4</sup>See David S. Ruder, *The Fallacy of Trademark Residual Goodwill*, 22 no. 1, INTELL. PROP. L. NEWSL. 1 (2003); Laurence R. Hefter and Lisa F. Peller, *US Courts in Quandry Over "Abandoned" Trademarks*, INTELL. PROP. WORLDWIDE (June 1999); *Sterling Brewers Inc. v. Schenely Indus. Inc.*, 441 F.2d 675 (C.C.P.A. 1971).

<sup>5</sup>3 J. Thomas McCarthy, MCCARTHY ON TRADEMARK AND UNFAIR COMPETITION, §§ 17:24 and 17:26 (4th ed., 2007).

<sup>6</sup>*Barcamerica Intern. USA Trust v. Tyfield Importers, Inc.*, 289 F. 3d 589, 596–598 (9th Cir. 2002); 2 J. Thomas McCarthy, MCCARTHY ON TRADEMARK AND UNFAIR COMPETITION, §§ 18:48 and 18:55–60.

<sup>7</sup>*Sugar Busters LLC v. Brennan*, 177 F.3d 258, 265–266 (5th Cir. 1999).

<sup>8</sup>See TRADEMARK MANUAL OF EXAMINING PROCEDURE § 1209.01(c) (3rd ed., rev. June 1, 2002) (citing examples of generic marks).

<sup>9</sup>2 McCarthy, MCCARTHY ON TRADEMARK AND UNFAIR COMPETITION, § 12:28.