

Resurgence of the Warfare State: The Crisis Since 9/11

By Robert Higgs

*The Independent Institute, Oakland, CA, 2005.
252 pages, \$12.95.*

REVIEWED BY CAROL A. SIGMOND

“Cry ‘Havoc,’ and let slip the dogs of war”—a line from Shakespeare’s *Julius Caesar*—sums up the disturbing premise of *Resurgence of the Warfare State*, which is that the so-called war on terror is less about battling terrorism than about government augmenting its domestic power at the expense of individual liberty and personal privacy. Most unsettling is that the book’s implicit thesis—that throwing out the bums in the present administration will do nothing to stop relentless government intrusion into our privacy and liberty—is true.

Resurgence of the Warfare State is a collection of 47 writings by Robert Higgs (assisted by occasional interviewers and co-authors) produced between Sept. 28, 2001, and Dec. 21, 2004, including interviews, essays, columns, and a poem. The book is organized by topic into eight sections, with the writings in chronological order within each section. Albeit occasionally repetitious, the book works.

In the first section, titled “Crisis and Leviathan, Again” (alluding to the author’s earlier book, *Crisis and Leviathan*), Higgs, in his first interview after 9/11, introduces the book’s thesis: 20th- and 21st-century U.S. government leadership has used—and even sought out—crises in order to expand its powers. Higgs reminds us that President Woodrow Wilson, with his own versions of the current PATRIOT Act—the Espionage Act of 1917 and the Sedition Act of 1918—definitively put government power ahead of public discourse. These statutes frankly sought to stop all criticism of World War I and resulted in the conviction of some 2,000 people who were guilty of nothing more than criticizing the war, the draft, the armed forces, or the gov-

ernment. Certainly, these statutes and the supporting court decisions created the dangerous notion prevalent today: that civil liberties may be sacrificed in a time of war (whether the war is real or imagined). If you need any further persuading on this point, Higgs painfully reminds us that approximately 160,000 Japanese-Americans were interned during World War II, none of whom were guilty of anything except being of Japanese extraction. That these acts were approved of by contemporary society and sustained by the courts at that time demonstrates the value of war to any government that seeks to restrain public discourse, individual freedom, and personal privacy.

There is a sometimes implicit, sometimes overt, theme that hangs over the book—the war on terror is a fraud. According to Higgs, terror by its very nature is ad hoc, and it is not possible to wage war against an idea or a small group in pursuit of an idea, even if that pursuit is by suicide bombings. A war requires more—a nation, a territory, organized armies, and the like. A war on terror, Higgs writes, is by its nature a war against individual thought and liberty (and not only that of people overseas). Higgs’ point is well taken: if the Bush administration had chosen the right battle, it might have called it the “war against Al Qaeda,” but the Bush administration abandoned the hunt for Bin Laden in order to attack Iraq.

The second section of the book, “Airport (In)Security,” presents a fairly conventional but well-reasoned argument about the ineffectiveness of government, when compared to private enterprise, in delivering the mail or making purchases. But Higgs’ basic point—that the government is completely ineffective when it comes to airport security—has been proved by recent reports from the Transportation Safety Administration that its investigators were able to move bomb-making parts through airport screening.

The third section deals with the possible revival of the Selective Service and the military draft. In one essay, Higgs reacts to an opinion piece by Charles Moskos and Paul Glastris, published in

the *Washington Post* on Nov. 4, 2001, advocating reinstating the draft in order to fight the war on terror. Higgs opposes the draft on libertarian grounds. These two essays are so limited in their focus that, unless you have read the underlying article, you can safely skip these two short pieces.

The fourth section discusses the way in which the unhealthy relationship of the military-industrial complex with the Department of Defense results in powerful imperatives favoring war (real or imagined). The title of one essay says it all: “Suppose You Wanted to Have a Permanent War.” In this section, Higgs makes three basic points. (1) By focusing public attention on a common enemy, war blurs the social, class, and political differences within society; for example, Higgs notes, the United States’ battle with communism was a unifying force in this country for 50 years. (2) Government uses periodic “crises” attributed to the common enemy to maintain a level of fear among the public that allows the government to continue its power grab at the expense of the people. One needs to look no further than the Bush administration’s claims of a pending catastrophe to distract opponents, such as the bogus claims of the threat of a terrorist attack that it made just as John Kerry began to climb in the 2004 presidential polls. (3) There is always a group that is financially interested in permanent war. As an example, Higgs cites Vice President Dick Cheney’s relationship with Halliburton or the love of public spending by members of Congress in their respective districts.

For those who do not approve of the current President, the fifth section of the book is a delight. Higgs considers whether George W. Bush is “unhinged,” is pursuing a “faith-based foreign policy,” or has a “crackpot” view of reality. Some will find the author’s assessments amusing and others will find them offensive, but Higgs’ real point is that Bush’s war on terror and war in Iraq are of a piece with President John F. Kennedy’s Bay of Pigs disaster and the Cuban Missile Crisis: both resulted from power-hungry nov-

ice leaders overdosing on testosterone and using contrived crises and foreign enemies for domestic purposes. Viewed through Higgs' lens, I can visualize the current front-runners for the 2008 Democratic and Republican presidential nominations making the same mistakes. Higgs' point is that the use of crises and foreign enemies is a practice that is common to both political parties, and both parties pose the same danger to our privacy and freedom.

The sixth section, "Road to War," deals with the run-up to the war in Iraq. In the period before the war, Higgs was generally critical of the idea of a war with Iraq. In hindsight, Higgs had it right: Iraq did not pose a threat to the United States; therefore the war was unjustified. He makes the point best in his parody, "Nuke France." As readers may recall, France was a vigorous opponent of the Iraq war, and an anti-French hysteria arose in this country. Against this backdrop, Higgs parodies the administration's "logic" for the war against Iraq by arguing that France, with its large number of nuclear weapons and its proven delivery system as well as its opposition to the Bush administration's war policy, was a more dangerous enemy of the United States than Iraq was; therefore, Higgs writes, if a war against Iraq was justified, then one against France was even more so.

The book's seventh section, "Slaughtering the Innocent," deals with a topic that has not been given the attention it deserves by this country's media. Higgs focuses on the mistreatment of detainees at the Abu Ghraib prison as well as on the killing and maiming of Iraqi civilians. He notes that, because Iraq posed no danger to the United States, these deaths and injuries cannot be justified.

The eighth and final section is titled "Cake Walk" and presents a not-so-subtle dig at the Bush administration's failure to find weapons of mass destruction in Iraq and the disaster that is the war in Iraq. I particularly liked Higgs' poem, "WMD Blues." Higgs' basic point in this section is that, if the Bush administration had been truthful with us, we would have opposed the war in Iraq. But, as Higgs points out throughout the book, all administrations need war to enhance their power;

therefore, this administration has been no different from any other.

Resurgence of the Warfare State is intellectually stimulating, and—whether you agree with its thesis or not—you will be challenged by Higgs' meticulous research and compelling logic. When you finish the book you will be reminded, as I was, of Marc Antony's call: "Cry 'Havoc,' and let slip the dogs of war." **TFL**

Carol A. Sigmond is a partner at Dunnington, Bartholow & Miller, New York, NY, and is a member of the New York County Lawyers' Board of Directors and of the New York State Bar House of Delegates.

Computer Forensics: An Essential Guide for Accountants, Lawyers, and Managers

By Michael Sheetz

John Wiley & Sons Inc., Hoboken, NJ, 2007. 152 pages, \$50.00.

REVIEWED BY HEIDI BOGHOSIAN

Digital detectives are becoming the frontline soldiers of law enforcement. The field of computer forensics is growing rapidly, with the demand for experts outpacing the need. Many hard-to-crack homicides and other felonies are solved on the basis of information unearthed by computer forensics experts who analyze digitally stored evidence and comprehensively report their findings to ensure its admissibility in court.

Part of the reason that computer forensics experts are in such demand is that the cost of computer-related crimes in the United States is burgeoning. The FBI reports that cyber-crimes cost businesses more than \$67 billion annually. But, in addition to crimes against private industry, the country faces the looming possibility of large-scale threats to national security. In 1998, the U.S. Department of Justice and the FBI created the National Infrastructure Protection Center to safeguard national infrastructure networks and systems from attacks, including computer-generated criminal acts such as hacking and spreading viruses. The center guards telecommunications systems, financial

networks, transportation systems, utilities, and other vital parts of the nation's infrastructure.

It is thus fitting that Michael Sheetz, the author of *Computer Forensics: An Essential Guide for Accountants, Lawyers, and Managers*, has a law enforcement background as well as a law degree. A frequent contributor to magazines such as *Law and Order*, *Police Chief*, and *Police Officer Quarterly*, Sheetz has a special interest in computer crime and served as the sergeant of an investigative team in Ft. Stewart, Ga., during Operation Desert Storm in 1991.

The National Institute of Justice at the Department of Justice also has an interest in computer crime. In April 2004, the institute issued an outstanding report on the subject: "Forensic Examination of Digital Evidence: A Guide for Law Enforcement." Sheetz's book measures up to the standards of this report and delivers much useful information in fewer than 150 pages of text.

For novices to the field, *Computer Forensics* covers the essential stages of the seizure and analysis of computer evidence—namely, collecting and preserving the evidence and rendering an opinion about it. The book's most important lesson is that digital evidence is fragile and ripe for inadvertent damage if improperly handled during an examination. The stages of data gathering are the most volatile; for example, even a single touch of the computer mouse by an inexperienced investigator can jeopardize an entire course of evidence collection and preservation. Sheetz cautions that "[t]he very process of turning on the computer will in fact change the evidence. ... The process of starting a computer is the functional equivalent of opening a book, erasing several lines of the text, and replacing the text with something new—every time you open it." Sheetz convincingly conveys the importance of documenting and explaining any change to digital evidence if the evidence is to be used in court.

Sheetz is at his best when he is in the criminal detection mode. He writes: "The computer installation is the crime scene, no different from the scene of a

REVIEWS *continued on page 62*

murder or a burglary. Investigators must document how the suspected criminal left the computer, just as they would document a murder scene.” In describing how investigators take control of a case, Sheetz covers the salient points of case assessment: determining the skill level of the offender, identifying the number of computers and any proprietary software, and evaluating the site. A similar checklist appears in the report produced by the National Institute of Justice.

Two chapters in Sheetz’s book—“Computer Tools and the Forensic Examination” and “Computers as Tools for Evil”—are immensely enjoyable, with the latter reading like the tabletop fantasy game, “Dungeons and Dragons.” One of the most interesting chapters covers hackers and describes such practices as “war driving,” which involves random drives through neighborhoods with wireless-enabled laptop computers and scanning programs, in attempts to capture access keys.

Sheetz explains that, “[a]s computer security administrators become more and more vigilant, frequent polling of the system reveals unauthorized processes running and leads to the discovery of the intruder.” In response, some hackers use a “hooking device that allows the rootkit [a Trojan horse-type program that gains control of computers at the system level] to hijack the system processes polled by the system administrator and report back whatever the hackers desire.” According to Sheetz, rootkits can be hard to detect with traditional virus protection software. But he does not provide an explanation of how to deal with hackers who gain nearly total access to a system with rootkits until later in the book, when Sheetz addresses the tools used by computer forensic investigators. It is at that point that we learn more details about rootkits and also that investigators have two kinds of forensic examination techniques to assist in identifying certain rootkits. The tools are to be used in tandem—accessing the system from a remote safe system, then comparing “the hash value of the system files with the hash value of trusted binaries.” Hashing, Sheetz explains,

is digital fingerprinting that creates a unique hash value for every digital object. Examiners can detect changes to a file, because any change will produce a different hash value. Hashing apparently solves the rootkit problem—a database of Windows and other programs holds all “true” hash values. Thus, by hashing all the program files on the computer being investigated and comparing them to the “true” hash values in the database, investigators can identify files that have been tampered with.

“In child pornography cases,” Sheetz writes, “certain image files tend to circulate frequently and seem to be perennial images in the most predators’ collections. Investigators have compiled databases of hash values for these common images files.” He explains that “investigators can compare the hash values of individual files on the target computer with the database of known pornographic images. A match proves to a scientific certainty that the image, regardless of the name, is the contraband file.”

A drawback to *Computer Forensics* is that it does not make it easy for readers to locate information by category. Managers as well as legal and accounting professionals would have benefited from an outline checklist with each chapter, which could serve as a quick road map. In this respect, the report issued by the National Institute of Justice is far easier to navigate because of its short and easily identifiable sections, bullet points, and special notes.

Apart from this formatting concern, however, *Computer Forensics* provides a useful introduction to a ubiquitous field. Classes in digital forensics are now offered in approximately 100 colleges around the country, and federal intelligence agencies such as the National Security Agency are seeking experts in the field. Familiarity with the subject is no longer necessary just for specialists. Sheetz points out that, although we have not experienced notable cyber-terrorist attacks, “the power of the bit and byte could well be a hundred times more powerful than the airliners that struck the World Trade Towers.” **TFL**

Heidi Boghosian is executive director of the National Lawyers Guild and a co-host on the nationally broadcast civil liberties radio show “Law and Disorder,” whose Web site is lawanddisorder.org/index.php.

The Age of Turbulence: Adventures in a New World

By Alan Greenspan

The Penguin Press, New York, NY, 2007. 531 pages, \$35.00.

REVIEWED BY CHRISTOPHER C. FAILLE

On one plausible reading of the political and constitutional history of the United States, the relationship between creditors and debtors has always been more central than any other relationship—more central than, say, the relationship between landlords and tenants, between the owners of and the laborers upon the means of production, or between wholesalers and retailers. In order to understand this history, it is important to realize that, until the fairly recent advent of inflation-adjusted instruments, it was a simple arithmetical fact that any given year’s debtors stood to benefit from inflation. Debtors would end up paying back loans with a currency that was cheaper than the one they used to borrow the money.

Would debtors then constitute a permanent constituency for inflation? As a class analysis that conclusion is way too simple. Most adults understand that inflation has a variety of consequences. For one, the creditors who lose out in this way will surely respond by increasing their rates in an effort to stay ahead of inflation thereafter. Therefore, a debtor who hopes to be able to continue to borrow in the future will be faced with a conflict of interests. Excessive money creation helps the debtor by reducing the existing loan burden but hurts the debtor by increasing the (predictable) burden of the next year’s borrowing.

To see why this matters from the point of view of constitutional scholarship, consider the debate in the 1830s between President Andrew Jackson

and his allies on the one hand, and the head of the national bank, Nicholas Biddle, along with his allies on the other. We tend to think of this (and of an earlier generation's parallel debate between Hamilton and Jefferson) in narrow legalistic terms. But when we study the speeches made by members of the U.S. Congress during the Jacksonian era, we quickly discover that the argument at that time was about credit and—as a consequence—it was about the constant value of money. During Senate debate on May 23, 1832, for example, Daniel Webster thundered in opposition to the Jacksonians, "Ordinary tyranny, oppression, excessive taxation: these bear lightly upon the mass of the community, compared with fraudulent currencies and the robberies committed by depreciated paper." Webster was referring to the fact, which no serious economist then or now disputes, that the depreciation of a currency confuses economic calculations, erodes household savings, and can undermine productivity.

The charge, in short (and in my own words, which are less eloquent than Webster's), was that the Jacksonians wanted to leave the chartering of banks in the hands of the states so that those banks could issue their own notes that would function as unsound money—to engage in "wildcat banking," as it was called. Keep the chartering in the hands of the United States, Webster was saying, and preserve the strength of the pivotal national bank; doing so will keep the dollar strong and prevent the creation of pseudo-currencies that might compete with it within each state that was tempted to issue notes of its own. Webster was also saying that, even though debtors might constitute the political constituency for wildcat banking, before long they would rue the result, seeing it as worse than tyranny.

Thomas Hart Benton, the senator from Missouri, rose to reply to Webster that day. As Webster had warned of inflation, Benton warned of an overly restrictive money supply. "If notes are issued," Benton said, "they are payable at the branch bank, and an adequate supply of gold and silver must be kept on hand to redeem them; but these orders being drawn on Philadelphia, the

gold and silver of the state [where this hypothetical branch bank is] must be sent there to meet them." The branch banks steal the specie (that is, precious metals or coins) of the South and West, he said, "gorge to repletion, then vomit their load into the vast receptacles of the Northeast, and gorge again," he added.

When reading such a debate, it is worth remembering that "dollar bills" in the sense we take for granted today didn't really exist between the ratification of the U.S. Constitution and the Civil War. A dollar was simply a minted coin, and it was always minted in a precious metal. Any note redeemable in cash was, consequently, redeemable in a precious metal because that's what cash was at the time. It also helps to remember that land sales in the West were one of the major sources of revenue for the federal government. The land was bought, in the first instance, on credit, then over time in specie as those notes came due, creating the flow of money to the east and north that so irked Benton.

As the 19th century neared its end, William Jennings Bryan would echo Benton, denouncing bankers who proposed to "crucify mankind upon a cross of gold." This is no legalistic argument; the language of binge and purge is, of course, emotional and indicates the depth of feeling that credit evokes. Such issues were integral to the development of regional animosity that brought about the Civil War. After that war, when issues that were much the same re-emerged, they had more of a west/east tilt to them than the old south/north tilt. But the participants knew of the continuity: Bryan knew that he was re-making Benton's arguments, and J.P. Morgan and Mark Hanna knew that they had replaced Biddle and Webster.

Skipping forward again, we should note that the lengthy presidency of Franklin D. Roosevelt produced at least two crucial changes in monetary policy, both of which had consequences for the relationship between creditors and debtors. In 1933, Roosevelt took the United States off the gold standard, thereby allowing for the creation of money without the need to back it with a precious metal. John Maynard Keynes taught the

world to regard this not as inflation nor as debt cancellation, but as "economic stimulus."

From World War II to the War in Vietnam

In 1944, at Bretton Woods, N.H., Roosevelt's brightest economic and financial minds met with their counterparts from the United Kingdom; Keynes himself was among the latter group. These financial experts were confident that World War II was going their way, and they met to discuss what kind of financial and monetary relations the capitalists among the victorious powers would have when the war ended. In this context, the two leading countries agreed to a partial restoration of the gold-dollar tie and to a separate dollar-pound tie.

At about the time that the Allies were hammering out this issue, a physician working for a draft board in New York City told a young man, Alan Greenspan, that he had a spot in his lung and that it could be tubercular. After a visit to a specialist the next day (and still with no definitive diagnosis) Greenspan was classified as unfit to serve in the military. With this perfectly honorable exemption from military service, Greenspan launched a brief career as a journeyman musician—a saxophone player in the dance bands of the day.

But let's return to what happened in New Hampshire. The negotiators there decided that the value of the U.S. dollar would be fixed so that \$35 would thereafter buy an ounce of gold. The U.S. government would never again allow its citizens to present their dollars and demand gold in return, but foreign governments and their central banks could do exactly that. The United Kingdom and each of the other countries that agreed to participate in the Bretton Woods system agreed to keep its currency within a narrow band of a specified ratio vis-à-vis the U.S. dollar (\$1 to £4.03) so that its value was also ultimately backed by the value of gold.

The evolution (or unraveling) of the Bretton Woods accord between Roosevelt's day and Richard Nixon's day was a complicated affair. What we need most to remember, though, is

REVIEWS *continued on page 64*

that, at first, the U.S. trade balance was at a huge surplus. It was in everybody's interest to reduce that surplus—to have dollars to flow out of the United States in order to pay for goods and services that would come into the country, thereby providing liquidity to the world economy.

The possibility that the central banks of other nations would use these newly acquired dollars to buy gold from the U.S. Treasury was, of course, written into the agreement, and nobody considered that at all worrisome. At war's end, after all, the United States had \$26 billion in gold reserves. Furthermore, there was no good reason to demand gold from the United States. The newly acquired dollars of the other participant nations with so many shattered battleground scenes among them might surely be put to better uses than that. Finally, even if another nation's central bank desperately wanted to stockpile gold, buying it from the U.S. Treasury was not mandatory. There was a worldwide market in gold—there were gold mines and gold merchants everywhere.

But a self-destruct mechanism was written into this agreement. As the economies of Europe revived during the 1950s, the problem became evident to many observers, and the problem turned out to be an unsustainable relationship between debtors and creditors. The matter was written up in formal terms by economist Robert Triffin and became known as the "Triffin dilemma." In any world system with a single key currency nation, either that nation maintains equilibrium in its balance of payments, or it goes increasingly into debt. If the nation maintains equilibrium, or (worse!) goes into a surplus, then the other nations will suffer from the unavailability of the key currency and thus from a lack of liquidity. Yet if the key nation increasingly goes into debt, there will come a point at which the nation's ability to meet its obligations will come into question, with destabilizing effects.

Put more concretely, what was going to happen once that worldwide unofficial market price of gold diverged significantly from the official price of \$35 an ounce? As the market price rose

above that amount, a simple arbitrage possibility arose. A central bank could present its dollars to the United States in return for gold, then sell that gold in the marketplace for a risk-free profit. Obviously, that process could go on forever only if the United States had infinite amounts of the stuff.

In 1967, Greenspan signed on as an economics and domestic policy adviser with Richard Nixon's campaign for President. Greenspan reports that he was very impressed by Nixon's acumen:

Without wasting time on chitchat, he drew me out with thoughtful questions about economics and policy. When he set forth his ideas, he did so in perfectly turned sentences and paragraphs. ... He could listen for five minutes on a subject he couldn't possibly know much about—a breaking news event, for instance—then get out there and sound as knowledgeable as a professor. I would say that he and Bill Clinton were by far the smartest presidents I've worked with.

By the time Nixon was inaugurated in 1969, however, Greenspan had become disenchanted with him. Behind that impressive intellect Greenspan saw a disturbingly misanthropic personality. Greenspan offered advice informally thereafter, but he took no official post with the Nixon administration until 1974, when it was falling apart. Until then, he remained at the helm of Townsend-Greenspan.

In *The Age of Turbulence*, Greenspan devotes about five pages to the period from 1969 to 1974. He uses those pages to chronicle his reactions to the income tax surcharge, the wage and price freeze, and the post-freeze controls and their gradual unraveling. The book contains nothing about what may have been the most important economic and financial development of that period: the formal dissolution of the system agreed upon at Bretton Woods. Nixon closed the gold window in 1971, returning the United States to Roosevelt's earlier experiment with pa-

per money.

I would have loved to have had Greenspan's comments on this change—not because I would have granted them authority over my own judgments, but because his reactions themselves would constitute a datum by which we might hope to better understand his own subsequent tenure at the Federal Reserve. Does he think that the Bretton Woods system was salvageable and that more should have been done to try to salvage it? Or does he believe that Triffin's dilemma was fatal and that any administration in office at the time would have had to close the window when Nixon did?

The Consequences of a Free Float of Currencies

What resulted after the Bretton Woods arrangement came to an end was a system in which every currency became a matter of governmental fiat, with most currencies in a state of free float against most others (although there are some fixes that are more or less rigid). Does Greenspan think that this is an ideal situation?

But it's instructive to fast-forward again—to the summer of 1987, when President Ronald Reagan offered Alan Greenspan the top job at America's central bank: chairman of the Federal Reserve. Greenspan's tenure will be remembered for a long time and for several reasons. He'll be remembered as the man who financed the "dotcom" boom that began in 1995, even though at the outset he recognized it himself as an example of "irrational exuberance." He'll be remembered as point man in the U.S. response to a wave of currency crises in East Asia and Russia in 1997 and 1998. And he may be remembered as an enthusiast of precisely the sort of subprime mortgages that have caused grave financial turmoil in the months since the release of his memoir.

The dotcom boom isn't in any very direct sense a story of the relationship of debtor to creditor. It was a stock market boom, and one that was no more highly leveraged than stock market booms usually are. Furthermore, the current subprime crisis continues to unfold, and I prefer to analyze situ-

ations in which I have the benefit of hindsight. Therefore, the remainder of this review will focus on the second point of those listed above.

In July 1997, Thailand devalued the baht, setting off a chain of events that had enormous consequences everywhere and kept many central bankers awake. By the end of 1997, not only Thailand's economy but also the economies of Hong Kong, the Philippines, and Singapore had been hit hard by the "contagion" caused by the devaluation of the baht. Currency speculators such as George Soros received much of the blame for this in the world press—which was probably unfair. In November 1997, a senior official at the Bank of Japan apparently called Greenspan to warn him that "the dam is bursting" and that South Korea would be the next victim of the impending flood.

In describing this period, Greenspan's memoirs parallel those of Robert Rubin, who was secretary of the treasury at the time. The two men and their respective teams feared that each crisis in this sequence would be an Armageddon. After receiving the call from Japan in fall 1997, for example, the top officials from the Federal Reserve and the Treasury Department worked together making old-fashioned telephone calls to officials of the largest banks in the world and talking them out of any plan to call Korea's loans, so that no one would force that republic into default.

Although the U.S. stock market continued its long bull run, economic shocks around the world continued the following year. In summer 1998, Russia devalued the ruble and defaulted on its bonds. That development, in turn, led to the collapse of Long-Term Capital Management and its rescue by a consortium of counter-parties, with a good deal of prodding from officials in the Federal Reserve system working under Greenspan.

The central banker's or treasury official's perspective on such events makes them seem all too exciting. It's all a bit like a Hollywood movie, in which disasters are barely averted when some alert bystander calls a cape-wearing hero, who swoops down just in time, saving creditors and debtors alike by preventing a default. But that is precisely the problem with the worldwide

free float as a system. It has an internal flaw that is every bit as severe as the one Triffin identified in its precursor.

The free float of currencies makes the value of government-issued bonds (which are, of course, denominated in the local currency) more volatile than they would otherwise be in some sort of fixed system. Furthermore, the possibility of a currency crisis implies the possibility of an outright bond default on the part of some nation's strapped treasury. When these crises arise, the Greenspans and Rubins of the major powers work to resolve them, but to the extent these officials' solutions are successful, they increase volatility even more going forward.

An interesting question to ask yourself is the following: Do I drive more carefully, or less so, when I know that I am inadequately insured? Most psychologists would agree one drives more carefully when carrying inadequate insurance. Similarly, under the crisis management model, the major financial powers become the insurers for debtor nations' treasuries—from Thailand with its baht to Mexico with its peso—and the volatility of the currency over time tends to increase as confidence in this informal "insurance" spreads. Indeed, the United States is the greatest debtor nation of all, and at times in recent years it has seemed to rely on China and Japan as its insurers.

The problem, stated generally and formally, is that volatility creates periodic crises, which create periodic rescues, which in turn increase volatility. Alan Greenspan, of course, doesn't deserve the blame for creating this problem. Blame is an unhelpful exercise in any event. Call it blame, bad karma, or the latest phase of the debtor/creditor dialectic if you are inclined to Hegelian formulations. But Greenspan's career, and his apology in this book, together surely illustrate the problem. **TFL**

Christopher Faille is a financial correspondent for an Internet-based news service and is a member of the Connecticut bar. He maintains a blog, "Pragmatism Refreshed," at cfaille.blogspot.com.

Trying Leviathan: The Nine-

teenth-Century New York Case That Put the Whale on Trial and Challenged the Order of Nature

By D. Graham Burnett

Princeton University Press, Princeton, NJ, 2007.
266 pages, \$29.95.

REVIEWED BY GEORGE W. GOWEN

Don't judge any book by its cover, certainly not *Trying Leviathan: The Nineteenth-Century New York Case That Put the Whale on Trial and Challenged the Order of Nature*, which has a charming circa 1810 depiction of a whale on its cover. Even though the word "trying" in the title bespeaks both a court trial and the process of rendering whale blubber, this book, when placed on a library shelf, would fit better under "New York City history" than under litigation or whaling. And, even though the subtitle speaks invitingly of a whale and a trial, these words are included, in part, as excuses for lengthy dissertations on other matters. This review, nevertheless, will focus on the trial.

Much of *Trying Leviathan* is devoted to erudite discussions of zoology, and, from these discussions, Burnett leaps to the thesis that the "American identity" may be rooted in a "nature-nationalism." At one point he trumpets, "From the practical to the symbolic, from ornithology to paleontology, from Lewis and Clark to Cole's *The Course of Empire*, we are reminded that America forged a particular kind of link between natural history and nationalism, and used the language of nature to narrate their nation, to call it into being." So be it, but what about trying leviathan?

The trial in the case of *Maurice v. Judd* was held during the final days of December 1818 in the Mayor's Court in City Hall. The case involved a New York statute that levied a fee for the inspection, gauging, and certification of casks of "fish oils." The defendant was charged with failing to pay the fee, and his defense was that his casks contained whale oil, not fish oil. Today, of course, we all know that whale oil is not fish oil, because a whale is a mam-

REVIEWS continued on page 66

mal, not a fish. And most people knew that in 1818 too; the problem for the defendant was that, in those days, most people nevertheless called a whale a fish. They reasoned: “mammalia or *Magnolia* he swims & lives in the sea”; therefore he is a fish. Dr. Johnson’s dictionary, in fact, defined a “fish” as “an animal existing only in water.” This view derived from Genesis, which gave man dominion “over the fish of the sea, and over the fowl of the air, and over ... every creeping thing that creepeth upon the earth.” Whales can’t fly or creep, so they must be fish, even if they are mammals. It was just a matter of semantics, with the defendant taking the more modern approach of declining to call a whale a fish.

Again, however, this book contains much about New York City’s history. Burnett tells us that, early in the 19th century, natural history museums blossomed in New York City. Devoid of outlets for mass entertainment, citizens flocked to view oddities, natural or otherwise. Burnett recounts:

The whale jaw was perhaps [John Scudder’s] greatest commercial success of all. Hacked from an animal taken on Long Island’s South Shore in the spring of 1814, and transported by coasting vessel and cart to a choice spot on Broadway just above City Hall Park, this massive archway of bone and flesh weighed nearly 4,000 pounds, and a dozen men could stand between its six-foot curtains of baleen. ... [T]he newspapers were instantly plastered with advertisements exhorting curious New Yorkers to “seize the present opportunity” and avail themselves (for the rock-bottom fee of twenty-five cents) of the chance to see “the jaw of this mammoth of the deep,” a wonder “beautiful beyond description.” By the next week a festival atmosphere prevailed, and Scudder, never afraid to gild the lily, had engaged his favorite band ... to perform evening concerts under the whale jaw.

Now we return to the courtroom. The trial, which dealt with the question of whether whale oil was fish oil and thereby subject to the inspection fee, lasted three days. The jury heard testimony from legislators on legislative intent (which seemed ambiguous), from naturalists on the difference between fish and warm-blooded mammals such as whales (there are many differences, all of which are enumerated repeatedly in this book), from New England whalers (testifying that a whale is not a fish), from dealers in whale oil (who said that whale oil should not be confused with low-quality liver oil that comes from fish), and from ordinary English-speaking New Yorkers (who stated that whales are like fish). During the trial, Blackstone was quoted: “Words are generally to be understood in their usual and most known signification; not so much regarding the propriety of grammar, as their general and popular use.”

On Dec. 31, 1818, it took the jury 15 minutes to decide for the plaintiff, determining that the fee was owed, because, as the *New-York Gazette* reported, “a *whale* is a *fish* and whale oil is fish oil.” The author of this book is not a lawyer, but he is astute enough to note that the plaintiff’s attorney had toyed with the prejudices of the New York jury. Burnett points out that, in those days (before professional baseball), “Yankee” was an epithet in New York City, meaning as it did a *New Englander*—someone without the Dutch blood that distinguished the true citizen of the city once known as “New Amsterdam.” By using the term “Yankee,” the plaintiff’s lawyer planted the seed in the jury’s mind that those whalers who testified that a whale is not a fish were New Englanders, and therefore their testimony was surely suspect.

In a move that would be highly unusual today, the judge stayed the jury’s verdict in order to give the legislature time to clarify the law, which it did. Just over a month after the verdict, the law was amended to provide that “liver oil, commonly called fish oil, shall be inspected ... and that all other oils shall be exempt from inspection.” But the case did not end there. Burnett writes:

“On the 27th of February [the judge] reconvened the court, and, perusing the new amendment, deployed an unimpeachably perverse legal analysis to *affirm* the jury’s verdict against Judd: since the legislature had decided that the law needed amendment so as not to reach whale oil, he reasoned, this as much as *proved* that the previous language of the statute *did* reach whale oil; otherwise, why did it need to be *changed* so as *not* to include it?”

In addition to the collection of revenue, the basis for the law in question was to protect the public from adulterated oils. Casks could be mostly filled with water, with only a film of oil on the surface. This brings to mind the 1962 salad oil scandal, inexplicably not mentioned by Burnett. Vast loans were obtained by a person named Tino De Angelis; the loans were secured by shipments of oils floating on water. When the scandal was exposed, Bank of America, American Express, Bank Leumi, and others suffered losses of about \$175 million (well over a billion dollars in today’s dollars). This has nothing to do with whales, but it is certainly another good New York story. (See Norman C. Miller’s *The Great Salad Oil Swindle*, published in 1965.)

Trying Leviathan is a good try, but the average reader may find it trying.

TFL

George W. Gowen is a partner with the New York law firm of Dunnington, Bartholow & Miller, LLP. He represents private clients and has served as counsel to leading sports organizations and as chair of humane and environmental organizations.

James Madison and the Struggle for the Bill of Rights

By Richard Labunski

Oxford University Press, New York, NY, 2006. 336 pages, \$28.00.

REVIEWED BY DANIEL L. KAPLAN

Sometimes the tail really *does* wag the dog. Few lawyers can recite the actual ruling in *United States v. Carolene*

Products Co., 304 U.S. 144 (1938), but most recollect the decision's seminal footnote 4, in which the Supreme Court, though retreating from its substantive due process line of cases, reserved protection for "discrete and insular minorities." And the very rights to which the famous footnote refers derive from yet another dog wagger: the first 10 amendments to the U.S. Constitution. The framers gave us a groundbreaking tripartite system of government that has thrived for more than two centuries, but when most Americans think of the Constitution they think of their "rights"—and the big-ticket individual rights are not in the original Constitution, but in the first 10 *revisions* to the document. Presumably because these amendments proclaim rights tangibly enjoyed by individuals and directly enforceable by them against the awesome power of their government, the Bill of Rights continues to capture the imagination of citizens as no other part of the Constitution does. What the structure of the Constitution would suggest are mere afterthoughts have come to be popularly seen, and revered, as the essence of our national charter.

In light of this fact, it seems fair to ask why the framers didn't include the Bill of Rights in the original document. The answer is that most of the key players—including James Madison, the subject of Richard Labunski's book—believed that a bill of rights would be an ineffectual distraction from the essential nation-building project at hand. Indeed, notwithstanding the title of Labunski's very readable book, the story he tells is in reality the story of Madison's struggle for the *Constitution*—with the Bill of Rights effort undertaken grudgingly, albeit energetically, as a means of saving the Constitution and its "more perfect union" from a stillbirth.

The story begins at the Constitutional Convention in Philadelphia, during most of which Madison sat in the front row furiously scribbling notes for posterity. After many days of sweltering heat and contentious and tedious debates, the delegates were relieved to find the Constitution ready for inspection. When George Mason, the delegate from Virginia, strenuously objected to the absence of a bill of rights, noting

that such a bill would "give great quiet to the people" and offering to cobble one together out of existing state bills "in a few hours," he was unanimously rebuffed. Labunski notes that "[f]atigue was certainly a factor." But there were more principled objections as well—chief among them, the one articulated by Alexander Hamilton in *The Federalist* No. 84, in which he asked, "[W]hy declare things shall not be done, which there is no power to do?" The new national government was to exercise only explicitly enumerated powers, in contrast to the plenary powers of state governments, and it seemed pointless to bar the federal government from exercising powers that it did not enjoy to begin with. The states had their own bills of rights, or could enact them, and the idea of incorporating a bill of rights into the Constitution struck some as not merely capricious but dangerous. The very existence of such an enumeration, it was feared, would suggest that, but for the bill, the federal government *would* enjoy the power to infringe these rights.

By the same token, enumerating rights would tend to suggest that the national government enjoyed the power to infringe any rights that were *not* enumerated. Madison himself expressed grave doubts about the efficacy of "parchment barriers" against oppression, noting in a letter to Thomas Jefferson that Virginia's own bill of rights had been "violated in every instance where it has been opposed to a popular current." Jefferson's response pointed out that a bill of rights would place a "legal check" in the hands of the judiciary, "a body, which if rendered independent, & kept strictly to their own department merits great confidence for their learning and integrity." Although, in hindsight, Jefferson's point seems perfectly obvious, at the time of this exchange, except for the Supreme Court, the federal judiciary was entirely hypothetical, and *Marbury v. Madison* was barely a gleam in John Marshall's eye.

The bill-less Constitution was delivered to Congress, and its text quickly began to be reproduced in newspapers. Instead of acclaim for the framers' achievement, however, the document sparked an outpouring of dismay and outrage at the absence of a list of

specific protections of individual rights. Many Americans, having undergone years of bloody conflict to throw off the yoke of an oppressive sovereign, were not prepared to take it on faith that a new *über*-sovereign, homegrown though it might be, would scrupulously refrain from trampling their cherished liberties. Among the anti-Federalists sounding this theme most loudly was the patriot firebrand, Patrick Henry.

Perhaps it was inevitable that Patrick Henry would become a sworn enemy of the Constitution. After all, he had made his name in Virginia by bravely declaring in open court in the "Parson's Cause"—more than a decade prior to the Declaration of Independence—that when George III declared a duly enacted law of Virginia null and void, he "degenerated into a Tyrant, and forfeits all rights to his subjects' obedience." In itself, such defiance might betoken only a dedication to fighting tyrannical measures imposed by a distant and unresponsive monarch. But a broader review of Henry's political career reveals an additional, more parochial motivation: a fierce dedication to combating any encroachments on the sovereignty of Virginia. While serving in the Virginia House of Burgesses, Henry had advanced both these agendas, introducing not only a resolution denouncing the Stamp Act but also one allowing Virginians to ignore laws passed by any entity other than the Virginia legislature. To Henry, legitimate sovereignty pretty much ended at the Virginia border, and all measures tending to interpose the will of a federal entity into Virginia's affairs were to be viewed with extreme suspicion.

As the ratifying convention began in Virginia, the stage was set for an epochal contest between Patrick Henry, with his commanding voice and his "overpowering bursts of eloquence," and James Madison, a frail, diminutive figure, who spoke so quietly that the convention's stenographer repeatedly found that he "could not be heard distinctly." The stakes were high. It was difficult to conceive of ratification of the Constitution without Virginia, because support for the new plan of government was shored up largely by the

REVIEWS *continued on page 68*

expectation that a Virginian—George Washington, the only figure capable of commanding nearly universal trust and respect—would serve as the new nation’s first President. If Virginia failed to ratify the Constitution, Washington would be ineligible for the office.

Labunski describes the likely results of a rejection of the Constitution by Virginia: a rapid shift in momentum toward the anti-Federalist view, leading to the defeat of ratification, followed by the calling of a second constitutional convention. The second convention would not have enjoyed the advantages of the first—principal among which was the element of surprise. The delegates to the first Constitutional Convention had been charged with the modest task of revising the Articles of Confederation. Instead, they had devised a plan for an entirely new system of federal government. In essence, they had been sent to Philadelphia to propose repairs to the gearshift on a bicycle and had returned, instead, with plans to build a Bentley. Labunski plausibly speculates that, in a second convention, it would have been impossible to repeat such a stunt. Wary of another bid for centralizing power, the state legislatures would have given their delegates strict instructions to refuse to compromise on issues that had been deemed fundamental. The result would have been a stalemate and an inability to propose another scheme for a workable federal government. Labunski describes the imagined results:

With no viable federal government in place, states formed regional alliances and established ties to foreign nations. Northern states joined together and sided with England. Virginia, North Carolina, South Carolina, and Georgia created a southern confederacy aligned with France. Citizens in the West banded together and chose Spain as their ally so they were guaranteed access to the Mississippi River.

Instead of a unified, affluent nation, America became a land of regional confederacies, each jealously guarding its independence,

endlessly bickering with neighboring states, and threatening to use the military power of its foreign partner.

Labunski’s rhetoric can be overwrought, but his essential point is sound: When the Virginia delegates met to consider ratification, our fate as a nation rested on Madison’s narrow shoulders.

And Madison came through, of course. By all accounts, the force of Henry’s rhetoric was impossible to resist while he was speaking, but when he stopped, the keen listener was left with little of substance. By contrast, according to one witness, when Madison spoke (assuming one could hear him), he conveyed “plain, ingenious, & elegant reasoning” that quietly dismantled Henry’s oratorical flourishes and convinced the delegates of the wisdom of the federal scheme. As a result, Virginia’s delegates voted in favor of ratification.

But the anti-Federalists were not yet ready to throw in the towel. Support for the Constitution was wobbly, calls for a second constitutional convention had not subsided, and the absence of a bill of rights continued to be a rallying point for opponents of the new government. Taking this issue off the table was to be one of Madison’s chief aims when he took a seat in the House of Representatives, but the anti-Federalists were determined to prevent him from getting there. In drawing up Virginia’s election districts, Henry and his cohorts in the Virginia legislature strung together anti-Federalist-leaning counties in a bid to ensure Madison’s defeat—an early instance of the practice that would be named after the “gerrymandering” Massachusetts governor, Elbridge Gerry, in 1812. The anti-Federalists also recruited James Monroe, the dashing war hero, to run against Madison. Once again, as at the Virginia ratifying convention, Madison seemed overmatched. Monroe was physically impressive, had a sterling war record—he had crossed the Delaware River with George Washington, been wounded in action, and served as military commissioner of Virginia—and was universally liked. Mad-

ison was small and sickly, and, even though he had been commissioned a colonel in the Orange County militia, he had never seen combat because of his poor health.

But Madison pulled through again and, by his own reckoning, he did so by stressing his dedication to getting a bill of rights enacted by the First Congress. Shortly before the voting, Madison confided to Washington that the issue “most likely to affect the election” was the perception that he was “dogmatically attached to the Constitution in every clause, syllable & letter” and would oppose any amendments. Therefore, Madison attacked this perception directly, pledging to the voters that, if elected, he would sponsor a bill of rights in the First Congress and do all that he could to get it enacted. Virginia’s voters approved, sending Madison to Federal Hall in New York to represent them in the new House.

Madison quickly set to work delivering on his campaign promise. His tone, however, was grudging, and it remained evident that his chief aim in pushing the amendments was to forestall a second convention and the likely unraveling of the Constitution to which that would lead. He told his fellow representatives that a bill of rights would be “salutary” in that it would “quiet the minds of people,” and he sought to assure them (and perhaps himself) that it could be enacted without “effecting [*sic*] the essential principles of the Constitution.” He addressed his own belief that a bill of rights would be nothing more than a “parchment barrier” against oppression, arguing (weakly) that the rights would sell themselves, because their enumeration would “establish the public opinion in their favor, and rouse the attention of the whole community.” And he used thinly coded language to remind his fellow representatives that the insertion of a bill of rights would suck the wind out of the sails of the anti-Federalists, who were bent on dismantling the government of which they were a part: “It will be a desirable thing,” he noted, “to extinguish from the bosom of every member of the community any apprehensions, that there are those among

his countrymen who wish to deprive them of the liberty for which they valiantly fought and honorably bled.”

Madison knew it was important to win this battle, and he fought it hard, but his heart wasn't in it. Having just taken his seat in the government that he had worked so hard to create, it must have been galling to find himself compelled to advocate tinkering with it in ways he considered unnecessary. He may well have sympathized with Representative James Jackson of Georgia, who complained that dithering over a pointless enumeration of rights would degrade the new government's image in the eyes of foreign nations, or with John Vining of Delaware, who argued that taking up amendments would be the equivalent of “suspending the operations of government, and may be productive of its ruin,” or even with Aedanus Burke of South Carolina, who scornfully analogized the amendments to “a tub thrown out to a whale, to secure the freight of the ship and its peaceable voyage.” But Madison fought on. The House passed the amendments and sent them on to the Senate, which revised them extensively. In one particularly significant modification, the Senate removed an amendment that Madison apparently genuinely did support, having attempted to insert a similar measure at the Constitutional Convention—a provision declaring, “No state shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases.” As Labunski observes, this rebuff was not surprising, because the “senators mostly saw themselves as protecting the interests of the states and the legislatures that elected them.” The Senate passed the modified enumeration of rights sent them to the states for ratification.

Patrick Henry still smelled a rat, however. He fought against ratification of the amendments, warning that they were nothing but a sop designed to distract the people from the “exorbitancy of Power granted away by the Constitution from the People.” But momentum had shifted strongly in favor of the new government. With Henry fuming that “Virginia has been outwitted, & her reserved rights sacrificed by the ingenious wording of the amend-

ments,” Virginia joined the requisite three-fourths of the state legislatures to ratify the amendments, adding to the Constitution the rights cherished by Americans to this day.

Labunski teaches at the University of Kentucky School of Journalism and Telecommunications and has a Ph.D. in political science as well as a J.D. He is not a historian, and he doesn't write like one, which has advantages and disadvantages. A historian might be more focused on developing an argument, less interested in speculating about such matters as how humiliating it must have been for Madison to delay his fellow carriage-riders while relieving his perpetually distressed bowels, and less apt to be as much of a cheerleader for his subject as Labunski is for Madison. But *James Madison and the Struggle for the Bill of Rights* does not pretend to be something it is not, and Labunski's gee-whiz tone is actually refreshing.

Labunski's exploration of the rivalry between James Madison and Patrick Henry is particularly interesting and may provide a touch of validation for anyone who has ever felt inadequate by comparison to the Patrick Henrys of the world. The book notes an intriguing contrast that John Marshall drew between the two men when he observed that, of all the men he knew, Henry had “the greatest power to persuade,” while Madison “had the greatest power to convince.” Marshall presumably meant to distinguish between Henry's ability to manipulate others through charisma and emotional appeals, and Madison's ability to win them over with compelling reasoning. Marshall's distinction seems especially apt in light of the context in which this rivalry unfolded. If ours was indeed to be a nation of laws, and not of men—a polity committed to timeless ideals, rather than a mob drawn together by a demagogue—it was crucial that the delegates to the Virginia convention who met to ratify the Constitution should be *convinced* by Madison and not *persuaded* by Henry. Spine-tingling rhetoric certainly has its place, particularly in the early stages of a just revolution. But the project of creating a lasting democracy calls for a different, less visceral, form of leadership.

As the well-recounted story by Labunski shows, they also serve who only stand and mumble. **TFL**

Daniel L. Kaplan is an assistant federal public defender in the District of Arizona and the president of the Federal Bar Association's Phoenix Chapter.

Brutality on Trial: “Hellfire” Pedersen, “Fighting” Hansen, and the Seamen's Act of 1915

By E. Kay Gibson

University Press of Florida, Gainesville, FL, 2006. 225 pages, \$34.95.

REVIEWED BY HAROLD L. BURSTYN

The Seamen's Act of 1915 is among the most prominent of the many reforms enacted during Woodrow Wilson's first term as President. Prodded by Andrew Furuseth, the longtime leader of the seamen's unions, Sen. Robert M. (“Fighting Bob”) LaFollette of Wisconsin introduced the statute. On March 4, 1915, in the last-night scramble of a lame-duck session, Congress passed “An Act To promote the welfare of American seamen in the merchant marine of the United States ...” (38 Stat. 1164).

Among its features, the Seamen's Act reaffirmed the abolition of flogging and other forms of corporal punishment aboard ships that sailed under the U.S. flag. Even though flogging and other forms of corporal punishment had been abolished by the White Act of 1898 (30 Stat. 761), the practice apparently continued. The Seamen's Act of 1915, consequently, extended the liability for such punishment beyond the vessel's master to the vessel itself or its owner, who, like the master, would be liable for damages to the person who had been punished illegally.

One of the few shipowners who supported passage of the Seamen's Act was also the mayor of San Francisco and president of Hind, Rolph & Company: James Rolph Jr. (1869–1934). When Rolph ran for mayor in 1911, he had received Furuseth's support. How ironic, then, that it was a ship

REVIEWS *continued on page 70*

owned by Hind, Rolph & Company, the barkentine *Puako*, whose master, Capt. Adolph C. Pedersen, and mates (Pedersen's 17- and 18-year-old sons), became the first to be convicted under the act. With problems like these, it is no surprise that Hind, Rolph & Company did not survive long as a shipowner. Despite the problems aboard his ships, however, James Rolph Jr. served San Francisco as mayor for 19 years, resigning only in 1930 to become governor of California. Four years later, he died in office.

By the time the Seamen's Act became law, sail had given way almost entirely to steam. Only in carrying bulk cargoes (such as coal, lumber, grain, or guano) long distances could a sailing vessel compete with a steamship, even though the former's wind was free and the latter's coal or oil was costly. During World War I, the decline of sail grew faster. The shortage of masters and mates qualified for sail, which was apparent as early as 1900, increased with conscription after the United States entered the war.

Late in April 1918, the American ship *Puako*, under Capt. Adolph C. Pedersen, set sail from Victoria, British Columbia, with a load of lumber headed for Capetown, South Africa. On her previous voyage to Capetown in 1917, Pedersen's problems with his crew had led the U.S. consul general there, George H. Murphy, to write to his superiors that Pedersen "is not a man who is fit to creditably command an American vessel in foreign trade." Unfortunately, Murphy did not have sufficient evidence to remove Pedersen from command, as the law would have allowed him to do.

Pedersen had great difficulty assembling a crew for the 1918 voyage; therefore, he hired his two sons as his mates as well as an old friend as the ship's carpenter. But, despite Pedersen's reputation and his nickname, "Hellfire," he eventually found another 12 men to sign on.

When the *Puako* again arrived off Capetown in late August 1918, two crew members were dead, having jumped overboard rather than suffer any more of Pedersen's wrath and beatings from

him and his sons. The rest of the crew showed signs of the beatings. The British officer who boarded the *Puako*, in response to Pedersen's signaling "Want assistance: mutiny," reported that "the master of the *Puako* was out of his mind." After the *Puako* was towed into Capetown, Pedersen reported to the South African authorities that his crew members were "German spies who had attempted to kill the ship's officers and destroy the vessel." The captain had placed the crew members in irons and forced them to sign incriminating statements.

Consul General Murphy, no supporter of the captain, had the men fed, obtained their statements, and wired the U.S. State Department in Washington, D.C., both to confirm that Pedersen's accusations were nonsense and to get approval for working with the South African authorities to determine the truth. Another seaman died from pneumonia, perhaps weakened by repeated beatings. Only the personal intervention of Secretary of State Robert Lansing persuaded Hind, Rolph & Company that there was a problem. Rolph authorized Murphy to get a new captain and crew for the *Puako*. The ship sailed to Sydney under a temporary master, a Briton, where it found an American crew, and then set sail for Seattle with its load of copra (dried coconut). Two members of the original crew sailed with the *Puako*; the rest of the injured men stayed behind awaiting return to the United States at U.S. government expense in order to appear as witnesses at the upcoming trial.

As authorized by the Seamen's Act, in October 1918, Murphy discharged Pedersen, his sons, the carpenter, and one seaman from the *Puako*; and the South Africans jailed the men. Murphy ordered the ship to be searched and sent the logbooks, confiscated weapons, and other evidence that had been found onboard to Washington. In January 1919, the Pedersens and their former shipmates sailed under guard from Capetown to London, were transferred there to the U.S. Navy, and returned to the United States in March.

The two trials that followed took place in New York City. In the first, the

jury acquitted Capt. Pedersen and his older son, both of whom were defended by Dudley Field Malone, of murdering the two drowned crew members. Because neither Consul General Murphy nor Capt. Elliott Howe of the South African police were able to arrive in time to testify at the trial, the government could not present its best witnesses to confirm the sailors' accounts. In the second trial of the three Pedersens for "felonious assault and maltreatment of the crew," the judge delayed the trial long enough for Murphy, Howe, and a vice consul to testify. The jury convicted all three men. Capt. Pedersen was sentenced to 18 months in prison, and his sons were each sentenced to six months. Their appeal failed, and they went to prison in 1921. In 1924, in San Francisco, an admiralty action against the ship (that is, a libel) on behalf of six sailors injured by the Pedersens led to an award of damages.

Brutality also occurred aboard another Rolph ship—the four-masted barkentine *Rolph*. Frederick Hansen became the first mate of this ship in 1919. His mistreatment of his shipmates led the U.S. consul in Antofagasta, Chile, to pay him off in 1921 and arrange for his return to the United States to face charges. But because the Chilean authorities did not want to get involved, they refused to hold Hansen, and he disappeared. When he turned up in Seattle in 1922, he was convicted and sentenced to five years of hard labor.

Before the libel against the *Puako*, sailors whom Hansen had injured aboard the *Rolph* libeled that ship and received substantial awards. To safeguard any judgment the court might award, the U.S. marshal seized the *Rolph* in 1921, and the ship lay idle in San Francisco Bay thereafter. The *Rolph* never sailed on a commercial voyage again.

Kay Gibson has mined a substantial number of records from several branches of the National Archives to finally tell an important story in the history of maritime labor and the legal protection it has received. Drawing on earlier research done by her husband, Charles Dana Gibson, and Harold Huycke,

both master mariners, she has crafted a readable account of both the legal background and consequences of the events at sea that led to these trials and judgments. Despite the meticulous detail, it is a rousing story. Anyone interested in the history of labor, especially its relation to admiralty law, should read this book. And anyone who is an admiralty lawyer ("proctor in admiralty") *must* read it. **TFL**

Harold L. Burstyn is in private practice in Syracuse, N.Y. From 1996 to 2001, he was the patent attorney for the Air Force Research Laboratory in Rome, N.Y. He teaches law to engineering and computer science students at Syracuse University, where he researches the relation between patent law and the history of science and technology. A former naval officer, he has published a book, articles, and reviews related to the history of seafaring.

Federal Bar Association Membership Application *Raising the Bar to New Heights*

TFL-3-08

I. PLEASE TELL US ABOUT YOURSELF (Please Print)

First Name M.I. Last Name

Title

Male Female Date of Birth / /

First Admission to Bar in U.S. (required, unless applying for law student or foreign associate status)

Court State Bar Date

Please supply both your business and home addresses below.

My preferred mailing address is Business Home

Business Address

Firm/Agency

Address

Suite/Floor

City State Zip

() ()
Phone Fax

E-mail

Home Address

Address Apt. #

City State Zip

() ()
Phone Fax

Practice Type (based on primary employment)
 Government Military Association Counsel University/College
 Judiciary Non-profit

Private Sector

Public Sector

Private Practice
 ACTIVE MEMBERSHIP Please choose one.
 Corporate/In-House

	Private Sector	\$25 Public Sector
<input type="radio"/> Member Admitted to practice 0-5 years	\$75	\$60
<input type="radio"/> Member Admitted to practice 6-10 years	\$125	\$100
<input type="radio"/> Member Admitted to practice 11 years or more	\$150	\$115
<input type="radio"/> Retired (fully retired from the practice of law)	\$75	\$75

2b. SUSTAINING MEMBERSHIP

Become a sustaining member today!
 This optional category is **in addition to regular dues**. It is used to support CLE programs & publications.
 \$60 \$60

2c. ASSOCIATE MEMBERSHIP

Foreign Associate
Admitted to practice law outside the U.S. \$150 \$150
 Law Student Associate
Currently enrolled in law school

Dues Total \$ _____
 Please enter amount in line 4A of the Dues Worksheet.

3. LOCAL CHAPTER AFFILIATION, SECTIONS & DIVISIONS

For a complete listing of chapters, sections and divisions, visit www.fedbar.org. Write in chapter, section(s) or division(s), and dues if applicable.

Dues Total \$ _____
 Please enter amount in line 4B of the Dues Worksheet.

4. DUES WORKSHEET

FBA Dues **4A** \$ _____
 Local Chapter, Section or Division Dues... **4B** \$ _____
Total Amount Enclosed (Add 4A, 4B) \$ _____

5. PAYMENT INFORMATION

Payment Options

Check payable to Federal Bar Association
 Please charge my dues to
 American Express Diners Club
 Mastercard VISA

Card No. Exp. Date

X
 Signature Date

The undersigned hereby applies for membership in the Federal Bar Association and agrees to conform to its Constitution and Bylaws and to the rules and regulations prescribed by its National Council.

X
 Signature of Applicant Date

*Note Contributions and dues to the FBA may be deductible by

Please complete and return to:
 FBA Membership Department,
 1220 N. Fillmore St., Suite 444, Arlington, VA 22201
 (571) 481-9100, (571) 481-9090 (fax)
membership@fedbar.org • www.fedbar.org