The Federal Lawyer

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Columns

Departments

Book Reviews

Indian Law

COVER PHOTO: ABO RUINS, SALINAS NATIONAL MONUMENT, NEW MEXICO. BY LAWRENCE BACA.

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The Federal Bar Association | Mission Statement

The mission of the Association 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.

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JUANITA SALES LEE

Coming Home to Indian Country: More Firsts in Native Leadership

The Federal Bar Association is continuing its tradition of employing the talents of all Americans as national leaders. Next September, when Lawrence Baca becomes president of the association, he will be our first Native American president and the first of any national

nonminority bar. Born in Montrose, Colo., Baca grew up in El Cajon, Calif. He earned a B.A. in American Indian history and culture from the University of California, Santa Barbara, in 1973. Baca graduated from Harvard University Law School, after which he worked at the U.S. Department of Justice, where he was the first Native American ever hired under the attorney general's Honor Law Program. In addition, he was the first Native American lawyer ever hired to work in the department's Civil Rights Division. Because of his groundbreaking work in civil rights as well as his many years of service to the Indian Law Section, the section created the Lawrence R. Baca Lifetime Achievement Award to recognize individuals who have worked diligently in the field of federal Indian law.

In recognition of the FBA's 34th Annual Indian Law Conference, to be held in Santa Fe, N.M., in April 2009, I will use my message this month to present a brief history of Native American leadership in the national political process of the United States. The first person of color to be elected vice president of the United States was Charles Curtis, a Native American enrolled member of the Kaw Nation of Oklahoma. Curtis served as vice president from 1929 to 1933.

Vice President Curtis had previously served as a U.S. representative and senator from Kansas. Born in Topeka, Kan., in 1860, Charles Curtis began his law practice in Topeka. He served as prosecuting attorney of Shawnee County from 1885 to 1889 and was elected to the 53rd Congress and to the six succeeding Congresses, serving from March 4, 1893, until Jan. 28, 1907, when he resigned, having been elected to the Senate. He was re-elected to the 60th Congress and served from 1907 to March 3, 1913. He was re-elected to the Senate in 1914 and again 1920 and 1926. He resigned his senatorial seat to assume the vice presidency. In all, Curtis served 14 years in the House of Representatives and 20 years in the Senate before becoming vice president.

There is a connection between Vice President Curtis and the FBA. Justice D. Michael McBride III, the immediate past chair of the FBA's Indian Law Section, was a justice on the Supreme Court of the Kaw Nation from 1999 to 2004.

Last year, the Indian Law Section's Annual Indian Law Conference discussed a historical connection between Native Americans and African Americans. A small number of Indian nations held African slaves prior to the Civil War and the adoption of the 13th Amendment. After ratification of the amendment, the United States entered into new treaties with each of the slave-holding Indian tribes requiring their slaves and progeny be made members of those tribes. Today those members are called the Freedmen. In the modern era, some of the former slave-holding tribes have sought to alter their membership criteria in ways that exclude many of their Freedmen members. (See "Should the United States be Fighting for Jim Crow's Survival by Its Complicity in Denying Voting Rights to the Cherokee Freedmen" by Jon Velie, published in the February 2007 issue of *The Federal Lawyer*.)

In *Vann v. Norton*, a case discussed at length at the conference, the federal district court for the District of Columbia ruled that the Cherokee Nation of Oklahoma could be sued by disenrolled Freedmen members to enforce the 13th Amendment, because Freedmen who lost their membership in the tribe also lost their right to vote. Even though most of the provisions of the Constitution are not applicable to tribes, the 13th Amendment has been held to apply to tribes, because it forbids slavery anywhere "within the United States, or any place subject to their jurisdiction." The Freedmen allege that they are denied the right to vote on account of race and former condition of servitude and that this is a "badge or incident of slavery."

Last year the Court of Appeals for the D.C. Circuit modified the trial court's opinion, upholding the tribe's immunity from suit but finding that, under the doctrine of Ex parte Young, tribal officials may be sued for alleged violations of federal or constitutional law. As of this writing, neither side has sought certiorari;

MESSAGE *continued on page 5*

RAYMOND J. DOWD

Cease-and-Desist Letters: A Trap for the Unwary

In today's world of globe-trotting, e-mail, and Skype, restricting an attorney's ability to practice in one jurisdiction appears to be an anachronism. Liberal practices in granting pro hac vice applications and relationships with local counsel permit many of us to serve clients around the nation. The global reach of Web sites and the national or international ambitions of a client may lead you to wish to spread your practice wings into other states. When a client comes into your office and wants you to dash off a simple cease-and-desist letter to someone who resides across the country from the state in which you practice, your first impulse might not be the correct one.

Sending a cease and desist letter outside your jurisdiction of practice may subject your client to a declaratory judgment action in that jurisdiction. The Declaratory Judgment Act provides that "any court of the United States … may declare the rights and other legal relations of any interested party seeking such declaration."[1] And if you haven't advised your client of the potentially disagreeable development of a lawsuit in an inconvenient forum, you may wind up losing the client, or worse. Certainly, you may not count on representing the client in that action without retaining local counsel. So before you blast off that "quick and easy" cease-and-desist letter, what do you need to know?

Can a cease-and-desist letter sent to a foreign jurisdiction create personal jurisdiction in which the party sending the letter otherwise has insufficient contacts with the forum? The ordinary rule is that such a letter is insufficient to confer jurisdiction in the foreign forum. Rights-holders ordinarily may inform others of their rights without subjecting themselves to jurisdiction in the foreign forum.[2] But, under certain circumstances, a more aggressive legal advocate might trigger personal jurisdiction in an inconvenient forum. For example, if you send a copy of the cease-and-desist letter to a client of an alleged infringer and the client ceases doing business as a result, such an action may create personal jurisdiction and subject your client to litigation in an inconvenient forum.

Several recent cases illustrate the problem that can arise. In *Dudnikov v. Chalk & Vermilion Fine Arts Inc.*, a cease-and-desist letter written to a would-be auctioneer in Colorado, with a copy to Ebay in California, caused Ebay to cancel an auction.[3] The would-be auctioneers sued for declaratory judgment in Colorado. The Tenth Circuit upheld jurisdiction because the letter's sender intended that a third party, Ebay, take action against the Colorado resident.

In another case, *Bancroft & Masters Inc. v. Augusta National Inc.*, a California plaintiff had registered the domain name "masters.com."[4] The defendant, Augusta National, sent a cease-and-desist letter to the plaintiff and copied the domain name registrar to trigger its dispute resolution procedures and appropriate the name for itself. The Ninth Circuit upheld the declaratory judgment suit in California, because Augusta's letter to the registrar had specifically targeted the domain name of the California corporation.

But what if your cease-and-desist letter results in a declaratory judgment action? Like any good attorney—with adrenalin pumping and the client howling—you will charge into a local court and file a second action. Of course, you feel that your client is the "true" plaintiff and the local judge will vindicate you. Not so fast. In the United States, we respect the first-to-file rule. That means that there is a strong presumption that the person who wins the race to the courthouse gets to litigate in the forum of his or her choice, assuming that jurisdiction is proper. Numerous federal courts have imposed sanctions on attorneys who file second actions without a proper basis.[5]

So how do you avoid losing the race to the courthouse and your access to a local forum? You can sue first and send letters second. This is a perfectly ethical strategy and often makes the difference between a smaller litigant having a chance of successfully engaging a larger adversary. Therefore, you should investigate your case carefully.

You can also send a cease-and-desist letter that looks more like an offer to settle or license than an actual demand to cease and desist. The Federal Circuit dismissed a declaratory judgment action on the grounds that a cease-and-desist demand was really an offer to settle. The court ruled that evidence of negotiations should not be admissible to confer personal jurisdiction.[6]

But writing a softball cease-and-desist letter can backfire. A major exception to the first-to-file rule is the case of a recipient's filing of a lawsuit after receiving notice of a planned lawsuit by an adversary. At first blush, one would think that all cease-and-desist letters provide notice of a planned lawsuit, but this may not always be the case. For example, in one case, the sender of a cease-and-desist letter stated that he would be "constrained to pursue appropriate legal steps against"

a purported infringer and that he would be "authorized to consider taking suitable legal and equitable action," but the party who filed the declaratory judgment was allowed to proceed because the letter was "suggestive of negotiations."[7] In another case, a sender wrote that he would have "little choice but to seek additional legal remedies," but there was no notice of a planned lawsuit.[8] A sender of a cease-and-desist letter who plans to rely on the notice exception to the first-to-file rule should be specific: the court, the date of filing, and the nature of the claims should be specified in the letter.

The rules are not hard-and-fast, and courts will make exceptions to the first-to-file rule when they believe that a party or an attorney has engaged in deceptive practice, forum shopping, or other inequitable conduct. In one case, the court disregarded the first-to-file rule when the party threatening a lawsuit had given a deadline for a response and the first party to file did so a day before the deadline expired.[9]

You should think hard before sending out that next cease-and-desist letter and be sure to advise your client of the potential consequences. **TFL**

Raymond J. Dowd is a partner in Dunnington Bartholow & Miller LLP in New York City and author of Copyright Litigation Handbook *(West 3d. ed., 2008). He serves as vice president for the Second Circuit of the FBA and is a member of* The Federal Lawyer*'s editorial board.*

Endnotes

[1]28 U.S.C. § 2201.

[2]*Red Wing Shoe Co. v. Hockerson-Halberstadt Inc.*, 148 F.3d 1355 (Fed. Cir. 1998).

[3]514 F.3d 1063 (10th Cir. 2008).

[4]223 F.3d 1082 (9th Cir. 2000).

[5]*See*, for example, *Red Carpet Studios Div. of Source Advantage Ltd. v. Sater*, 465 F.3d 642 (6th Cir. 2006).

[6]*Red Wing Shoe Co.*, *supra* note 2.

[7]*J. Lyons & Co. Ltd. v. Republic of Tea Inc.*, 892 F. Supp. 486 (S.D.N.Y. 1995).

[8]*Abovepeer Inc. v. Recording Indus. Ass'n of America Inc.*, 166 F. Supp. 2d 655, 658 (N.D.N.Y. 2001).

[9]*Int'l Development Corp. v. INTP Inc.*, 2004 WL 2533560 (N.D. Tex. 2004).

Editorial Policy

The Federal Lawyer is the magazine of the Federal Bar Association. It serves the needs of the association and its members, as well as those of the legal profession as a whole and the public.

The Federal Lawyer is edited by members of its editorial board, who are all members of the Federal Bar Association. Editorial and publication decisions are based on the board's judgment.

The views expressed in *The Federal Lawyer* are those of the authors and do not necessarily reflect the views of the association or of the editorial board. Articles and letters to the editor in response are welcome.

MESSAGE *continued from page 3*

therefore, the matter will return to the trial court. The court may dismiss the case on the grounds that the tribe is an indispensable party that cannot be brought before the court, or the case may go to trial to test whether the actions taken do, in fact, violate any law.

Finally, the country has no active sitting federal judge who is Native American on the bench today, and in American history there have been only two Native American federal judges. It is simply impossible to believe that, in the history of the federal judicial system, only two Native Americans have met the qualifications to be appointed by the President. I encourage President Obama to cast the widest net possible in his search for men and women to fill vacant seats in the federal judiciary.

I invite you to meet me in Santa Fe for the exciting and history-making 34th Annual Indian Law Conference entitled "Coming Home to Indian Country." For the first time in history, the conference will take place in a tribal community, at the Pueblo of Pojoaque's Hilton Buffalo Thunder Resort and Casino, on April 2–3, 2009. I offer my congratulations to the officers of the Indian Law Section and the conference planning committee for what looks to be a superior program. **TFL**

Juanita Sales Lee

Sixth Circuit

Chattanooga

The Chattanooga Chapter held its annual meeting on Jan. 28 at the Chattanoogan Hotel, at which Hon. William M. Barker, retired chief justice of the Supreme Court of Tennessee, spoke about professionalism and giving back to the community. Eastern District of Tennessee judges at the meeting included Hon. Curtis L. Collier, chief U.S. district judge; Hon. Harry S. Mattice Jr., U.S. district judge; Hon. John C. Cook, chief U.S. bankruptcy judge; Hon. William B. Mitchell Carter, U.S. magistrate judge; and Hon. Susan K. Lee, U.S. magistrate judge.

At the meeting, Rita LaLumia, Federal Defender Services of Eastern Tennessee, outgoing chapter president, presented its 2008 WOW! Awards to three attorneys—David Higney of Grant, Konvalinka & Harrison; Donna Mikel of Burnette, Dobson & Pinchak; and Maury Nicely of Miller & Martin PLLC—in recognition of their assistance in fulfilling the FBA's mission "to strengthen the federal legal system and administration of justice by serving the interests and needs of the federal practitioner, both public and private, the federal judiciary, and the public they serve." Shelley Rucker of Miller & Martin PLLC, past president of the chapter, presented Barry Cammon of Advanced Video Solutions with the 2008 Best Supporting Actor Award for the generous contribution of his time, talent, and wisdom to the chapter in producing the documentary, "Balancing the Scales: The Chattanooga Trial of *U.S. v. James R. Hoffa*." Incoming chapter president, Leslie Cory of Ortwein & Cory LLC presented the 2008 Above and Beyond Awards to Angela Gibson and Sharon Lehmkuhl for their outstanding assistance to the chapter in presenting its programs.

On Nov. 20, 2008, the chapter held its first Member Appreciation Reception at Table 2 Grille in Chattanooga. All members of the chapter were invited as guests to share in the chapter's 2008 WOW Award and the Presidential Citation Award, which were on display. The chapter received the awards at the FBA Annual Meeting and Convention in September 2008 for its work on the documentary, "Balancing the Scales: The Chattanooga Trial of *U.S. v. James R. Hoffa*, and for the program based on the documentary, which was presented at the May 2008 Sixth Circuit Judicial Conference in Chattanooga. Several members of the judiciary attended the reception.

Ninth Circuit

Inland Empire

In May 2008, the Inland Empire Chapter presented the Erwin Chemerinsky Defender of the Constitution Award to Jim Parkinson to honor his many professional and pro bono accomplishments. During the presentation of the award, Judge Stephen Larson of the U.S. District Court for the Central District of California described Parkinson as a Renaissance man, because he is very well read and has a broad variety of interests. He has spent nearly his entire career practicing law in the Inland Empire. During this time, he has worked with some legendary members of its legal community, including Thomas T. Anderson and Hon. Douglas Miller, associate justice of the California Court of Appeals for the Fourth District, Division Two. Parkinson's most notable cases include *Ellis v. R.J. Reynolds Tobacco Co.*, the California case against "Big Tobacco" companies, as well as *Poole v. Nippon Steel*, the case involving Japanese prisoners of war. Jim was of counsel to Casey Gerry and Robinson Calgagnie in the *Ellis* litigation and served as co-lead counsel in *Poole*.

Chattanooga Chapter: At the chapter's annual meeting—(left photo, l to r) Rita LaLumia, immediate past chapter president; U.S. District Judge Harry Mattice; Harry Burnette; and John Medearis; (right photo, l to r) Maury Nicely, winner of one WOW award, and Rita LaLumia, immediate past chapter president.

Inland Empire Chapter—At the presentation of the Erwin Chemerinsky Defender of the Constitution Award (left photo, l to r) award recipient Jim Parkinson and Judge Stephen Larson of the U.S. District Court for the Central District of California; (right photo, l to r) Judge John Tobin of the Social Security Administration and Dean Erwin Chemerinsky.

Hawaii

In November, Ninth Circuit Judges Mary M. Schroeder, Richard A. Paez, and N. Randy Smith met with members of the Hawaii Chapter when they visited Honolulu to hear cases as a panel. At the meeting they participated in an informative question-and-answer session on appellate practice tips.

At the chapter's annual holiday party held in December, the Hawaii Chapter presented Exemplary Service Awards to the District of Hawaii's three magistrate judges, Barry M. Kurren, Leslie E. Kobayashi, and Kevin S.C. Chang.

In January, Circuit Judge Mary M. Schroeder returned to Honolulu and shared intriguing reminiscences of her years as chief judge of the Ninth Circuit (2000–2007) with chapter members. She also expressed her thoughts on current issues related to national judicial administration and policy. **TFL**

Chapter Exchange is compiled by Melissa Stevenson, FBA manager of chapters and circuits. Send your chapter information and photos to mstevenson@fedbar.org or Chapter Exchange, Federal Bar Association, 1220 North Fillmore Street, Suite 444, Arlington, VA 22201.

Hawaii Chapter—At the November meeting with Ninth Circuit judges (top right photo, l to r) Hon. N. Randy Smith; Carol A. Eblen, past chapter president; Hon. Mary M. Schroeder; Hon. Richard A. Paez; and Howard G. McPherson, chapter president-elect; at the January meeting—(bottom right photo, l to r) Carol A. Eblen, past chapter president; L. Richard Fried, chapter member; Hon. J. Michael Seabright of the District of Hawaii; Hon. Mary M. Schroeder of the Ninth Circuit; Hon. Helen Gillmor, chief judge of the District of Hawaii; and Sue Beitia, clerk of court, District of Hawaii, and chapter secretary; at the chapter's annual holiday party—(bottom left photo, l to r) Hon. Leslie E. Kobayashi, Hon. Barry M. Kurren, and Hon. Kevin S.C. Chang.

Federal Career Service Division

The Federal Career Service Division continued to serve as a key sponsor of the 2009 Washington, D.C./Baltimore Public Service Career Fair, which was held at George Mason University Law School on Jan. 30. Almost 50 public service organizations and local, state, and federal government employers registered and attended the event. More than 300 students from the law schools of American University, University of Baltimore, Catholic University of America, University of the District of Columbia, University of Maryland, and George Mason University participated as well. The Federal Bar Association hosted registration for employers on its Web site and was represented at the Career Fair by Neysa Slater-Chandler, former chair of the Federal Career Service Division. In addition, the division hosted the employers' luncheon, which featured a keynote address by Jim Richardson, the FBA's immediate past president, a former chair of the division, and a founding member of the Career Fair.

Government Contracts Section

The Government Contracts Section and its Federal Grants Committee hosted a brown-bag lunch on Jan. 8. The featured speaker was Harold L. Cohen, deputy assistant general counsel for democracy, conflict, and humanitarian assistance of the U.S. Agency for International Development. During the program entitled "International Grants and Cooperative Agreements: You're Not In Kansas Anymore," Cohen spoke about USAID's process of giving grant monies, the organization's structure, and its relationships with foreign governments, NGOs, and Public International Organizations. **TFL**

Sections and Divisions is compiled by Adrienne Woolley, FBA manager of sections and divisions. Send your sections and divisions information and photos to awoolley@fedbar.org or Sections and Divisions, Federal Bar Association, 1220 North Fillmore Street, Suite 444, Arlington, VA 22201.

| *Editor's Note:* **Correction** |

A book review of an autobiography of James A. Baker III (*The Federal Lawyer*, February 2009, p. 60) stated that Baker never ran for public office. In 1978, however, he lost an election for attorney general of Texas.

| *Candidates for National Office* **FY 2010** |

Pursuant to the FBA Constitution and Bylaws, and in accordance with the notice disseminated earlier this year, the Nominations & Elections Committee has met and considered applications for nomination to national FBA office. The committee has nominated the following members for the offices indicated:

National Officers

President-elect ..... Ashley L. Belleau
Treasurer ..... Fern C. Bomchill

Board of Directors

Group 1*
Director ..... Stephen R. Jackson

Group 2**
Director ..... Hon. Michelle H. Burns

Group 3***
Director ..... Hon. D. Michael McBride III

Group 4****
Director ..... Kelle S. Acock

*One FBA member in good standing and a current or former FBA vice president of a circuit.

**One FBA member in good standing and a current or former chair of an FBA section or division.

***One FBA member in good standing and a current or former FBA chapter president.

****One FBA member in good standing and has served as an FBA chapter officer, a national FBA YLD officer or board member, or as an FBA chapter leader with YLD responsibilities. In addition, at the time of election, the person must be age 36 or younger.

Vice Presidents for the Circuits

First ..... Dora L. Monserrate-Peñagaricano
Second ..... Shana-Tara Regon
Third ..... Neal C. Belgam
Fourth ..... Stephen R. Jackson
Fifth ..... Patrick E. O'Keefe
Sixth ..... Cameron S. Hill
Seventh ..... Joel R. Skinner
Eighth ..... Anh Le Kramer
Ninth ..... W. West Allen
Tenth ..... Hon. Robert E. Bacharach
Eleventh ..... Cynthia M. Van Rassen
D.C. ..... Brian C. Murphy

The names of these candidates will be listed on the ballots that will be distributed to each member in good standing as of **June 15, 2009**.

Petition Procedure

Any member who wishes to be listed, in addition to those nominated, may send to the chair of the Nominations & Elections Committee at FBA headquarters a petition specifying the office being sought and bearing the required number of signatures; *i.e.*, fifty (50) signatures for national offices; twenty (20) signatures for vice presidents for the circuits by members within the respective circuit. All petitions must be received no later than 5 p.m., EDT, **Monday, April 27, 2009**.

The petition must be accompanied by a biographical sketch of the petitioner's background, including the following: present position; date admitted to the bar; period of membership in the FBA; FBA activities; and membership in other bar associations. Please limit the biographical sketch to approximately 150 words, or the equivalent of a paragraph one-inch deep.

2009 Nominations & Elections Committee

These candidates are respectfully submitted by the members of the Nominations & Elections Committee: Juanita Sales Lee, President and Chair; Lawrence R. Baca, President-elect; James S. Richardson Sr., Immediate Past President; George E. Liberman, Circuit Vice President; Sharon L. O'Grady, Circuit Vice President; Carol Wild Scott, Section Chair; Kelsey Kornick Funes, Division Chair; Steve E. Rau, Chapter Representative; and Jonathan O. Hafen, Chapter Representative.

BRUCE MOYER

Will Congress Cast Light on the Dark Side of the Bush Era?

A new Congress is faced with a dilemma: whether to begin a controversial process that investigates possible government wrongdoing during the Bush administration. Findings of wrongdoing potentially could lay the groundwork for the prosecution of high-level government officials, past and present.

The chairmen of the Judiciary Committees in the Senate and the House of Representatives both have called for the creation of expansive, independent commissions to investigate the Bush era, focusing on whether American and international laws were violated. The committees would have a key role in creating such commissions because of the committees' jurisdiction.

Sen. Patrick Leahy (D-Vt.), chairman of the Senate Judiciary Committee, has proposed the creation of what he calls a "Truth Commission" to probe the use of torture and other alleged violations of the U.S. Constitution and the Geneva Conventions. The commission would probe the legality of anti-terror policies and the misuse of intelligence to promote the invasion of Iraq and partisan abuses in the Justice Department through the firing of U.S. attorneys who were viewed as potentially disloyal to the administration.

Leahy would use a process modeled partly on the Truth and Reconciliation Commission of postapartheid South Africa. He also has invoked the Church Committee, a Senate panel in 1975 that investigated illegal intelligence gathering by the CIA and FBI after certain activities had been revealed by the information that came out of the inquiry into the Watergate affair. Leahy would give his Truth Commission subpoena power and the authority to grant prosecutorial immunity to witnesses.

"We need to get to the bottom of what happened and why," Leahy said in a speech at Georgetown University on February 9. "The reason we do that is so that it'll never happen again. One path to that goal would be a reconciliation process—a Truth Commission."

Rep. John Conyers (D-Mich.), chairman of the House Judiciary Committee, has introduced more narrow legislation, H.R. 104, that would create the National Commission on Presidential War Powers and Civil Liberties. The commission would be charged with investigating the provocative policies that helped to anchor the Bush administration's prosecution of the war on terror. Conyers' proposal targets specific tools and methods,

- Detention: Should the CIA and the military be able to detain suspected terrorists indefinitely without charging them or allowing them access to lawyers?
- Enhanced interrogation: Should prisoners be subjected to waterboarding and other techniques commonly seen as torture?
- Extraordinary rendition: Should U.S. authorities send suspects to prisons in countries where harsh interrogations and techniques, including torture, are likely?
- Warrantless electronic surveillance: Was it legal for U.S. officials to eavesdrop on citizens without getting warrants to do so?

Will Congress establish a commission to probe the legality of these and other polices during the Bush era? A minority of Americans appear to have the stomach for ferreting out the past and determining whether or not their leaders committed war crimes. Even though 61 percent of Americans support some kind of investigation into these matters, only 41 percent favor criminal probes, a recent Gallup Poll found. Even among liberals, strong support for such a commission is lacking, according to a recent MoveOn.org poll.

President Barack Obama has not yet signaled support for such an investigation, preferring to focus on saving the distressed economy. In his first days in office, President Obama reversed some of the most controversial detention and interrogation policies of the Bush administration. Obama's three executive orders issued within days of his inauguration mandated the closure of the Guantánamo Bay detention facility within a year, suspended military commission proceedings and the CIA's enhanced interrogation program, and established an interagency task force to look into the future use of military interrogation procedures and to determine if rendition compromises U.S. compliance with bans on torture.

Republicans are bound to oppose the creation of any commission, calling it a witch hunt. Rep. Lamar Smith (R-Texas), the ranking GOP member of the House Judiciary Committee, has already opposed the proposal, saying, "We have already had a thorough investigation into the Justice Department, including a two-year inquiry led by Democrats in Congress and an official investigation by the Justice Department's inspector general." **TFL**

Bruce Moyer is government relations counsel for the FBA.

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&

THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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- U.S.S.G Basics
- Fraud & Theft Offenses
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Mark the dates of May 21 - May 22, 2009, on your calendar and join us in Clearwater Beach, Florida, to discuss the latest issues of the Federal Sentencing Guidelines with some of the top experts in the field. Tuition for all Government attendees is $305 if postmarked by April 21, 2009; $345 if postmarked April 22, 2009, or later. Tuition for all Non-Government attendees is $340 if postmarked by April 21, 2009; $380 if postmarked April 22, 2009, or later. For hotel reservations call the Hilton Clearwater Beach at 1-800-753-3954. Please remember to mention that you are attending the Federal Sentencing Guidelines Seminar to receive the discounted room rate. Course materials will be available on CD for purchase.

To register or for more information, please contact Anderson Smith at (813) 229-4954 or by e-mail at asmith@carltonfields.com.

MICHAEL J. TONSING

Lean Times Require Cyberian Lawyers to Think Wisely

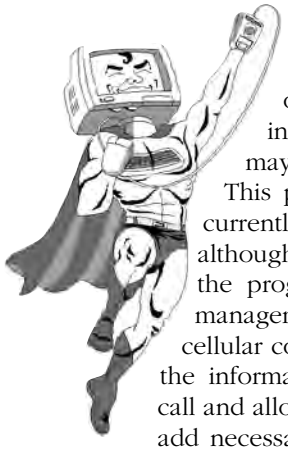
So what do Cyberian lawyers do in lean times like these? They think wisely.

Use What You Already Have, But Use It More Effectively

First, Cyberian lawyers do a quick inventory of their hardware and software. Many of us buy products because they seem so terrific when we read their descriptions, but once these products arrive, we fail to use them, simply because we've moved on to another, newer thought. Now would be a fruitful time to revisit products we've already purchased but never removed from their shrink wrap and products we've installed but whose manuals we've never read (making us far less efficient—or even clueless about the real contributions these items could make to our practice). It is a good time to hunker down, install these products, and read their manuals.

Second, in lean times, wise Cyberian lawyers limit new product acquisitions to items that will almost certainly add to the bottom line (billing and matter management software comes to mind). I use PCLaw® in my own practice, and I've used it for quite a while. Next month, I will finally get around to taking the two-day training program offered by its creators—presumably to learn how to make the software dance.

Study after study has shown that lawyers who do not contemporaneously record billable time bill fewer hours. I believe that my investment in training will pay dividends very quickly.



Consider Adopting TalkTIMR®

If you use a Blackberry®, Palm Treo®, or Windows Mobile® phone—plus a calling plan that includes data service—you may want to consider adopting TalkTIMR. This program, which is for smart phones and currently integrates fully only with Abacus Law®–although the developers are planning to integrate the program with other legal billing and client management software soon—is installed on your cellular communications device. TalkTIMR captures the information necessary for billing the telephone call and allows the attorney who concludes the call to add necessary explanatory comments. That data can then be exported to your billing software. A year of TalkTIMR service costs about as much as it would cost to pay most lawyers for the time used to capture less than two hours' worth of such phone calls that would otherwise have been lost.

According to the folks at Proximiti®, the company behind TalkTIMR,

> You … use your cell phone just as you normally would. Our software operates quietly in the background and automatically captures information about inbound and outbound calls. The default setting for TalkTIMR is to pop a window at the end of each call with information on the call just completed and suggestions on call type, client/matter code and billable time. You can accept this information or revise it on a per call basis. Since cell phones are often used for personal calls too, you can quickly mark calls as personal and from that point forward, these numbers are omitted from reporting. You can also delete immediately any call record from TalkTIMR and it will not be included in any of the reports. If you're busy and need to get to the next call, simply click on "Later" and the call detail record is retained where you can later either append the necessary billing data or have an assistant do that for you." (*See* www.proximiti.com/TalkTIMR_Main.aspx.)

The service seems like a moneymaker to me.

Many lawyers understand that, in tough economic times, the government will be looking for any and all sources of revenue; therefore, disallowing business expenses attributable to a law firm's cell phones will be a tempting target. TalkTIMR will provide effortless and irrefutable proof of the percentage of cellular business use like no other product I am aware of.

Proximiti also sells a similar product for landline telephones. That service might also be worth considering.

Once Again, Consider LawDocsXpress®

A money-saving source I have touted to cost- and efficiency-minded Cyberians in several previous columns—and one that deserves special emphasis during difficult economic times—is LawDocsXpress. This company, now in its seventh year of operation, allows law firms to do several things with great confidence, security, and confidentiality: they can outsource legal secretarial work, reduce overtime, supplement resources in costly or difficult to staff markets (or, in effect, have Internet-based secretarial service available as needed while trying a case out of town), do some very cost-effective load-leveling in an in-house typing

pool, and improve attorney/secretarial ratios. Whew!

I am a sole practitioner, and I know from experience that I can keep my overhead significantly lower by relying on these excellent "Cyberian secretaries." Of course, I continue to use these services. According to its Web site (www.lawdocsxpress.com), LawDocsXpress—

> provides reliable and secure, outsourced legal secretarial services and legal word processing for law firms, corporate legal departments and governmental entities. LawDocsXpress has been able to differentiate their offering and acquire a significant client base by using only U.S. labor with years of legal secretarial experience and emphasizing a high quality of service via the Internet.

As a lawyer who has used these services even when I have been in litigation "crisis mode," I can personally attest to the truth of this mission statement. These folks are nothing short of amazing. Everything they do for you is encrypted and safe. They check their resource staff for conflicts before assigning your work, and they assign your project to a secretary who's familiar with your field of law and its specialized lingo. The company's Web site continues:

> LawDocsXpress enables their clients to dramatically reduce costs associated with overtime and temporary help. Law firms, corporate legal departments and governmental entities use LawDocsXpress for full outsourcing, occasional help, overflow (evening and weekend) work projects, peak periods or standard document preparation and word processing. LawDocsXpress caters to the unique needs of "boutique firms" that practice intellectual property (patent and trademark), workers compensation, corporate transactional and litigation (including appellate).

If you have not heeded my previous advice, consider doing so now. LawDocsXpress knows its stuff. And the service will save you money in the long run—and maybe even in the short run, as discussed below. Controlling overhead costs in this way allows me to pass efficiencies along to clients by producing faster results at a lower cost.

By visiting the LawDocsXpress Web site, you can sign up and use its services for 30 days, paying only for the typing/transcription services that you use (which are billed on a quarter-hour basis). You literally cannot lose! At the end of the 30-day trial, you can decide whether to continue using the services—only then would you sign up as a permanent firm client and pay the license fee (which goes to pay for your third-party-vendor encryption license, for the most part.)

LawDocsXpress is truly a no-brainer during tough economic times.

Once Again, Consider Support.com®

I have mentioned Support.com in this column before. The company also deserves a special mention again in the context of a column on controlling costs related to technology. (See www.support.com.) In a nutshell, Support.com provides computer technical support over the Internet. The company's technicians are very knowledgeable and are based in the United States. The company's pricing can be by the episode, or you can purchase a yearly subscription—it's your choice. For obvious reasons, I've opted for a yearly subscription.

Words cannot describe the feeling of confidence it gives me to know that my computers, which are so central to my professional life, are backed up by a team of highly competent computer engineers who are available day or night to resolve the puzzling glitches that go with owning the labor-saving devices we call computers. When something bad happens, I don't want a two-day turnaround; I want a fix right now. And when I need help, I get the undivided attention of a very competent computer engineer within minutes.

Moreover, because Support.com's charges are based on a flat fee and are known in advance (fees vary according to a schedule that is based on the type of problem)—I am never nervous in dealing with the technicians. I have dealt with other technical support groups in the past, and I have always suspected—rightly or wrongly—that the technicians were stretching my problems out to make their "bottom line" larger. I no longer encounter this problem. I also have dealt with technical service providers located offshore. Not any more.

High-quality, omnipresent, U.S.-based technical support with fees determined in advance—all of this is good for controlling costs. Try Support.com; I believe you will find that its services are extremely cost-effective.

Type Faster Yourself with Speech Recognition Software

In a not-too-distant future issue, I will review the latest version of Dragon® Naturally Speaking® for Lawyers (Version 10), the speech recognition program from Nuance Communications Inc.® that purports to be able to boost your "typing speed" from whatever it currently is to a remarkable 140–160 words per minute with a 99 percent accuracy rate. The program also promises a "read back" feature that allows users to sit back in their chairs and have an electronic voice read back what they've dictated and written. (I have always believed that hearing one's words read back produces superior results when compared to ordinary visual proofreading on one's own.)

I have used Version 9 of Dragon Naturally Speaking for Lawyers quite happily. If Version 10 surpasses Version 9—and does anything close to what the devel-

CYBERIA *continued on page 14*

opers claim it will do—the program unquestionably will add further to my professional efficiency and to my bottom line. Like LawDocsXpress, which I use for larger projects like briefs and memorandums (thanks to the ability of their Cyberian legal secretaries to deal with complex tables of contents and tables of authorities), Dragon also helps control overhead costs and allows me to pass further efficiencies along to clients—again, by producing faster results at a lower cost.

Consider Making Your CLE Experiences Far More Comfortable and Somewhat More Cost-Effective

Lawyers who spend nonproductive time traveling to and from continuing education classes because they abhor the small laptop screen CLE "webinars" and video podcasts that have recently become ubiquitous may be able to justify investing in a product that will allow them to watch CLE classes on a high-defintion television in their home or office thanks to a new device currently available through Amazon.com®.

This new device, called SlingCatcher®, is technically known as a "universal media player," which allows you to watch any video you've captured on your computer on your big screen television. The product has received mixed reviews on Amazon.com, but the latest iteration seems to be delivering on the developer's original promise.

According to one consumer/reviewer writing last November, "It is easy to set up, you only need to hook up one cable to your TV and then you hook up the SlingCatcher to the internet." (SlingCatcher is made by the highly successful company that developed the highly advertised and almost universally acclaimed SlingBox®.) One major advantage of SlingCatcher is that it comes with a remote control box that lets you pause the video you are watching, then resume watching—no small blessing during an MCLE presentation delivered by a talking head. (Go to www.slingmedia.com/go/slingcatcher.)

Check Out Audio and Video Products Made by Roku

A company called Roku makes some ingenious Cyberian products that are in the same vein as SlingCatcher and also may have present or future applications to your practice. One device is a "radio"—the so-called Roku Wi-Fi Soundbridge radio system that picks up streaming audio broadcasts from your Wi-Fi network and broadcasts them. The broadcasts have beautiful sound quality, and the system does not require an intervening computer terminal. The Roku Soundbridge can also play an array of nonstreaming file types, including MP3s, making the system potentially useful as a broadcaster of business-related podcasts (whether streamed live or captured on a computer-based SD/MMC card).

The Roku Wi-Fi Soundbridge radio system is matched by the Roku digital video player (previously known as the "Netflix Player by Roku"), which instantly streams movies from Netflix (and will soon be able to do so from Amazon Video on Demand—a library consisting of more than 40,000 movies) over the Internet—directly to your television. Can videos of legal seminars available from Amazon be far behind?

The *Wall Street Journal*, *CNET*, *WIRED*, and other publications have given the Roku digital video player overwhelmingly positive reviews. For example, the editors at *CNET*, generally not given to hyperbole, could hardly contain themselves when reviewing the video device: "In the final analysis … it's a groundbreaking product. … [T]he Roku box lets us enjoy more content at no extra charge beyond the price of the box itself. In other words, it's pretty much giving you access to video-on-demand content for nothing, and it's pretty hard to compete with 'free.'"

The Roku video player is priced considerably lower than the SlingCatcher is, selling at a bit less than $100. According to the company as well as those who have previously reviewed the device, "it is compact, easy to set up and intuitive to use." (There can be no denying that it is compact! Weighing in at 11 ounces, the player is a mere 5 x 5 x 1.75 inches.)

You can connect a Roku video device to the Internet through most broadband providers (such as a cable modem or a DSL connection). You'll need at least 1.2 megabytes per second of Internet download speed to watch movies that have decent quality instantly on the Roku digital video player. The faster your connection is, the better your video quality (although the folks at Roku indicate that this rule of thumb peaks out at about 5 megabytes per second).

You can use your audio or video Roku's built-in Wi-Fi capabilities to connect directly to a wireless network or use a router's Ethernet port for a wired connection. Either way works.

The video Roku device, like the SlingCatcher, is controlled via an included remote control box. According to the Roku Web site, "Choose the item you want to watch, play, fast-forward, rewind, pause, and resume play later, just like watching a DVD."

Roku's digital video player sounds terrific. Plus, the price is very reasonable. Big screen MCLE anyone?

Conclusion

Be prudent and think wisely—and your Cyberian law practice may not just survive an economic downturn, it may actually prosper. See you again next month in Cyberia. **TFL**

Michael J. Tonsing practices law in San Francisco. He is a member of the FBA editorial board and has served on the Executive Committee of Law Practice Management and Tecchnology Section of the State Bar of California. He also mentors less-experienced litigators by serving as a "second chair" to their trials (www.Your-Second-Chair.com). He can be reached at mtonsing@lawyer.com.

The Federal Bar Association *in conjunction with*
The Office of Chief Counsel Internal Revenue Service
presents the 21st Annual

Insurance Tax Seminar

May 28-29, 2009 • J.W. Marriott, Washington, D.C.

The Insurance Tax Seminar is the most successful and widely attended conference directed at professionals specializing in insurance taxation matters. The seminar features programs dealing with the taxation of insurance companies and their products. The seminar this year will have more than 19 sessions devoted to timely topics, presented by expert government and private-sector panelists, including:

- A viewpoint on Stunning Tax Issues arising from the financial and economic crisis will be presented by Lee Sheppard, the popular contributing editor and columnist for *Tax Analysts*.
- Thursday's luncheon will feature a presentation by Jane L. Cline, the Commissioner of Insurance of West Virginia and president-elect of the National Association of Insurance Commissioners.
- A roundtable discussion of the likely result of the current financial and economic crisis, Regulatory Revision of Insurance Companies with Peter Wallison from American Enterprise Institute, J. Stephen Zielezienski from American Insurance Association, and Gary Hughes from American Council of Life Insurers as participants.
- Another result of the current financial crisis will be explored by a panel on Tax Losses: Impaired Assets and Limits on Utilization by Insurance Companies of Losses, Including Section 382 and Consolidated Returns
- The Tax Aspects of Life and Nonlife Securitizations as Use of Capital Markets for Insurance Funding will be considered by a panel of experienced practitioners and IRS personnel who are studying the relevant tax issues.
- IRS representatives from the LMSB Division will provide an update from the Field and National Office on current audit issues--one panel will cover the life insurance company issues and a separate panel will highlight the issues impacting principally on nonlife insurers. In another session, the "Insurance Branch" in the Office of Chief Counsel will again provide an update on its actions.
- Three separate sessions will be devoted to aspects of the taxation of life insurance and annuity products, with separate emphasis on current tax developments, the recent activity concerning the taxation of partial and complete contract exchanges and the special rules for separate accounts.
- The IRS process for Developing Tier I, II, and III Issues and Identifying Transactions of Interest will be featured in one panel, while another session will discuss the CAP Program and the Office of Appeals Role in handling insurance company audits.
- Recent developments in many other areas will also be covered including current tax legislative developments.

REGISTER ONLINE AT WWW.FEDBAR.ORG or mail to: FBA, Insurance Tax Seminar, 1220 North Fillmore Street, Suite 444, Arlington, VA 22201 or fax to: (571) 481-9090.

A reduced registration fee is offered for new registrants and those who have not attended the Insurance Tax Seminar in the last five years. The discount is not applicable to the government employee fee.

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- ❑ $570 Nonmember who hasn't attended within last five years
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- ❑ $410 FBA Member who hasn't attended within last five years
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- ❑ Check (payable to the Federal Bar Association)
- ❑ Government Purchase Order
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Hotel

A limited number of rooms are available at the seminar hotel, the J.W. Marriott, 1331 Pennsylvania Ave. NW, Washington, DC 20004, (202) 393-2000 or (800) 228-9290 at $262 for single occupancy. Reservations at special seminar rates must be made by April 29, 2009. Mention the Federal Bar Association Insurance Tax Seminar in order to obtain the special room rate.

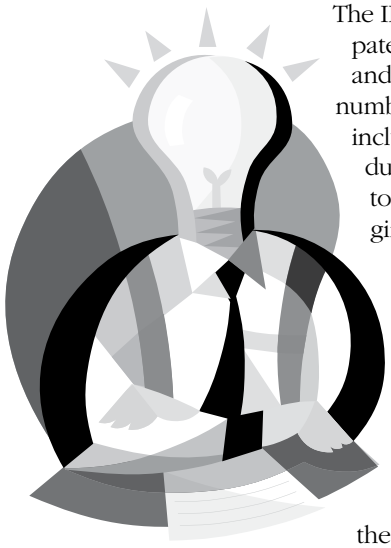
WILLIAM H. HOLLANDER

New Intellectual Property Database is a Powerful Tool

Those studying trends in intellectual property law now have a powerful new tool in a database created at Stanford University Law School. According to Stanford, "[t]he primary goal for this exciting project is to address the critical need for a comprehensive, online resource for scholars, policymakers, industry, lawyers, and litigation support firms in the field of intellectual property litigation."

The Stanford Law School Intellectual Property Litigation Clearinghouse (IPLC) (lexmachina.stanford.edu) is a searchable online database that contains information on cases involving patent, trademark, and copyright law and plans to include trade-secret filings in the future. The IPLC was developed by the Law, Science & Technology Program at Stanford University Law School with support from a number of corporations and firms active in the computer technology and intellectual property fields.

The database has attracted the most attention for the statistical information it contains on patent case filings and outcomes since 2000. Similar information on other types of intellectual property litigation is coming. The IPLC is modeled after the school's successful online securities litigation database, which provides detailed information relating to the prosecution, defense, and settlement of federal class action securities fraud litigation. The securities litigation database was started in 1996 and has since become a resource for legal scholars, journalists, and lawyers.



The IPLC contains information on 23,000 patent suits filed since 2000; copyright and trademark cases bring the total number to around 78,000. The database includes real-time data summaries, industry indexes, and trend analyses, together with a full-text search engine, providing detailed and timely information that the creators claim cannot be found elsewhere in the public domain. Researchers have already used the database to determine that patent infringement case filings dropped last year by about 8 percent from 2007 and that the biggest drop came in the last five months of the year, at the height of the credit crisis and recession fears. Joshua Walker, executive director of the IPLC, said that the system's statistics weed out false filings that often appear in regular searches by district courts and claimed that a comparable search of PACER had produced erroneous information. Mark Lemley, a professor of intellectual property law at Stanford, has also reported that the system reveals that federal judges in Delaware have been even less likely to grant summary judgment in patent cases than judges in the Eastern District of Texas, which was a surprise to many.

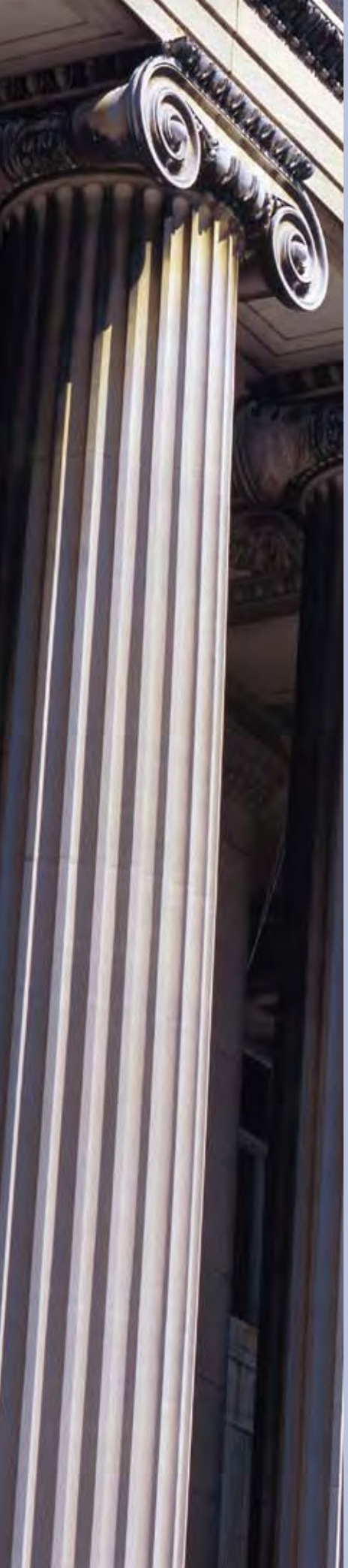
Professor Lemley hopes that the database will allow companies, inventors, and lawyers to make more rational decisions—before they litigate—by having better access to outcomes in previous litigation. He also says that the database should allow judges "to define what patent terms mean based on past cases and interpretations and to rely on data to inform settlement negotiations." However, Lemley continued—

> We also built this tool so that scholars and policymakers could help Congress reform the patent system in rational ways, based on what's really happening rather than our perception of what's happening. For example, today there are patent reforms under consideration in Congress focused on the problem of litigation abuse which floods the courts with unnecessary litigation and holds up the true innovators. One of the most talked about examples of this abuse is the phenomenon of "patent trolls." But no one can agree on how many trolls there are out there. … The IPLC offers us the data we need to do empirical analysis and develop the best possible reforms.

Several features of the database have drawn positive comments. One blogger, a law firm shareholder, noted that he could simply search "trademark" in a particular judicial district and determine how many cases were filed last year and how many remain active. According to his blog, "You can click on a case and see its docket (though you can't access the underlying filings). While this information clearly comes from PACER, and to date is patent-centric, Stanford organizes it well and—best of all—offers it up for free."

Well, the part about free use is not exactly true—the database is not free to everyone. As of the end of January 2009, use of the database was limited to "non-commercial" users. Noncommercial terms of use, which must be accepted before gaining access to the

INSIGHT *continued on page 22*



Become a Member of the Supreme Court Bar

Monday, June 8, 2009

Take advantage of a unique opportunity to join the bar of the United States Supreme Court, with the help of the FBA.

The Younger Lawyers Division is hosting its annual Supreme Court Admissions Ceremony at the Court. As in years past, we will be inviting the Justices to join us for a breakfast reception after the ceremony. Although the Younger Lawyers Division sponsors this event, FBA members of all ages and levels of practice are welcome to participate.

While some believe that the highlight of the day is being sworn in before the nine Justices in the historic courtroom of the highest court in the land, many others find the breakfast reception to be equally memorable. Each year we have been joined by one or two Justices. Other dignitaries such as the Solicitor General of the United States have also made welcome appearances. Whatever your preference, joining the most elite bar in the United States is an experience that will last a lifetime.

More information is available at the YLD Web site at www.fba-yld.org and from Adrienne Woolley at FBA Headquarters (awoolley@fedbar.org or (571) 481-9100).

Don't miss this chance to join the bar of the Supreme Court

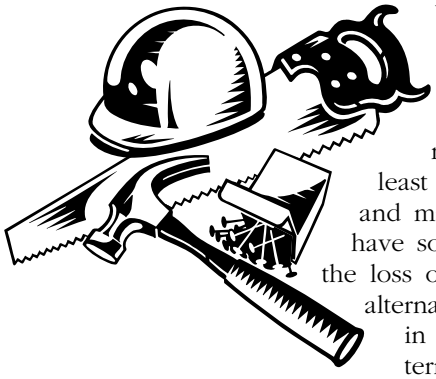
MICHAEL NEWMAN AND FAITH ISENHATH

The WARN Act 101

During these tough economic times, companies are being forced to eliminate positions and close operations, making knowledge of the Worker Adjustment and Retraining Notification Act important. The Worker Adjustment and Retraining Notification Act (WARN Act), enacted in 1988, requires employers of 100 or more employees to give written notice to affected employees, union bargaining representatives, and local government officials 60 days in advance of a "plant closing" or "mass layoff."[1] This column briefly outlines the requirements of the WARN Act so that attorneys can become familiar with this area of the law.

The Bureau of Labor Statistics reported a total of 21,137 mass layoffs in all of 2008—the highest annual level since 2001–2002.[2] In December 2008 alone, there were 2,275 mass layoffs, each action involving at least 50 employees.[3] Recently, numerous companies have eliminated jobs or plan to do so. A few of the major companies and their numbers are listed here:

- Cessna Aircraft cut a total of 4,600 jobs;
- Starbucks plans to close 200 U.S. stores and to cut 6,700 jobs;
- Sprint Nextel plans to eliminate 8,000 jobs;
- Target plans to eliminate 1,500 jobs;
- Saks plans to cut 1,100 positions;
- Walgreens plans to cut 1,000 jobs; and
- AT&T anticipates cutting 12,000 jobs in the United States.[4]



Therefore, the WARN Act is likely to come into play often.

The purpose of the WARN Act is to provide protection to workers and their families by requiring employers to give at least 60 days' notice of plant closings and mass layoffs so that the workers have some transition time to adjust to the loss of employment and to look for alternative employment.[5] The first step in following the WARN Act is determining whether the company is considered an "employer" that is required to give notice. The WARN Act defines an "employer" as any business enterprise that employs either 100 or more employees (excluding part-time employees), or 100 or more employees who, in the aggregate, work at least 4,000 hours per week.[6] Independent contractors and subsidiaries that are wholly or partially owned by a parent company are treated as separate employers—depending on the degree of their independence from the parent company and several other factors, such as common ownership, common directors/officers, de facto exercise of control, unity of personnel policies coming from a common source, and the dependency of operations.[7]

If the company is considered an "employer" under the WARN Act, the next determination is whether the employer's anticipated action constitutes either a "mass layoff" or a "plant closing." A "plant closing" is defined as "the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees excluding part-time employees."[8] A single site of employment refers to either a single location or a group of contiguous locations. Separate buildings or areas that are not immediately connected may be considered a single site "if they are in reasonable geographic proximity, used for the same purpose, and share the same staff and equipment."[9] Contiguous buildings that are owned by the same employer but have separate management, produce different products, and have separate workforces are considered separate single sites of employment.[10]

Under the WARN Act, the term "mass layoff" means a reduction in force that is not the result of a plant closing and results in an employment loss[11] at a single site of employment during any 30-day period for at least 33 percent of the employees (excluding part-time employees) *and* at least 50 employees (excluding part-time employees), or at least 500 employees (excluding part-time employees).[12] Mass layoffs involve loss of employment, regardless of whether one or more units are shut down at a site; plant closings involve loss of employment resulting from shutting down one or more distinct units within a single site of employment—both within a 30-day period.[13] If an employer is planning a plant closing or a mass layoff, affected employees must be provided at least 60 days' notice of such an action.[14]

Employers must also provide advance notice to the representatives of the affected employees, or if there is no representative, then to each affected employee, to the state or entity designated to carry out rapid response activities, and to the chief elected official of the unit of local government within which the plant closing or layoff is to occur.[15] The required content

of the notice depends on the recipient, and the applicable regulations detail what is required for notices to government officials, employees, and representatives.[16] An employer who fails to provide required notice as specified by the WARN Act is liable to each affected employee for wages and benefits incurred during the period that employment was lost.[17]

In addition, an employer who violates the act's provisions related to the local government is subject to a civil penalty of not more than $500 for each day of the violation, except if the employer pays each employee the requisite back pay within three weeks from the day the plant closing or layoff began.[18] These penalties do not apply if the employer can prove that the violation was in good faith and that the employer had reasonable grounds for believing that the omission did not violate the act.[19]

The WARN Act requirements regarding notice have a number of exceptions. The "faltering company" exception allows a reduced notice period in a plant-closing context if the employer was actively seeking capital or business that, if obtained, would have enabled the employer to avoid the shutdown.[20] Also, an employer may give less than 60 days' notice if a plant closing or mass layoff is caused by "sudden, dramatic, and unexpected" business circumstances that were not reasonably foreseeable and outside the employer's control. Examples of unforeseeable business circumstances include an unexpected termination of a major contract, a strike taking place at the employer's major supplier, an unanticipated economic downturn, and an unannounced government-ordered closing.[21] The WARN Act is waived entirely if a plant closing or mass layoff is caused by a natural disaster, but, in that case, the employer must give affected workers as much notice as possible.[22] Furthermore, the act provides an exception in the case of the sale of a business. This exception assigns the responsibility for giving the act notices to the seller if the mass layoffs or plant closings occur "up to and including the effective date of sale," but then the responsibility shifts to the purchaser after the date of sale. This exception also deems all the seller's employees the purchaser's employees immediately after the effective date of the sale.[23]

Employers can consider several alternative strategies in complying with the WARN Act. To avoid liability under the WARN Act, employers can voluntarily pay employees in lieu of giving them notice, as long as the correct pay and benefits are provided.[24] Another strategy is to provide employees with a paid leave of absence in lieu of advance notice with full pay and benefits.[25] Employers must always be sure to also comply with any notice provisions required by the state along with the WARN Act.

In an era in which company shutdowns and layoffs are likely options, it is imperative for attorneys to be familiar with the provisions of the WARN Act so that they can help advise either their company clients of their obligations under the act or their employee clients of their notice rights. **TFL**

Michael Newman is a partner in the Labor and Employment Department of the Cincinnati-based firm, Dinsmore & Shohl LLP, where he serves as chair of the Labor and Employment Appellate Practice Group. He is a vice president of the Sixth Circuit for the FBA. Faith Isenhath is an associate in the same department and a member of FBA's Cincinnati-Northern Kentucky Chapter. The authors may be reached at michael.newman@dinslaw.com and faith.isenhath@dinslaw.com, respectively.

Endnotes

[1]29 U.S.C. §§ 2101–2109.

[2]Bureau of Labor Statistics, *Mass Layoffs Summary*, available at www.bls.gov/news.release/mmls.nr0.htm (Jan. 28, 2009).

[3]*Id.*

[4]Bureau of National Affairs, Daily Labor Report, *Workforce Reductions*, available at news.bna.com/dlln/display/alpha.adp?mode=topics&letter=W&item=B916EEBC6DC4ADE55C2F58894F543D09&act=exp&clear_exp=1 (last visited Feb. 2, 2009).

[5]20 C.F.R. § 639.1.

[6]29 U.S.C. § 2101. Workers who have been temporarily laid off or are on leave and have reasonable expectation of recall are counted as employees. 20 C.F.R. § 639.3.

[7]20 C.F.R. § 639.3(2).

[8]29 U.S.C. § 2101(2). A part-time employee means an employee who is employed for an average of fewer than 20 hours per week or who has been employed for fewer than six of the 12 months preceding the date on which notice is required. 29 C.F.R. § 639.3(h).

[9]29. C.F.R. § 639.3(h)(3). An example is an employer who manages numerous warehouses in an area but who regularly rotates the same employees from one building to another.

[10]*Id.*

[11]Employment loss means (1) termination of employment other than a discharge for cause, voluntary departure, or retirement; (2) a layoff exceeding six months; or (3) a reduction in hours of work of more than 50 percent during each month of any six-month period. 29 U.S.C. § 2101(a)(6).

[12]*Id.*, § 2101(a)(3).

[13]The WARN Act also looks at employment losses that occur over a 90-day period. An employer is required to give advance notice if it has a series of small layoffs that add up to the numbers that would require notice under the WARN Act. An employer is not required to give notice if it can show that the individual events occurred as a result of separate and distinct actions that are not an attempt to evade the requirements of the WARN Act. *Id.*, § 2102(d).

[14]20 C.F.R. § 639.2 . The term "affected employees"

LABOR *continued on page 22*

KRISTOPHER EDWARD AUNGST

Trying to Remove the Trustee? A Tough Road Ahead!

The entire Chapter 7 bankruptcy system is predicated on the orderly gathering and distribution of a debtor's assets to long-suffering creditors. The Chapter 7 trustee is thrown into this frequently adversarial—and often emotionally charged—process. Promptly after a voluntary Chapter 7 case is filed and the order for relief is entered by the bankruptcy court, the U.S. trustee, under Bankruptcy Code § 701(a), appoints the trustee, whose many duties are spelled out in § 702 of the code. In sum, the duties revolve around marshaling and distributing the assets of the debtor's estate created by the bankruptcy filing in accordance with the distribution scheme prescribed by the Bankruptcy Code.

In gathering the assets of the estate that will be distributed, the trustee has many valuable statutory tools at his or her disposal. Among these are the so-called § 341 meeting, named after the Bankruptcy Code section that created it, in which the trustee is allowed to question the debtor or the debtor's representative about the assets of the estate. From a review of the bankruptcy schedules filed by the debtor and the information gathered at the § 341 meeting, the trustee learns more about what assets are in the estate that needs to be administered. Assets not only includes tangible and intangible property that remains in the estate but also often consists of potential causes of action undertaken against insiders and third parties to recover an estate's assets.

The trustee's actions to recover fraudulent transfers, preferential payments, and other funds that rightfully belong to the estate—in an attempt to liquidate and return them to creditors—can frequently lead to contentious litigation. It is in this acrimonious atmosphere that those being pursued by the trustee may try to forestall recovery against them by seeking removal of the trustee, or creditors who are not targets of litigation may disagree with the business judgment of the trustee and seek his or her removal. In either instance—or in the enumerable chasm of possibilities in between—barring actual fraud or self-dealing on the part of the trustee, the road to removal is almost always impassable.

Section 324(a) of the Bankruptcy Code provides the sole statutory ground for removal of a trustee, stating the following: "The court, after notice and a hearing, may remove a trustee … for cause." Removal of a bankruptcy trustee is one of the most serious actions that a bankruptcy judge can decide. Under § 324(b), if a trustee is removed for "cause," then that trustee is removed from all other cases in which the trustee is then serving. Because of the serious nature of a motion to remove, courts generally will not remove a trustee absent an actual fraud or injury. *See In re Martin*, 817 F.2d 175 (1st Cir. 1987).

Courts generally give a trustee a wide degree of latitude in deciding how to handle and administer an estate. This "substantial degree of discretion in deciding how to administer the bankruptcy estate … [is] governed by a business judgment standard." *In re Beery*, 2007 Bankr. LEXIS 1868 at 17 (Bankr. N.M. May 30, 2007). Therefore, a trustee will not be removed for mistakes in judgment when the judgment is discretionary and reasonable under the circumstances. *See In re Cult Awareness Network Inc.*, 205 B.R. 575 (Bankr. N.D. Ill. 1997).

Furthermore, a trustee is not required to prosecute every cause of action belonging to the estate. *See In re Olympia Holding Corp.*, 305 B.R. 586 (Bankr. M.D. Fla. 2004). Therefore, even when a creditor alleges that the trustee's actions are damaging to the creditor individually, courts still generally consider the best interests of the entire estate, rather than those of a single creditor who issues a complaint. *See Baker v. Seeber*, 38 B.R. 705, 708 (Bankr. D. Md. 1983). Because of this high standard and wide discretion given to the trustee, "[i]t is clear that removal of a trustee is an extreme remedy even where a trustee has acted negligently." *In re Cee Jay Discount Stores Inc.*, 171 B.R. 173, 175 (Bankr. E.D.N.Y. 1994).

Because of the high standard set for imposing removal and the harsh ramifications if removal is granted, some circuits require a clear and convincing evidence standard of proof to be established rather than just a mere preponderance of evidence. *See In re Walker*, 2004 Bankr. LEXIS 2187 (Bankr. S.D. Fla. Dec. 1, 2004), *aff'd, Walden v. Walker (In re Walker)*, 515 F.3d 1204 (11th Cir. Fla. 2008).

Generally a trustee is removed only when there are egregious facts present. Situations in which a court has deemed the removal of a trustee necessary include an explicit conflict of interest,[1] embezzlement by the trustee,[2] and actual fraud on the creditors of the estate perpetrated by the trustee.[3] A removal motion is not taken lightly and is granted only when a court is faced with clear and convincing evidence that the trustee's

continued representation of the estate is no longer appropriate, and, as a consequence of that behavior, under § 324(b), the trustee should be removed for all of his or her other cases as well. Therefore, because the consequences of removal are so drastic, trustees obviously launch a vigorous defense against removal motions.

When a trustee is faced with a removal motion not only is the "trustee generally … entitled to defend himself from allegations of malfeasance by a party in interest," but the estate will also incur the cost of that defense. *In re NWFX Inc.*, 267 B.R. 118, 249 (Bankr. W.D. Ark. 2001). The court in *In re Yellow Cab Company*, 212 B.R. 154 (Bankr. S.D.Cal. 1997), explained the rationale for having the estate bear the cost of defending a trustee, stating the following:

> Bankruptcy Code § 323(b) expressly recognizes that a trustee may be sued. The trustee may or may not prevail. If the trustee is determined to be negligent in the administration of the estate, the trustee is personally liable. *See In re Cochise College Park Inc.*, 703 F.2d 1339 (9th Cir. 1983). Obviously, if the trustee is determined to have properly exercised his judgment, no liability results. The difficulty with adopting [the creditor/plaintiff's] position is that even where a trustee properly exercises his business judgment, but is nonetheless sued, the trustee's defense could not be funded by the estate. By definition, where the trustee is a defendant, settlement of the action will not result in the recovery of assets. …
>
> Trustees are an integral part of the successful operation of the bankruptcy laws. If this Court required the trustee to pay for his or her own representation, given the relatively modest compensation the Code provides for trustees, the practical effect would be that few trustees would be willing to serve. … A representative of the bankruptcy estate in otherwise good standing is entitled to defend him or herself from allegations of malfeasance by a creditor, and, unless malfeasance is established, the estate shall bear the reasonable costs of such defense.[4]

Thus, not only is the trustee entitled to have the estate bear the cost of successful litigation in defense of a motion to remove the trustee, but he or she may also seek sanctions against the party bringing the motion to remove. If the motion to remove is a baseless or vindictive action or simply a litigation tactic without underlying merit, the trustee can seek sanctions in an amount sufficient to fully compensate the estate for the expenses incurred in defending a motion to remove the trustee. *See In re JIK Industries Inc.*, 155 B.R. 321 (Bankr. W.D.N.Y. 1993).

Because of the drastic implications on the trustee, the motion to remove the trustee is generally granted only in extreme situations that are based on facts. In most instances, the trustee's business judgment provides him or her with a functional shield from the accusations contained in a removal motion. With the estate bearing the burden of defending a removal motion and with the potential imposition of sanctions, a motion to remove a trustee should be used only in factual circumstances evidencing the obvious need for removal. **TFL**

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Endnotes

[1]*See In re Morgan*, 375 B.R. 838 (8th Cir. BAP 2007) (finding a Chapter 13 trustee's negotiation of a settlement to relieve herself of personal liability at the expense of unsecured creditors was sufficient cause for removal of the trustee).

[2]*See Scofield v. U.S.*, 174 F. 1 (6th Cir. 1909).

[3]*See In re Freeport Italian Bakery Inc.*, 340 F.2d 50 (2d Cir. 1965) (holding that, where the trustee was a close relative of the principals of the bankrupt company and of its major creditors, had participated in defrauding other creditors by concealing his own claims, and had filed an exaggerated claim on his own behalf and on behalf of his mother-in-law removal, was appropriate).

[4]*In re Yellow Cab Company*, 212 B.R. 154, 159 (Bankr. S.D. Cal. 1997).

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INSIGHT *continued from page 16*

system, allow use by academicians and government attorneys at no charge. Stanford's press release announcing the IPLC stated that "all three branches of government—judicial, executive, and legislative—may use the IPLC to track, manage, analyze, and debate IP litigation in real time."

Commercial uses—both direct and indirect—were initially prohibited, but Walker expects that a pay-for-use system for commercial users will be available in a few weeks (most likely by the publication date for this column or shortly thereafter). Such uses will be subject to different terms—including an up-front charge for each firm as well as hourly usage charges—which Walker says will be lower than those levied by other commercial services. As of this writing, the terms of use define commercial uses as those used by private attorneys defending, managing, or prosecuting litigation; by litigation consultants; by any for-profit legal entity; and by those who need to analyze the purchase, sale, licensing, commercialization, or valuation of any intellectual property. According to Walker, the charges are necessary to support the continued operation of the IPLC, which, like every other party, pays the federal government for access to PACER. However, Lemley says that he believes some commercial uses of the IPLC may be free in the future.

If the database works as well as expected, Lemley believes that it could lead to similar efforts in other fields, such as bankruptcy or antitrust law. **TFL**

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LABOR *continued from page 19*

means employees who may reasonably be expected to experience an employment loss as a result of the plant closing or mass layoff. 29 U.S.C. § 2101(a)(5). It is important to note that, even though part-time employees are not included when considering whether the WARN Act will apply, they are entitled to notice if the act does apply.

[15]29 U.S.C. § 2102(a).
[16]20 C.F.R. § 639.7.
[17]29 U.S.C. § 2104.
[18]*Id.*
[19]*Id.*
[20]29 U.S.C. § 2102.
[21]*Id.*; 20 C.F.R. § 639.9.
[22]*Id.*
[23]29 U.S.C. § 2101.
[24]*See generally Association of Western Pulp and Paper Workers v. Grays Harbor Paper Co.*, No. C93-5226B, 1994 U.S. Dist. LEXIS 13094 (W.D. Wash. Mar. 14, 1994).
[25]*See* U.S. Department of Labor, *The WARN Act: Employers Guide*, available at www.doleta.gov/layoff/pdf/EmployerWARN09_2003.pdf (last visited Feb. 3, 2009).

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MATTHEW DEKOVICH

Hon. Sim Lake
U.S. District Judge, Southern District of Texas

In his two-decade tenure as a U.S. district judge in Houston, Texas, Sim Lake has presided over a number of high-profile cases. The list ranges from the murder trial of a cult leader to the legal challenge of a county's display of an open Bible near the local courthouse. Perhaps no case, however, attracted more attention than the 2006 criminal fraud and conspiracy trial of former Enron executives Kenneth Lay and Jeffrey Skilling. The trial, which lasted nearly four months and was preceded by more than a year of pretrial preparation, made national headlines and was deemed by some to be a landmark among white-collar criminal cases.

In the spotlight of the Enron trial, Judge Lake's considerable judicial talents were on prominent display. Lake won nearly universal praise for the adept manner in which he kept a complex case involving accounting and financial securities on track and remarkably free of distractions and unnecessary delays. Jurors appreciated the always punctual Lake both for his efforts to respect their time by requiring lawyers on both sides to "sharpen their pencils" and avoid undue repetition and for his considerate manner and obvious legal acumen. Even defense counsel Daniel Petrocelli, whose client did not fare well in the case—to say the least—acknowledged that the judge had presided over the trial with "grace, skill and dignity."[1]

Judge Lake's expert handling of the Enron trial came as no surprise to those who know him. Intelligent, disciplined, hardworking, humble, and fair, Judge Lake is widely regarded as one of Houston's finest jurists. He has led a life of distinction and achievement, and he is a source of pride for those who have been fortunate over the years to call him mentor, colleague, or friend.

Simeon T. Lake III was born in Chicago on July 4, 1944. He spent his formative years in Fort Worth, Texas, before enrolling at Texas A&M University. Lake excelled at his beloved A&M, where he simultaneously studied as an undergraduate and trained as a cadet in the U.S. Army. Among other activities, he found time to participate on the debate team and in the student senate. A "Distinguished Student" every semester, he graduated sixth in his class and was awarded a B.A. in history, with honors, in May 1966. Upon graduation, Lake was commissioned a second lieutenant in the U.S. Army.

Lake spent the next three years in Austin pursuing a law degree at the University of Texas School of Law. As he had done at Texas A&M, he steadily compiled an impressive record. He was a member of the editorial board of the *Texas Law Review* and president of the law school's Class of 1969. In the classroom, Lake displayed a keen aptitude for mastering legal doctrine. His academic performance earned him a place in prestigious honor societies, and he was a member of the Order of the Coif. In January 1969, Lake graduated from law school first in his class and with high honors.

As a newly minted lawyer, Lake worked briefly as an associate at the law firm of Fulbright & Jaworski in Houston before leaving for active duty with the U.S. Army in February 1970. After completing an assignment at the U.S. Armed Forces Language Institute in

El Paso (during which time he continued to practice law part time), Lake was sent to Vietnam, where he would spend much of 1971. In Vietnam, Lake tried cases as a prosecutor in the Army Judge Advocate General Corps. He attained the rank of captain, received the Bronze Star and Army Commendation medals and was honorably discharged.

Lake returned to Houston and Fulbright & Jaworski in February 1972. Lake quickly became an accomplished trial lawyer and was admitted to partnership in the firm in June 1977. Over time, Lake's law practice came to focus on energy and environmental litigation, and he tried numerous such cases to verdict. Among his colleagues, he was famous for his tireless work ethic and discipline, superb organizational skills, and penchant for mastering and cutting to the core of complex sets of facts and legal doctrines. When working on a case, he would compile notebooks full of material on any given topic, which he called his "mud pies." Lake's approach to the practice of law was that he would not be outworked or caught unprepared.

During his time as a partner at Fulbright & Jaworski, Lake demonstrated a sincere interest in mentoring young lawyers. He played an active part in developing the firm's litigation training program and had a significant impact on the professional development of young lawyers who worked with him on a day-to-day basis. William D. Wood, a partner at Fulbright & Jaworski who joined the firm in 1984, counts Lake among his many "outstanding mentors." Wood remembers Lake "leading by example in every aspect of law practice—tireless work ethic, desire to do one's best, being thorough and creative, and above all, treating everyone with respect and courtesy." "On the infrequent occasions when I appear before the Judge in court," Wood reflects, "I am happily reminded of the better parts of our profession."

After years as a litigator, Lake grew interested in becoming a judge. In 1988, President Reagan nominated Lake to be a U.S. district judge in the Southern District of Texas, and the Senate confirmed Lake the same year. Bringing his characteristic hard work and discipline to bear on his new tasks, it did not take Lake long to settle into the job. He quickly developed the first-rate judicial reputation that he enjoys today. In surveys of litigators who have appeared before him, Lake consistently receives high marks for his intelligence, efficiency, and evenhandedness. He is known for his excellent judicial temperament and professionalism as well as for his innate sense as to how to run an efficient docket while also giving the lawyers before him a fair opportunity to advocate their case. Lake reads everything that is filed and comes to the bench thoroughly prepared—and always on time—and he demands that the lawyers who appear before him put forth the same effort and preparation. This is equally true whether the matter is Enron or one of the more typical cases that populate his docket. To Judge Lake, there is no such thing as a "small" case, because any given case may well be the lawyer's or the litigant's most important one.

Judge Lake is also known for his well-reasoned and clear judicial opinions. David Levy, a litigation partner at Morgan, Lewis & Bockius who completed a stint in law school as a judicial intern for Judge Lake, credits the judge with teaching him how to craft clear and concise legal prose. "Much of Judge Lake's true brilliance is reflected in his written rulings," remarks Levy, who to this day will commend Judge Lake's opinions to young lawyers as examples of the kind of effective legal writing they should strive to emulate. "He is able to distill complex fact patterns into the key legal questions, and then to rule on those issues based on the facts and the law."

Judge Lake's contribution to the law has extended beyond his own docket. From 1999 to 2005, he served on the U.S. Judicial Conference Committee on Criminal Law, spending part of that time as chairman. His tenure as chairman coincided with the decision handed down by the U.S. Supreme Court in 2005 that effectively made the previously mandatory Sentencing Guidelines advisory. In the wake of the decision, Judge Lake guided the committee's efforts to analyze the meaning of the Court's ruling and its administrative and practical implications.

As those who have had the opportunity to work for Judge Lake over the years will confirm, his virtues are equally apparent when he is off the bench as they are when he is running his court. It is no coincidence that Judge Lake has a loyal and dedicated staff as well as a group of clerks and former clerks who admire and appreciate him greatly.

Even though he has always been a serious and diligent worker, Judge Lake also maintains a balanced outlook on life. As anyone who has spent time around him can attest, Lake's family is by far his greatest source of happiness. He is a devoted family man. Besides the law, Lake's interests are many: he has taught Sunday school, he is a voracious reader (particularly of history), and he likes to stay in shape with daily workouts. Lake is also justly famous for his dry wit and keen sense of humor.

With the publicity generated by the Enron trial, Judge Lake received widespread recognition for what many in Houston have known all along: that he is an excellent and honorable judge. These qualities—excellence and honor—have been, and remain, the hallmarks of Judge Sim Lake's remarkable life and career. **TFL**

Matthew Dekovich is an associate at Fulbright & Jaworski LLP in Houston. He clerked for Judge Lake from 2004 to 2005.

Endnote

[1]*See* Mary Flood, *All Rise: Judge Garners Praise: Jurors, Others Applaud Lake's Handling Of Lay And Skilling's Trial*, Hous. Chron, June 4, 2006, at Business p. 1.

HON. BRUCE S. JENKINS

Hon. Willis W. Ritter
Lessons Learned from the Principles, Practices, and Personality of Utah's First Chief U.S. District Judge

In the mid-1960s, an incident occurred across the street from the Salt Lake City federal courthouse, at the Manhattan Club. During the 1950s and 1960s, prominent Utahns would frequent the club for lunch, a drink, conversation, or just to pass the time with compatible people. The mayor, a governor, a National Guard general, a city commissioner, and the venerable Judge Willis W. Ritter would all gather at the Manhattan Club. Sometimes, after too much conversation and too much Wild Turkey, the conversation would grow heated. One afternoon, a city commissioner and Chief Judge Ritter began to quarrel and the commissioner challenged Willis to a duel. The commissioner was a small, skinny little guy; whereas Willis, though short, was shaped like a massive pear. They both stood toe-to-toe on the postage-stamp-sized dance floor. The chief judge replied to the commissioner's challenge: "Okay, protocol says that I get to choose weapons," and the commissioner responded, "Yes, that's right." Willis shouted, "Then I choose bellies," and bumped the commissioner with his massive belly and laid him out flat on the dance floor.

> While funny—and, by the way, true—today it seems so incongruous that the presiding officer of the federal court, who each day helped people solve problems in a peaceful and rational way, and a city commissioner, who passed ordinances on how citizens should treat one another, in a stressful liquid moment of their own, should choose the most primitive of ways to settle an argument. The symbolism speaks volumes.

It has been 30 years since Chief Judge Willis W. Ritter died. I succeeded Judge Ritter. I didn't replace him, for no one could.

From the distance of 30 years, I want to try to do four things: First, to provide background and context, I want to present a short history of the U.S. district court in Utah before Judge Ritter assumed the bench. Second, I want to sketch Ritter's early life, his appointment as judge, and his subsequent elevation to chief judge. Third, I want to relate, in vignette form, a few incidents, practices, and cases from his 30-year tenure in an attempt to depict the flavor of the man. And fourth, I want to distill a few lessons learned from him about law and about life.

From 1896 (the year Utah became a state) until 1954, the District of Utah had one federal district judge. The first judge was John Marshall, a Cleveland appointee and distant relative of the great Chief Justice of the United States. Judge Marshall served from 1896 until 1915 and resigned after an alleged affair with a cleaning lady. The second district judge was Tillman Johnson, a skinny little animated shoestring of a man, who was appointed by President Woodrow Wilson in 1915. Both Marshall and Johnson were non-Mormons by design, President Wilson made it an express condition. Both judges were born outside of Utah. Johnson served until 1949 when, in June of that year, he retired at the age of 93. In 1944 (when Johnson was 88 years old), the attorney general of the United States wrote to the judge, respectfully suggesting that it might be time for him to retire. (It was even rumored at the time that Ritter wanted to replace Johnson as early as 1944. Ritter had confided to a friend that "Tommy"—Sen. Elbert D. Thomas—had promised him that position when Johnson retired.) Judge Johnson, a feisty sort, replied to the attorney general that the question of if, or when, the judge retired was none of the attorney general's business, pointing out that Johnson had a lifetime appointment. He didn't refer to the last clause in the presidential commission, which says that the judge's lifetime tenure is in force as long as he exhibits "good behavior." The same condition of "good behavior" was included in the commission of the third U.S. district judge, Willis W. Ritter, who, unlike Johnson, was a native Utahn; Ritter was born

on Jan. 24, 1899, in Salt Lake City, but like Marshall and Johnson, he was not a Mormon.

After a brief stay in Salt Lake City, Ritter's family moved to Tintic in Juab County, where his father worked in the mines and his mother worked as a sometime nurse and midwife. When Ritter was about seven years old, the family again moved to a resort that his father had inherited—the hot pots near Heber, Utah, which the family ran. A few years later, the family moved to Park City, Utah, where his father again engaged in hard-rock mining.

Conditions were harsh and money was scarce. Ritter's mother and father divorced. His mother remarried and took her three younger children with her to California and left Ritter with an aunt and uncle in Utah. It should come as no surprise that the boy felt abandoned.

He attended Park City High School, where one of his classmates was Roger Traynor, who later gained fame as a highly respected chief justice of the state of California. In a class of 18, Traynor stood first and was the class valedictorian; Ritter was second and was salutatorian. Roger McDonough, who later served twice as the chief justice of the Utah Supreme Court, was a teacher at the school, where he taught both future judges. All three—the teacher and his two students—were smart.

After graduating from high school, Ritter had a brief stint in the mines, spent a brief time in the Army, and studied for a year at the University of Utah. He got his law degree from the University of Chicago, from which he graduated cum laude; in 1926, he became a member of the Illinois bar. He practiced tax law in Washington, D.C., for two years and then was invited to teach at the University of Utah Law School. While teaching, he finished his undergraduate work at the university and made Phi Beta Kappa. He later earned a master's degree at Harvard University.

While teaching at the University of Utah, Ritter became a great friend of Elbert D. Thomas, a young political science professor, and was active with him in the faculty senate. That friendship flourished and lasted a lifetime. Ritter was an indifferent Catholic; Thomas, an ardent Mormon.

I lay this background for a reason. In 1932, Elbert D. Thomas—known as "Tommy" to Ritter—ran against the Mormon apostle Reed Smoot, an incumbent Republican U.S. senator who had been in the Senate for more than 30 years. Smoot was an icon and considered unbeatable. He was first appointed by the Utah legislature and continued in his seat after direct election by the people came about. Now remembered for the Smoot-Hawley Tariff, he was perhaps more famous at the time for his war on pornography. He was immortalized in the poem by Ogden Nash,

Senator Smoot, Republican Ute,
A man of power and pelf.
He'll save our homes from erotic tomes
By reading them all himself.

Helped in the election by Roosevelt's landslide victory, Thomas beat Smoot and was twice re-elected. His electoral victories enabled Thomas, in 1949, to sponsor and recommend to President Truman that his faculty friend, Willis W. Ritter, replace Tillman Johnson, who had finally decided to retire.

Despite enormous political and family pressure on Thomas, he stuck by his old friend and sent his recommendation to Truman asking for his nomination. By then, Ritter had been teaching law for more than 20 years and had practiced on the side for prominent clients. His specialties were tax, property, trusts, and estates.

He was a demanding teacher. He was Socratic—the *Paper Chase* professor personified—and, on occasion, he was downright mean. After a poor recital by a hesitant student, Ritter said slowly, "Now Mr. Smith, I recommend that you transfer to the School of Engineering. Over there, they learn to work with their hands."

RITTER *continued on page 28*

RITTER *continued from page 27*

Ritter's nomination to the bench bestirred controversy and opposition. In the U.S. Senate, Arthur V. Watkins asked for public hearings, citing letters of criticism he had received. Although the Judiciary Committee's subcommittee involved in Ritter's nomination recommended his confirmation, that recommendation was not considered by the full Judiciary Committee before Congress adjourned for the year.

In October 1949, Truman made a recess appointment. Utah needed a judge, but as *Time* magazine pointed out, it wasn't until after almost a year of "wrangling, secret hearings [in spite of Sen. Watkins' request for public hearings], Republican protests, and disapproval by the American Bar Association's ... Committee" that Ritter was confirmed. He had survived an extensive and bitter confirmation fight with cross-currents arising from ambitious competitors, the Mormon desire for a Mormon judge, and the Republican desire to wait Truman out and have an appointment of their own. Truman renewed Ritter's nomination and, with the "advice and consent of the Senate," Ritter was appointed to his lifetime position on July 7, 1950.

Ritter's formal swearing-in took place on Aug. 1, 1950, presided over by Circuit Chief Judge Orie Phillips, who came from Denver to administer the oath. Judge Johnson, who had retired by then, opened court. The president of the Utah State Bar, David L. Stine from Ogden, presented the judge to the court, and Judge Phillips administered the oath. Complimentary and idealistic speeches were offered, and Ritter realized his longtime ambition.

Not bad for a Park City kid from a broken home. But, sadly, the confirmation process, which raised questions of loyalty to the United States, philandering, his arbitrary and tyrannical behavior, and his sobriety, colored his tenure until the day that he died. He never got over it. Emotionally, it was like a cancer that metastasized over the next 28 years and affected almost every action he took.

In spite of the condition that he was to occupy the position as long as he exhibited "good behavior," Judge Ritter didn't always behave very well. Perhaps it was his behavior that led the Eisenhower administration—with the prodding of Sen. Watkins, a vocal critic of Ritter—–to pass legislation creating a second judgeship in 1954: a temporary position that would morph into a permanent position. Thus, Senator Arthur V. Watkins sponsored A. Sherman Christensen for the post, and President Eisenhower appointed him. It was in 1954, upon the ascendancy of Sherman Christensen to the bench, that Willis Ritter became the first chief judge of a two-judge court.

The law was then in a two-judge court, if the judges couldn't agree on court policy, rules, or personnel, that the chief judge made the decision. In Judge Ritter's view, not much had changed. He thought there was no need for a second judge; therefore, for all intents and purposes, the second judge did not exist. What conversation occurred between the two judges occurred via the newspaper. Other than decisions about chambers personnel, all decisions were made by the chief judge. Ritter was the one who chose personnel for the Office of the Court Clerk and the Probation Department as well as the commissioners (predecessors of magistrate judges) and the then–referee in bankruptcy. There was only one then. Courtroom deputies were Chief Judge Ritter's choices as well. Case assignment became a matter of controversy, which the circuit court finally had to settle in 1958.

Ritter enjoyed the status of chief judge until he died in 1978, even though his years of service were enmeshed in controversy. In 1977, Wade McCree, the solicitor general of the United States, and Ramon Child, the U.S. attorney for Utah, filed a petition in excess of 800 pages asking the circuit court to remove him from every case in which the United States was a party. This was sparked by his erratic use of a trailing calendar, according to which a multitude of cases were set to be heard on the same day and at the same time, following a policy of "wait your turn."

Ritter was not a tall man—about 5 ft. 7 in. tall—but he was a big man; he had large head with shock of gray hair when first appointed, which quickly turned white. His complexion was florid, which contrasted greatly with his white, white hair. He was shaped like a pear—some preferred to say a pouter pigeon—with a very large chest and an abundant belly.

He brought to the bench the demands of a teacher, sympathy for the underdog born of his days as a hard rock miner, a short fuse when he thought someone was unprepared, a growing passion for Wild Turkey bourbon whiskey, an animus toward those who had objected to his appointment (particularly those affiliated with the Mormon church) and, in my opinion, a subsurface need for praise and acceptance. He was a complex man of many parts. He collected Indian weavings, early paintings of Utah scenes, and old coins. He also bought a ranch in Idaho, which he visited often. He was himself a litigious person, who sued and was sued over water rights and mining claims. In short, Willis Ritter was a walking civil war—both a good guy and a bad guy, with an unrequited feeling for the underdog. His bad guy persona was emotionally triggered and would win the internal war too often.

A few Judge Ritter stories briefly merit mention. Toward the end of his tenure, the judge hit the national news because of, among other things, his confiscation of a KSL camera taking his picture as he walked across the street from the Hotel Newhouse, his residence at the time, to the courthouse. He was visited by Mike Wallace, of "Sixty Minutes" fame, who wanted to in-

terview the judge on camera, but Ritter routinely refused to be filmed. Wallace said, "Ah judge, I could make you a celebrity," to which Ritter replied, "Mike, I am already a celebrity." In the end, no interview took place.

On another occasion, one of his law clerks was given a check and told to go across the street to the liquor agency in the Newhouse Hotel and purchase three bottles of Wild Turkey. When the law clerk was told that the agency did not take checks, he responded, "You will take this one." The store clerk looked at the check signed by the hotel's tenant on the 11th floor and accepted it.

Early on in his career, Judge Ritter was handling the criminal calendar. It was his style to hear orally from the probation officer at the time of sentencing. Bernie Rhodes, then a newcomer to probation, was in court with a young man convicted of a drug offense. Bernie tried to say "LSD," but it came out "LDS" (which is short for Latter-Day Saints, another name for the Mormon church.) The probation officer tried again, but made the same error. Ritter looked down from the bench and said, "I know what you mean, Mr. Rhodes. However brief the exposure with LSD or LDS, they both result in hallucinations."

In those days, it was the practice of Ritter to appoint counsel for criminal defendants. He was a pioneer of this approach, which anticipated the *Gideon* ruling. Ritter would take the bar list and have his clerk call the attorney and tell the attorney that he or she had been appointed. Refusal was not an option and payment was nil. One newly minted attorney with such an appointment, dressed in his best court attire—shoes polished, dark suit, white shirt, conservative tie—interviewed his client and prepared remarks for the court. His client was in custody and appeared in court wearing prison garb; his hair was long and he had a beard. With both client and counsel standing before the bar, Ritter looked down and said, "Now which of you is the defendant?" adopting a pattern that had been used by his predecessor, Judge Johnson.

When Sherm Christensen came on board, the system that was used for case assignment—before the circuit forced a random draw in 1958—was to take cases alternatively in the order in which they were filed. It took practitioners not too long to know how to beat the system: they would file two identical cases and then dismiss one. The manipulation did not all flow in one direction; one prominent lawyer once said to me, "I would rather have the chief full of Wild Turkey than that other guy sober."

Judge Ritter is also remembered for his efforts to stop the execution of Gary Gilmore. The judge entered his order and state officials took a state plane carrying the attorney general as well as some members of the circuit court and flew to Denver at night so that there would be a panel in place to deal with the judge's order peremptorily, which they did so in the early morning hours of Jan. 17, 1977. The panel vacated the stay, and the execution—the first in the country in many years—took place. Ritter's response was "that lawless bunch." He said that often.

Judge Ritter's decisions were frequently reversed: some say that 40 percent of his rulings in criminal cases were reversed and 80 percent of his decisions in civil cases were overturned. The first reversal came in a sensational murder case called *Braasch and Sullivan*, in which the judge granted the defendants' *habeas* petition because of the absence of competent counsel in their state murder trial.[1] His action foresaw the later U.S. Supreme Court case of *Gideon*, in which the Court ruled on a defendant's right to counsel in criminal cases.

The second reversal occurred in the cases involving Indian ponies, in which Ritter held for the plaintiffs against the United States for the destruction of Indian horses that had been rounded up by the Bureau of Land Management and sold for three cents a pound.[2] He tried the case, found liability and damages of $100,000, was reversed by the circuit, which was in turn reversed by the Supreme Court on liability, but they lamented the lack of a record on damages. He tried the case again on damages, made extensive findings, and found damages of $186,000. This decision was reversed again by the court of appeals, which reassigned the case to Judge Kerr of Wyoming, in effect finding that Judge Ritter was too emotionally involved in the case. The case was later settled for $45,000.

The third case is that of El Paso Natural Gas, a divestiture case that ultimately went up and down the appeal ladder and eventually led the U.S. Supreme Court to remove Judge Ritter from the case entirely.[3]

His strong suit was his vigorous analytical mind. He did best in the courtroom when he was challenged by a problem or a proposition that interested him. He could, if he wanted to, make the effort, focus quickly on the critical question, and rule then and there. Hence, many of his cases were not appealed, but quickly resolved. He was handicapped by his uncontrollable emotions and a penchant for intruding in the trial of a case.

He could be charming, solicitous, attentive, compassionate, interested, and a gracious host—indeed the epitome of a sophisticated gentleman. A former client, a brilliant businessman who was trained as a lawyer, called the judge an American tragedy—a man with a huge potential that was wasted. A former clerk called Ritter a Shakespearean tragedy—a man who had gained a longed-for position for which he was ill-suited. In his later days, he was caricatured in a brutal cartoon printed on the cover of a local magazine; when handed a copy, the judge wept.

Shortly after Ritter died, I ran into his daughter, Nancy. President Kimball and the Mormon church had

RITTER *continued on page 30*

RITTER *continued from page 29*

just announced the revelation on African-Americans and the priesthood and its availability to all qualified males. Nancy pointed to the heavens and said, "I guess the old boy stirred them up."

Several lessons can be learned from Judge Ritter's life:

- Don't duel with a federal judge when the judge chooses the weapon, but don't hesitate if the weapons are rules, disputes, and facts.
- Be prepared as though you needed to recite something in class; perhaps the judge is willing to learn.
- Have the courage to state and defend your position, but be sure you have a position to defend.
- Know the local rules, but—just as important—know and understand the judge and recognize that resolving human problems is a complex and very human enterprise.

It is fun to speculate about the turning points of history. Had two young faculty members not become friends; had Thomas not beaten the unbeatable Mormon apostle, Reed Smoot, and been re-elected two more times; and had Tillman Johnson not finally decided to retire and Truman not beaten Tom Dewey—then Willis W. Ritter would have ended a career in the law as a *Paper Chase* law professor at the University of Utah Law School. If so, the people of the placid state of Utah would not have had the opportunity to observe, decry, applaud, and wonder about the new U.S. district judge—and to do so for a colorful and chaotic 29 years. **TFL**

Judge Jenkins is a U.S. senior district judge in the District of Utah. The comments in this article were first presented by Judge Jenkins at a seminar sponsored by the FBA's Utah Chapter in November 2008.

Endnotes

[1]*Application of Sullivan*, 126 F. Supp. 564 (D. Utah 1954), *reversed sub nom. State of Utah v. Sullivan*, 227 F.2d 511 (10th Cir. 1955), *cert. denied sub nom. Braasch v. State of Utah*, 350 U.S. 973 (1956).

[2]*United States v. Hatahley*, 220 F.2d 666 (10th Cir. 1955), *reversed, Hatahley v. United States*, 351 U.S. 173 (1956), *on appeal after remand, United States v. Hatahley*, 257 F.2d 920 (10th Cir.), *cert. denied*, 358 U.S. 899 (1958), *further proceedings sub nom. United States v. Ritter*, 273 F.2d 30 (10th Cir. 1959), *cert. denied*, 362 U.S. 950 (1960).

[3]*United States v. El Paso Natural Gas Co.*, No. 143-57 (D. Utah Nov. 20, 1962) (unpublished disposition), *reversed and remanded*, 376 U.S. 651 (1964), *on remand, United States v. El Paso Natural Gas Co.*, 37 F.R.D. 330 (D. Utah 1965), *reversed and remanded with instructions, Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967).

Judicial Profile Writers Wanted

The Federal Lawyer is looking to recruit current law clerks, former law clerks, and other attorneys who would be interested in writing a Judicial Profile of a federal judicial officer in your jurisdiction. A Judicial Profile is approximately 1,500–2,000 words and is usually accompanied by a formal portrait and, when available, personal photographs of the judge. Judicial Profiles do not follow a standard formula, but each profile usually addresses personal topics such as the judge's reasons for becoming a lawyer, his/her commitment to justice, how he/she has mentored lawyers and law clerks, etc. If you are interested in writing a Judicial Profile, we would like to hear from you. Please send an e-mail to Stacy King, managing editor, sking@fedbar.org.

34th Annual
Federal Bar Association
Indian Law Conference

"Coming Home to Indian Country"

Hilton Santa Fe at Buffalo Thunder

Located on the Pueblo of Pojoaque

Conference Overview

For the first time in its history, the annual Federal Bar Association Indian Law Conference will take place in a tribal community just outside of Santa Fe, New Mexico, at the Hilton Santa Fe at Buffalo Thunder, located on the Pueblo of Pojoaque. We celebrate this historic move as an opportunity for reflection on the relationship between federal Indian law and Indian communities, particularly in an era of political change and promise.

Federal Indian law, with its assimilationist legacy, has not always promoted the best interests of Indian tribes. Today, however, grassroots movements in Indian Country inspire tribal advocacy before all three branches of federal government. Tribes are positioned like never before to shape the law that affects tribal people, resources, and values.

The 2009 conference will examine these issues through discussions on reservation-based economies, renewable energy, religious freedoms, environmental regulation, legal ethics, Supreme Court litigation, and gaming. Other panels will address opportunities for tribes to use the law as a tool in revitalizing Indian communities, particularly in light of the new Presidential administration.

"Coming Home to Indian Country"

Full Schedule of Events

Wednesday April 1, 2009

1:00–5:00 p.m. — NNABA Annual Meeting ..... *Mesa A-B*

I. Report on 2008/Discussion of 2008 Priorities
- *NNABA Lists for Obama Administration Jobs/Federal Judges*

II. Board Election
- *President-Elect, Secretary, Treasurer, 6 NNABA At-Large Board Positions*

III. Resolution Votes
- *Review of "Box-Checking" Resolution*

IV. Panel: Taking a Closer Look at Difficult Tribal Membership Issues
- *Looking to U.S. "Immigration" Law for Ideas*
- *"To Disenroll or Not to Disenroll?"—That is the Question*

4:00–6:00 p.m. — Conference Registration ..... *Outside Tewa Ballroom*

6:00–8:00 p.m. — NNABA and NNALSA Welcome Reception, sponsored by Wal-Mart ..... *Outdoor Terrace*

Thursday April 2, 2009

7:00 a.m. — Conference Registration ..... *Outside Tewa Ballroom*

7:00 a.m.–5:00 p.m. — Career Tables, Exhibits, and Vendors ..... *Caldera*

8:00–8:30 a.m. — Welcoming Remarks/Conference Opening ..... Tewa Ballroom

Juanita Sales Lee, *President, Federal Bar Association*
Allie Greenleaf Maldonado, *Chair, Federal Bar Association Indian Law Section*
Matthew Fletcher, *Chair, 2009 Federal Bar Association Indian Law Conference*
Jack Lockridge, *Executive Director, Federal Bar Association*

8:30–10:00 a.m. — Plenary 1: What's Red Is Green ..... Tewa Ballroom

Moderator: Pilar Thomas, *Of Counsel, Lewis and Roca LLC*
Panelists: Governor David Toledo, *Pueblo of Jemez (invited)*
Tracey LeBeau, *Principal, Red Mountain Tribal Energy*
Winona LaDuke, *Executive Director, Honor the Earth and White Earth Land Recovery Project*

9:00 a.m.–1:00 p.m. — NNALSA Annual Meeting ..... Barranca B

10:00–10:15 a.m. — Break

10:15–11:45 a.m. — Plenary 2: RFRA: Neither Sword Nor Shield for Sacred Space ..... Tewa Ballroom

Moderator: Kristen A. Carpenter, *Associate Professor, Univ. of Denver Sturm College of Law*
Panelists: Tom Berg, *St. Ives Professor of Law, University of St. Thomas Law School*
Zackaree Kelin, *Managing Director, DNA Peoples Legal Services*
Patricia Millett, *Partner, Akin Gump*

11:45 a.m.–12:00 p.m. — Break

12:00–1:30 p.m. — Luncheon Keynote ..... Pueblo Ballroom

Gov. George Rivera, *Pueblo of Pojoaque*
Ken Salazar, *Secretary of the Interior (invited)*

1:30–1:45 p.m. — Break

1:45–3:15 p.m. — Plenary 3: Arising Issues in Indian Gaming ..... Tewa Ballroom

Moderator: Matthew L.M. Fletcher, *Associate Professor, Michigan State Univ. College of Law*
Panelists: Andrew Adams III, *General Counsel, St. Croix Band of Lake Superior Chippewa Indians*
Ezekiel (Zeke) J.N. Fletcher, *Associate, Rosette & Associates*
Carrie Newton Lyons, *Assistant Professor, University of Akron School of Law*

3:15–3:30 p.m. — Break

3:30–5:00 p.m. — Plenary 4: Change.Gov - Indian Country in Transition (Hot Topics Panel) ..... Tewa Ballroom

Moderator: Richard A. Guest, *Staff Attorney, Native American Rights Fund*
Panelists: *Appointee, Department of Justice Office of Legal Policy*
Appointee, Assistant Secretary for Indian Affairs
Appointee, White House First American Public Liaison

6:30 p.m. — Dinner Reception ..... Outdoor Terrace

Friday April 3, 2009

7:00 a.m. — Conference Registration ..... Outside Tewa Ballroom

7:00 a.m.–5:00 p.m. — Career Tables, Exhibits, and Vendors ..... *Caldera*

8:30–10:00 a.m. — Plenary 5: Community Economic Development: A New Path to Self-Sufficiency ..... Tewa Ballroom

Moderator: Pilar Thomas, *Of Counsel, Lewis and Roca LLC*
Panelists: Steve Barbier, *Management Consultant, NeighborWorks America (invited)*
Lorna Fogg, *President, Travois, Inc.*
David Heisterkamp, *Partner, Wagenlander & Heisterkamp, LLC*
Tom Hampson, *Executive Director, ONABEN*

9:00 a.m.–12:00 p.m. NNALSA Elections ..... NALSA Table, Caldera Room

10:00–10:15 a.m. Break

10:15–11:45 a.m. Plenary 6: This Land Is Our Land: Models of Environmental Regulation in Indian Country ..... Tewa Ballroom

Moderator: Kristen A. Carpenter, *Associate Professor, University of Denver Sturm College of Law*
Panelists: Stephen Etsitty, *Executive Director, Navajo Nation Environmental Protection Agency*
Darren Ranco, *Associate Professor, University of Maine*
Gail Small, *Executive Director, Native Action*

10:15–11:45 a.m. Concurrent Focus Group Sessions

A. Focus on Renewable Energy ..... Barranca A
Moderator: Pilar Thomas, *Of Counsel, Lewis and Roca LLC*
Panelists: Tracey LeBeau, *Principal, Red Mountain Tribal Energy*
Douglas MacCourt, *Partner, AterWynne LLP (invited)*
Michael O'Connell, *Member, Stoel Rives LLP*

B. Focus on ADR in Indian Country ..... Barranca B
Moderator: Sarah Palmer, *Senior Program Manager, US Institute for Environmental Conflict Resolution/Native Dispute Resolution Network*
Panelists: John Bickerman, *Bickerman Dispute Resolution, PLLC*
Brian Upton, *Attorney, Confederated Salish & Kootenai Tribe*

C. Focus on Indian Gaming under the Obama Administration ..... Vista A
Moderator: Ezekiel (Zeke) J.N. Fletcher, *Associate, Rosette & Associates*
Panelists: Russell Brien, *Partner, Stinson Morrison Hecker LLP*
Bryan Newland, *Associate, Dykema Gossett, PLLC*
George Skibine, *Acting Assistant Secretary of Indian Affairs, Department of the Interior*

D. Focus on Federal Judicial Appointments ..... Mesa
Moderator: Richard A. Guest, *Staff Attorney, Native American Rights Fund*
Panelists: Greg Smith, *Partner, Smith & Brown-Yazzie LLP*
Virginia Davis, *Associate Counsel, National Congress of American Indians*
Heather Dawn Thompson, *President, National Native American Bar Association*

11:45 a.m.–12:00 p.m. Break

12:00–1:45 p.m. Luncheon Program ..... Pueblo Ballroom

Presentation of Section Awards: Allie Greenleaf Maldonado, *Chair, FBA Indian Law Section*
Report from National Native American Law Students Association: Burton W. Warrington, *Kansas University School of Law, NNALSA President*

1:45–2:00 p.m. Break

2:00–3:30 p.m. Plenary 7: The Court As Conqueror ..... Tewa Ballroom

Moderator: Richard A. Guest, *Staff Attorney, Native American Rights Fund*
Panelists: Jacob Levy, *Tomlinson Professor of Political Theory, McGill University*
Ann Tweedy, *Teaching Fellow, California Western School of Law*
Steven Wheeless, *Partner, Steptoe & Johnson*

3:30–3:45 p.m. Break

3:45–5:15 p.m. Plenary 8: Advising Tribal Leaders in an Unpredictable Legal Climate (Ethics) ..... Tewa ballroom

Moderator: Matthew L.M. Fletcher, *Associate Professor, Michigan State University College of Law*
Panelists: Kathryn E. Fort, *Staff Attorney, Michigan State University College of Law*
Kyme Allison-Marie McGaw, *Law Offices of Kyme AM McGaw PLLC*
Jana Werner, *General Counsel, Pueblo of Pojoaque*

"Coming Home to Indian Country"

Indian Law Section Leadership

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Chair Emeritus:	Lawrence R. Baca, *FBA President-Elect*
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	Pilar Thomas, *Of Counsel, Lewis and Roca LLC*
	Kristen Carpenter, *Associate Professor, University Of Denver Sturm College of Law*
	Richard Guest, *Staff Attorney, Native American Rights Fund*

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INDLAW-CONF 09

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Conference Registration

Enrollment and Fees

Enrollment in the conference is open to all persons with an interest in Native American legal issues. The deadline for registration by mail or fax is March 25, 2009. The conference fee includes one ticket to each luncheon and one ticket to the Thursday night reception as well as one set of course materials as provided by the speakers. Registration fees paid to the Federal Bar Association are not tax deductible as charitable contributions for federal income tax purposes. However, such fees may be deductible under other provisions of the IRS Code, such as ordinary and necessary business expenses.

Scholarships

We are offering a limited number of partial scholarships to individuals from public interest and other organizations unable to allocate funds for the full registration fee. Scholarships are awarded on a space available basis and applications must be in writing on letterhead (company, organization, etc.) addressed to the Manager of Meetings and Education at the FBA. Letters must be received no later than March 4, 2009. Applicants will be informed of the status of their requests within three business days. Registration and payment must be received by the March 25, 2009, registration deadline. (Scholarships cannot be given to those eligible for the student rate.)

Cancellation Policy

No refunds will be made for cancellations received after the close of business on March 25, 2009. No-shows will be billed. Substitutions may be made at any time upon written notification to the conference office. All requests for refunds must be made in writing and be addressed to the Indian Law Conference, Federal Bar Association, Suite 444, Arlington, VA 22201. For more information regarding refund, complaint and/or program cancellation policies, please contact Kate Faenza at kfaenza@fedbar.org.

Hotel

A limited number of rooms at Buffalo Thunder have been set aside for conference participants at a special rate of $140/single/double. To secure this special rate, call Hilton Reservations at (800) 445-8667. Please be sure to mention the Federal Bar Association 2009 Indian Law Conference. Or, go to the FBA special reservations Web site at: www.hilton.com/en/hi/groups/personalized/SFECGHH-FBA-20090331/index.jhtml. The cut-off date for reservations is March 13, 2009, unless rooms sell out earlier.

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The shuttle picks up from the Albuquerque Airport every hour on the 0:45 and drops off at the Santa Fe rail station. (A Hilton shuttle will transport from the station to the hotel—please check with the hotel for their schedule.) A special rate of $40 per roundtrip has been arranged. Reservations are required and may be made no more than 30 days in advance by calling 1-888-775-5696 and mentioning the Federal Bar Association. Schedules and other information are available at www.sandiashuttle.com.

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New Member Opportunity: Join the Federal Bar Association now and save up to $80! For the early registration fee of $475, you will receive conference registration, a full 1-year membership in the FBA, and a full 1-year membership in the Indian Law Section of the FBA. After March 4, 2009, you still receive the savings, but the fee goes up to $535. You must complete **both** the registration form and membership application and submit these together to the FBA in order to receive the savings.

This total package is only being offered to the 2009 Indian Law Conference attendees, so take advantage of this one-time offer today!

Please be sure to complete the conference registration form and the member application

❑ $555 Non-Member

❑ $180 Law Student

*The FBA is very excited to present the 2009 Indian Law Conference in Indian Country at the brand new Hilton Santa Fe at Buffalo Thunder on the Pueblo of Pojoaque. Major change can carry an increase in cost, but we have worked to keep quality high and cost reasonable for this meaningful conference experience.

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The Green Road Ahead

Renewable Energy Takes a Stumble But Is on the Right Path, Possibly Right Through Indian Country

By Tracey A. LeBeau

A New Green Economy: Journey or Destination?

As this article is being written, markets and policy related to renewable energy sources are in flux and will no doubt still be that way by the time this article is published. The new administration has numerous objectives to impact and stimulate the economy and marketplace. Congress has just passed a stimulus package that seeks to address the broadly supported goal of creating or retooling tax and financial incentives for creating a greener energy economy. But significant challenges remain, and addressing them will require more than one piece of stimulus legislation or one government bailout. These challenges include a pressing need to expand and build a transmission infrastructure across wide swaths of renewable resource-rich areas in order to accommodate the waves of new energy generation to be developed, which many—including the new President—hope will shore up our nation's energy security and economic needs. At the same time, this uncertainty about both the marketplace and policy gives Indian tribes a unique opportunity to become more active in supporting policies and solutions that address their own unique needs for infrastructure, diversification, and energy security.

This article will touch on the market and policy issues currently affecting the nation, which range from taxation to energy security and financing. The article also seeks to posit how the new Obama administration's long-term vision for a green energy economy, as laid out during his presidential campaign, might bolster the nation's potential position and interest in supporting climate change policy internationally. Finally, this article will discuss how this country's Indian nations (or as they are colloquially referred to in general as "Indian Country") may represent a unique point of nexus between federal interests, the marketplace, and a new frontier poised to host the growth of infrastructure needed for sustainable energy while also supporting growing tribal populations, regional economies, and the national interest. Indian tribes are ready for "nation building at home"[1] by investing, developing, facilitating, and participating in building the infrastructure required to support green energy.

Abo Ruins, Salinas National Monument, New Mexico. By Lawrence Baca.

Renewable Energy Sources Waiting Out the Storm: Markets and the Financing Environment in 2009

First we need to talk about change. Last year witnessed record growth, retraction, and gyrations in investment and financing activity in the renewable energy sectors. It has been estimated that, when the final numbers come in, the capacity of new wind generation in 2008 will have reached nearly 7,500 megawatts (at least 35 percent of new capacity added), bringing total installed wind capacity in the United States to about 24,000 megawatts.[2] According to some estimates, the solar industry will have nearly doubled installations of solar photovoltaic modules that same year.[3]

Midway through 2008, however, the renewable energy sector saw the beginnings of contracting credit and debt markets—a clear sign that dark clouds were gathering on the horizon. By the fall, even though the sector sighed with some relief when the Emergency Economic Stabilization Act of 2008 extended tax credits for renewable energy projects,[4] many companies involved in producing renewable energy were forced to re-think development commitments as they saw their tax equity partners facing major problems, their credit facilities being scaled back, and long-term power prices starting to contract. Aside from the global effects of the recession, these economic problems have created an interesting set of topsy-turvy factors.

For instance, a previously rapidly growing wind energy sector, which had the effect of heating up prices for wind turbines, is now seeing turbine manufacturers slowing production as manufacturers check and re-check the status of orders and commitments given by companies that are now pushing back installation dates. Meanwhile, the prices of steel, electric, natural gas, and power are dropping. Therefore, when the sector rebounds, at least for a while, project proponents may well find that turbine supply and manufacturing capacity have had a chance to catch up, that steel prices have moved to a point that permits the competitive pricing of new equipment; and that the price of oil and concomitant price of natural gas and power have stabilized to levels that are more in keeping with long-term expectations. This scenario is not exactly a takeaway that has a silver lining, but it would be a curious turn of events.[5] As one commentator noted recently—and he was discussing only wind energy—

> Although, [wind energy] industry growth rates will slow down, it does not mean the industry will stall. While unfortunate for certain industry players, the economic slowdown will turn out to be a growth opportunity for others. Cash-rich companies and those with a higher credit rating will be able to extend their

wind portfolios at reasonable prices. Cheaper equipment available at shorter lead times for new installations, as well as wider availability of specialized construction services and fiercer competition along every segment of the value chain, will force total project costs down.[6]

When it comes to solar energy, analysts' recent year-end reports turned bearish. Overall, analysts began to advise institutional clients that, given the apparent lack of any new major financing for solar energy projects on the horizon, if the stimulus had not passed, an oversupply of photovoltaic modules was imminent. Analysts also warn that, even though the U.S. market is the most interesting market worldwide, in the near- and mid-term are likely to see an increase in solar power used by public utilities but will probably show lower profit margins than many may have expected initially.[7] However, anecdotally, it is worth noting that, given all the bearish talk that the solar industry—in both solar thermal and photovoltaic—the market is still on a fast track with respect to new start-ups and venture capitalists' investment in technology. In addition, many European solar powerhouse corporations are establishing corporate and manufacturing footprints primarily throughout the American Southwest and California. Hence, even though caution abounds, the market may be taking a breath but still establishing footprints in the Americas.

But in the midst of all these sectoral challenges, a new administration has set its sights on utilizing the renewable sector as the linchpin in its economic plans to move the United States, once again, into a new economic era—the age of green energy. Doing so, however, will require initiating an aggressive legislative and policy agenda on all levels—ranging from restructuring economic incentives and setting national renewable portfolio standards to encouraging investment in transmission technology and rewriting tax policy.

Renewable Energy Policy: Band-Aids or a Comprehensive Fix?

Replete with aggressive goals focused on massive green-collar job creation in manufacturing and deployment, the new administration's campaign platform to create a clean energy economy will require an innovative and substantive overhaul of legislation and policy. President Obama campaigned on the creation of a national base renewable portfolio standard (RPS) of 10 percent of energy to renewable sources by 2012 and 25 percent by 2025. Because there is support for some sort of RPS in both houses of Congress, those levels may hold but that will not be the hard part. The solar industry is pressing hard for an RPS but with specific solar carve-outs, as is the case with many state renewable portfolio standards. Both timing and enforcement mechanisms associated with these proposals are also issues that must find a wider consensus.

The President's final stimulus package will address shorter-term adjustments in the law, and government agencies will do what they can to address regulatory issues to complement legislative initiatives. But 2009 is likely to be the year when the tough issues will be addressed, and many of them will require substantive restructuring in the way our country creates incentives and builds the foundation for an energy economy in the wake of a worldwide economic recession. One of the major choices will between incentives that were deployed in past years past, which would continue a stop-and-start clean energy economy, and new incentives that will create a sustainable future.

Incentives Will Be a'Changing: Tax Credits Anyone?

It was only in late 2008 that the industries involved in renewable energy throughout the world celebrated when, as part of the bailout legislation, the U.S. Congress voted to extend tax credits for one year primarily for the production of wind energy and investment tax credits for eight years primarily for solar energy systems. However, what was not fully anticipated while these extensions were being lobbied was the timing and the extent to which the economic crisis would affect the few financial institutions that are heavily involved in financing the renewable energy sector.

At the height of growth in attention to renewable energy, between 2007 and 2009, approximately 14 institutional investment banks and entities (largely representing tax equity investors) were players in the vast majority of renewable energy projects and the financing of other projects (portfolios, credit facilities, and the like). In the aftermath of the financial meltdown, many of the institutions that were using these sizable tax credits no longer needed them, because these institutions' overall tax bases and large losses affected their capacities to take advantage of the large tax credits, or, in many cases, they simply went out of business. At the beginning of 2009, only three or four of these institutions were still standing, and even they had scaled back to wait until the turbulent seas of the markets and legislative bodies were calm enough to see their way through to the other side.

Industry lobbyists have been urging Congress to make any tax credits or subsidies that the owner of a project cannot use refundable, in addition to provide an option to carry back unused tax benefits for up to 10 years (with refunds of taxes paid during that period). Accelerated depreciation is important to these deals as well and often amounts to more than half the tax incentive for some projects. The sticky issue here is that there is no easy strategy to make depreciation refundable without major legislative changes; therefore, the stimulus legislation addressed shorter-term remedies, such as a limited term grant in lieu of tax credits.

Another option or discussion point has been the idea of expanding the class of potential tax equity investors by allowing individuals to invest, by changing passive loss and at-risk rules, and by changing the legislation in a way that would allow individuals to invest through publicly traded partnerships. Another sensible—but unpopular—option is the idea of trading tax credits; this would allow entities that cannot use the credits to transfer them to other entities that can use them, as has been done in other sectors, such as housing and even unconventional energy. Nontaxable entities such as electric cooperatives, Indian tribes, municipal utilities, and their counterparts are deeply frustrated with

this aspect of financial incentives for using renewable energy, because the stringent rules regarding the use of these incentives do not easily allow these entities to participate in the financing or ownership of such projects. Congress attempted to address this problem by creating Clean Renewable Energy bonds,[8] but because of inadequate appropriations for the bonds, this answer has been a good try but far from a home run. In the end, giving incentives to those who have an economic and political interest in investing in renewable energy, rather than those whose primary interest is to minimize their tax capacity, is a challenge that Congress and the administration will approach either incrementally or boldly when they work to restructure the policy tenants of investing in renewable energy and infrastructure for the electricity sector.

Energy Legislation: Post-Stimulus Plan and Setting the Stage

Providing an added layer of complexity is another basic policy question that will also re-emerge in 2009: climate change and the Kyoto Protocol. Within two weeks of the inauguration, President Obama named a new envoy for climate change, signaling the intention to prepare for upcoming discussions of the issue. The United States, along with its international counterparts, set a December 2009 deadline by which to conclude a new global climate agreement. It is anticipated that Congress will take up supporting legislation designed to set new emissions standards,[9] among other things. The timing of this, in concert with the Obama administration's agenda to create a new green energy economy, could not be better in many respects.

The creation of a new wave of players in clean energy economy who have significant political and economic clout within U.S. borders will also create a new business class that could demonstrate the positive economic impact of clean energy on the U.S. economy by supporting international emissions standards. Making climate change policy a political goal fueled by national economic self-interest is probably the best and most efficient way to effectuate the type of national and international policy change required. As David Rothkopf, a Carnegie Endowment scholar, recently noted, "Making America the world's greenest country is not a selfless act of charity or naïve moral indulgence. It is now a core national security and economic interest."[10] Diplomacy on the issue of climate change may be a good way to pave the road to sustainability for this new green economy.

Transmission, Transmission, Transmission

Even though a discussion of transmission of electricity probably fits in the previous paragraph, the issue is so critical to the future of any development of energy generation that the topic deserves separate treatment. Without transmitting electricity, the windiest and sunniest resources in the world cannot be developed to benefit the population on the scale necessary to provide an effective response to the need to reduce greenhouse gas emissions significantly. Even though the distribution of renewable energy sources is an important part of the overall solution—and the only solution in many communities—scale is a critical issue in this process. Scale provides the rationale investors need to expand manufacturing capacity, which in turn creates economies of scale that encourage competition, which results in driving down prices on a per unit basis. In many cases, the concept of scale allows for more efficient investment in transmission infrastructure when it is paired with large installations of renewable energy sources. At this moment in the adolescence of industries involved in renewable energy, it seems difficult to identify even what is a chicken and what is an egg properly, but transmission of electricity is widely accepted as one of the single most important aspects in growing the generation of renewable energy to the levels that the Obama administration has targeted. This challenge has been called the "Trillion Dollar Conundrum."[11]

Movement is afoot in transmission policy, legislation, and markets. Because it is widely accepted that the United States' old "decrepit" electric infrastructure is in dire need of upgrading and that, if production of renewable energy is to triple, as is the current goal (or even double), it is imperative to come up with a new approach to the transmission of electricity. Two of the most important related considerations for transmission are (1) siting authority and streamlining regulatory approvals and permitting and (2) investments (cost recovery and incentives).

There is, and has been, discussion about providing the federal government the same power of eminent domain that it now has with natural gas pipelines. However, even though it is doubtful that this issue could attract enough votes to approve such a jurisdictional hot potato, it is possible that some sort of federal process to certify the need could emerge and certainly make the process easier on federal lands, which, coincidentally, are largely in the West, where renewable resources are most plentiful. Earlier this year, for example, the Bureau of Land Management announced a one-stop shop to streamline permitting for renewable energy projects on and through the lands owned by the bureau. Streamlining and maintaining the critical tenants of the National Environmental Policy Act is the goal, especially for any targeted regional or zonal initiatives.

Almost as contentious will be deciding a process for recovering the cost of investment in new or expanded transmission projects for new generation deployment on the grid. Currently, there are cases in which the project proponent pays much of the cost for any upgrading or expansion needed or may share those costs with the transmission owner or utility company, which may or may not pass those costs on to customers. Discussion and legislative language has emerged involving low-interest short-term federal loans, particularly for projects for which financing cannot be secured as a result of current frozen credit and debt markets. Federal backstopping in the form of loan guarantees for electricity transmission that does not completely subscribe to the preferences of financial institutions or investors.

Other incentives will undoubtedly emerge. Industry is keeping a sharp eye on how those federal incentives

Abo Ruins, Salinas National Monument, New Mexico. By Lawrence Baca.

might help or hinder public-private investment opportunities. Many federal entities involved in the transmission of electricity—such as Bonneville Power and Western Area Power Administration—have a multitude of shovel-ready transmission projects on the books, and private companies with interests in those same areas would also like to see policies and incentives to provide for at least shared ownership opportunities, which, in the past, have resulted in successful projects.

In terms of policy and administrative initiatives, more than five years ago, the Federal Energy Regulatory Commission (FERC) issued FERC Order 2003,[12] which provided policies and procedures dealing with transmission interconnection and service requests that have been adopted by many of their jurisdictional and nonjurisdictional utilities. FERC's order was issued in response to a plethora of applications for projects involving renewable energy sources that proposed to interconnect transmission systems across the country, many of which were speculative, were clogging up the transmission application queuing system, and slowing down reviews and approvals on a national level. These new rules, which are now in the process of implementation by many transmission-owning entities, set higher standards in terms of fees and application requirements and are having the effect of forcing many project proponents, who are not as ready as they might have let on, to back out of the queue and allow the projects that are ready to be implemented to be processed accordingly. Although FERC's order is less visible to many who are not actively involved in the sector, this administrative action will have a tremendously important effect on the speed at which projects involving renewable energy can be developed and installed. Administrative efficiencies and policy changes can have a major impact on industry and market behavior, attracting capital for and focusing on the areas that hold the greatest promise for a sustainable green energy marketplace.

Indian Country Is Ready

The road to an area of great promise for a sustainable renewable energy market leads directly to—and through—Indian Country. Indian reservations, especially throughout the western United States, are rich in conventional energy sources and renewable energy resources that remain largely undeveloped. Tribal communities on most reservations have been growing at a dramatic rate and continue to do so. Thus, while development of the significant amount of renewable energy potential found in Indian Country can have a dramatic impact on large regions in the West, tribal communities also need energy supply and infrastructure to

serve their own members and as well as their commercial sectors. Properly managed under tribal leadership, development of alternative energy resources in Indian Country could serve as the model of how to develop sustainable energy and infrastructure.

In addition, key transmission corridors currently run through Indian reservations—or could do so in the future—and many of these tribes are anxious to develop their critical infrastructure and participate in the new green economy. Interest in the development of transmission capability in the western United States is at a peak today. However, up to now, transmission of electricity has represented a double-edged sword for Indian tribes: transmission can be a tool that tribes can control and master, or it can be a weapon that can and has been used against Indian tribes. Developers representing all sorts of interests have been scouting Indian reservations in an effort not only to develop projects but also to use tribal land as a backbone upon which to support needed transmission of electricity. Developers' plans are not in and of themselves all that sinister; but, if those parties who seek to leverage their position with the tribe—or among tribes in a region—do so, Indian Country will have again borne witness and fallen victim to a divide-and-conquer strategy. Not only would that result be a shame, it would also be a waste.

Transmission of electricity has been the bane of many tribal communities for many years, primarily because electric lines have led to hydroelectric or other electrical projects that have flooded tribal lands and disrupted Indian communities for decades. Federal, state, and regional organizations have been busily planning transmission corridors over the last two years, but Indian tribes have been left out of significant discussions, and, more often than not, tribal lands are excluded from the routing altogether. Why is this so? Anecdotally, in some cases, reasons have been made along these lines:

- because only Congress has the power of eminent domain over tribal trust lands, it was easier to exclude trust lands from prospective routing mapping exercises;
- because federal agencies have not heard from many tribes about their interest in being included or their consent to be included in these renewable mapping exercises, rather than be accused of not properly consulting with tribes federal agencies have excluded these tribal lands from maps that industry and government review to assess the potential of renewable resources potential; or
- because utility companies have had issues in the past related to the siting of transmission lines and rights-of-way, the utilites would rather err on the side of caution and seek routes that bypass Indian lands altogether.

Whether any of these reasons are valid or have any basis in fact is beside the point; the discussions and planning are moving swiftly by way of regional and state initiatives, and plans have been carefully drawn up with perhaps enough consensus to catch the interest of state and federal legislators. The net result may be that transmission lines may be sited leading to and from renewable energy centers that may exclude from them tribal lands. This potential makes any tribal renewable energy project even more difficult to develop because of limited ways to physically get energy to market or the possibility may make the undertaking uncompetitive in comparison with projects done by large centers of renewable energy sources, which will benefit from transmission of scale. The prospect of developing renewable energy has opened a door through which tribal leaders can pass and thereby assume a leadership role in discussions about alternative energy sources, rather than being consulted through a peephole, which his usually the case.

One major conundrum for many Indian tribes is that, although many now have capital they wish to invest in renewable energy projects, the current tax regime provides a disincentive for them to do so, because, in order to use tax credits most efficiently, tribes must usually bring on a tax-paying investor and owner (in the case of the production tax credits) for their costs to be competitive with those of other nontribal projects. It is a very frustrating state of affairs for many tribes who see the development of renewable energy sources as a way to diversify their economic holdings that is in keeping with cultural sensitivities. Native communities have been exceptionally good at adapting to new technology while being able to maintain their unique cultures. A well-quoted proverb encapsulates this tendency: "When the wind changes direction, there are those who build walls and those who build windmills." Indigenous peoples and American Indian tribes have incrementally incorporated new technology with grace for centuries. However, it is quite ironic that America now stands on the precipice of a new economic engine that tribes innovated centuries earlier—energy-efficient design, conservation techniques, and use of natural resources in a sustainable manner—but if tribes are not proactive, they may find themselves left behind.

A few tribes who do have capital to invest are, in the interim, looking at the technology needed for renewable energy instead, particularly in those sectors where technologies are still emerging and have attendant manufacturing prospects. Specifically, in the last year, several tribes have started new ventures: they have created tribal renewable investment funds, tribal corporations with which to hold interests in renewable energy projects, and intertribal corporate development companies with which to pool capital to enable them to take positions in projects and to give them investment opportunities. As the industry is looking for critical mass for projects, they are also looking to co-site and build manufacturing capacity to serve project needs and growing markets efficiently. Given that substantial critical railroads were forced through Indian Territory, and transportation corridors lie within vast areas of Indian reservations, manufacturing and technology deployment are compelling opportunities that numerous tribes—or their corporate alter egos—are exploring.

It is well known that Indian people have long been among this country's most patriotic citizens. Long before

Indians were granted citizenship in 1924, they were serving in the military and fighting for our freedom; and they have continued to do so in disproportionate numbers. Of the central ideas surrounding President Obama's administration and its plans for a new green economy is the idea of producing our own energy—a form of energy security for the United States. The idea is also a form of climate security. Indian tribes stand in a unique nexus between renewable energy resources and transmission of electricity in key areas of the West. Indian tribes would also be natural leaders for hosting and developing these key areas to promote climate security and energy security. This development would be a call to service that Indian tribes are absolutely ready to answer—and uniquely ready to do so.

Recommendations

The new administration and the federal agencies that are involved in Indian affairs are undertaking efforts to understand the needs of Indian tribes and to seize opportunities when engaging with Indian tribes as willing partners in the national effort to help build a clean energy economy. Throughout the new administration's transition and afterward, tribes and tribal leaders have been making recommendations to make current Indian programs more effective and responsive to the needs of tribal governments and communities. One initial recommendation was to establish more effective coordination of intra- and interagency activities; this proposal was a direct result of the poor coordination—or lack of any coordination—among multiple federal agencies during the term of the last administration in responding to tribal initiatives related to infrastructure.

In addition to recommendations related to administrative and regulatory actions, Indian tribes requested funds for important Department of Energy programs and energy provisions that were authorized but never implemented or appropriated. Streamlining regulatory approvals related to leasing and/or joint development of energy projects on tribal lands has also become a pressing issue, because most projects involving renewable energy resources that are sited on Indian lands usually require approval by the Department of the Interior's Bureau of Indian Affairs, a process that necessitates contingent National Environmental Policy Act reviews and approvals.[13] Other recommendations included the following:

- lengthening federal contract power purchase agreement terms to longer than five years (as is the current practice) for renewable energy projects located on tribal lands;
- providing incentives for upgrading and expanding electric transmission systems in key areas that have renewable energy resources, such as Indian reservations in the Upper Great Plains;
- creating a special lease review team within the Bureau of Indian Affairs with expertise on projects involving renewable energy and transmission of electricity;
- supporting the ability to transfer or refund tax credits for developing renewable energy for Indian tribes or their tribal corporations that have partnership agreements with others;
- developing a preference in federal transmission interconnection and service; and other incentives that effectively promote investment on Indian lands and by tribes themselves.

The Green Road Ahead

Numerous tribes share a common cultural concept of walking in balance with the natural environment. Walking "the red road" is a descriptive phrase that refers to the principle of walking the road of balance—living right and following the rules of the creator, among which is the need to take care of all living things so that they will, in turn, take care of you. This principle is so commonly accepted among Indian people that neither tribes nor the outside world question that this is not just an idealized version of how tribal people operate in the world but that the belief is as real as the problems that tribes, as a pivotal part of our society, also share as a part of that society. Perhaps we also all need to walk—collectively—a new green road.

Unless Indian people and leaders watch closely and participate actively in the creation of a new green economy, to help chart its course, tribal communities may very well be bypassed by this road altogether, or they may become victims of its construction. Throughout the industrialization of the United States—and particularly in energy development throughout the 20th century—Indian tribes fell victim to becoming primarily export nations within a nation, with industry exploiting raw natural resources that were either shipped off reservations or burned for generation purposes. All these trends and events primarily benefited nontribal communities and development throughout the western United States. Environmental justice was a term coined by primarily urban communities that were put in the same position, but Indian Country was probably the primary genesis of the idea, or at least, the sad inspiration for it. What would be regrettable is, if in our rush to foster and facilitate green energy development and its attendant transmission, tribes in the 21st century were cast aside and decades later law review articles were to cite a historical disgrace akin to climate change justice or green energy poverty, where, upon the ascent of this green revolution, disproportionate negative effects were exacted upon native peoples.

Nevertheless, it is also the responsibility of tribal communities and tribal leadership of all ranks to design their role or roles in this growing movement thoughtfully. While their governmental counterparts struggle with designing regulatory regimes to control, yet facilitate, investing in renewable energy in their jurisdictions, tribal governments should do so as well.

Natural resources, like wind and water, that are found on tribal lands are resources that Indian tribes can develop for the benefit of their community at large because they are inherently tribal resources. They are also resources to which individual members of the tribe should have access in order to benefit their households if the proper regula-

tory environments are thoughtfully adopted and enforced within their territories, because commercial and distributed energy development are sensible ways to develop these resources in a sustainable manner. Sustainability is not just a tribal ethic; it is a corporate and leadership ethic and Indian tribes are particularly well positioned to take lead in pursuing and preserving it as the energy industry and the nation start down this green road together. **TFL**

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Models of Tribal Environmental Regulation

In Pursuit of a Culturally Relevant Form of Tribal Sovereignty

By Darren J. Ranco

This article examines the current regulatory models in tribal environmental programs to see if the regulations meet standards of tribal sovereignty that are designed to protect tribal cultures and lifeways. In particular, I am concerned that the approaches to regulation currently available to tribes—driven by federal mandates and notions of environmental management—not only are potentially vulnerable to challenge and erosion but also do not allow for tribes to fully address their cultural needs as sovereign nations. This article aims to call attention to what many tribal lawyers and environmental managers already know—that we must be diligent defenders not only of tribes' legal and juridical control over environmental regulations but also the forms of this control.

Most contemporary environmental law in the United States is carried out through "cooperative environmental federalism," in which the states play a prominent role. Much of the history of relations between Indian tribes and the federal government has been shaped by conflicts between states and tribes—conflicts in which the tribes usually rely on the federal government to keep states from intruding into tribal affairs. As a general rule, states have no authority over tribes and tribal members within reservations, and state authority over individuals who are not members of the tribe can be pre-empted by operation of federal law. Several major environmental statutes have been amended to authorize tribes to be treated the way states are when it comes to environmental regulations. These amendments, which were enacted between 1986 and 1990, typically use the phrase "treatment as States" (TAS)[1]; in response to comments from tribes during the rule-making process, the Environmental Protection Agency (EPA) has restated this approach, labeling it "treatment in the same manner as a State."

The TAS approach affords a significant measure of respect for the status of tribes as sovereign nations and also implicitly recognizes the importance of the natural environment for the survival of tribal cultures, which are rooted in the natural world. Treating tribes like states has not proven to be sufficient, however, primarily because of unmet funding needs for tribal programs. Just as important, when the interests of non-Indians are affected, tribal authority can be challenged under a number of decisions issued by the U.S. Supreme Court over the last quarter-century.[2] To date, the lower federal courts have sustained the EPA in its support for tribal programs, but no case has yet been decided by the U.S. Supreme Court. This situation presents a paradox to tribes: the more closely a tribal program resembles a federal or state program, the more likely it is to survive litigation; but the more a tribe tries to build a program that reflects its own cultural values, the greater the risk to its own tribal sovereignty, especially if the tribal approach is different from the approach adopted by the state or states that surround the tribal land.

During the 1990s, a number of American Indian nations began to seek TAS status for various purposes under the federal environmental laws. As of March 1998, the EPA had approved TAS status for at least one program proposed by 146 tribes,[3] although most of these approvals have been for financial assistance for planning and the development of regulatory programs rather than for administration of EPA-approved regulatory programs. The statute in which tribes seeking TAS status for regulatory programs have been most involved has been the Clean Water Act; the water program in which there are the most TAS approvals is the Water Quality Standards (WQS) Program, in which, as of October 2006, 30 tribes have EPA-approved WQS in place.[4]

Taking on such regulatory functions firmly embeds tribal governments into the cooperative federalist system of major environmental laws in the United States. In this system, the federal government establishes the framework for regulating pollution, but the states assume some prominent roles in the process. The approach varies from statute to statute but generally features setting standards and administering permit programs as well as other mechanisms designed to achieve compliance with standards. Some programs are carried out in the first instance by the states and others are done by the EPA. Many programs that are carried out by the EPA can be taken over by the states; these are often called "delegable" programs.[5] There are several examples of this arrangement: Under the Clean Water Act, the states set water quality standards that follow federal guidelines, and the EPA administers a permit program to ensure compliance with these standards; the permit program is delegable to the states. Under the Clean Air Act, the EPA sets national standards and the states administer a permit program and also carry out "state implementation plans." Under the Resource Conservation and Recovery Act (which has not yet been amended to include TAS provisions), states operate permit programs for municipal landfills, pursuant to standards set by the EPA, and the EPA regulates the transport and disposal of hazardous wastes, a program that states can operate instead of the EPA doing so.

With varying success, tribes have begun to use these programs to control pollution within reservations and, by developing tribally based standards, the tribes are seeking

Three Rivers Petroglyph Site, New Mexico. By Lawrence Baca.

to force polluters in neighboring jurisdictions to control pollution sources that affect Indian lands. The ability of a tribe to set its own standards is critical, because such standards can adopt ceremonial and other culturally specific uses of resources.[6] Many consider the ability to incorporate standards that include culturally specific uses of resources an important aspect of self-determination, sovereignty, and therefore tribal survival.[7]

The case of *Albuquerque v. Browner*[8]—as well as other cases, such as *Montana v. EPA*, 137 F.3d 1135 (9th Cir. 1998) and *Wisconsin v. EPA*, 266 F.3d 741 (7th Cir. 2001)—have upheld tribal regulatory control in the TAS system. These cases provide a potential contradiction in the scope of tribal sovereignty when it comes to their environment, because the rulings reinforce strong checks on tribal sovereignty by the U.S. government and potentially pave the way for limited and contestable future environmental regulation by tribes. At the same time, these cases serve as a remarkable example of the federal government's committed attempts to promote tribal autonomy and decision-making.

An examination of the relationship between a tribe's authority and that of a federal agency reveals that the realm of agency control may not be a bad place for tribes to be if they must be in the control of some governmental body. In general, as Amy Quandt made clear, "Congress quite often delegates expansive authority to administrative agencies, and the judiciary consistently defers to agency determinations made pursuant to such delegations."[9] Thus, if an agency is supportive of tribal sovereignty, as the EPA has shown itself to be in *Albuquerque v. Browner*, tribes may be fortunate that these favorable agency decisions may face little challenge from other governmental bodies, and the courts will generally defer to the agencies.[10] Furthermore, some agencies have certain characteristics that might make them the most accommodating entities with which tribes can be involved. The fact that there is less separation of functions in agency decision-making than in other areas of government may limit the number of bureaucratic processes and bodies with which tribes need to deal when issues arise.[11] In addition, in the administrative realm, judicial review is acceptable only under certain conditions, the most important being when an agency has made a final decision on an issue.[12] Limiting the avenues for judicial review of agency decisions may consequently limit the number of times tribes are pulled into the courts,[13] especially if, to "adapt an old joke[,] … no Indian reservation is safe while the Supreme Court is in session."[14]

Moreover, if tribes deal primarily with agencies—in particular, with the EPA—tribes may be able to keep interactive management dialogues focused on science rather than on jurisdictional issues that could possibly follow in the footsteps of *Brendale v. Confederated Tribes and Bands*

of the Yakima Nation.[15] In *Albuquerque v. Browner*, tribal involvement with the EPA produced a success for tribal sovereignty, because the EPA tried to set aside as many potential jurisdictional questions as possible and relied on scientific evidence put forth by the tribe related to the creation of water quality standards that could have an impact on the city of Albuquerque. In *Albuquerque*, the EPA ignored competing private interests and offered the tribes the authority to establish "what will count as truth in the policy process."[16] In an article published shortly after the decision, Allison Dussias underscored the somewhat radical and impressive nature of the EPA's approval of the tribe's reliance on indigenous knowledge and interests in formulating regulations; the author pointed out that "this is a great departure from the efforts of earlier federal government officials to eradicate the nature-based religious beliefs and practices of Native Americans."[17]

Thus, it appears that tribes might fare relatively well in the realm of agency control—in particular EPA control—and *Albuquerque* and later cases reaffirm this conclusion. However, the logic determining that tribes could benefit from such a relationship with the EPA rests on two rather dangerous assumptions: that agencies will always decide in favor of tribes (especially acknowledging that agency policy can change with the change of a presidential administration), and that reviewing courts will always defer to agencies' decisions. Accepting the provision of TAS status and subjecting themselves to agency control might, in some instances, be beneficial to tribes—as demonstrated in the case of *Albuquerque*—but if the agency or courts were to rule against a tribe, it would be left totally entangled within the federal government with few protections. If this were to occur, all the benefits cited above that safeguard tribes under agency control would then serve the opposite function: placing tribes in a restricted situation with few tools with which to reassert their tribal autonomy.

As we have seen, *Albuquerque v. Browner* and the cases like it can be viewed as a success not only for the reasons discussed above but also from an environmental perspective: the court upheld tribal rules that blocked the city of Albuquerque from polluting the Rio Grande River, which flows through tribal lands. But the case can also be viewed as an example of U.S. government efforts to limit tribal sovereignty and thus prevent tribes from making meaningful authoritative decisions. The case might be deemed a failure by the larger standards of tribal self-determination:

- The tribe obtained permission to adopt standards under a clean water law and system that the tribe did not devise and could not change.
- The tribe's standards were subject to review by a U.S. agency.
- Only the agency that reviewed the standards could enforce them.

By making these tools available to the tribe, was the U.S. government really making a fundamental change in U.S.-tribal relations and creating a new opportunity for tribal self-government? As Taiaiake Alfred, Mohawk scholar, notes, "From the perspective of the state, marginal losses of control are the trade-off for the ultimate preservation of the framework of dominance."[18]

Before examining the potential cultural dilemmas that tribes face in the TAS process, it is important to point out some of the difficulties tribes face when they participate in the cooperative federalism involved in U.S. environmental law. The case of *Albuquerque v. Browner* demonstrated that in order to gain treatment as a state in programs that come under the Clean Water Act, for example, the Pueblo of Isleta—as well as other tribes—must apply to the EPA for such status and submit evidence that (1) it is a tribe, as recognized by the secretary of the interior; (2) it has a functioning tribal government; and (3) it has the authority and capability to create effective water quality standards.[19] Thus, in order to gain any authority over its water quality standards, the tribe was required to go through a tedious procedure to gain the approval and recognition of the federal government. Thus, when one considers what TAS status actually signifies and who can obtain it, these stipulations for gaining TAS status have serious implications for understanding whether the TAS amendments to the Clean Water Act are even significant. For example, in a case concerning the Flathead WQS, attorney Daniel I.S.J. Rey-Bear pointed out that "the dispute is not really about the technical content of those WQS themselves. Rather, this dispute concerns the scope of the underlying federally recognized tribal authority to promulgate those standards under the CWA's section 518(e) TAS provisions."[20] Therefore, TAS status is one of those ironic situations that *appears* to augment the authority of tribes but, in fact, diminishes tribal sovereignty.

It seems obvious that the regulatory approaches embedded in the TAS process are tied to America's environmental regulatory culture and do not emerge from tribal ideals regarding the environment. That said, in the *Albuquerque* case, the Pueblo of Isleta was able to set standards based on ceremonial uses of the Rio Grande—and that was no small victory. Still, there are some serious challenges in using the TAS regulatory approach in a way that not only protects but also reflects tribal cultures and also shows how they are different from the dominant culture.

As a point of departure, the meaning of "different" in this context should be clarified. In his discussion of tribal courts in *Braid of Feathers*, Frank Pommersheim discussed what he calls the "dilemma of difference" for tribal courts.[21] He pointed out that the courts run by tribal communities "do not exist solely to reproduce or replicate the dominant canon appearing in state and federal courts. If they did, the process of colonization would be complete. …"[22] Pommersheim, like many others, is concerned about the possibility of maintaining tribal differences through the use of quasi-autonomous structures within the contours of the United States. Within the context of environmental regulation, these differences quickly become issues that affect the relative health not just of tribal cultures but also of Indians themselves, who often bear an inordinate amount of environmental risk.

In addition, the "dilemma of difference" in this sense is also a problem of recognition. In a system of unequal pow-

er, cultural differences and concepts like justice or environmental management have to be understood as features that occur in a system in which differences are not usually desired or communicated. According to Pommersheim, in the American federalist system, the "federal record evinces a tolerance of similarity rather than dissimilarity,"[23] and this makes it difficult for tribal courts and governments to define spaces for cultural differences. Therefore, to be protective of tribal cultural differences, tribal sovereignty cannot just mean that tribes are just another partner in the federal system, the dominant culture must also recognize that tribal governments can form the basis of a different civic community and a different sense of the public good. This idea can be seen as dangerous to members of the dominant culture when non-Indians are subject to this different sense of the public good; for example, the U.S. Supreme Court has repeatedly shown that it is not comfortable allowing tribal police powers over non-Indian residents within reservations because these individuals are not full participants in the political process that takes place on Indian reservations. Moreover, states often see tribal sovereignty claims as threats to their own territorial sovereignty, as demonstrated by the numerous challenges to the legality of environmental programs that tribes propose or conduct.

Therefore, the basic challenge for tribal governments is to maintain "separateness" by holding on to a difference that is recognizable and acceptable to the dominant culture and its institutions as well as to tribal citizens within the minority culture. An example of where the TAS structure might shortchange tribal difference is in the arena of environmental risk assessment. Even though risk assessments come out of a different regulatory context, they easily represent the Faustian cultural bargain that tribes face in exerting regulatory control in a system that is not of their making.

Many critics of environmental risk assessment have pointed out that the science used in risk assessments does not protect cultural minorities very well for a variety of reasons—one of the key reasons being that some cultural minorities access resources in the environment differently than both the mainstream culture and the scientists and policy-makers conducting the risk assessments do.[24] Since the late 1990s, there has been a flurry of activity within both the EPA and among American Indian nations to address this problem, and two different but sometimes overlapping approaches have developed to address the problems of cross-cultural risk assessment. The following discussion briefly explores how the EPA and tribal nations have shaped these approaches.

One approach to solving the problems of cross-cultural risk assessment the EPA and the tribal nations have explored is to make science more responsive to the ways that Indians actually access resources in the environment today and the way they have done so in the past. Instead of using aggregate models from the entire American population for something like fish consumption, this approach would have the EPA and tribal scientists measure the actual intake of fish by tribal people who live off the resources on their land. I believe this approach is very similar to the TAS approach for setting standards; it modifies the existing structure of science and regulation and places it into a tribal context.

The other approach is much more culturally relevant but harder to define in a scientific manner from the EPA's perspective and clearly does not fit into the regulatory approach of cooperative federalism. This approach to solving the problem of cross-cultural environmental risk assessment, defined by some as the "health and well-being" model, would allow for and encourage tribal nations and the EPA to redefine health in culturally relevant terms. Therefore, a risk assessment would not just emphasize the potential number of deaths caused by cancer, for example, but would look at the risks cancer poses to a healthy, culturally defined lifestyle in each tribal nation. This approach has the potential to allow tribal nations to define health in much broader terms than simply death rates tied to cancer and would include cultural indicators, such as access to a healthy traditional diet, ability to participate in ceremonies, the passing down of traditional knowledge, and so forth. Unlike the classic risk assessment paradigm, the new one based on health and well-being addresses tribal cultural differences. The model is driven by tribal priorities, whereas traditional risk assessment is driven by the EPA's regulations and measurements of risk.[25] The health and well-being paradigm also focuses on the health of communities, as determined by the tribes: hence, a healthy community encompasses all aspects of tribal relationships and tribal priorities that affect a community.[26] This paradigm does not simply focus on a certain aspect of the environment; it takes a holistic approach so that the interconnectedness of all aspects of a community is respected. This approach to risk assessment is also an approach to environmental regulation that surely goes beyond the TAS approach to shared regulatory control. The health and well-being paradigm is framed around tribal concerns and definitions of health, and there is the potential that a regulatory program could be built up around these more culturally defined parameters, not on the concepts and rules that define federal standards and cooperative federalism.

This article has presented only a short overview of the problems and prospects of tribal environmental sovereignty. The essay needs to conclude with the gentle reminder that many tribal lawyers, policy-makers, and environmental professionals deal with these issues on a daily basis and still continue to come up with creative responses in the face of unfair power relationships and a limited number of resources. The health and well-being paradigm described above, for example, has come out of tribal environmental managers' attempts make risk assessment more reflective of tribe members' way of life and the tribal community's understanding of what makes a healthy human being. We should all be mindful that the TAS approach to cooperative federalism may drown out these more culturally appropriate approaches to tribal environments; therefore, we should all do whatever we can to support this work. **TFL**

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Endnotes

[1]In 1986, TAS amendments were enacted for the Safe Drinking Water Act (42 U.S.C. § 300f–300j-26 (2000), TAS provisions at § 300j-11) and the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. § 9601–9675 (2000), TAS provisions at § Sec. 9626, *see also* natural resources damages provisions in Sec. 9607). Clean Water Act TAS amendments were enacted in 1987 (33 U.S.C §§ 1251–1387 (1988), TAS provisions at § 1377). Clean Air Act TAS amendments were enacted in 1990 (42 U.S.C. § 7401–7671q (2000), TAS provisions at § 7601(d)). The major environmental federalism statute administered by the EPA that has not been amended to include TAS provisions is the Resource Conservation and Recovery Act (also known as the Solid Waste Disposal Act) (42 U.S.C. §§ 6901–6992k), which established the framework for regulating municipal solid waste and hazardous waste. In addition to statutes administered by the EPA, there are a number of other federal statutes that treat tribes in a manner comparable to states, including the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. § 1221 and various sections to 1328 (2000), tribal provisions at § 1235(k)) and the National Historic Preservation Act (16 U.S.C. §§ 470–470x-6 (2000), tribal provisions at § 470a(d)).

[2]*See* David Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 Cal. L. Rev. 1573 (1996); Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority Over Nonmembers*, 109 Yale L.J. 1 (1999); and Dean B. Suagee, *The Supreme Court's "Whack-a-Mole" Game Theory in Federal Indian Law, A Theory that Has No Place in the Realm of Environmental Law*, 13 Tulane L. Rev. 1. (2002).

[3]U.S. Environmental Protection Agency, Office of Water, "Treatment of Tribes in the Same Manner as States/Program Approval Matrix" (1998).

[4]U.S. Environmental Protection Agency, Office of Science and Technology, "Indian Tribal Approvals for the Water Quality Standards Program" (2006).

[5]Robert V. Percival, et al., Environmental Regulation: Law, Science, and Policy 118 (New York, Little, Brown, and Company 1996).

[6]William Galloway, *Tribal Water Quality Standards Under the Clean Water Act: Protecting Traditional Cultural Uses*, 17 Stan. Env. L. J. 3.

[7]Jace Weaver, ed., Defending Mother Earth: Native American Perspectives on Environmental Justice 116 (Maryknoll, N.Y., Orbis Books 1996).

[8]*City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996), *cert. denied*, 522 U.S. 965 (1997).

[9]Amy Quandt, *American Trucking Associations, Inc. v. United States Environmental Protection Agency: A Speedbump Along the Highway of Judicial Deference to Agency Determinations*, 11 Vill. Envtl. L.J. 425, 426 (2000).

[10]Stephen Breyer and Richard Stewart, Administrative Law and Regulatory Policy: Problems, Text, and Cases 1029 (3rd ed., New York, Little, Brown, and Company 1992).

[11]Dean B. Suagee and John P. Lowndes, *Due Process and Public Participation in Tribal Environmental Programs*, 13 Tul. Envtl L.J. 8, 20 (1999).

[12]*Id.* at 22.

[13]*Id.*

[14]Frickey, *supra* note 2, at 24.

[15]492 U.S. 408 (1989).

[16]Bruce Williams and Albert Matheny, Democracy, Dialogue, and Environmental Disputes: The Contested Languages of Social Regulation 34 (New Haven, Conn., Yale University Press 1995).

[17]Allison M. Dussias, *Asserting a Traditional Environmental Ethic: Recent Developments in Environmental Regulation Involving Native American Tribes*, 33 New Eng. L.Rev. 653, 659 (1999).

[18]Taiaiake Alfred, Peace Power Righteousness: An Indigenous Manifesto 47 (New York and London, Oxford University Press 1999).

[19]40 C.F.R. § 131.8 (1995).

[20]Daniel I.S.J. Rey-Bear, *The Flathead Water Quality Standards Dispute: Legal Bases for Tribal Regulatory Authority Over Non-Indian Reservation Lands*, 20 Amer. Indian L.Rev. 151, 186.

[21]Frank Pommersheim, Braids of Feathers: American Indian Law and Contemporary Tribal Life (Berkeley, University of California Press 1995).

[22]*Id.* at 99.

[23]*Id.* at 100.

[24]Robert Kuehn, *The Environmental Justice Implications of Quantitative Risk Assessment*, 103 U. of Ill. L.Rev. 1 (1996); Christine O'Neill, *Variable Justice: Environmental Standards, Contaminated Fish, and "Acceptable" Risk to Native Peoples*, 19 Stanford Env. L.J. 3 (2000).

[25]Tribal Science Council, "Health and Well-Being Paradigm Development Meeting: Draft Summary 9" (U.S. Environmental Protection Agency, Tulalip Indian Reservation) (2004).

[26]*Id.*

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"Motherhood and Apple Pie"
Judicial Termination and the Roberts Court

A Commentary by Richard A. Guest

On June 25, 2008, a sharply divided U.S. Supreme Court took another significant step in diminishing the authority of Indian tribes over nonmembers. In a 5-4 decision in *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709 (2008), the Court held that the Cheyenne River Sioux Tribal Court does not have jurisdiction over a discrimination claim by tribal members Ronnie and Lila Long against Plains Commerce Bank involving the bank's sale of fee lands on the reservation to non-Indians on terms that were more favorable than those offered to the tribe's members. As a matter of record, the less-than-favorable terms that the bank offered to the Longs were based solely on their status as Indians.

Plains Commerce Bank was the first Indian law case since Chief Justice Roberts and Justice Alito were named to the Supreme Court. Chief Justice Roberts, joined by Justices Scalia, Kennedy, Thomas, and Alito, distinguished *sales* of fee land by non-Indians on the reservation—over which the majority opined that tribes have no legislative authority— and *activities* by non-Indians on fee lands that may implicate a tribe's sovereign interests and thus be subject to tribal regulation. Although it is only one case, the Court's opinion is disturbing, because a majority of the Court was willing to ignore Plains Commerce Bank's extensive dealings with tribal members on the reservation, including the bank's successful use of the tribal court in numerous other cases against tribal members. Instead, the majority of the Court chose to rely on a hypertechnical distinction to further chip away at tribal sovereignty.[1] It is unclear what the long-term effects of the decision will be, but the ruling was not a promising beginning for the Roberts era.[2]

Chief Justice Roberts' decision to author (that is, to assign himself the task of writing) the majority opinion in *Plains Commerce Bank*, his style and word choice in discussing tribal lands, and the manner in which he frames the sovereignty of Indian tribes all require additional reflection on the question: What type of justice is John Roberts going to be on Indian law cases? Back in July 2005, after President George W. Bush nominated John Roberts to replace Justice Sandra Day O'Connor on the Supreme Court of the United States, the Native American Rights Fund—as part of the Judicial Selection Project of the Tribal Sovereignty Protection Initiative—conducted research, gathered documents, and prepared an August 2005 memorandum to tribal leaders entitled "The Nomination of John G. Roberts to the U.S. Supreme Court: An Indian Law Perspective." The research uncovered several documents authored by John Roberts during his tenure at the White House as associate counsel to the President (1982–1986) in which he provided legal advice to his superiors related to various legislative bills affecting Indian Country.

A handful of these documents raised a few eyebrows. In particular, in a memorandum dated Jan. 18, 1983, and entitled "Draft Indian Policy Statement," Roberts addressed the proposed renunciation by Congress of House Concurrent Resolution 108—the official federal policy known throughout Indian Country as the "Termination Policy." In this memorandum, Roberts wrote the following: "H. Con. Res. 108, in my view, reads like *motherhood and apple pie*." (Emphasis added.) This statement and statements in other memorandums were troubling for tribal leaders and tribal advocates when they considered his confirmation as Chief Justice.[3] However, the concerns were tempered by the fact that more than 20 years had elapsed since he had penned these memorandums. Surely Roberts' personal policy views as a young attorney in the Reagan White House should not be given too much weight, given his maturation into a "lawyer's lawyer" with flawless credentials, whose legal experience included representing the state of Hawaii and native Hawaiian interests before the U.S. Supreme Court in *Rice v. Cayetano*.

Today, in light of the *Plains Commerce Bank* decision, a review of these memorandums may provide much needed insight into the future direction of Indian law before the Roberts Court. The first part of this article provides an overview of the August 2005 memorandum to tribal leaders. The second part presents quotes from the memorandums that John Roberts authored as a young White House attorney. The last part reviews the oral argument transcript in the *Plains Commerce Bank* case and examines portions of the majority opinion written by Chief Justice Roberts. This material is offered to continue the dialogue about the Roberts Court and to pose the question of whether a more concrete profile of Chief Justice Roberts is emerging—especially in relation to his jurisprudence dealing with Indian law.

The title of this article—"Motherhood and Apple Pie": Judicial Termination and the Roberts Court—found its origin, in part, from Roberts' 1983 characterization of the Termination Policy. However, the title further coalesced following a review of Professor Jacob Levy's recent law review article, "Three Perversities of Indian Law,"[4] in which he observes:

> Like the threat of termination, *self-determination as judicially construed* has put tribes in a position of facing a kind of punishment for success. Under Nix-


Gran Quivira, Salinas National Monument, New Mexico. By Lawrence Baca.

> on's interpretation of termination, those "step[s] that might result in greater social, economic, or political autonomy" brought with them the risk that tribes' formal political and legal standing might be eliminated altogether. In the modern era, those steps instead carry the risk of a kind of *whittling away* of jurisdiction, rendering tribes slowly but consistently *less able to act as effective governing entities*. Tribes that wish to ensure their continuing viability as polities have very strong reason *not* to pursue policies that might lead to broad private-sector-led economic development, or indeed to much economic development at all. (Emphasis added.)

In an article published in 2001, "Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color Blind Justice and Mainstream Values,"[5] David Getches concluded that an intellectual leader among the justices must emerge—one who "can assume the hard work of understanding Indian law, its historical roots, and its importance as a distinct field." According to Getches, failing such an intellectual "rediscovery" of Indian law by the Court, "Indian policy will unravel further [and] Indian interests will suffer." Do we think Chief Justice Roberts views himself as the emerging intellectual leader of the Court when it comes to Indian law? If so, does the decision in *Plains Commerce Bank* indicate that Indian Country may be facing another era of *judicial* termination—courts poised to "whittle" away tribal sovereignty one case at a time in the name of "motherhood and apple pie"?

The August 2005 Memorandum to Tribal Leaders

John Glover Roberts Jr. was born on Jan. 27, 1955, in Buffalo, N.Y. His father was an executive in the steel industry; his mother, Rosemary, was a homemaker. When he was a boy, his family moved to Long Beach, Ind., an all-white, predominantly Catholic community on the shores of Lake Michigan. He and his sisters attended Notre Dame Catholic School. He then attended La Lumiere, an all-boys Catholic preparatory school in Indiana; in high school he was co-captain of the football team, co-editor of the school newspaper, and valedictorian of his class.

After graduating from high school, Roberts attended Harvard University, where he majored in history. He graduated in 1976 at the top of his class and spent the next three years at Harvard Law School, where he served as managing editor of the *Harvard Law Review*, graduating magna cum laude in 1979. During his first summer in law school, he clerked at the law firm of Ice, Miller Donadio, & Ryan (now Ice Miller) in Indianapolis. During his second summer, he clerked at the law firm of Carlsmith, Carlsmith, Wichman & Case (now Carlsmith Ball LLP) in Honolulu.[6]

Following law school, Roberts clerked for Judge Henry J. Friendly, a well-respected appellate judge and a proponent of judicial restraint,[7] whom President Eisenhower had appointed to the U.S. Court of Appeals for the Second Circuit. Next, from July 1980 to August 1981, Roberts clerked for then Associate Justice (now former Chief Justice) William H. Rehnquist of the U.S. Supreme Court. Following his clerkships, Roberts served as special assistant to attorney general of the United States, William French Smith, although Roberts' direct boss was Kenneth Starr. In November 1982, President Reagan appointed Roberts to the White House staff to serve as associate counsel to the President—a position in which he distinguished himself as an aggressive advocate for the administration's policies. Roberts' responsibilities as associate counsel to the President included advising the President about his constitutional powers and responsibilities as well as about other legal issues affecting the executive branch.

In May 1986, Roberts joined the law firm of Hogan & Hartson as an associate attorney and was elected as a general partner of the firm in October 1987. In 1989, he left private practice to serve as principal deputy solicitor general of the United States under Kenneth Starr. In this capacity, Roberts personally argued a number of cases before the U.S. Supreme Court and the federal courts of appeals on behalf of the United States. He had general substantive responsibility for cases arising from the Civil and Civil Rights Divisions of the Justice Department. In 1993, President George H. W. Bush nominated Roberts for a federal judgeship to the U.S. Court of Appeals for the D.C. Circuit, but the Senate did not vote on his nomination before the Clinton administration took office. According to various reports, Roberts was crestfallen, disappointed that that his nomination had languished in a standoff over judicial nominations at the end of George H. W. Bush's term.

As a result, in January 1993, Roberts returned to private practice with Hogan & Hartson, where he established a successful appellate practice and developed a reputation among Washington insiders as a lawyer's lawyer. In 2001, President George W. Bush nominated Roberts for a federal judgeship to the U.S. Court of Appeals for the D.C. Circuit, and Roberts was confirmed by the full Senate on May 8, 2003, without a roll call vote. On July 19, 2005, President George W. Bush nominated John G. Roberts to become an associate justice on the Supreme Court of the United States, but upon the death of Chief Justice Rehnquist on Sept. 3, 2005, President Bush nominated Roberts to become the 17th Chief Justice of the United States. Roberts was confirmed by the U.S. Senate and sworn in as Chief Justice on Sept. 29, 2005.

After providing this biographical sketch, the August 2005 Memorandum posed questions about his Indian law experience, his judicial philosophy, and his judicial temperament. First, it was instructive to ask if Roberts had any experience with federal Indian law prior to becoming Chief Justice. There is nothing in the record to indicate that he had direct responsibility for any case involving federal Indian law during his days as a judicial clerk or as an attorney with the federal government in the Reagan and first Bush administrations. However, it is important to note that, during Roberts' clerkship for Justice Rehnquist, the U.S. Supreme Court ruled on one very important case involving Indian law: *Montana v. United States*, 450 U.S. 544 (1981) (Indian tribes do not have civil jurisdiction over non-Indians on non-Indian owned fee lands within the reservation, except when there is a consensual relationship or when the non-Indian conduct threatens the political integrity, economic security, health, or welfare of the tribe).[8] In addition, during the Court's term that began in October 1980, Justice Rehnquist issued a written dissent to a denial of certiorari in *Connecticut v. Mohegan Tribe*, 452 U.S. 968 (1981), a land claims case arising under the Non-Intercourse Act, wherein he characterized the decision reached by the court of appeals as "unprecedented," one that made "millions of acres in the eastern United States vulnerable to Indian land title-claims." Justice Rehnquist would have preferred that the Supreme Court decide the territorial applicability of the Non-Intercourse Act (that is, how the act applies to Indian lands in the original 13 colonies versus Indian lands in the rest of the states).

Most of Roberts' experience with Supreme Court cases involving federal Indian law arose during his years in private practice, when he represented the interests of the state of Alaska in *Alaska v. Native Village of Venetie* and those of the state of Hawaii in *Rice v. Cayetano*.[9] Each of these cases is summarized below.

Alaska v. Native Village of Venetie Tribal Government (Scope of Indian Country)

In 1986, Alaska entered into a joint venture agreement with a private contractor to construct a public school in the Village of Venetie using state funds. The Native Village of Venetie Tribal Government notified the contractor that it owed the tribe approximately $161,000 in taxes for conducting business activities on its land and sought to enforce the tax in tribal court. The state filed an action to enjoin the collection of the tax and the Federal District Court for the District of Alaska held that, because the tribe's lands were not "Indian Country" under the Alaska Native Claims Settlement Act (ANCSA), the tribe lacked the power to impose a tax upon parties that were not members of the tribe. On appeal, the U.S. Circuit Court of Appeals for the Ninth Circuit reversed the district court's ruling, holding that the land meets the definition of "Indian Country" under 18 U.S.C. § 1151(b) as a "dependent Indian community."

The state of Alaska hired Roberts to prepare and file a petition for certiorari to the U.S. Supreme Court. The Court granted review on the merits, and Roberts argued that the U.S. Congress has plenary authority over Indian affairs, that Congress has spoken clearly through ANCSA, and that the Court should abide by Congress' intent. However, several legal scholars have noted and taken exception to Roberts' re-statement of the Court's language in *U.S. v. Kagama* in his introductory statement of the case:

> By the time the United States had acquired "Russian-America," as Alaska was then known, most Indians in the contiguous United States had been displaced from

their aboriginal lands by war or treaty, and confined to federally established territories or reservations. Although these reservations were created expressly for the use and occupancy of Indians, Indians did not own or control the land. Rather, the land was held in "trust" for them by the federal government, and any action concerning the land was subject to exclusive federal control. At the same time, because their means of subsistence had fallen prey to westward expansion, reservations Indians were almost entirely dependent upon the federal government for food, clothing, and protection, and were often "dead[ly] enemies" of the States. *U.S. v. Kagama*, 118 U.S. 375, 383–384.

In other words, Roberts re-characterized Indians as the "deadly enemies" of the states (alluding to the sterotype of the savage Indian). In fact, in *U.S. v. Kagama* the Supreme Court stated the following: "These Indian tribes are wards of the nation. They are communities dependent on the United States, dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, *the people of the states where they are found are often their deadliest enemies*." (Emphasis added.)

Quoting the concurring opinion reached by the Ninth Circuit, Roberts argued that recognizing Indian Country in Alaska would invite a "blizzard of litigation throughout the State as each and every tribe seeks to test the limits of its power over what it deems to be its Indian country," asserting "claims to freedom from state taxation and regulation, claims to regulate and tax for tribal purposes, assertions of sovereignty over vast areas of Alaska, and even assertions that tribes can regulate and tax the various corporations created to hold ANCSA land." In a unanimous opinion delivered by Justice Thomas, the Court held that the tribe's land is not Indian Country.

Rice v. Cayetano (Status of Native Hawaiians)

In 1978, the state of Hawaii amended its constitution to establish the Office of Hawaiian Affairs (OHA), a public trust entity that administers programs to benefit the people of Hawaiian ancestry. OHA is governed by a nine-member board of trustees, whose members must be "Hawaiian" and elected by "Hawaiians." By statute, the term "Hawaiian" means "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778" and the term "native Hawaiian" means "any descendant of not less than one half-part [blood] of the races inhabiting the Islands before 1778."

Harold Rice, a non-native citizen of Hawaii and a descendant of pre-annexation residents of the islands, brought suit in federal district court contesting his exclusion from voting in the elections for OHA trustees based on the Equal Protection Clause of the 14th Amendment and the prohibition of the 15th Amendment (providing that a citizen's right to vote may not be denied or abridged on account of race) of the U.S. Constitution. The U.S. District Court for the District of Hawaii granted summary judgment to the state, finding that the Congress and the state of Hawaii have a guardian-ward relationship with the Native Hawaiians, analogous to the relationship between the United States and Indian tribes. The U.S. Court of Appeals for the Ninth Circuit affirmed the ruling, holding that the state "may rationally conclude that Hawaiians, being the group to whom trust obligation runs and to whom OHA trustees owe a duty of loyalty, should be the group to decide who the trustees ought to be."

After the U.S. Supreme Court granted certiorari, the state of Hawaii retained Roberts, who argued that the classification drawn by the statute had not been drawn on the basis of race.[10] Instead, the statute simply restricted the right to vote to the beneficiaries of the trusts. Rice had not challenged the validity of the trusts, and it was rational for the state to limit voting to those most directly affected by the administration of the trusts. In addition, Roberts argued that similar to native Americans in the lower 48 states and Alaskan native peoples, Congress has established a special trust relationship with Native Hawaiians as an indigenous people:

> Classifications based on Congress' decision to assume a special relationship with an indigenous people are not based on race, but rather the unique legal and political status that such a relationship entails. Congress has expressly provided that classifications involving indigenous Hawaiians should be treated the same as those involving American Indians, Alaska Natives, and the other indigenous people over whose aboriginal lands the United States has extended its domain. This Court has repeatedly reaffirmed that such judgments are peculiarly within Congress' prerogative to make. Centuries of jurisprudence, not to mention an entire title of the United States Code, are built on the understanding that such classifications are not race-based. This regime is fully applicable to indigenous Hawaiians.

As a strict constructionist, Roberts went on to argue that this perspective "is true not only because Congress has said so, but because the Framers of the Constitution drew no distinctions among different groups of indigenous people in conferring power to deal with such groups on Congress, and the Framers of the Civil War Amendments never envisioned that those amendments would restrict the ability of Congress to exercise that power." However, the Supreme Court rejected Roberts' arguments and held that the state statute that limited voters to those persons whose ancestry qualified them as either a "Hawaiian" or "native Hawaiian" violated the 15th Amendment, using ancestry as proxy for race.

It is also worth asking what we know of Roberts' judicial philosophy and judicial temperament. In August 2005, there were more questions than answers to the inquiry regarding what kind of Supreme Court Justice John Roberts would be if confirmed by the U.S. Senate. His two years as

a judge on U.S. Circuit Court of Appeals for the D.C. Circuit did not provide enough time for him to develop a judicial record or sufficient opportunity for others to evaluate it. In Roberts' own words, he does not have an "overarching, uniform" judicial philosophy.

By most accounts, Roberts' role model was Judge Henry Friendly of the U.S. Circuit Court of Appeals for the Second Circuit, for whom Roberts clerked after getting his law degree. Many legal scholars consider Judge Friendly to be one of the great appeals court judges of the modern era. Judge Friendly was not results-oriented; rather, he carefully weighed the facts and the law, was deferential to precedent, and had a reputation of being intellectually honest. Based on Roberts' responses during his confirmation process, his reputation as a lawyer's lawyer, and the 20 years that had passed since he had served as a White House attorney, the conclusion reached by the Native American Rights Fund in August 2005 was that there was nothing recent in the Roberts' record—as a judge or as an attorney—to indicate that he is results-oriented or a political ideologue with a specific agenda. Perhaps the time has come to reassess this conclusion.

Roberts' White House Memorandums

From 1982 to 1986, Roberts served as associate counsel to President Reagan providing legal advice in relation to various legislative bills, including bills affecting Indian Country. In particular, Roberts wrote five memorandums in which he discussed his policy views and values in relation to the history, treatment, and legal status of native Americans and of Indian tribes in the United States.[11]

First, in a January 1982 memorandum, Roberts provided the following commentary on the Texas Band of Kickapoo Reservation Act:

> The Kickapoos, originally from the Great Lakes area, *did not stop running from their encounter with Europeans until they reached Mexico*, where they now hold 17,000 acres of land. The Kickapoos provide migrant labor in the United States and a group of them made Newsweek *by choosing to live in squalid conditions* beneath the International Bridge in Eagle Pass, Texas, rather than their Mexican homeland. ...
>
> While the approach of the bill—ad hoc exceptions to restrictions in general laws—strikes me as unfortunate, and while its provisions seem overly generous—particularly in light of the fact that these are, generally speaking, *Mexican Indians and not American Indians*—the bill is consistent with the Administration's recommendation. (Emphasis added.)

Then, in a January 1983 memorandum entitled "Miscellaneous Amendments of the Internal Revenue Code and the ERISA," Roberts stated the following: "I view treating tribal governments as states as objectionable as a policy matter, but it is consistent with the equally objectionable (but well established) non-integrationist policy with respect to Indians." And, as noted above, in a January 1983 memorandum addressing Congress' wish to adopt an Indian policy statement officially renouncing the 1950's Termination Policy—House Concurrent Resolution 108—Roberts wrote:

> [I]n my view, [House Concurrent Resolution 108] reads like motherhood and apple pie: "It is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, and to end their status as wards of the United States, and to grant them all the rights and prerogatives pertaining to American citizenship."
>
> I am advised … that Indians oppose the notions of "equality" embodied in H. Con. Res. 108 as departures from their "special" status, and that renunciation of H. Con. Res. 108 (itself having no legal effect) has great symbolic value. The decision to urge renunciation of H. Con. Res. 108 was made at a Cabinet Council meeting last fall, and has already been announced in the January 14 summary, so it appears in any event to be water under the bridge.

In a fourth memorandum prepared in November 1983, Roberts wrote the following:

> This bill would declare that 3,800 acres of public land in Nevada (valued at $1.5 million) be held in trust for the Las Vegas Paiute Tribe. The tribe, consisting of 143 members, has no legal claim to the land, but simply wants to expand its economic base. Interior originally opposed the bill, contending that the land should not be transferred without compensation, but now has no objection. OMB recommends approval; Justice and EPA defer to Interior. This bill essentially does nothing more than take money from you and me and give it to 143 people in Nevada (about $10,000 each), simply because they want it. (Emphasis added.)
>
> I have reviewed the memorandum for the President..., and the bill itself, and have no legal objection. (Emphasis in original.)

A year later, in a September 1984 memorandum advising the President about the Shoalwater Bay Indian Tribe Claims Settlement Act, Roberts characterized the settlement as "another Indian giveaway":

> The bill would provide $1,115,000 to an Indian tribe to settle the tribe's claims to eight acres of land. The land was included in the tribe's reservation by an 1866 executive order, but an 1872 General Land Office land patent granted the land to another party. Both the tribe and the successors-in-title to the other party now claim the land, and the tribe has filed suit against the other claimants. The other claimants have

sued the United States and a third-party defendant.

In 1982 Interior offered $120,000 to settle the tribe's claims. Under typical Indian Claims Commission formula, the land would be worth only several hundred dollars. Nonetheless, Interior and OMB recommend approval, arguing that the United States could be exposed to greater liability if the lawsuit goes forward, and noting that the whole problem was caused by the Government in the first place. Justice defers to Interior.

This strikes me as *another Indian giveaway*, since the amount awarded greatly exceeds any reasonable valuation of the tribe's claim. If Interior, Justice and OMB approve, however, I do not think we should interpose an objection. (Emphasis added.)

The *Plains Commerce Bank* Case

When the Court granted review in the *Plains Commerce Bank v. Long Family Land & Cattle Co.* in January 2008, there was swift reaction from around Indian Country. The U.S. Court of Appeals for the Eighth Circuit had clearly rejected all the bank's arguments and had made a straightforward application of the first "consensual relations" exception to the *Montana* exception to the general rule that Indian tribes retain civil jurisdiction over non-Indians on their reservation.[12] Three principal concerns dominated the subsequent discussion in relation to the Court's reason for granting the review: (1) The Court could reverse *National Farmers* and *Montana* and establish an *Oliphant*-style rule prohibiting tribal civil jurisdiction over non-Indians. (2) The Court could adopt a "clear and explicit consent" requirement by non-Indians to tribal court jurisdiction following Justice Souter's concurring opinion in *Hicks*. (3) The Court could hold that tribal courts have no jurisdiction over tort claims against non-Indian defendants, following the lead of Justice Scalia's majority opinion in *Hicks*.

Recognizing these concerns, a strategy was developed on behalf of Ronnie and Lila Long as the respondents—a strategy designed to close every door the bank was attempting to open and prevent the Court from issuing a broad sweeping ruling. For Indian Country, if ever there was a case of consensual relations between a non-Indian and tribal members arising on the reservation, this case was it! In addition, in anticipation of the fact that the Court did not grant review to affirm tribal authority over non-Indians, the strategy included ways to limit the damage the Court may be prepared to cause to tribal sovereignty.

To achieve this objective, the respondents developed a full briefing presentation, which included the following:

- the respondents' brief providing a detailed factual background giving rise to the consensual relations and to the bank's discrimination;
- an amicus brief, prepared by the United States, supporting tribal court's authority over a bank doing business with tribal members on the reservation and taking advantage of a federal guaranteed loan program through the Bureau of Indian Affairs;
- an amicus brief, prepared by the Cheyenne River Sioux Tribe, detailing their tribal laws, their tribal court system, and the bank's long history of doing business on the reservation and using the tribal court on many occasions in actions against tribal members;
- an amicus brief, prepared by the National Congress of American Indians and individual Indian tribes, focusing on the fundamental principles of federal Indian law giving rise to the tribe's inherent authority over non-Indians;
- an amicus brief, prepared by the National American Indian Court Judges Association, the Northwest Intertribal Court System, and the Navajo Nation Tribal Courts, providing an overview to the Court of the capacity of tribal courts to adjudicate cases involving non-Indians fairly and efficiently; and
- an amicus brief, prepared by Sacred Circle and other groups that advocate against domestic violence, enlightening the Court about the consequences for civil protection orders issued by tribal courts against non-Indian perpetrators of domestic violence against Indian women and children.

To help develop this comprehensive presentation, David Frederick, a seasoned Supreme Court practitioner and co-director of the University of Texas Law School Supreme Court Clinic, stepped forward and offered his legal expertise to the Long family pro bono. After the briefs were filed, three moot court oral arguments were held to prepare for the barrage of questions expected from the justices. Each moot court included questions from practitioners who were familiar not only with Indian law but also with Supreme Court practice and the proclivities of individual justices.

On reflection, what emerged from the oral argument was a preview of the struggle by many of the justices, including the Chief Justice, to get their minds around the concept that Indian tribes as governments could have authority over non-Indians who come on to their reservations to do business. Early on, there was a glimmer of hope that Justice Scalia, in his own way, got it. During an exchange with the bank's attorney regarding the personal guarantees on the bank loans that Ronnie and Lila Long had given to their corporation, Justice Scalia said: "And then you get guarantees from on reservation Indians. It *smells* like dealing with Indians on the reservation to me. ... In the absence of [a choice of law/forum provision], why should we bend over backwards to give something that has the *smell* of dealing with Indians any other name?" *Plains Commerce Bank* transcript at 15–16. (Emphasis added.) One wonders whether Justice Scalia could have chosen a different sensory descriptor, such as "it sounds like dealing with Indians" or "it looks like dealing with Indians," instead of choosing the term "smells"—as in "has a bad odor"—and using it twice; the language leaves one with the sense that, if you do business with Indians, then you deserve whatever bad deal you get, including being hauled into tribal court.

Later in the argument, during an exchange with David Frederick about the nature and scope of tribal law, Chief

Justice Roberts clearly demonstrated his disdain for tribal law: "Well, neither could—and neither could anybody [find tribal law as precedent], right? I mean if anybody could find it you could. It's because it's not published anywhere, right?" Justice Scalia followed up with and expression of his own disdain: "Certainly your reliance upon the Federal rules doesn't impress me as much as it did when you first told be about it, because apparently the Federal rules mean whatever the tribal courts say they mean, is that right?" *Plains Commerce Bank* transcript at 31–32.

In another exchange with David Frederick on the status of Indian-owned corporations, Chief Justice Roberts used a curious comparison to challenge the special status of Indians:

> One of the points you mentioned earlier is that this is an Indian corporation, and that's a concept I don't understand. If Justices Scalia and Alito form a corporation, is that an Italian corporation?
>
> * * *
>
> [If] the point here is … that the corporation is a member of the tribe … I certainly do not think the State, when it incorporated this entity, said: You're a different type of corporation than every other; you're an Indian corporation.

Plains Commerce Bank transcript at 32–34.

In his response, David Frederick clarified for the Court that, in fact, the South Dakota Supreme Court had recognized the special status of Indians and Indian-owned corporations. However, the Chief Justice was not finished with his aggressive challenge to the special status of Indians and Indian-owned corporations: "But if you are a bank and somebody comes in and says: I'm a corporation; I would like a loan, is the bank supposed to start asking questions about whether there are Indian shareholders, and how many, and all that? … So they should have a check box on their loan applications that says: Are you an Indian?" *Plains Commerce Bank* transcript at 34–36. Isn't a check box on a loan application based on race a violation of federal law? When David Frederick responded that, in this case, the Plains Commerce Bank clearly knew it was doing business with tribal members—with an Indian-owned corporation which had secured federal loan guarantees for the bank based on its status—all Roberts could say was, "Well I am sure the facts here matter."

Toward the end of oral argument, the question of the *Montana* ruling as precedent finally came up. Justice Alito demonstrated his struggle to understand Indian law when he asked: "Well there are many facts here that are favorable to your position, but I would appreciate it if you could articulate the rule of law that you would like us to adopt in this case." When David Frederick responded that the Court need not adopt any new law, but merely apply the first *Montana* exception—the consensual relations exception—to the facts of this case, Alito replied: "Can that be the case: Any consensual relationship between a member of the tribe and a nonmember is subject to the jurisdiction of the tribal courts?" *Plains Commerce Bank* transcript at 37–38.

Finally, Chief Justice Roberts revealed his predilection to never vote in support of tribal court jurisdiction over non-Indians when he picked up this thread from the discussion with Justice Alito: "You said earlier that this is a straightforward application of *Montana*?" Once again, David Fredericks said yes—based on the facts of this case, to which the Chief Justice, in perhaps the most often quoted exchange stated, "Yes given the facts. But isn't it true that this would be the first case in which we have asserted or allowed Indian tribal jurisdiction to be asserted over a nonmember?" *Plains Commerce Bank* transcript at 39–40.

When the Supreme Court issued its 5-4 decision in *Plains Commerce Bank*, any optimistic hope that Chief Justice Roberts would emerge as the intellectual leader of the Court—the justice who would "rediscover" the historical roots of Indian law—was eviscerated. Although the holding is extremely narrow—no tribal authority over the *sale* of non-Indian fee land—some of the language used by the Chief Justice in the opinion deserves additional scrutiny as we consider the future direction of Indian law.

From the outset—in the very first sentence of the opinion—Chief Justice Roberts makes clear what the outcome is going to be: "This case concerns the sale of fee land on a tribal reservation by a non-Indian bank to non-Indian individuals." Roberts characterized Ronnie and Lila Long as the "Indian couple" who defaulted on their bank loans and *then* claimed that the bank had discriminated against them. The discrimination had actually occurred when the bank changed the terms of the loan to the Longs based on the fact that they were Indians, which in turn resulted in default by the Longs because of the breach of the loan agreement by the bank (for example, the bank had not contested the claims of breach of contract and bad faith). In essence, Roberts characterized the Longs—not the bank—as the wrongdoers in this contract.

But to reach this pre-determined outcome, the Chief Justice had to redefine the nature of tribal lands and recast the history of the Cheyenne River Sioux Reservation, describing it as: "[o]nce a massive, 60-million acre *affair* ... appreciably diminished by Congress in the 1880's and at present consists of roughly 11 million acres …" 128 S. Ct. 2714. (Emphasis added.) The word "affair" generally connotes something temporary or transitional. It seems only the promises made by the United States during treaty negotiations were temporary. But for the Cheyenne River Sioux Tribe, the treaty negotiations with the U.S. government had set aside a permanent *homeland*—not an "affair" subject to the whims of the superior sovereign.

And perhaps the oddest play on words in the Chief Justice's written opinion appears in the following statement regarding tribal lands: "*Thanks* to the General Allotment Act of 1887, there are millions of acres of non-Indian fee land located within the contiguous borders of Indian tribes." *Id.* at 2719. (Emphasis added.) The use of the phrase "thanks to the General Allotment Act" and the subsequent discussion leading to the general rule that tribes have no authority to regulate the use of fee land, at best, reveals a complete denial of the poverty, misery, and suffering endured by Indians—let alone the extraordinary loss of Indian lands,

which occurred in the wake of the allotment and assimilation policies of the United States.

Chief Justice Roberts also reframed the Court's discussion of tribal sovereignty, distinctly referring to it as a "residual sovereignty" centered "on the land owned by the tribe and on tribal members within the reservation." *Id.* at 2718. In drawing the hypertechnical distinction between the *sale* of fee land and *activity* on fee land, Roberts relied on the fact that since the Court has only "permitted regulation of nonmember activity on non-Indian fee land," but never authorized a tribe to regulate the sale of such land—no such tribal authority exists! *Id.* at 2722–2723. This is a non sequitur, which Roberts attempted to support in his next paragraph:

> [This is] entirely logical given the limited nature of tribal sovereignty and the liberty interests of nonmembers. By virtue of their incorporation into the United States, the tribe's sovereign interests are now confined to managing tribal land, protecting tribal self-government and controlling internal relations. The logic of *Montana* is that certain activities on non-Indian fee land (say, a business enterprise employing tribal members) or certain uses (say, a commercial development) may intrude on the internal relations of the tribe or threaten tribal self-rule. To the extent that they do, such activities may be regulated. To put it another way, certain forms of nonmember behavior, even on non-Indian fee land, may sufficiently affect the tribe as to justify tribal oversight. While tribes generally have no interest in regulating the conduct of nonmembers, then, they may regulate nonmember behavior that implicates tribal governance and internal relations. [Citations and quotation marks omitted.]

Is the determination of tribal authority over non-Indians now solely a balancing test between tribal sovereign interests versus the liberty interests of nonmembers? Is the doctrine of inherent tribal authority no longer a consideration?

And Chief Justice Roberts' references to certain occasions when an Indian tribe might be able to exercise authority over non-Indians on non-Indian fee land (for example, as employer of tribal members or for commercial development) are illusory. In the opinion, Roberts made it clear that the tribe's sovereign interests that give rise to the first *Montana* exception are identical to those of the second exception. Under the second *Montana* exception, Roberts stated that the sovereign interests of Indian tribes are only implicated when "catastrophic consequences" befall a tribal government. *Id.* at 2726. Can we expect an equally heightened standard for the first exception?

More disturbing is the Chief Justice's willingness—similar to what was shown in his brief in *Venetie*, in which he cited *Kagama* as precedent for the proposition that Indians were the "dead[ly] enemies" of the states—to misuse a footnote found in the 2005 *Cohen Handbook of Federal Indian Law* for the proposition that Indian legal scholarship recognizes this heightened "catastrophic consequences" standard for the second exception. According to Roberts, "One commentator has noted that 'th[e] elevated threshold for application of the second *Montana* exception suggests that tribal power must be necessary to avert catastrophic consequences.'" In fact, when considered in its entirety, the footnote on which Roberts relied actually refutes this notion of a heightened standard flowing from the Court's precedent:

> In a footnote [in *Atkinson Trading*], the Court observed that "unless the drain of the nonmember's conduct on tribal services and resources is so severe that it actually 'imperil[s]' the political integrity of the Indian tribe, there can be no assertion of civil authority beyond tribal lands." This elevated threshold for application of the second *Montana* exception suggests that tribal power must be necessary to avert catastrophic consequences. In *Montana* itself, however, the Court reasoned that the existence of state rather than tribal authority on non-Indian fee lands had had practically *no* effect on tribal jurisdiction over hunting and fishing on Indian lands, and that the tribe had long accommodated itself to the exercise of state jurisdiction on fee lands. [Citations omitted.]

Conclusion

The August 2005 Memorandum to Tribal Leaders concluded that there were more questions than answers regarding what type of justice John G. Roberts would be when cases involving Indian law came before the U.S. Supreme Court. Perhaps the opinion he wrote in *Plains Commerce Bank* and reconsideration of the five memorandums he wrote as a young White House attorney provide a more concrete profile of the Chief Justice's Indian law jurisprudence. To be sure, by the end of the term that began in October 2008, Indian Country should have more definitive answers to this question as the Roberts Court decides three more cases involving Indian law: *Carcieri v. Kempthorne, U.S. v. Navajo Nation*, and *State of Hawaii v. Office of Hawaiian Affairs*. **TFL**

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Endnotes

[1]According to the majority, since the discrimination claim "is tied specifically to the sale of the fee land"—land alienated from tribal trust land and removed from tribal control—the tribe has no authority to regulate the terms upon which the land can be sold, even if those terms are discriminatory and favor non-Indians over Indians. Lacking

authority to regulate fee land sales, the tribe has no adjudicatory authority over claims based on such sales, because a tribe's adjudicatory authority cannot exceed its legislative authority. It is interesting to note, however, that, because the majority expressly made clear that it was not addressing whether the tribal court had jurisdiction over the Longs' claims of breach of contract and bad faith (the bank had not appealed those claims), the tribal court's jury award of $750,000 to the Longs is left undisturbed and subject to further proceedings.

[2]Although a disappointing outcome, attorneys from throughout Indian Country worked extremely hard to limit the damage that the Court could do to tribal sovereignty if it issued a broad holding. When the Court granted review of the favorable ruling issued by the U.S. Court of Appeals for the Eighth Circuit in January 2008, many Indian law practitioners anticipated three possible worst-case scenarios.

[3]The Senate Judiciary Committee scheduled confirmation hearings to begin on Sept. 6, 2005, but with the death of Chief Justice William Rehnquist on Sept. 3, 2005, the hearings were postponed. On Sept. 6, 2005, President Bush nominated John Roberts to become the 17th Chief Justice of the United States. Roberts was quickly confirmed by the U.S. Senate and sworn in as Chief Justice on Sept. 29, 2005, four days before the start of the 2005 term.

[4]Jacob Levy, *Three Perversities of Indian Law*, 12 Tex. Rev. of Law & Politics 329, 341–342 (Spring 2008).

[5]David Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color Blind Justice and Mainstream Values*, 84 Cal L. Rev. 1573 (2001).

[6]The firm was founded in 1857 and describes itself as Hawaii's oldest and largest law firm with offices in Honolulu, Hilo, Kailua-Kona, Maui, Kapolei, Guam, Saipan, and Los Angeles.

[7]Judge Friendly frequently criticized the Warren Court for pushing rights that were not included in the Constitution. He was also known for his deference to the political branches of government.

[8]As noted in the August 2005 memorandum, the nature and scope of tribal civil and regulatory authority over non-Indians on the reservation is an area of continuing controversy and litigation, as demonstrated by the Supreme Court's decisions in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001); and *Nevada v. Hicks*, 533 U.S. 353 (2001).

[9]*Alaska v. Native Village of Venetie*, 522 U.S. 520 (1998) and *Rice v. Cayetano*, 528 U.S. 495 (2000). Roberts also represented the state of Alaska on a petition for rehearing en banc in *Katie John v. United States*, 247 F.3d 1032 (2001), in which he argued against federal protection of native peoples' subsistence rights, contending that "the basis question presented by this case 'is whether Alaska or the United States has control over … navigable waters.' Few matters are more central to a state's sovereignty than the authority to manage the natural resources within its borders." Although Roberts was successful in obtaining the rehearing en banc, the state of Alaska lost the case on the merits and did not seek review by the Supreme Court. The only case involving Indian law in which Roberts participated as a judge on the D.C. Circuit Court was *City of Roseville v. Norton*, 348 F.3d 1020 (2003), in which a group of cities challenged the authority of the secretary to take land in trust for an Indian tribe to operate a casino under the restored lands provision of the Indian Gaming Regulatory Act. Roberts joined the unanimous opinion, written by Judge Rogers, which held in favor of the secretary and Indian tribes.

[10]Roberts discussed this case in an interview with National Public Radio aired on Oct. 6, 1999, entitled "Interview, Profile: Racial Discrimination Case in Hawaii." In the interview, Roberts characterized Rice's claim that he was "as Hawaiian as anybody" as being "like the descendants of Myles Standish saying they're native Americans because they've been here for a long time." In that interview, Roberts went on to say, "the fact of the matter is, there was somebody else there when they arrived, and there was somebody else there when Mr. Rice's ancestors arrived in Hawaii, the aboriginal inhabitants. We give special treatment to Alaskan natives. We don't give special treatment to the Russian settlers who were there before that land was part of the United States. … Now if it is held to be racial discrimination to single out Native Hawaiians, it's hard for me to see why it wouldn't also be racial discrimination to single out American Indians or Alaskan natives. And, of course, that takes place in countless laws in the U.S. code."

[11]John G. Roberts, Memorandum to the President, re Texas Band of Kickapoo Reservation Act, Jan. 4, 1982; Memorandum to the President, re Amendments of the Internal Revenue Code and the ERISA, Jan. 10, 1983; Memorandum to the President, re Draft Indian Policy Statement, Jan. 18, 1983; Memorandum to the President, re Las Vegas Paiute Trust Lands, Nov. 30, 1983; Memorandum to the President, re Shoalwater Bay Indian Tribe Claims Settlement Act, Sept. 26, 1984.

[12]*Montana v. United States*, 450 U.S. 544 (1981). Until the Court's decision in *Montana*, the general rule had been that Indian tribes retain civil regulatory over non-Indians on their reservations. In this sense, the "rule" announced in *Montana* (no regulatory authority over fishing and hunting by non-Indians on non-Indian fee land) is an exception to the general rule that tribes retain their inherent authority not explicitly divested under their treaties.

Q: Please write a column about the difference between *loan* and *lend*, which no one gets right.

A: This request, sent by Portland, Oregon, attorney Jonathan Hoffman, has been asked before, but it bears answering again. The last four words of his e-mail provide the answer: "... no one gets right." When even literate writers, along with virtually the entire public, fail to "get it right" by distinguishing the meanings of two words, the difference in meaning disappears—despite the efforts of a small minority who know there is a difference.

Attorney Hoffman quoted a James Kilpatrick column lamenting the failure to distinguish the two verbs. He argued that in "Julius Caesar," Shakespeare did *not* say, "Friends, Romans, Countrymen, Loan me your ears." But that was long ago. Today, *loan* is the choice of a large majority of English speakers, as both a noun ("The bank made subprime loans.") and as a verb ("My brother loaned me some money.").

I admit that I don't like that change any more than Mr. Hoffman, so I'll continue to use *lend* as the proper verb in the second sentence. But I have little hope that *lend* will survive. Does it matter? Perhaps not, for the loss of *lend* does not seem to cause a loss of clarity, so it is probably not worth fighting for.

The loss of *lend* is part of a process of "leveling" that our language is undergoing. As a result, valuable distinctions disappear. One such loss is the distinction between *unique* and *unusual*. The adjective *unique* once meant "one of a kind," but as people began to insert adverbs like *somewhat*, *very*, and *completely*, in front of *unique*, that adjective diminished in strength and has come to mean "unusual." So today, to express the original meaning of unique, one is forced to say "completely unique." That seems to me a pity.

Mr. Hoffman also referred to the January "Language for Lawyers" column, which discussed ungrammatical double negatives. A reader had asked whether the ungrammatical double negative *irregardless* was now considered correct. (The answer is no.)

Later in the same column I wrote "... double negatives are not uncommon in English." I was then referring to another kind of double negative, the grammatically correct kind; like the phrase "not uncommon." When you say something is "not uncommon," you are sitting on the fence, for you are not saying that it is common, nor that it is not common. You are deliberately creating a rhetorical evasion, leaving vague your exact feelings about the subject.

From the Mailbag I

Craig H. Winslow, a former editor in chief of *The Federal Lawyer* sent a comment that may interest many lawyers. An advocate at the Supreme Court coined the term *romanette* in order to identify lowercase Roman numerals; for instance, the use of *i* to indicate lowercase Roman numeral one and *ii* to indicate lowercase Roman numeral two. Mr. Winslow asked whether I had seen the new term (I had not); neither, apparently, had the Chief Justice of the United States, causing "a bit of a stir" at the Court.

The question that the new term raises is whether the choice of a French diminutive suffix is appropriate to affix to a Latin word—especially when a Latin diminutive suffix was available—the resulting term being *romanula*.

From the Mailbag II

Chicago attorney David L. Hanson sent me an e-mail that said, in part, "I recall that in a column many years ago you wrote that the title *Chairman* was not, as is often claimed, 'sexist.' My wife is a strong defender of the traditional title *Chairman* to identify both sexes. She considers the appellation *chair* to be offensive because a chair is an inanimate object intended to be sat on. She also finds the coined word *chairperson* clumsy, ostentatious, and politically correct. I promised her that you would be the best person to provide the historical and intellectual ammunition she needs to defend her position."

What a timely e-mail! When Mr. Hanson opens the current issue of *The Federal Lawyer* and turns to "Language for Lawyers," he can tell his wife I support her views. Changing the vocabulary does not change reality. The reverse is true, a change in the view of reality does result in a changed vocabulary. The youth of America, because they believe that women and men are equal, are slowly changing our vocabulary.

A further improvement of the attitude toward women may be ahead; news headlines report that U.S. women are poised to surpass men on the nation's payrolls. Although the proportion of women who are working has changed little since the recession began, 82 percent of the lost jobs have occurred to men, who are mostly employed in distressed industries like manufacturing and construction.

Heather Boushey, a senior economist at the Center for American Progress, says that because women are employed in areas like health care and education, the proportion of women working may continue to increase. The recession has given women the burden—or the opportunity—to be breadwinners. Those changes in status will eventually eliminate the supposed need for politically correct language. **TFL**

Gertrude Block, lecturer emerita at the University of Florida College of Law, is author of Legal Writing Advice: Questions and Answers *(William S. Hein Co.). She is also author of* Effective egal Writing *(5th edition, Foundation Press, 1992) and co-author of the Judicial Opinion Writing Manual (American Bar Association, 1991). She can be reached at block@law.ufl.edu or by snail-mail: Gertrude Block, Lecturer Emerita, Emerson Hall, University of Florida, Gainesville, FL 32611.*

The previews are contributed by the Legal Information Institute, a nonprofit activity of Cornell Law School. This department includes an in-depth look at two cases plus executive summaries of other cases before the Supreme Court. The executive summaries include a link to the full text of the preview.

Coeur Alaska Inc. v. Southeast Alaska Conservation Council (07-984); Alaska v. Southeast Alaska Conservation Council (07-990)

Appealed from the U.S. Court of Appeals for the Ninth Circuit (May 22, 2007)
Oral argument: Jan. 12, 2009

In 2005, the Army Corps of Engineers issued a permit under the federal Clean Water Act (CWA), authorizing Coeur Alaska Inc. to discharge wastewater from the Kensington Gold Mine in navigable waters in Alaska. Environmental groups claimed that this permit violated the CWA because the discharge from the mine did not comply with the Environmental Protection Agency's (EPA) pollution standards under the CWA. Coeur Alaska, however, argued that the Army Corps of Engineers governed the discharge under a different section of the CWA and that the issuance of the permit therefore did not violate the CWA. In this case, the Supreme Court's decision will determine whether the permit issued for the Kensington Mine is valid and potentially resolve the conflicting authority of the EPA and the Army Corps of Engineers under the CWA. In addition, the outcome of this case will have an impact on environmentalists and industry representatives in determining the extent to which certain pollutants can be discharged into U.S. waters.

Background

In 2004, Coeur Alaska sought a permit from the Army Corps of Engineers to open the Kensington Gold Mine in southeastern Alaska. Coeur Alaska planned to use a froth-flotation process to process the gold ore from the mine, whereby crushed rock from the mine would be mixed with water and various chemicals to separate out the gold. Upon completion of the process, residual ground rock, called tailings, would remain. The company would put some of the tailings back into the mine itself but would have to dispose of the rest—approximately 1,140 tons each day. To dispose of the tailings, the waste would be discharged directly into nearby Lower Slate Lake. The bottom of Lower Slate Lake, which supports native fish and other aquatic life, would be raised 50 feet to its current high-water mark and the lake's surface area would be tripled. In addition, Coeur Alaska would be required to take steps to reduce the environmental impact after mining operations. The U.S. Forest Service approved the proposal on December 9, 2004, and, on June 17, 2005, the Army Corps of Engineers issued a permit to discharge the waste tailings into Lower Slate Lake.

In 1972, Congress passed the Clean Water Act "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251. Among other things, the CWA prohibits the discharge of pollutants into navigable waters except as permitted by certain sections of the act. According to §§ 301(e) and 306(e), the EPA must establish national standards—known as effluent limitation guidelines— limiting the discharge of polluted wastewater to the greatest extent possible from both new and existing point sources. To ensure compliance with these national standards, the CWA established two permit programs: (1) § 402 permits, which are issued by the EPA and are required for any discharge that falls under the CWA's effluent limitations required in § 301(e) and § 306(e); (2) § 404 permits, which are issued by the Army Corps of Engineers and are specifically directed at the discharge of "dredged" or "fill material." Army Corps issued a § 404 permit to Coeur Alaska in 2004 under this second standard, because the Army Corps found Coeur Alaska's discharge to constitute "fill material."

In September 2005, the Southeast Alaska Conservation Council, the Sierra Club, and Lynn Canal Conservation filed a lawsuit in federal court challenging the Forest Service's decision and the Army Corps' issuance of the permit, claiming that the permit was issued in violation of the CWA. The Army Corps of Engineers suspended the permit and re-examined its decision but subsequently reinstated the permit and issued a revised Record of Decision explaining its reasoning. Coeur Alaska, Goldbelt Inc., and the state of Alaska intervened as defendants, and the district court granted the defendants' motion for summary judgment, reasoning that the permit was properly issued under § 404 of the CWA for the disposal of fill material. The Ninth Circuit Court of Appeals reversed the district court's decision, and Coeur Alaska and the state of Alaska filed separate writs of certiorari to the U.S. Supreme Court. The Supreme Court granted the writs on June 27, 2008, and consolidated the two cases into one.

Environmental Concerns Versus Industry's Concerns

Because the Supreme Court's decision in this case greatly affects the interests of environmental groups, mining industries, and native Americans, all these parties are following the case closely.

Environmental groups, scientists, and native Alaskans raise concerns about the possible permanent impact of allowing the discharge of waste into Lower Slate Lake. Environmental groups point out that the mine's waste has a pH of 10 and will kill almost all aquatic life in the lake, including all fish. Advocates for the environment contend that the lake may never again be able to support its current ecosystem. In addition, native Alaskans claim that the impact of a favorable interpretation for Coeur Alaska will affect other mining projects and bodies of water as well, pointing specifically to the proposed Pebble Mine in the Bristol Bay region of Alaska, which is rich with salmon,

whitefish, trout, and other aquatic species. Native Alaskans argue that Bristol Bay has been one of the state's most important commercial fisheries, and native Alaskans have relied on the bay for thousands of years.

On the other hand, Alaska's mining industry argues that a ruling for the Southeastern Alaska Conservation Council would have dramatically negative effects on the mining industry in the state. Because mining is a huge part of Alaska's economy, these organizations contend that the environmental groups' interpretation of the CWA would impose a great burden on the whole state. In addition, the Resource Development Council for Alaska contends that mining is a "critical part" of the development of native Alaskans, because mining allows them to reap great economic benefits from their land.

Legal Questions

The outcome of this case depends on how the Supreme Court interprets the scope of § 402 and § 404 of the Clean Water Act. The petitioners, Coeur Alaska and the state of Alaska, argue that discharges permitted under § 404 are not subject to the EPA's effluent limitations, which are established in § 301(e) and § 306(e). In contrast, the respondents—the Southeast Alaska Conservation Council, the Sierra Club, and Lynn Canal Conservation (together abbreviated as SEACC)—argue that the Environmental Protection Agency's effluent limitations apply to all applicable discharges, whether or not they are permitted under § 402 or § 404.

To resolve the question of statutory interpretation, courts first look to the plain text of the statute to determine whether Congress has addressed the "precise question" before the court. *See Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842–843 (1984). "If a court ... ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Id.* at 843 n.9.

According to SEACC, the plain language of § 306(e) prohibits the Army Corps of Engineers from issuing § 404 permits for wastewater discharges that do not comply with the EPA's effluent limitations. The environmentalists argue that this is clear in the text of § 306(e), which makes it "unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source." According to the environmentalists, there are no exceptions in § 306(e). Furthermore, SEACC points out that the EPA has adopted no-discharge performance standards for mills that use the froth-flotation process to process gold and its remains—the discharge at issue in this case. SEACC also looks to the language in § 404 as evidence that § 404 must comply with applicable effluent limitations. Specifically, the environmentalists point to § 404(b), which states that, "because other laws may apply to particular discharges ... a discharge complying with the requirement of these Guidelines will not automatically receive a permit."

The Ninth Circuit agreed with SEACC and held that the plain language of the CWA prohibits the Army Corps of Engineers from issuing § 404 permits unless the discharges comply with applicable EPA effluent limitations. Specifically, the court read § 301 and § 306 as "absolute prohibitions" on the discharge of wastewater that did not comply with applicable performance standards and did not provide for an exception for the discharge of "fill material" covered by § 404. *SEACC v. Army Corps*, 486 F.3d 638, 645 (9th Cir. 2007) (quoting *E.I. de Pont de NeMours & Co. v. Train*, 430 U.S. 112, 138 (1977)).

Coeur Alaska and the state of Alaska, in turn, also support their position by using the plain language of the CWA, but the petitioners reach a different result. Specifically, Coeur Alaska argues that the statute clearly establishes § 402 and § 404 as mutually exclusive permitting programs, with § 402 applying only to those discharges not covered by § 404. According to Coeur Alaska, the Supreme Court already endorsed this reading of the statute in *Rapanos v. United States*, 547 U.S. 715 (2006). The state of Alaska points to the fact that, whereas § 402 specifically requires that discharges comply with the effluent limitations in § 301 and § 306, § 404 includes no such requirement. Coeur Alaska argues that, based on proper rules of statutory interpretation, "if Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Brief for Petitioner Coeur Alaska at 25, quoting S.D. *Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 384 (2006). The Ninth Circuit rejected this argument based on "negative inference," arguing that such inferences are "generally disfavored." *See SEACC v. Army Corps*, 486 F.3d at 646.

Conclusion

The Supreme Court's decision in this case will further define the scope of the Clean Water Act as it relates to the discharge of fill material. The ruling will also help resolve the conflict between the authority of the Environmental Protection Agency and the Army Corps of Engineers with respect to their issuance of permits for discharging pollutants. The Supreme Court's decision in this case will have an impact on both industry and environmental groups in determining the extent to which certain pollutants can be discharged into U.S. waters. **TFL**

Prepared by Katy Hansen and Rebecca Vernon. Edited by Hana Bae.

Kansas v. Ventris (07-1356)

Appealed from the Supreme Court of Kansas (Apr. 28, 2008)
Oral argument: Jan. 21, 2009

Around January 2004, Donnie Ray Ventris was arrested and charged with the murder, burglary, and robbery of Ernest Hicks. At Ventris' trial, the prosecution offered the testimony of his cellmate, whom the prosecution had recruited to uncover incriminating information from Ventris. This testimony was obtained in violation of Ventris' Sixth Amendment right to counsel, because his counsel had not been present at the time, nor had the defendant waived his right to counsel beforehand. The trial court therefore did not allow the prosecution to use the testimony in its case in chief. The court did, however, let the prosecution use the testimony for impeachment purposes. Eventually, Ventris was ac-

PREVIEWS *continued on page 64*

quitted of felony murder but convicted of robbery and burglary. The Kansas Court of Appeals affirmed the decision, but the Kansas Supreme Court reversed it, because the higher court held that Ventris' statements to his cellmate should not have been admitted for any purpose, including impeachment. The U.S. Supreme Court will now decide whether voluntary statements obtained in the absence of a waiver of a defendant's Sixth Amendment right to counsel can be used for impeachment purposes. The Supreme Courts decision will have an impact on the procedural fairness and truth-finding function of criminal trials.

Implications

The U.S. Supreme Court's decision in this case will have significant implications for the reliability of criminal trials. The petitioner—the state of Kansas—argues that a defendant's incriminating statements to an informant, made in violation of the defendant's Sixth Amendment right to counsel, should be admitted at trial for impeachment purposes, because the statements will increase the reliability of the proceeding. In support of Kansas, the United States contends that, if the statements are admitted, the jury can balance and weigh them against the defendant's inconsistent testimony and also argues that, if the defendant's statements are not admitted into evidence, the jury will be unable to determine the defendant's credibility properly.

On the other hand, the respondent, Donnie Ray Ventris, argues that impeachment testimony by undercover informants that is obtained through the violation of the defendant's Sixth Amendment rights should not be admitted. The National Association of Criminal Defense Lawyers (NACDL) explains that informants' testimony is untrustworthy and could lead to unreliable criminal trials, particularly when the informants are "jailhouse informants," as in this case. The NACDL cites evidence indicating that jailhouse informants often lie at trial and fabricate a defendant's confession, because these witnesses generally receive benefits from the police— such as better prison conditions or reduced sentences—in exchange for testifying. Therefore, the NACDL argues that jailhouse informants' testimony is untrustworthy and could result in the conviction of innocent defendants.

The NACDL also argues that a decision allowing the use of jailhouse informants for impeachment purposes might prevent a defendant from testifying when he or she otherwise would have done so. Because the prosecution can use an informant's impeachment testimony only if the defendant actually testifies, the defendant might choose not to testify in order to avoid having the jury hear the informant's fabricated testimony. The NACDL argues that the uncertainty over whether an informant plans to testify will hinder the defense counsel's strategic planning, especially as to whether or not the defendant should testify.

In support of Kansas, however, the United States counters that jailhouse informants should be allowed to impeach a defendant's testimony at trial, because the use of impeachment testimony will deter defendants from testifying falsely and committing perjury. Similarly, 25 states argue that defendants might easily lie on the stand if not for impeachment testimony. According to the states, "This would erode the confidence of ordinary citizens in their judicial system."

Legal Arguments

The Sixth Amendment

The Sixth Amendment guarantees criminal defendants the right to counsel. A defendant's Sixth Amendment right to counsel attaches upon the initiation of formal charges against the accused. Once formal criminal proceedings begin, the Sixth Amendment does not allow prosecutors to use statements that have been "deliberately elicited" from a defendant in his or her case in chief without an express waiver of the right to counsel. A defendant whose right to counsel has attached, however, may execute a knowing and intelligent waiver of that right.

In *Massiah v. United States*, the U.S. Supreme Court held that the use of a defendant's incriminating statements that have been obtained without his or her knowledge by a co-defendant upon the police's request and after the defendant had been indicted and retained counsel, violates the defendant's Sixth Amendment rights. 377 U.S. 201 (1964). This rule also applies to statements obtained through confidential jailhouse informants. *United States v. Henry*, 447 U.S. 264 (1980).

In *Michigan v. Harvey*, the Court addressed whether statements obtained in violation of a defendant's Sixth Amendment rights could be used to impeach his or her false or inconsistent trial testimony. 494 U.S. 344, (1990). In the *Harvey* case, the police had initiated a conversation with the defendant after he had invoked his Sixth Amendment right to counsel, and the defendant had subsequently waived his right and made an incriminating statement. The Court held that the statement could be used to impeach the defendant's trial testimony, even though the police had violated the prophylactic rule that such a waiver is presumed to be invalid if it was secured pursuant to a conversation that had been initiated by the police. However, the Court reserved its decision on whether such statements would be admissible for impeachment purposes if the police engage in conduct—such as the use of jailhouse informants—that prevents the police from obtaining a valid waiver.

The state of Kansas argues that evidence should be excluded only if doing so will deter future misconduct that would not otherwise be deterred. The benefits of excluding the evidence must be weighed against the costs to the truth-seeking function of the criminal justice system of excluding relevant evidence. Kansas points out that the Court has held that evidence obtained in violation of the Fourth Amendment, the *Miranda* protections, and the Sixth Amendment may be used for impeachment purposes. Kansas argues that, in all those cases, as in this case, the additional deterrent effects of precluding the evidence for the purpose of impeachment do not outweigh the costs of allowing a defendant to commit perjury. In addition, Kansas argues, the Court has also recognized that making

such evidence inadmissible would pervert the right to testify into a right to falsify facts without facing the possibility of contradiction.

The respondent argues that exclusion of evidence operates differently depending on whether one is talking about violation of the Fourth Amendment, *Miranda* rights, or the Sixth Amendment. Ventris points out that the Court has allowed tainted evidence to be used to impeach a defendant's trial testimony only when the use of such evidence does not violate the accused's constitutional right at trial. The Sixth Amendment right at issue here, Ventris explains, is a trial right designed to preserve the integrity of the adversarial process. Ventris argues that the logic used to justify impeachment in other situations does not apply to this case, and the logical implication is that the text of the Sixth Amendment makes it inadmissible to include statements that were obtained in the absence of counsel, even if they are used for impeaching a witness' testimony.

Kansas argues that, to the extent that allowing impeachment with voluntary statements discourages defendants from testifying, such conduct only prevents them from offering false and inconsistent testimony. Kansas emphasizes that the Sixth Amendment does not include the right to have counsel assist a defendant in committing perjury. In addition, Kansas points out that the Supreme Court has recognized a fundamental interest in preventing perjury for more than 50 years. Therefore, Kansas argues, stopping the government from introducing such evidence as impeachment allows defendants to use the government's illegal conduct to shield themselves from their own fabrications.

Ventris, however, argues that the right to counsel constructed by the framers of the Constitution is intended to provide criminal defendants with a champion to test the prosecution's evidence. The right to assistance of counsel represents the Court's belief that even the educated layperson is unable to navigate the complexities of the criminal process without legal assistance. Ventris argues that "trials should focus on whether the accused actually committed the conduct charged and not whether he could be fooled or forced in a private interrogation into saying he did." Ventris contends that counsel's absence from such interrogations makes it impossible for counsel to attack the evidence effectively, and without access to counsel during questioning the defendant cannot make an informed decision about whether or not to make a statement. Ventris also argues that total exclusion does not create a right to commit perjury as human frailty, rather than a desire to lie, may lead a defendant to make an inconsistent statement.

Deterring Unconstitutional Conduct

The state of Kansas also argues that excluding unconstitutionally obtained voluntary statements from the prosecution's case in chief already provides sufficient deterrence of misconduct on the part of the police. Kansas contends that total exclusion would have a highly speculative and probably marginal effect on police conduct and that the ability to use all statements gained within constitutional limits provides police with more than adequate incentives to abide by the Constitution. In addition, Kansas argues, it is highly speculative that any particular defendant will testify at trial, and a significant number choose not to do so, even in serious cases. Kansas also points to the fact that individual law enforcement officers and police departments that engage in conduct that violates the Sixth Amendment already face the possibility of civil liability, which acts as a significant deterrent of unconstitutional conduct. As a result, Kansas argues, as long as the prosecution is prevented from using involuntary or compelled statements at trial, then the defendant's rights are adequately protected.

On the other hand, Ventris argues that the injury placed in the balance here is far greater than Kansas recognizes. Allowing the prosecution to use statements obtained without the benefit of counsel at trial—even for impeachment purposes—undermines the Sixth Amendment guarantee of an effective advocate. Ventris contends that use of such statements for impeachment ties counsel's hands in regard to his or her client's testimony even before trial and may prevent defendants from making the informed decision to choose to stay silent at trial on the advice of counsel. In addition, Ventris argues that the prospect of civil liability does not deter prosecutors or police from committing such violations. Ventris points out that prosecutors and police normally enjoy qualified immunity while conducting investigations, which shields them from civil suit.

Conclusion

In this case, the U.S. Supreme Court will determine whether a statement obtained from an informant without the defendant's knowledge and in violation of the defendant's Sixth Amendment rights may be used to impeach his or her trial testimony. If the Supreme Court finds in favor of Kansas, defendants may be deterred from testifying in their own defense at trial. A decision in favor of Ventris, on the other hand, may prevent the government from being able to impeach a defendant's false or inconsistent statements at trial. **TFL**

Prepared by Evan Ennis and Sarah Soloveichik. Edited by Hana Bae.

Boyle v. United States (07-1309)

Appealed from the U.S. Court of Appeals for the Second Circuit (Nov. 19, 2007)
Oral argument: Jan. 14, 2009

A jury convicted Edmund Boyle of racketeering and racketeering conspiracy under the Racketeer Influenced and Corrupt Organizations (RICO) Act and sentenced him to 151 months in prison for his participation in a string of bank robberies. Boyle appealed his conviction to the Court of Appeals for the Second Circuit, arguing that the United States misinterpreted the scope of an "enterprise" under the RICO Act, arguing that it did not apply to his case, because the United States could not prove that the group of bank robbers was an enterprise if it could not prove the group had a formal, ascertainable structure. The United States argued that it did not need to prove a formal structure existed under the RICO statute. The Second Circuit affirmed the conviction. The U.S. Supreme Court granted Boyle's petition to determine a three-way circuit

PREVIEWS *continued on page 66*

split over what constitutes an enterprise under the RICO statute. The outcome of this case will affect the scope of the RICO Act and will have an impact on the ability of law enforcement to prosecute individuals under the RICO Act. Full text is available at topics.law.cornell.edu/supct/cert/07-1309. **TFL**

Prepared by Tom Kurland and Jennelle Menendez. Edited by Allison Condon.

Corley v. United States (07-10441)

Appealed from the U.S. Court of Appeals for the Third Circuit (Aug. 31, 2007)
Oral argument: Jan. 21, 2009

When Johnnie Corley was arrested for assaulting an officer and interrogated about the robbery of a credit union, he did not confess to his role in the robbery until more than six hours after his arrest. Moreover, Corley did not appear before a magistrate judge until the next day. After the district court found Corley guilty, the Court of Appeals for the Third Circuit affirmed the decision. Corley is now appealing to the U.S. Supreme Court. His case will determine whether or not the suspect's confession is still valid in light of the unreasonable delay in bringing a suspect before a magistrate judge. The Supreme Court's decision will affect suspects' rights as well as the procedure that police must follow when obtaining a confession. Full text is available at topics.law.cornell.edu/supct/cert/07-10441. **TFL**

Prepared by Courtney Bennigson and Zsaleh Harivandi. Edited by Lauren Buechner.

Harbison v. Bell (07-8521)

Appealed from the U.S. Court of Appeals for the Sixth Circuit (Sept. 27, 2007)
Oral argument: Jan. 12, 2009

The Terrorist Death Penalty Enhancement Act of 2005, codified at 18 U.S.C. § 3599, provides indigent defendants in death penalty cases the assistance of federally funded lawyers. Edward Harbison was convicted of first-degree murder by a Tennessee jury and sentenced to death. Harbison asked to retain his federally provided lawyer for his state clemency proceedings, and his request was denied, because the U.S. Court of Appeals for the Sixth Circuit found that § 3599 does not apply to strictly state proceedings. Harbison appealed this ruling, arguing that the language of § 3599 indicates that it applies to all death penalty proceedings, including state clemency proceedings. The United States argues that Congress intended § 3599 to apply exclusively to federal proceedings and that the legislative history supports this interpretation. With its decision in this case, the Supreme Court may resolve a split of opinion among the federal circuit courts regarding the scope of § 3599. Full text is available at topics.law.cornell.edu/supct/cert/07-8521. **TFL**

Prepared by Michael Selss and Katie Worthington. Edited by Courtney Zanocco.

Knowles v. Mirzayance (07-1315)

Appealed from the U.S. Court of Appeals for the Ninth Circuit (Nov. 6, 2007)
Oral argument: Jan. 13, 2009

During his trial for first-degree murder. Alexandre Mirzayance's attorney advised him to withdraw his insanity plea on the morning the insanity phase of the trial was to begin. After he was sentenced, Mirzayance initiated a habeas petition, claiming that his attorney's advice constituted ineffective assistance of counsel. The California Court of Appeals and the California Supreme Court both summarily dismissed the petition, and Mirzayance appealed the decision in federal court. Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a federal court is barred from granting habeas relief unless the state proceeding "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law." After a remand from the Ninth Circuit to conduct a factual hearing, the district court granted the petition. The Ninth Circuit applied the facts surrounding the withdrawal of the defense and found that Mirzayance had suffered from ineffective assistance of counsel under the Strickland test. The government argues that the Ninth Circuit failed to adhere to AEDPA's rule requiring deference to state courts. The government also argues that the court should have reviewed the state court's decision to see if there was any way that the state court could have ruled the way it did. Mirzayance argues that, when a state court has no published reasoning for its decision, a federal court is entitled to conduct its own fact-finding on review. Full text is available at topics.law.cornell.edu/supct/cert/07-1315. **TFL**

Prepared by Lara Haddad and James McConnell. Edited by Carrie Evans.

Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Elahi (07-615)

Appealed from the U.S. Court of Appeals for the Ninth Circuit (May 30, 2007)
Oral argument: Jan. 12, 2009

Under the Victims of Trafficking and Violence Protection Act (VTVPA), victims of state-sponsored acts of terrorism conducted by Iran may receive compensation from the U.S. Treasury Department toward the satisfaction of judgments against Iran. Under the Terrorism Risk Insurance Act, plaintiffs who secure judgments against a party that has been named a terrorist may seek attachments of certain assets of the terrorist party to satisfy the judgments. VTVPA claimants relinquish rights to attachment against Iranian assets if such property interests are "at issue" in claims against the United States in an international tribunal. The respondent, Dariush Elahi, received compensation from the United States for a wrongful death judgment against Iran under the VTVPA. Elahi now seeks attachment of a judgment entered in favor of Iran for a breach of contract. The United States and the petitioner, the Iranian Ministry of Defense, argue that, because the breach of contract judgment is "at issue" in the Iran-United States Claims

Tribunal, Elahi has waived any right to attachment against the judgment under the Terrorism Risk Insurance Act. Full text is available at topics.law.cornell.edu/supct/cert/07-615. **TFL**

Prepared by Joe Rancour and Sun Kim. Edited by Carrie Evans.

Montejo v. Louisiana (07-1529)

Appealed from the Louisiana Supreme Court (Jan. 16, 2008)
Oral argument: Jan. 13, 2009

Does the sound of silence answer in the affirmative, in the negative, or not at all? The question at hand is whether Sixth Amendment rights attached to a defendant who has been appointed counsel but has not actively expressed or asserted his or her right to have such counsel. In this case, Jesse Jay Montejo admitted during initial questioning to shooting Lewis Ferrari, and because Montejo was indigent, he was appointed counsel. However, within hours after appointment, police returned to Montejo's cell to continue interrogation, which is strictly barred once counsel has been assigned. During that interrogation, Montejo wrote a confession letter, which was later admitted as evidence. At issue in this case is whether that letter should have been suppressed, because it was obtained in violation of Montejo's Sixth Amendment right to counsel. Louisiana argues that Sixth Amendment rights may not be passively applied but that a defendant must assert his choice to have counsel appointed. Montejo argues that presence at an appointment proceeding is enough. Full text is available at topics.law.cornell.edu/supct/cert/07-1529. **TFL**

Prepared by Conrad C. Daly and Lauren Jones. Edited by Joe Hashmall.

Nken v. Mukasey (Docket No. 08-681)

Appealed from the U.S. Court of Appeals for the Fourth Circuit (April 9, 2008)
Oral argument: Jan. 21, 2009

Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) in 1996 partly with the intention of making it more difficult for aliens to remain in the United States when a government agency had deemed that they must be removed; the IIRIRA thus contained stricter standards for judicial courts to follow when overruling an agency and allowing such aliens to remain in the country. At issue is how far Congress went in creating stricter standards. The petitioner, Jean Nken, an alien who applied for asylum in the United States, was ordered to leave the country and filed a motion for a stay of removal pending appeal of his case. Instead of applying a traditional test to determine whether to grant the stay, Court of Appeals for the Fourth Circuit applied § 1252(f)(2) of IIRIRA, which bars judges from enjoining the removal of aliens unless the alien can clearly show that the removal is prohibited by law. The petitioner appealed the ruling, contending that IIRIRA was not intended to apply to motions for stays. How the Supreme Court rules on this case will determine the proper way to interpret IIRIRA and how much power courts have over federal agencies once they have made decisions in aliens' cases. Full text is available at topics.law.cornell.edu/supct/cert/08-681. **TFL**

Prepared by Lara Haddad and Allison Condon. Edited by Allison Condon.

Puckett v. United States (07-9712)

Appealed from the U.S. Court of Appeals for the Fifth Circuit (Oct. 23. 2007)
Oral argument: Jan. 14, 2009

James Puckett was charged in federal court with armed bank robbery and use of a firearm during the commission of the crime. Puckett agreed to plead guilty to both charges in exchange for the prosecutor's promise to recommend a reduction in his sentence. After the agreement but before the sentencing, Puckett engaged in acts to defraud the U.S. Postal Service, and the prosecutor refused to recommend the sentencing reduction. Puckett's counsel did not object to the prosecutor's refusal to file the recommendation, thus creating a forfeited error. When the court sentenced Puckett, he received no reduction in his sentence. On appeal to the Fifth Circuit Court of Appeals, Puckett requested that he be allowed to revoke his guilty plea. The Fifth Circuit denied Puckett's request and upheld the sentence, finding that Puckett had not met his burden under Rule 52(b), under which the party challenging a forfeited error must prove that the error was significant enough to warrant reversal even though the party forfeited his or her right to have the court consider the error by not objecting when it occurred. Full text is available at topics.law.cornell.edu/supct/cert/07-9712. **TFL**

Prepared by Joe Tucci and Kaci White. Edited by Lauren Buechner.

State of Vermont v. Brillon (Docket No. 08-88)

Appealed from the Supreme Court of Vermont (March 14, 2008)
Oral argument: Jan. 13, 2009

The Sixth Amendment of the U.S. Constitution provides defendants with the right to a speedy trial. In July 2001, Michael Brillon was charged with aggravated domestic violence and was ultimately sentenced to confinement for 12 to 20 years. However, as a result of excessive delays of his trial caused solely by his public defenders, the Supreme Court of Vermont vacated Brillon's conviction and dismissed the charges with prejudice. The U.S. Supreme Court will have to decide whether delays caused by the lack of preparedness by an indigent person's public defenders can be the basis for a violation of a person's Sixth Amendment right to a speedy trial on the theory that the state is responsible for providing adequate public defenders to indigents. If the Court determines that a public defender's lack of preparedness violates this right, does this give greater rights to indigent defendants than the rights that defendants with private attorneys have? Full text is available at topics.law.cornell.edu/supct/cert/08-88. **TFL**

Prepared by Kelly Terranova and Isaac Lindbloom. Edited by Joe Hashmall.

Loot: The Battle Over the Stolen Treasures of the Ancient World

By Sharon Waxman

Times Books/Henry Holt and Company, New York, NY, 2008. 414 pages, $30.00.

Reviewed by George W. Gowen

Loot is an entertaining book on a hot topic. In the last two years, the Metropolitan Museum of Art, the J. Paul Getty Museum, the Museum of Fine Arts, and the Princeton Art Museum returned artifacts to Italy. In November 2008, the Cleveland Museum followed suit. For better or worse, more objects will be sent back to the land of their origin.

The word "Loot" in the title of this book, followed by the words "Battle" and "Stolen Treasures," have a wartime ring, and might be thought to refer to the West European works of art that the Nazis and Soviets stole and that were recovered under the leadership of the United States and returned to their owners. In fact, however, the loot and treasures that are the subject of Sharon Waxman's *Loot* are objects that were seemingly abandoned, buried in desert sands, engulfed by seas, or otherwise lost, then harvested by colonialists, armies, explorers, romantics, robbers, and thieves. The "battle" in Waxman's subtitle refers to the multibillion-dollar war for illicit art treasures that is waging between nations, private collectors, knaves, and the world's leading cultural institutions.

In *Loot* we read of the Rosetta Stone, stumbled upon by Napoleon's legions in the Egyptian desert, acquired by England, and now encased in the British Museum; the Elgin Marbles, pried from the Parthenon in Greece and now, almost two centuries later, exhibited in the British Museum; the Lydian Hoard, which mysteriously traveled from an ancient tomb in Turkey to the Metropolitan Museum of Art in New York and back to Turkey and is now lost or perhaps stolen; the Euphronios krater, which was dug up in Italy, displayed in New York, and is now back in Italy; and the magnificent Macedonian gold wreath from Turkey, purchased by the Getty Museum but now back in Turkey. American museums have been the eager recipients of such "loot" and are now its unwilling repatriators; although the Rosetta Stone and the Elgin Marbles remain in London, where they have seemingly been transformed by time into British patrimony.

For centuries, explorers, adventurers, and scholars brought artifacts from past civilizations back to England and Western Europe. Leading museums, such as the Louvre and the Metropolitan Museum of Art, felt impelled to enlarge their collections and sought to house art representing all civilizations. The only practical way to accomplish this was to deal with those who were willing to sell these artifacts—no matter how they were acquired. In the 20th century, the ever-expanding market in America and elsewhere for antiquities—such as Cycladic sculpture, Mayan stele, Buddhist carvings, Greek vases, and pre-Columbian gold—led to the destruction of archaeological sites and the denuding of countries (usually underdeveloped nations) of their indigenous treasures. Increasingly, the removal of such artifacts was considered plundering, and, in 1970, the United Nations Educational, Scientific and Cultural Organization (UNESCO) adopted a convention banning the illegal export of cultural property, which the United States signed in 1983. The UNESCO convention and the rising tide of national pride fueled demands for restitution that culminated in the last five years.

Waxman calls for museums to apologize for their decades of unchecked looting and to admit to the cloudy provenance of their collections. Somewhat sarcastically, she gives time to the then director of the Metropolitan, Philippe de Montebello, and describes a talk he gave in 2006 as follows:

> For an hour, he lamented the fact that museums had been far too slow to react to the rising tide of "politically correct" "nationalistic ideology" that had been taking hold when it came to the question of cultural property. People should not so "blithely" accept the idea that cultural objects belong in the countries where they happen to have been dug up. ... "The new chauvinism does a great disservice to mankind," he observed. Should that approach have been taken two hundred years ago, "our knowledge of the ancient past would still be in its infancy," he said. "And notions of the encyclopaedic museum would be nonexistent."

The crux of this argument is that, for thousand of years, these treasures were largely abandoned, with no one taking care of them. Even today, there are few suitable museums where these treasures may be preserved, studied, and exhibited. Without the encyclopedic collections housed in museums such as the Metropolitan and the Louvre, the argument goes, civilization would be denied the knowledge of their very existence and the treasures might have been left to decay or to be melted down for a quick profit.

In rebuttal, Waxman recruits an earlier director of the Metropolitan Museum of Art, Thomas Hoving, who admits, "I bought a lot of smuggled stuff" but then, with perhaps a touch of professional one-upmanship adds, "Don't be taken in by the dulcet tones of Philippe de Montebello. I've heard that lecture; it's mostly specious." Aside from almost glorying in past misbehavior, this argument admits guilt and seemingly denies that leading museums are guardians of civilization.

Although Waxman's scholarship is reflected throughout this work, the 144 pages devoted to the Getty Museum and its curator, Marion Tree, are enlivened by tales of sex, greed, tax fraud, and betrayal. Missing from the text and the bibliography is any reference to Paul Bator's seminal article, "An Essay on the International Trade in Art" (published in *Stanford Law Review* in 1982 and republished by the University of Chicago Press in 1988 as *The International Trade in Art*), which is a worthy supplement to *Loot* and should be read by all who have a deeper interest in the topic.

The UNESCO convention seeks to prohibit the illegal export of objects constituting the cultural heritage of a nation and to leave to each nation the right to determine which of its objects should be protected. The embargo may be broad, preventing the export of virtually all cultural art, as is the case with the laws of the Mediterranean nations and those of Central and South America, or it may be narrow, as is the case in England, which does not require an export license for works made within the last 100 years and for those of a low value. Even if an export license is required and issued, the object may remain in England if an English collector steps up and pays the market price. In the case of a painting by Velázquez that was considered part of England's patrimony, the needed money could not be raised locally and the work was exported.

Bator comments on these laws, writing that "any attempt to embargo the export of a broad category of art treasure for which there is a substantial demand is fated to be ineffective, for two (connected) reasons: (a) its structure creates irresistible pressure against itself; and (b) it is administratively unenforceable. ... The international black market thrives because no alternative is allowed to exist for either buyer or seller, so that all economic incentives are pushed in favor of the illegal trade."

Bator adds, "Art is a good ambassador." Perhaps this is another way of saying that great art is to be shared. De Montebello's encyclopedic museums certainly protected and shared with a broad public the great works of art that may have been illicitly acquired. Arguments that lands of origin have neither the facilities nor the means to safeguard their treasures while they exhibit them to an international public still have resonance, but the basis in fact of these positions is weakening.

Waxman tempers her demands that "looted" art should be repatriated with suggestions of exchanges and long-term loans between museums. Perhaps the Elgin Marbles have served their term as ambassadors from Greece to England and should now be returned to Greece to be housed in the new museum overlooking the Parthenon that has been especially built for them. On the other hand, it might have benefited all involved—including a broad public—if an accommodation had been reached to allow some of the Greek and Roman objects repatriated by the Getty Museum to remain where they were so stunningly displayed in the Getty Villa. **TFL**

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Brethren and Sisters of the Bar: A Centennial History of the New York County Lawyers' Association

By Edwin David Robertson

New York County Lawyers' Association and Fordham University Press, New York, NY, 2008. 416 pages, $29.95.

Reviewed by Carol A. Sigmond

Do you know who advised female lawyers to "look like a girl, act like a lady, think like a man and work like a dog"? Do you know what Chief Justice Charles Evans Hughes Sr. had in common with John W. Davis and Alton B. Parker? Do you know what Justice Benjamin N. Cardozo had in common with Lawrence E. Walsh, the special prosecutor in the Iran-Contra affair? Do you know what Elihu Root and Hillary Rodham Clinton have in common? The answers, in order, are the following: Caroline K. Simon, a member of the New York County Lawyers' Association (NYCLA), gave the quoted advice; Hughes, Davis, and Parker were all NYCLA officers and unsuccessful candidates for presidency of the United States (Hughes as a Republican and Davis and Parker as Democrats); Cardozo and Walsh were both vice presidents of NYCLA; and both Root and Clinton were named honorary members of NYCLA (in addition to both being appointed secretary of state).

But Edwin David Robertson's history of the New York County Lawyers' Association is more than just the dry recitation of facts and figures: It is a tableau of America's 20th century, because the history of NYCLA is the history of various features that marked the era, such as the shortcomings of a political system that requires judges to stand for election; the Prohibition era; the increasing diversity of the legal profession; the bar's steady commitment to pro bono activities; and the horrors of the last century, including two world wars and the rise of international terrorism that culminated in the Sept. 11, 2001, attack on the World Trade Center and the Pentagon.

On the evening of Oct. 1, 1907, at the Carnegie Lyceum (located on 57th St. and 7th Ave.), about 100 reform-minded attorneys, active in the practice of law in New York and Bronx Counties, met to discuss the feasibility of forming an organization to make bipartisan nominations for judicial positions. The need for this meeting arose because Tammany Hall controlled the Democratic Party and an equally rigid group controlled the Republican Party. Judges endorsed by these parties would be beholden to their sponsors—not to justice.

Just 10 years before this extraordinary meeting, five counties and boroughs of Kings, Queens, Richmond (that is, Staten Island), the Bronx, and New York (that is, Manhattan) had been consolidated into the City of New York. In 1908, the young city had 25 judicial positions, including two positions on the court of appeals, on the ballot.

Over the next six months, under the leadership of John F. Dillon, Alton B. Parker, John F. Daly, and Charles Strauss, the organization now known as NYCLA emerged. Between April 7 and April 21, 1908, scores of lawyers joined these four men in signing the articles of incorporation, which were approved by Justice Henry A. Gildersleeve on April 21, 1908.

To join the new bar association, applicants needed only to show that they were members in good standing of the Bar of the State of New York and to

REVIEWS *continued on page 70*

pay their annual dues of $10. This community of men and women shared (and still share) only their status as lawyers.

The first meeting of the membership occurred on May 21, 1908. John Dillon, a major force in the law—having served as a state court judge in Iowa, a federal appeals judge in the Eighth Circuit, president of the American Bar Association, and professor at Columbia University Law School—was elected president of the association. Democrat Parker and Republican Daly were elected vice presidents. Dillon's inaugural speech was notable in reaffirming three important principles. The first was that bar membership would be the only requirement for membership in NYCLA, because lawyers were brothers and sisters in the law (and yes, there were women attorneys involved in the founding of NYCLA). Second, judges must be independent of political influence and guardians of our individual liberties. Third, the selfish, the partisans, the zealots, and extremists of all varieties were not welcome at NYCLA. The association would not lend its name or support to the "vagaries, schemes or projects" of such advocates.

The New York County Lawyers' Association certainly avoided involvement in "vagaries, schemes or projects" in its board of directors' machinations relative to the repeal of Prohibition. Suffice it to say, through the early 1920s, the board had "wet" and "dry" members. By 1928, Prohibition appeared to have failed, with the trade in wine and spirits driven underground, which spawned criminal syndicates to meet the demand for alcohol. In early 1928, at a general membership meeting, a motion was made to examine the effects of Prohibition. The motion was deferred to a special membership meeting, at which it was debated for three hours before it was passed. NYCLA then formed the Special Committee on the Constitutionality of the 18th Amendment. A year later, the Special Committee concluded that the direct issue of "wet" versus "dry" was political and therefore not one that the NYCLA should address. The committee finally settled on recommending a challenge to the constitutionality of the way that the Eighteenth Amendment had been adopted.

The constitutional issue arose under Article V of the Constitution, which provides two methods for proposing amendments: (1) Congress may propose them by a vote of two-thirds of both houses, or (2) on the application of the legislatures of two-thirds of the states, Congress must call a convention to propose amendments. (In either case, three-quarters of the states must then approve the amendment for it to be ratified.) NYCLA's Special Committee, however, prepared and adopted a report that maintained (to quote *United States v. Sprague*, 282 U.S. 716 (1931), rather than the Special Committee's report) that the Constitution implicitly mandated "that proposed amendments conferring on the United States new direct powers over individuals," as opposed to "mere changes in the character of federal means or machinery," be ratified by a convention. The Eighteenth Amendment, being of the former type, was therefore alleged to be invalid. In *Sprague*, the Supreme Court rejected this contention and upheld the Eighteenth Amendment. Although NYCLA did not play a role in *Sprague*, Chief Justice Hughes, who was a former president of the NYCLA, recused himself from the case.

The report of the Special Committee on the Constitutionality of the 18th Amendment was presented to NYCLA's board of directors in early 1930. The board, which was still divided between "wet" and "dry" members and preoccupied with completing and occupying the "Home of Law" at 14 Vesey St., deferred. The report remained in purgatory under a "no publicity" ban until it was published by the Association Against Prohibition later that year. At that point, NYCLA gradually shifted course, moving away from a challenge to the Eighteenth Amendment and toward support for outright repeal of Prohibition, but Prohibition was swept aside by the Twenty-first Amendment while NYCLA dithered.

There are other similar vignettes in *Brethren and Sisters of the Bar*. Women played a role in NYCLA from the beginning. The organization had one founding female member, and its first woman officer was Ruth Lewinson, who was elected treasurer in 1931 and served until 1975; she was also the first woman to have her portrait hung in NYCLA's headquarters. The Nov. 11, 1954, issue of the *New York Daily Mirror* marked the occasion with the headline: "New York Lawyers Hang First Woman." After that headline, it is little wonder that it was not until 20 years after Lewinson's retirement that NYCLA elected its first female president, Rosaline S. Fink.

African-American attorneys also participated in NYCLA's activities and government from the outset: two founding members, D. Malcolm Webster and Wilford H. Smith, were African-American. NYCLA was one of the bar associations that successfully pressed the American Bar Association to abandon its discriminatory membership practices. But the most striking piece of history on this front was that, as a young lawyer in New York, Thurgood Marshall used NYCLA's library and reportedly said that NYCLA made him feel more comfortable than other bar associations.

NYCLA has had only two residences in its 100-year history: at 165 Broadway and at 14 Vesey St. The latter residence was designed by Cass Gilbert and constructed under his supervision as the Roaring Twenties gave way to the Great Depression. William Cromwell, the president of NYCLA from 1927 to 1930, headed the effort to build the headquarters on Vesey Street. Cromwell and Gilbert did not get on, and the construction of the building was a constant struggle between the two men.

Christened "Home of Law" in a Masonic-like proceeding on May 26, 1930, the NYCLA headquarters building stood essentially unchanged inside and out as it watched the 20th century pass by. NYCLA's headquarters witnessed many events—none more horrifying than the airplanes flying into the World Trade Center towers on Sept. 11, 2001. The association's headquarters was closed for two weeks following the attacks. Like New York itself, NYCLA cleaned up the debris and reopened the building so that the organization could continue its work, providing one of the most complete law library services in

the United States, studying and reporting on important legal issues, and providing pro bono services for the elderly and needy of New York County and the Bronx.

As a member of NYCLA's board of directors, I am hardly the most objective reviewer of this book, but there is no doubt that Edwin Robertson has skillfully weaved two world wars, Prohibition, the Great Depression, the civil rights movement, the women's rights movement, and international terrorism into NYCLA's history. And, through it all, the three principles cited above that the association's first president John F. Dillon espoused have continued in force at the New York County Lawyers' Association. **TFL**

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The Activist: John Marshall, Marbury v. Madison*, and the Myth of Judicial Review*

By Lawrence Goldstone

Walker & Company, New York, NY, 2008. 294 pages, $25.00.

Reviewed by Charles S. Doskow

The term "activist" is normally applied to a judge who has made a decision that the speaker deplores. No doubt, John Marshall was as activist a judge as has ever graced the U.S. Supreme Court. But, as a judge devoted to the concept of a strong central government and in his pivotal role in establishing a strong federal judiciary, he remains a major figure in the history of the early nation.

Lawrence Goldstone, however, undoubtedly intended the usual connotation when he chose *The Activist* as the title of his new book. He treats Marshall's signature creation, *Marbury v. Madison*, as an example of strong-arming to achieve a desired result. Goldstone does not believe in judicial review, and he uses *Marbury* to make his case that the doctrine has no sound historical basis.

Goldstone devotes a substantial part of the early pages of *The Activist* to showing that neither the Constitutional Convention of 1787, nor the ratification debates, justified Marshall in finding in the Constitution the power of the Supreme Court to set aside laws duly enacted by Congress. Admittedly, the early evidence for judicial review may be thin, but, as every law student knows, our constitutional history begins with *Marbury v. Madison*, and it seems too late in the day to challenge it.

Nevertheless, in *The Activist*, Goldstone—who earned a Ph.D. in American Constitutional studies from the New School for Social Research in 1973 and has written a well-received book on slavery and the Constitution, historical medical mysteries, and (with his wife) books on book collecting—gives us a first-rate description of the earliest days of the federal court system.

It is hard to relate the importance with which we treat each appointment to the Court today to the first attempts to fill the seats on that body. Prior to appointing the first Chief Justice, President Washington received a great deal of advice and several subtle applications (to ask outright would have been infra dig). Being Washington, the President played it cool and kept the selection process to himself. After considering all the candidates, he selected John Jay, who had little legal experience and a great deal of political baggage, but who was a loyal Federalist. Jay served as Chief Justice from 1789 until 1795, when he resigned to become the governor of New York. Jay also went to England in 1974 and negotiated Jay's Treaty, which averted the threat of war with England. He was succeeded as Chief Justice first by John Rutledge, who received an interim appointment and was never confirmed, then by Oliver Ellsworth in 1796.

In 1801, John Adams appointed John Marshall as the fourth Chief Justice. Marshall's appointment was made in the dying days of the Adams administration, as the Federalists prepared to cede power to Thomas Jefferson and the Republican Party. As both Congress and the presidency fell into opposition hands, the Federalists took the only steps they could to preserve some modicum of influence: they created judgeships (forever known as the "midnight judges") at all levels, and Marshall was a committed Federalist and advocate of a strong central government.

Among the new offices that the Federalists created were 43 justices of the peace for the District of Columbia, one of which went to William Marbury. (That number tells us how insignificant the office was, considering that, at the time, the District of Columbia was little more than a village.) In the hectic final hours before Jefferson's inauguration, Marshall's brother, James, attempted to deliver the signed and sealed commissions to the appointees, but he missed some and returned their commissions to the secretary of state's office.

James Madison found the commissions in his desk when he assumed his position as secretary of state, and there they remained. Marbury subsequently sued in the Supreme Court to require Madison to deliver his commission. When the suit came to the Court in 1803, Madison ignored it, but the Court was in a pickle. There was great concern that the Republicans would impeach the Federalist judges and equal concern that, if the Court ruled for Marbury, the administration would thumb its nose at the judgment and prompt a constitutional crisis.

Marshall had several outs—none of them satisfactory. He could have recused himself, based on his intimate knowledge of the facts and his brother's involvement. He could have found Madison in default because Madison made no appearance in the case. And Marshall could have found the commissions invalid because they had never been delivered. But he took none of these courses and chose to tackle the problem head-on.

Marshall's masterful opinion first found that Marbury had a right to the commission and that the law gave him a remedy. The Chief Justice then found, however, that the Constitution did not give the Supreme Court the power to issue the writ that Marbury sought. Marbury had brought suit in the wrong

REVIEWS *continued on page 72*

court, and Marshall decided that the statute (the Judiciary Act of 1789) that would have enabled the Court to grant the writ could not, consistently with the Constitution, be enforced. The opinion achieved this result by giving Article III of the Constitution an extremely limiting reading.

Marshall thus had his cake and ate it too: He established the right of the Federalist Marbury to his commission, embarrassing his archenemy President Jefferson. Marshall then avoided being impeached or creating a standoff between the executive and judicial branches by finding the law allowing the Court to enforce the right unconstitutional. In so doing, he established the power of the Court to declare acts of Congress void. Point, set, and match.

There are interesting unanswered questions here. How was Marshall able to craft *Marbury* without a single comment—concurring or dissenting—from any of the other five justices on the Court? In later years, Marshall's dominating personality brooked little dissent (there were terms when the Court sat without a single dissent), but these were the early days. Was the rest of the Supreme Court composed entirely of wusses? Or did they simply share Marshall's preference for self-preservation? Goldstone criticizes *Marbury* because Marshall made no reference to language in Article III, which, he argues, gives Congress the power to amend the Supreme Court's jurisdiction. Did none of the other five justices catch this omission?

Having established judicial review, the Marshall Court never used it again. The next Supreme Court decision that invalidated a law enacted by Congress was the *Dred Scott* decision in 1857.

In *The Activist*, Goldstone quotes Marshall's familiar language from *Marbury* that "[i]t is, emphatically, the province and duty of the judicial department, to say what the law is" as something to which "justices of all stripes have retreated in support of judicial activism ever since." Maybe, but this language is universally accepted and is quoted in many decisions—not all of which could be characterized as judicial activism. After all, as Marshall wrote in the same paragraph of *Marbury* as the sentence that Goldstone quotes: "If two laws conflict with each other, the courts must decide on the operation of each. So, if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must ... determine which of these conflicting rules governs the case: this is of the very essence of judicial duty." 5 U.S. (1 Cranch) 137, 178 (1803). Thus, if one acknowledges that it is the province of the courts to say what the law is, then one must acknowledge the legitimacy of judicial review. But not all judicial review is judicial activism.

John Marshall, a man of great vision, was a firm believer in a strong central government. In 1819, in *McCulloch v Maryland*, he referred to "this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific," even though at the time there was virtually no American presence beyond the Mississippi River.

Goldstone notes Marshall's partisan bias in other decisions and considers him the father of judicial activism. Goldstone deplores the lack of checks and balances limiting the power of the judiciary. But Goldstone acknowledges that even as devoted an originalist as Justice Antonin Scalia accepts judicial review, despite its appearing nowhere in the Constitution. Marshall's vision has prevailed.

In *John Marshall and the Judicial Function*, published in *Harvard Law Review* (vol. 69, p. 217) in 1955, Justice Felix Frankfurter wrote:

> When Marshall came to the Supreme Court, the Constitution was still essentially a virgin document. By a few opinions—a mere handful—he gave institutional direction to the inert ideas of a paper scheme of government. Such an achievement demanded an undimmed vision of the union of states as a nation and the determination of an uncompromising devotion to such insight. Equally indispensable was the power to formulate views expressing this outlook with the persuasiveness of compelling simplicity.

The early days of the new republic under the Constitution make for a fascinating story and, whatever one's view of judicial review, *The Activist* tells it well. **TFL**

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Plumes: Ostrich Feathers, Jews, and a Lost World of Global Commerce

By Sarah Abrevaya Stein

Yale University Press, New Haven, CT, 2008. 256 pages, $30.00.

Reviewed by Henry S. Cohn

Sarah Stein, a professor at the University of California at Los Angeles, presents a history of the trade in ostrich feathers—an account that deals with flighty fashion, transnational commerce, and an ethnic group's business ventures before World War I. She notes that, although historical studies exist of commercial activities by Jews—such as those in New York City's garment district—little has been written on Jews' involvement in international commerce. Stein believes that this is the case because historians have feared promoting anti-Semitic stereotypes. Stein, however, argues that, to the contrary, studying links between Jewish commerce in Europe, the United States, and other parts of the world will bring about a heightened appreciation for Jews in the modern world as well as a better understanding how markets function. In *Plumes*, therefore, Stein traces the feather trade from the bird handlers to the financiers and from the bird to the bonnet. She demonstrates that, at least until the feather crash of 1914, Jewish business acumen, familiarity with various related industries, and contacts with kith and kin throughout

the world produced global profits in ostrich feathers.

The story begins with a depiction of the style of the 1870s in Paris that dictated that ostentatious ostrich plumes adorn hats, dresses, and shawls. *Plumes* includes illustrations of French postcards picturing models displaying their ornate plumage as de rigueur fashion.

There were three sources for these feathers. The primary source was the Western Cape of South Africa, centered in and around the town of Oudtshoorn. Breeders there had established bird farms and harvested the feathers, and traders purchased and bundled the product for further sale. Stein sets forth, complete with photographs, the mechanics of raising ostriches and removing their feathers.

A second source for ostrich feathers was the Tripoli region of Northern Africa, on the shores of the Mediterranean. The trade there had started earlier than it had in South Africa, but, as fashion called for more feathers in the 1870s, South African production outpaced that in the Tripoli region. In the Tripoli region, incidentally, the feathers were harvested from dead birds, in contrast to how it was done in Oudtshoorn, where the birds were plucked while alive.

The third source for the feathers, as the 1900s began, was California and Arizona. Carl Hayden, who was to become the longest serving member of Congress in history, began his political career in 1912 by encouraging Arizona's farmers to establish ostrich farms. California's industry gained a supporter when Edwin Cawston imported birds from South Africa and found that it was profitable to compete with the fruit farms. According to Stein, "Ostriches required little water or space, the plumes themselves were compact and easy to package and ship, and, more significantly still, they were not perishable, did not require refrigeration, and were not prone to decay or to bug infestations."

After the feathers were graded and bundled at the point of production, those in the western United States were sometimes shipped to New York City, but most feathers were shipped to London, which was the center of the trade. Workers in London prepared the feathers for garment use under unpleasant conditions—similar to those found in other sweatshop industries. London brokers conducted auctions of variously graded feathers and facilitated the transfer of the feathers to the United States and Western Europe. The process was regulated by Britain's Ostrich and Fancy Feather and Artificial Flower Trade Board.

In New York City, working conditions in the feather industry differed little from those in the garment industry. The workers in both industries were immigrants—mostly women—who worked in unhealthy settings and occasionally attempted feeble job actions. Stein shares photographs of sweatshops where the feathers were stripped for clothing use as well as a touching remembrance of one worker's throat illness caused by feather dust. With dark humor, Stein points out that there was one difference between the feather and garment industries—the feather rooms were much quieter than the garment industry's cutting and sewing rooms.

Stein shows that, as long as ostrich feathers were in demand, the breeders and brokers involved in the trade were financially successful. The feather venture was comparable to what was going on in the diamond market, which also had its major source and central organization in South Africa. Oudtshoorn had its "feather mansions," which were "luxurious homes adorned with, in one contemporary's description, 'paneled walls, tiled bathrooms, hand-painted friezes; the finest mahogany, walnut, and oak furniture ... imported mostly from Birmingham, but also from the Continent, ... [and] gilt concave mirrors, silver and Sheffield plate, the best Irish linen.'"

The birds themselves were celebrities; they were displayed at world fairs in the United States, London, and Paris. In fact, at one British exhibition, Queen Alexandra "clipped plumes from a live bird." The value of the feathers may be judged from reports that, when the Titanic sank in 1912, £20,000 ($100,000) in plumes were lost.

In 1904, developments led to the closing of the Tripoli supply of ostrich feathers. The native population threatened Europeans as they traveled over the routes from the interior of northern Africa to Tripoli, and the Ottoman government imposed new taxes and made changes that undercut profits and ended special privileges that traders held in the market. As the trade ended, some merchants chose to liquidate, others moved their operations to South Africa; only one major trader held out until the 1940s through cost-cutting measures and expanding their operations into other products.

In 1914, the entire feather industry suffered a collapse from which it never fully recovered. Stein sets forth several reasons for the turnabout. The first reason was the shift in Paris fashion away from feathers, but there were less obvious reasons as well: Bird-protection societies lobbied governments to pass "anti-plumage" legislation to spare the ostriches from harm, and the female workforce during World War I wanted to wear simple garb on the assembly line. In addition, Stein blames the feather brokers for their reckless speculation when they were receiving massive cash inflows. In 1919, a small rally for feathers took place, but it soon died.

With the financial collapse in South Africa in 1914, the feather mansions fell to ruin; many brokers even ended up on the dole. In London, the hub of the industry, some merchants continued their operations into the 1950s, sustained less by feathers (which were then sold mainly for use in feather dusters) than by their holdings of real property. Stein's book includes a recent photograph of the last trace of one company's abandoned building on Shaftesbury St. in London. In California, Cawston Farms survived for a time as a tourist attraction, but it closed in ruin in the 1920s.

Plumes also focuses on the fact that the feather trade was predominantly a Jewish business. Other businesses that Jews dominated were more successful, especially diamond mining in South Africa (Jewish businessmen organized De Beers), although, at the height of the feather trade, it was said that fine ostrich feathers "hold their place like the diamond." Stein notes that, at the turn of the 20th century and afterward, Jews dominated other businesses as well, in-

REVIEWS *continued on page 74*

cluding the garment, scrap metal, banking, and motion picture industries.

Not only were the feather traders and auctioneers Jewish, but the workers in the sweatshops in New York City and London were also Jewish; they were drawn from the numerous immigration waves from Eastern Europe. In South Africa, the workers who tended the ostriches and plucked them were usually not Jewish but "colored." Stein discusses the organizational structure that developed between these workers and their Jewish employers. In Tripoli, the Jews faced challenges in coping with the Arabs who opposed the intrusion of foreigners, but at the same time, the Jews and Arabs found common ground that proved to be financially rewarding.

As the feather business expanded and contracted, the Jews involved in it were subject to anti-Semitism. When they were living in riches, people accused the Jews of overreaching, and, when the market collapsed, the Jews were deemed the cause of the workers' suffering. This was inevitable because, as Stein writes, "Jewishness provided the crucial economic thread that knit together global markets."

Plumes is a fascinating history, well researched and clearly explained, and certainly has echoes of the commercial boom of the last few years as well as the current global economic downturn. **TFL**

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Dear Mr. Buffett: What an Investor Learns 1,269 Miles from Wall Street

By Janet M. Tavakoli

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Reviewed by Christopher C. Faille

The title of this book refers to Warren Buffett. As far as I know, the author of this book, Janet Tavakoli, has no interest whatsoever in the resident of Margaritaville who is also named Buffett. The finance world's Buffett—sometimes known without irony as the Oracle of Omaha—has various claims on our attention. He's the chairman and chief executive of Berkshire Hathaway, the wildly successful conglomerate holding company behind GEICO, General Re, and Wesco Financial Corporation.

Buffett has made a career out of keeping his head while all about him were losing theirs, whether they were losing their heads to fear or to greed. It was largely in recognition of his head-retaining skill that, in 1999, the Carson Group named him the top money manager of the 20th century, rating him ahead of two other near-legendary figures, Peter Lynch and John Templeton.

His annual letters to Berkshire Hathaway shareholders are extremely quotable, in a pithy *Poor Richard's Almanac* sort of way. Indeed, it was in one of those letters—written in 2002—that Buffett coined a now famous characterization of financial derivatives. In a play on a phrase that the Bush administration was then employing to talk the nation into war, Buffett called derivatives "financial weapons of mass destruction."

Derivatives and Credit

In finance, a "derivative" is anything that derives its value from something else (namely, the "underlying," which is used as a noun). The connection between a derivative and its underlying can be fairly simple. A stock option is a derivative, because its value depends on the value of the stock that the option empowers the holder to buy at a pre-set price. And as the new secretary of state surely remembers, a cattle futures contract is a derivative too—the underlying is the physical cattle.

But what Buffett had in mind in 2002 were more complicated instruments—in particular, credit derivatives. The underlying in a credit derivative isn't an asset at all in the traditional sense; it's the reliability of a stream of payments or, conversely, the risk of some party's default.

Probably the easiest credit derivative to understand is known as a credit default swap (CDS). If I own a lot of Argentine government bonds, for example, I might worry enough about the risk of default to buy protection—a quasi-insurance contract. As the buyer of protection, I'll make a series of fixed payments, and the seller of protection will make one big payout if and only if Argentina defaults on those bonds.

In some crucial senses, though, a CDS is not an insurance contract. I have to have a home in order to buy fire insurance on it; I have to have an automobile in order to buy liability or theft insurance on it. But I don't have to own any Argentine bonds in order to buy a CDS against its default. My position in the CDS, in other words, doesn't have to involve hedging risks elsewhere in my portfolio. It can be a simple speculative play: my bet that Argentina will default. If there is a liquid market in CDS contracts for Argentine bonds, then the price of those contracts serves as an ongoing market referendum on the creditworthiness of that country's treasury. Any bad news for Argentina is likely to drive up the price of the bonds, whereas good news will drive it down.

Credit derivatives can get much more complicated than that, and, whether simple or complex, they are not always liquid. Indeed, they are often the least liquid assets on a company's books. In such a case, the question of the value of a particular CDS position for a company in this market (negative or positive) can become a difficult quandary, with the answer having grave implications for that company's balance sheet.

What may be even more important is that credit derivatives represent leverage. For very small sums of money, a trader or an institution can make very large bets that will earn or lose it boatloads of money down the road. It isn't hard to imagine a cascade of defaults: Argentina, in defaulting on its bonds, would force large payoffs from companies that had bet the other way. Some of those companies may not have properly funded or leveraged their liability and, therefore, may then default on their own bonds, putting in play another class of CDS contracts, and so on.

It would be wrong to say that this is how the financial crises of 2007–2008 played out. First, it would be wrong,

because Argentina is totally innocent of the role I've hypothetically assigned to it. Moreover, discussing the real catalysts of the financial crisis is beyond the scope of this book review. Second, it would be wrong, because the above explanation suggests something—similar to a row of falling dominoes—that is more mechanical than was the reality of the situation. Still, such a cascade of events is what Warren Buffett had in mind back in 2002, and his concern now seems prescient.

Buffett and Tavakoli Meet

Janet Tavakoli is the principal partner of Tavakoli Structured Finance, a consulting firm that helps financial institutions grasp the significance of the more exotic, hard-to-value products on their balance sheets. She is also the author of *Credit Derivatives & Synthetic Structures* (published in 2001) and *Collateralized Debt Obligations and Structured Finance* (published in 2003). These books, which—as their titles may hint—are not written in the generally accessible style of *Dear Mr. Buffett*, warned that the markets for credit derivatives were expanding much more quickly than was the institutional competence necessary to make proper use of them.

Tavakoli's concerns meshed with Buffett's, so it was natural that the two should come together, and *Dear Mr. Buffett* begins with a brief account of their meeting in 2005: "We both knew the market was overleveraged, rating agencies misrated debt, and investment banking models were incorrect, but neither Warren nor I was aware that our interests would become more closely aligned as the largest financial debacle in the history of the capital markets began to unfold."

Buffett makes further appearances throughout the book as an organizing motif, but he isn't the subject of the book. The real subject, rather, is what ails us—what the ongoing credit and securities crisis is about.

In a word, the crisis is about groupthink. Both in Washington, D.C., and in lower Manhattan, the same people deal with one another year after year in an all-too-clubby context and share the same assumptions. They don't fear making a bad investment or a bad regulatory call. What they fear is being out of step with the consensus.

Buffett's success owes much to geography—to the simple fact that he keeps his home and operations 1,269 miles away from Wall Street. Tavakoli writes, "Investment banks tend to lend money just because another investment bank has lent money due to *pluralistic ignorance*. The second bank to lend will assume the first bank checked out the borrower, and it will skimp on its due diligence. We look around to see what the other guy is doing, and if everyone else is doing it, we go ahead."

Abandoning Laissez-Faire

As recently as September 2007, Tavakoli thought of herself as a laissez-faire capitalist. In a comment of that vintage that she quotes here, she said, "I ... do not believe in protecting consenting adults from making informed decisions, even if that decision is to make a blind bet." Furthermore, it isn't obvious that regulation resolves the problem of "pluralistic ignorance," since the regulators are made of the same human clay as those they oversee.

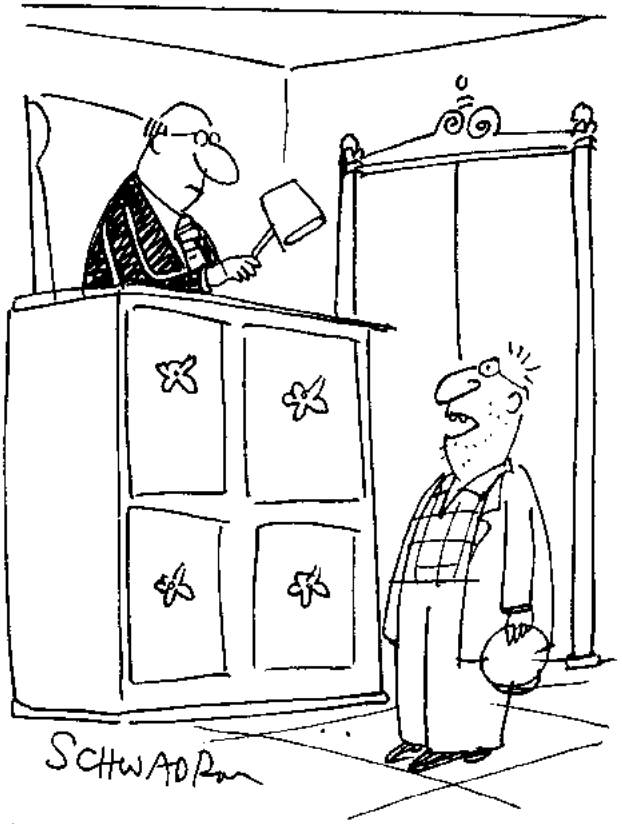
More recently, Tavakoli has changed her tune. Wall Street has received what amounts to a no-strings-attached bailout from the consequences of its irresponsibility. The money for the bailout is coming from present and future generations of taxpayers, and those taxpayers are entitled to attach strings. The country's taxpayers are entitled to expect that their political representatives will create a system of competent regulation. In *Dear Mr. Buffett*, Tavakoli writes: "Watching the regulatory system is like watching bad doubles tennis players. No one hits the ball thinking the other guy will get it. ... The global capital markets are suffering from too little competent regulation where it counts most."

Even though this book is certainly worth reading for anyone who wants to understand the issues with which it wrestles, I must conclude by noting my unhappiness that she has abandoned what I think was the better view of these issues—the laissez-faire view she held less than two years ago. The intervening events are proof of the folly of bailouts, not of the need to keep bailing out companies and to attach regulations to the measures in the hope of getting it done right the next time!

Indeed, recent events remind me of something that the great Austrian economist Ludwig von Mises wrote in 1936. I will give Mises the last words in this review—words that explain not only the crisis through which the world was making its way as he wrote those words but that also explain every economic crisis that arose since that time, including this one. His advice ends with a brief description of the only real remedy:

> It will be necessary to understand that the attempts to artificially lower the rate of interest which arises on the market, through an expansion of credit, can only produce temporary results, and that the initial recovery will be followed by a deeper decline which will manifest itself as a complete stagnation of commercial and industrial activity. The economy will not be able to develop harmoniously and smoothly unless all artificial measures that interfere with the level of prices, wages, and interest rates, as determined by the free play of economic forces, are renounced once and for all. **TFL**

Christopher Faille, the managing editor of Hedge Fund Law Report, www.bflawreport.com, has written on a variety of legal and historical issues. He is the author of The Decline and Fall of the Supreme Court.



"IF YOU DON'T MIND, I'D LIKE TO GET A SECOND OPINION."