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Environmental Justice on the Move

This edition of The Federal Lawyer focuses on federal transportation law, and this month’s At Sidebar addresses its intersection with “environmental justice.”

What is “environmental justice” and its related federal policy?

Environmental justice, at its core, envisions that (1) all persons, regardless of whether they are part of a low-income or minority community, be provided with an equal opportunity to be heard before consequential environmental decisions are made or actions taken and (2) all persons, regardless of their low-income, minority, or tribal status, bear an equal share of associated burdens of pollution. We, as a society, have not achieved environmental justice. As President Barack Obama recently summarized: “Two decades ago … [l]ow-income neighborhoods, communities of color, and tribal areas disproportionately bore environmental burdens like contamination from industrial plants or landfills. … While the past two decades witnessed great progress, much work remains.”

Federal policy regarding environmental justice began in earnest in 1994, when President William J. Clinton signed Executive Order 12898. That order directed federal agencies to “make achieving environmental justice part of [their] mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of [their] programs, policies, and activities on minority populations and low-income populations in the United States.” Executive Order 12898 also called for “greater public participation” and access to information.

Executive Order 12898 remained on the books, unchanged, ever since. President George W. Bush’s first administrator of the Environmental Protection Agency (EPA), a lead agency on environmental justice, expressed a “firm commitment to the issue of environmental justice” and explained that “[e]nvironmental justice is achieved when everyone, regardless of race, culture, or income, enjoys the same degree of protection from environmental and health hazards and equal access to the decision-making process to have a healthy environment in which to live, learn, and work.” The current administration has similarly stated that it is “committed to ensuring that communities overburdened by pollution—particularly minority, low-income and indigenous communities—have the opportunity to enjoy the health and economic benefits of a clean environment.”

In 2011, the heads of 17 federal agencies executed a memorandum of understanding on environmental justice (EJ MOU). The EJ MOU “declare[s] the continued importance of identifying and addressing environmental justice considerations in agency programs, policies, and activities as provided in Executive Order 12898.” The EJ MOU also called for agencies to share their “environmental justice strategies and implementation progress reports.” In particular, each agency agreed to: (1) post on its Web page its environmental justice strategy and annual implementation progress reports, (2) provide the public with “meaningful opportunities … to submit comments and recommendations” on the agency’s strategy and progress, and (3) respond to comments and recommendations in the next report.

How does the Department of Transportation consider environmental justice?

Executive Order 12898 and the EJ MOU, by their terms, apply to the U.S. Department of Transportation (DOT), a large agency that encompasses the Federal Aviation Administration (FAA), Federal Highway Administration (FHWA), Federal Transit Administration (FTA), and other components. Indeed, the EJ MOU identified as a particular area for focus “impacts from commercial transportations and supporting infrastructure.”

The DOT promotes federal environmental justice policy through an intra-agency directive, DOT Order 5610.2(a), which essentially mirrors Executive Order 12898. The agency’s environmental justice strategy includes considering environmental justice in the context of its obligations under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370h. NEPA generally “imposes … procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions.” In 2011, the DOT issued an intra-agency memorandum entitled “Guidance on Environmental Justice and NEPA.” It explains that agencies should, inter alia: (1) identify low income or minority populations in the path of the proposed action, (2) determine whether a disproportionately high and adverse impact on one or more of those populations would occur if the proposed action were taken, and (3)

Andrew J. Doyle, a member of the editorial board of The Federal Lawyer, practices with the U.S. Department of Justice’s Environment and Natural Resources Division in Washington, D.C. He writes in his personal capacity; the views expressed are not necessarily those of the department. He also serves on the Advisory Committee on Admissions and Grievances of the U.S. Court of Appeals for the D.C. Circuit and on the Federal Court Practice Committee of the Florida Bar. In addition, he volunteers at the Advice and Referral Clinic of the D.C. Bar’s Pro Bono Program.
decide to take the proposed action unless there is no “further practicable mitigation measure or practicable alternative that would avoid or reduce the disproportionately high and adverse effect(s).”23

Furthermore, in accordance with the EJ MOU, the DOT posts on its web page its environmental justice strategy and implementation progress reports.24 Other initiatives include training provided by the FTA “for practitioners, reviewers, and grantees on effective ways for integrating the consideration of environmental justice impacts throughout the transportation planning and project development/NEPA processes.”25

How have federal courts addressed environmental justice in transportation cases?

No federal court has found Executive Order 12898 or its prodigy (including the EJ MOU or DOT Order 5610.2(a)) enforceable in its own right. This is not surprising; Executive Order 12898 provides that it “is intended only to improve the internal management of the executive branch and is not intended to, nor does it, create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, it officers, or any person.”26

Circuits appear to be split, however, regarding whether the DOT’s (or other federal agencies) consideration of environmental justice is reviewable under any circumstance. More than 10 years ago, the D.C. Circuit, in resolving challenges to the FAA’s approval of an airport expansion, held that an environmental justice claim can be reviewed if: (1) the agency considered environmental justice as part of its NEPA analysis of the action’s environmental impact, and (2) the challenging party has properly invoked the Administrative Procedure Act (APA) or similar provision governing review of the agency’s action.27 The court of appeals, “in agreement with the FAA,” explained that where the agency “exercises its discretion to include the environmental justice analysis in its NEPA evaluation, [that analysis . . . is properly subject to ‘arbitrary and capricious’ review under the APA.]”28 The Fifth Circuit later followed this approach.29

A few years before the foregoing decisions, the Ninth Circuit declined to review any aspect of an agency’s consideration of environmental justice—even in the context of a claim under NEPA and the APA challenging the FAA’s approval of an arrival enhancement project. The court of appeals reasoned that Executive Order 12898 and the predecessor version of DOT Order 5610.2(a) “specifically state that they do not create any right to judicial review for alleged noncompliance.”30 The First Circuit later followed this approach.31

Just last year, another circuit identified—but sidestepped—the same question of reviewability, i.e., “whether an environmental justice claim can be asserted as a NEPA violation under the APA’s ‘arbitrary and capricious’ standard.”32 In the context of a challenge to the FHWA’s approval of a new bridge and associated infrastructure connecting Detroit with Windsor, Ontario, Canada, the Sixth Circuit found no need to resolve the question, “assum[ed] for purposes of [its] analysis only that the [challengers] have a right to bring an environmental justice challenge,” and found that the FHWA had “satisfied its environmental justice obligations.”33

The Sixth Circuit’s decision also illustrates the kind of record-specific environmental justice issues that can arise in transportation cases. No party disputed that the bridge in that particular location could result in disproportionately high and adverse environmental impacts on the residents of Delray, a low-income, minority neighborhood in Detroit. But the record also indicated that, before approving the bridge, the FHWA and other project proponents engaged with residents and “developed a community and mitigation enhancement plan to avoid or minimize those effects.”34

The parties advocating on behalf of Delray contended that the FHWA violated Executive Order 12898 and its prodigy by “improperly eliminating due to political pressures” alternative locations for the bridge consisting of “predominantly affluent white neighborhoods.”35 The Sixth Circuit disagreed, finding that the agency rejected those locations as impracticable “for a variety of reasons, including the presence of old mining sites, poor performance in regional mobility rankings, and significant community impacts on both sides of the [Detroit] River.”36

The court of appeals also noted that “other crossing alternatives considered by the FHWA had higher concentrations of low income and minority populations than Delray.”37 Following the Sixth Circuit’s decision to uphold the FHWA’s approval, the private owner of the Ambassador Bridge—the only existing bridge that connects Detroit with Windsor—petitioned the U.S. Supreme Court for certiorari on issues seemingly unrelated to environmental justice.38 But a public interest group, as amicus curiae, filed a brief urging review of the FHWA’s decision as contrary to Executive Order 12898, NEPA, and the APA; it argued, inter alia, that “environmental justice concerns were circumvented and were never a serious consideration.”39 Earlier this year, the Supreme Court denied certiorari.40
What is the future of federal policy regarding environmental justice?

Federal policy regarding environmental justice, by all reasonable accounts, is here to stay. Executive Order 12898 turned 21 earlier this year. Slowly but surely, federal agencies, including the DOT, have developed the practice of considering environmental justice in conjunction with their NEPA obligations. In 2011, the EPA issued written guidance on how it can address environmental justice when exercising discretion under more substantive statutes. Other agencies may elect to offer similar guidance. Regardless, as environmental justice becomes more familiar to agencies and ingrained in their operations, the chances of a future administration changing course diminish.

Of course, Congress could decide to intervene. But such action seems unlikely; not only given the current state of gridlock, but also because of historic legislative failure on the subject of environmental justice.37

On the judicial front, in light of the circuit split, it is conceivable that the Supreme Court could eventually resolve whether and to what extent an agency’s consideration of environmental justice is reviewable. But it is more likely that the circuits themselves, in future cases, will clear up the conflict and follow the D.C. and Fifth Circuits’ decade-long approach of reviewing an agency’s consideration of environmental justice under NEPA and the APA. The “no review whatsoever” approach of the Ninth and First Circuits lacks cogency.

Meanwhile, communities with low-income, minority, or tribal populations should become increasingly aware of the DOT’s (and other federal agencies’) commitment to environmental justice, including the administrative practice of submitting for public comment environmental justice strategies and implementation progress reports. Greater accountability should ensure as more opportunity for public involvement becomes the norm. In addition, as agencies become more attuned to federal policy regarding environmental justice and their obligations under Executive Order 12898, communities should find it easier to be meaningfully heard—on a decision-by-decision basis and even on a more programmatic level.

More critically, as federal policy regarding environmental justice continues to move forward at the DOT and elsewhere, we should see more on-the-ground results—in particular, more communities, regardless of their low-income, minority, or tribal composition, living, working, and playing in a proportionately safe environment. Equal justice under the law contemplates nothing less. ☿

Endnotes
1See, e.g., www.epa.gov/compliance/environmentaljustice/index.html (“Environmental Justice . . . will be achieved when everyone enjoys the same degree of protection from environmental and health hazards and equal access to the decision-making process to have a healthy environment in which to live, learn, and work.”), (last visited Mar. 10, 2015).
2Proclamation 9082: 20th Anniversary of Executive Order 12898 on Environmental Justice, 79 Fed. Reg. 8,821, 8,821 (Feb. 10, 2014). See also, e.g., Reilly, 1 Toxic Torts Prac. Guide § 10:7 (2014) (“There is no disagreement that some neighborhoods have been adversely affected by past pollution and that residents have health concerns.”).
3Executive Order 12898: Federal Actions to Address

59 Fed. Reg. at 7,629. When issued, Executive Order 12898 applied to 11 agencies: Department of Agriculture, Department of Commerce, Department of Defense, Department of Energy, Department of Health and Human Services, Department of Housing and Urban Development, Department of the Interior, Department of Justice, Department of Labor, Department of Transportation, and Environmental Protection Agency. Id. at 7,629 and 7,632. In addition, it applied to certain offices within the Executive Office of the President, Id., and other agencies and offices that the President may designate in the future. Id.


4 Memorandum from Christine Todd Whitman to the EPA’s assistant administrators, general counsel, inspector general, chief financial officer, associate administrators, regional administrators, and office directors, at 1 (Aug. 9, 2001) (emphasis in original).


6 www.epa.gov/environmentaljustice/resources/publications/interagency/ej-mou-2011-08.pdf (last visited Mar. 10, 2015). Listed in the order of the signature blocks, the 17 agencies were: Department of Justice, Department of the Interior, Department of Agriculture, Department of Labor, Department of Health and Human Services, Department of Housing and Urban Development, Department of Transportation, Department of Energy, Environmental Protection Agency, Department of Commerce, Department of Defense, Department of Education, Department of Veterans Affairs, Department of Homeland Security, Council on Environmental Quality, General Services Administration, and Small Business Administration. EJ MOU at 5-6.

7 EJ MOU at 2.

8 Id.

9 Id. at 3.

10 59 Fed. Reg. at 7,630 and 7,632; EJ MOU at 5.


12 EJ MOU at 2-3.


15 environment.fhwa.dot.gov/projdev/guidance_ej_nepa.asp (last visited Mar. 29, 2015). See also id. (explaining that the agency “will approve the proposed action only if it determines no such practicable measures exist,” and that “[t]he NEPA document needs to describe how the impacted populations/communities were involved in the decision-making process” and “what practicable mitigation commitments have been made”).

16 Id. The memorandum also explains that the agency “will approve the proposed action only if it determines no such practicable measures exist.” Id. In addition, according to the memorandum, “the NEPA document needs to describe how the impacted populations/communities were involved in the decision-making process” and “what practicable mitigation commitments have been made.” Id.


20 Generally, under the APA, “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” 5 U.S.C. § 702. Review is deferential to the agency. See, e.g., Dickinson v. Zurko, 527 U.S. 156, 149 (1999) (“A reviewing court reviews an agency’s reasoning to determine whether it is ‘arbitrary’ or ‘capricious,’ or, if bound up with a record-based factual conclusion, to determine whether it is supported by ‘substantial evidence.’”) (citation omitted).

21 Communities Against Runway Expansion Inc. v. FAA, 355 F.3d 678, 688-89 (D.C. Cir. 2004). Although the Eighth Circuit had followed a similar approach the previous year, no party appears to have argued that Executive Order 12898 limited review, and the court did not address any question of reviewability. See Mid States Coalit for Progress v. Surface Transportation Board, 345 F.3d 520, 541 (8th Cir. 2003).

22 See Coliseum Square Ass’n Inc. v. Jackson, 465 F.3d 215, 232 (5th Cir. 2006) (reviewing the Department of Housing and Urban Development’s consideration of environmental justice in conjunction with its decision to fund a housing project) (citing Communities Against Runway Expansion, 355 F.3d at 688).

23 Morongo Band of Mission Indians v. FAA, 161 F.3d 569, 575 (9th Cir. 1998).

24 Sur Contra La Contaminacion v. EPA, 202 F.3d 443, 449-50 (1st Cir. 2000) (declining to review the EPA’s consideration of environmental justice as part of the agency’s analysis of the air quality implications of a permitted facility) (citing Morongo, 161 F.3d at 575).


26 Latin Americans, 756 F.3d at 476-77.


28 Latin Americans, 756 F.3d at 475-76.

29 Id. at 476.

30 Id.


32 Amicus Curiae Brief of the Hispanic Bar Association of Michigan in Support of Petitioner, 2015 WL 108404, at *4 (Jan. 5, 2015). See also id. at *9 (arguing that federal policy regarding environmental justice required the FHWA “to avoid placing the [new bridge] in a poor, Latino neighborhood like Delay, if possible, or, that at minimum, the prospect of placing the [new bridge] somewhere else had to be given a hard look”).


Thirty-four national, circuit and chapter leaders of the Federal Bar Association met with Senate and House lawmakers and staff on April 30 to educate Congress on the challenges and needs of the federal courts. This year’s event involved FBA leaders from 28 chapters, located in 19 states, visiting approximately 150 Congressional offices.

The Government Relations Committee of the Association coordinated the event. “We’re delighted that so many committed FBA leaders from across the country took time from their busy schedules to come to Washington to focus Congress’ attention on the role of the Third Branch,” GRC chair West Allen said. “This is one more way that FBA is helping to make a difference.”

FBA President Matt Moreland, who participated in the event, said “The FBA, as the representative of the practicing bar and the foremost constituency of our federal courts, has a responsibility to remind Congress of the important role our courts play, the challenges they face and their ongoing needs.”

Meetings with Capitol Hill offices on Capitol Hill Day focused on four policy priorities:

- Adequate funding for our federal courts
- Prompt Senate consideration of all judicial nominees
- Reforms to curb abusive litigation practices
- Establishment of an Article I immigration court

These priorities are explained in an FBA Issue Brief that FBA advocates used in connection with their visits.

FBA advocates received training from FBA Government Relations Counsel on the four issues before stepping foot on the Hill. “Through our preparation, we became forceful advocates for the federal courts,” Allen said. The FBA Issue Brief and other materials about Capitol Hill Day are available on the FBA website.

FBA representatives received a warm reception and a positive response from many of the Congressional offices they visited, providing the opportunity for ongoing and stronger relationships between FBA and the Hill.

Make plans to participate in Capitol Hill Day next year. The event is scheduled for May 19, 2016.
What does it mean to “transport” something?
According to the dictionary, it means “to carry, move, or convey from one place to another.”¹ In the electronic world we live in and—as lawyers—in the reality that we practice and advise clients in, one issue that is continually on the forefront of discussion topics is transporting protected health information (PHI).²

As Microsoft founder Bill Gates stated, “We always overestimate the change that will occur in the next two years and underestimate the change that will occur in the next 10. Don’t let yourself be lulled into inaction.”³ Nowhere is this statement more apropos than in transporting PHI because of the increasing reliance on electronic health records and other forms of electronic media. Therefore, the purpose of this article is to provide attorneys with a semblance of the background of the relevant laws and who is impacted, as well as measures that can be taken to mitigate the risk of liability.

Legal Background
To appreciate the context of the following laws, it is first important to understand the relationship between electronic media and PHI. Specifically, electronic media means: (1) electronic storage material on which data is or may be recorded electronically, including, for example, devices in computers (hard drives) and any removable/transportable digital memory medium, such as magnetic tape or disk, optical disk, or digital memory card; and (2) transmission media used to exchange information already in electronic storage media. Transmission media include, for example, the Internet, extranet or intranet; leased lines; dial-up lines; private networks; and the physical movement of removable/transportable electronic storage media. Certain transmissions, including of paper, via facsimile, and of voice via telephone, are not considered to be transmissions via electronic media if the information being exchanged did not exist in electronic form immediately before the transmission.³

Many of these devices and services are utilized to transport PHI from one entity to another. And, therein lies the liability.

In 1996, Congress passed the Health Insurance Portability and Accountability Act (HIPAA).⁴ The Privacy Rule and Security Rule followed. These were promulgated by the U.S. Department of Health and Human Services (HHS) in 2002 and 2003, respectively. Nearly 13 years after HIPAA became law, the Health Information Technology for Economic and Clinical Health Act (HITECH Act)⁵ was enacted, and subsequent interim rules and the 2013 Final Omnibus Rule⁶ followed. These three laws alone permeate every industry, whether in terms of health insurance portability or the creation, receipt, transmission, or maintenance of PHI.

These three laws define three main categories: covered entities, business associates, and subcontractors, which are defined as: (1) Covered Entity—a health care provider who transmits any health information electronically in connection with certain transactions, health plans, and health clearinghouses;⁷ (2) Business Associate—a person who “creates, receives, maintains, or transmits” protected health information;⁸ and (3) Subcontractor—a person who acts on behalf of a business associate, other than in the capacity of a member of the workforce of such business associate. This definition applies to an agent or other person who acts on behalf of the business associate, even if the business associate has failed to enter into a business associate agreement.⁹

Covered entities and business associates use both domestic and foreign entities to perform services involving PHI. Those companies or individuals that contract with business associates are referred to as subcontractors. Initially, express liability only applied to covered entities while it was implied for business associates and subcontractors. The July 14, 2010, Proposed Rules¹⁰ and the Final Omnibus Rule expressly extended liability to business associates and their subcontractors.

Attorneys should also consider state and international laws as well. In Texas, a business associate and a subcontractor are actually considered a “covered entity,” which is defined as, “any person who: (A) for commercial, financial, or professional gain, monetary fees,
or dues, or on a cooperative, nonprofit, or pro bono basis, engages, in whole or in part, and with real or constructive knowledge, in the practice of assembling, collecting, analyzing, using, evaluating, storing, or transmitting protected health information. The term includes a business associate, health care payer, governmental unit, information or computer management entity, school, health researcher, health care facility, clinic, health care provider, or person who maintains an Internet site; (B) comes into possession of protected health information; (C) obtains or stores protected health information under this chapter; or (D) is an employee, agent, or contractor of a person described by Paragraph (A), (B), or (C) insofar as the employee, agent, or contractor creates, receives, obtains, maintains, uses, or transmits protected health information.”11 This distinction can become important if both federal HIPAA and state HIPAA are implicated in either a domestic or international situation.

**Preventive Measures**

In April 2014, the Federal Bureau of Investigation (FBI) released a notification, “Health Care Systems and Medical Devices at Risk for Increased Cyber Intrusions for Financial Gain.”12 Compliance areas were the focus, in light of the increase in the black-market sales of protected health information obtained from electronic health records (EHRs). As if the black-market sale of PHI was not enough, two notable reports provide additional reasons:

- According to a Ponemon Institute report dated March 2013, 63% of the health care organizations surveyed reported a data breach in the past two years with an average monetary loss of $2.4 million per data breach. The majority of each data breach resulted in the theft of information assets. Lastly, 45% reported that their organizations have not implemented security measures to protect patient information.”13
- “A SANS report dated February 2014 indicates health care security strategies and practices are poorly protected and ill-equipped to handle new cyber threats exposing patient medical records, billing and payment organizations, and intellectual property. Data analysis revealed multiple devices (e.g., radiology imaging software, digital video systems, faxes, printers) and security application systems (e.g., Virtual Private Networks (“VPN”), firewalls, and routers) were compromised. Once medical devices are compromised, malicious traffic is transmitted through VPNs and firewalls. The biggest vulnerability was the perception of IT health care professionals’ beliefs that their current perimeter defenses and compliance strategies were working when clearly the data states otherwise.”14

These two reports illustrate that the potential liabilities for non-compliance with HIPAA and related laws and regulations are vast. Therefore, how PHI is transported is crucial.

Now that the potential liability has been addressed, what can organizations do to mitigate risk and increase compliance?

1. Encrypt the data at rest and in transit—including CD-roms and USB drives.
2. Establish adequate policies and procedures.
3. Monitor telecommuters, and make sure that they have the appropriate firewalls, automatic log-out, and appropriate computer administration.
4. Utilize virtual private networks (VPNs).
5. Make sure that software updates are being implemented.

**Conclusion**

The transportation of data occurs in a variety of ways—from USB drives to email to the cloud. As Bill Gates indicated, companies cannot look two years down the road. Instead, keeping a pulse on current and proposed regulations, as well as changes in technology options, can enable companies to be better prepared to anticipate and plan for changes.

**Endnotes**

2. 45 CFR §160.103 (defining protected health information to include electronic and other forms and mediums that can contain individually identifiable health information, which can be used to identify the individual or creates a reasonable belief that the individual can be identified from the information provided).
3. 45 CFR § 160.103.
7. 45 CFR §§ 160.102, 164.500.
9. Id.
11. Texas Medical Record Privacy Act (H.B. 300), Section 181(b)(2) (Sept. 1, 2012).
A Critical Look at Nutrition Policymaking
With the Co-Author of The China Study

Over the last few years, considerable attention has been paid to laws, rules, and regulations around food and nutrition at all levels of government and business—an issue that impacts all Americans. John Okray, chair of the Health Law Section of the Federal Bar Association, recently interviewed T. Colin Campbell, a biochemist who specializes in the effect of nutrition on long-term health. Campbell is professor emeritus of nutritional biochemistry at Cornell University, has written more than 300 research papers on the subject, and co-authored 2005's The China Study, described as “the Grand Prix of epidemiology” by The New York Times. He is featured in the documentary films Forks Over Knives, Planetat, and Vegucated. He has served on a number of nutrition advisory committees and has promoted nutrition legislation. Campbell received his bachelor’s of science degree from Pennsylvania State University and his master’s of science in nutrition and biochemistry and his Ph.D. in nutrition, biochemistry, and microbiology from Cornell. This interview has been lightly edited for clarity and brevity. We hope that health lawyers and those with a general interest in this area will find the dialogue of interest.

Federal Bar Association: Your book, The China Study, has sold more than 1 million copies. Former President Bill Clinton referenced your research, and this book, as one of the reasons he dramatically changed his diet after his quadruple heart bypass surgery. Can you summarize the China-Cornell-Oxford Project study and its conclusions?

T. Colin Campbell: The China Study is the name of the best-selling book co-authored with my son Thomas, now director of a new program in nutrition and medicine at the University of Rochester (New York) Medical Center. However, only one chapter specifically addresses the result of the Cornell-Oxford-Project. This study investigated the dietary and lifestyle factors most responsible for widely varying rates of cancers and other diseases among the 2,400 counties in China. It also was designed to see if, in this human population, the dietary and lifestyle factors responsible for cancer causation in experimental animals are supported by human data. The main conclusion affirmed that the nutrition provided by the consumption of whole, plant-based foods (vegetables, fruits, grains, and legumes) is exceptionally capable of not only preventing future diseases like heart disease, cancer, and age-degenerative diseases but also, in most cases, reversing (that is, treating) these diseases when diagnosed. It is important to note that it is the whole food form of these foods not their individual nutrients that provide these impressive benefits.

FBA: The Dietary Guidelines for Americans is jointly published by the U.S. Department of Health and Human Services (HHS) and the U.S. Department of Agriculture (USDA) every five years. They are in the process of releasing the 2015 guidelines. What in your view needs to be done to make the Dietary Guidelines reflect your research on nutrition and health?

T. Colin Campbell: The major failing of the U.S. government, in the field of nutrition, is the continued overemphasis on carbohydrate counting and low-fat diets. The guidelines are inconsistent with the evidence we have that whole foods prevent disease. The government needs to aim for a balance of macronutrients in their guidelines and need to recommend vegetable and fruit consumption over carbohydrate counting. It is also important to emphasize that we need to focus on whole foods, and not nutrients, for disease prevention.
to be changed from the 2010 version? Has the process for promulgating these guidelines improved over time?

**Campbell:** I have just completed my commentary on this most recent report of these guidelines and am submitting it to the committee. Very briefly, I have watched closely the history of these reports ever since two friends of mine (one from Ag and one from Health) wrote the first report in 1980. Later, I participated in news conferences of the subsequent issues of these guidelines. I have concluded that it is time to abandon this approach of appraising the American public of the latest scientific evidence on diet and health. No progress has been made, to my knowledge, in advancing this information. This strategy of informing the public of the latest science has been corrupted by industry. (In one of the more recent reports, a lawsuit was successful in forcing the USDA and the committee members to reveal their previously hidden industry conflicts, which showed, for example, that the majority of the members had ties to the dairy industry.)

In brief, there has been no substantive progress. They ignore dramatically new evidence that shows a remarkable ability of diet and nutrition to improve health, while extending the life of past nutrition mythologies that have been responsible for the poor health of U.S. citizens.

**FBA:** The Healthy, Hunger-Free Kids Act that was passed a few years ago caused the USDA to make major changes to school meal nutritional guidelines for the first time in 15 years. These guidelines impact approximately 32 million American school children. In your opinion, are they based on good nutritional science, industry-group lobbying, or a combination of the two?

**Campbell:** The changes that have been made, according to some reports, were merely intended to cut calories and to ensure the consumption of low-fat milk. Neither recommendation makes sense. Based on scientific evidence, it’s not the quantity of food but the kind of food that matters most for good health. Not surprisingly, some children have complained that they are not getting enough food (calories); were they to eat the right food, this would not be a problem. Yet, children also are complaining about the kind of food now offered—at least in some programs—meaning that these children are not getting access to the food high in fat, sugar and salt that they have traditionally craved. And then there are the very negative reports circulated by the industries whose foods are not now in favor. In short, the results are very mixed, starting with a compromised recommendation intended to please contradictory interests and practices.

A different approach is needed, starting with elimination of the disgusting food subsidy program that makes available the wrong food then becomes vested in the interests of industry. It is time that a new approach is started, and I have a former graduate student who has developed such a program. She has offered her program to teachers and food-service people in more than 3,000 U.S. schools, but because of serious conflicting interests, she has had to develop this work while scrambling for very limited funding. Her original graduate work at Cornell University was in education for her doctoral program, for which she received national awards. It’s about making children and their parents aware of the scientific evidence—and this can be done with very young children. We now are able to develop some marvelous programs that are much more independent of government and industry oversight and interests and that will serve the best interests of the children and their parents!

**FBA:** The idea of labeling genetically modified organisms (GMOs) in food products continues to be debated. Whole Foods Market announced that it will require GMO labeling for all products in its stores by 2018. Is GMO transparency labeling good, and if so, why?

**Campbell:** Yes, GMO labeling is essential. The fundamental science that has already been published clearly shows that multitudes of biochemical mechanisms can lead to unintended consequences as genes are altered, then expressed. It is a crime that the consumers of these foods, who are not sufficiently literate in this science, are forced to assume unknown risks of future health outcomes over which they have no control. It is shameful when we now know the biological basis for these risks—we don’t know what those outcomes might be, but by the time they start to become expressed, it is going to be almost impossible to correct the problem, either on a personal level or on a societal level. One company in particular, Monsanto, is holding a sledgehammer over our heads and over the heads of our children and grandchildren, and this must stop.

**FBA:** You are featured in an upcoming documentary, PlantPure Nation. What lessons did you learn in the making of this film about impacting nutrition legislation?

**Campbell:** The story starts with my lecture on the floor of the Kentucky legislature (joining with my colleague, Caldwell Esselstyn, M.D.), where we talked about our respective and closely related findings with the whole-food, plant-based diet. It was well-received in the chamber, and it was then that my son Nelson decided to do a film beginning with this event, which he directs and which will appear in theaters on July 4. He worked closely with a senior representative of the Kentucky Legislature, Tom Riner, and with the former producer of the highly successful documentary Forks Over Knives, John Corry, and the screenwriter of that film, Lee Fulkerson, which also featured the work of my colleague Dr. Esselstyn and myself. I helped to identify most of the professionals interviewed for this latest film, but it was Nelson and his group who had total control of the story line, which mainly concerns the question, “Why have we not heard this information before?”

I am enthusiastic about this film, not only because it has been superbly crafted but also because I have had to comment on this same question ever since the publication of The China Study. I attempted to address it in another book, Whole, published with Dr. Howard Jacobson in 2013. This new film takes advantage of imagery to answer this question. In my view, it confronts a much larger question beyond diet and health that concerns the manner in which very powerful, wealthy interests control information for their own selfish interests on a variety of topics of interest to the citizens in this and other countries.

**FBA:** Apart from nutrition, are there differences in the environmental impact between animal- and plant-based diets?

**Campbell:** Animal-based diets, based on the production of live-
Law Student Perspective

by Ashley Akers

Why Joining Organizations—Like the FBA—Is Better Than Meeting Elvis

Law school is not only about learning the law, just like law practice is not only about sitting at a desk billing all day (or so I hope). Law school is about understanding how to read case law, learning how to resolve issues, and most important, joining every club, organization, and association to make your resume stand out as best as possible. This is essential, because you know that is what the other hundreds of law students applying for the same firm jobs and clerkships are doing.

But which of these clubs, organizations, and associations are a worthwhile endeavor in which to invest precious time, limited energy, and significant effort? On the short list is the Federal Bar Association. Though I am certain all presidents say the same of their own organization, my opinion was recently validated by a man with many more years of experience and infinite more wisdom: Gen. William K. Suter.

Gen. Suter's practice as an attorney has been nothing short of outstanding. During his 29 years of service in the U.S. Army, he rose to the highest ranks, serving as the major general. Then he served as the U.S. Supreme Court Clerk for 22 years. Now, he is a visiting fellow at the Hoover Institution and a regular speaker at graduations, annual conferences, and other law-and-Army-related events across the nation.

The KU Law FBA Student Division hosted Gen. Suter for a two-day stay in Jayhawk Land to meet with and speak to division members. While it was no coincidence that his visit coincided with a KU men's basketball game (he attended Trinity University on a basketball scholarship), the trip was inspired by his willingness to pay forward all the benefits he has received from the Federal Bar Association.

Gen. Suter did not find the FBA so much as the FBA found him. His 51-year membership began when he was a judge advocate general in Anchorage. A committed FBA member had moved to Alaska and chosen to start the first chapter in the state. Suter's superior at the time called him one day and said, “Bill, an FBA chapter is starting, and it’s probably a good idea for you to join.” Understanding that he had no real choice in the matter, Suter joined the Alaskan Chapter in 1964. The small group of members met for a monthly luncheon at the Wigwam Cafe in Anchorage for a “mostly social gathering.” It was only a short year later that Suter would first reap the benefits of his commitment to the FBA.

While still serving in Alaska, Suter was tasked with setting up a federal magistrate's court on Fort Richardson. Unsure of how or where to begin, he called his fellow Alaskan FBA members to ask for help. “Of course I didn’t know how to set up a court; no one teaches students that in law school,” Gen. Suter said. “But I did know a group of people from the Wigwam Cafe who could help me.” And while the Wigwam Cafe group was Gen. Suter's earliest memories of his participation in the FBA, it was only the first of many lifelong relationships established in part by his membership.

During his visit at KU Law, Gen. Suter spoke to both the prestige of the FBA and the unending support from the federal judiciary, while also noting how important the organization is for students. “Federal judges across the country and the Supreme Court justices are members of the FBA, and students can be members of that same organization. It’s important that law students become involved in this network of lawyers to meet people and learn about the federal practice,” he said.

Gen. Suter attributes some of his greatest professional and personal relationships to the FBA, and he believes every law student should take advantage of the opportunity to become a member in the early stages of learning to practice law. “For most law students, the FBA is the first professional organization where they can become a member. It's important for students to make the decision to get involved early in a professional organization where they can meet other students, successful lawyers, and members of the judiciary,” Gen. Suter said.

While speaking with KU Law Division members, Gen. Suter shared stories of his experiences speaking at FBA chapters across

Ashley Akers is a second-year law student at the University of Kansas School of Law. A founding member of the Federal Bar Association Division at KU Law, Ashley is now the active president. Photo used with permission from University of Kansas School of Law.
the country, working for the Supreme Court, and enjoying a seat at the State of the Union address. He attributes many of his experiences to the connections he made and opportunities he was given through the FBA as a young lawyer. He said, “Networking is important, and getting out to meet people is the best thing you can do, especially when you are young. Networking is how opportunities are created.” Certainly one of the greatest benefits of being a FBA member is access to the online membership directory and open invitations to large networking events. For law school divisions, members enjoy the benefits of being part of a group of peers who value these same opportunities.

Gen. Suter’s appreciation for the opportunities provided through his membership with FBA may be most noticeable when he talks about Elvis Presley. Over a two-day visit and more than a few conversations with the General, I heard about his personal relationship with the King only once—and in less than three sentences. Gen. Suter noted his time with the celebrity when they were in boot camp together, complimented the icon’s humble and gracious attitude, and then returned to his praise of the FBA. If that does not speak to the greatness of this organization, I do not know what does.

For law students, becoming a part of an FBA division is more than just joining another something to bolster a resume. It’s the beginning of a lifelong journey as a member of a professional organization that includes the most highly regarded attorneys, judges, and practitioners in the country. A telling example is the wonderful opportunity our division had to meet Gen. Suter and learn about his incredible career as a Federal Bar Association member.

**HEALTH continued from page 11**

stock and our consumption of their products, do great harm to the environment in many ways. There is general agreement that the main cause of global warming is livestock production, with some estimates (from the World Bank) running as high as more than 50 percent. A United Nations agency has a lower estimate, but it is still higher than the estimate for the transportation sector. (Think of the recent California drought problem.) The rearing of livestock also consumes natural resources at rates as high as five to 10 times the amount needed to produce an equivalent amount of human food from plant sources. Other consequences of this practice include dangerous depletion of deep-water (aquifers) sources, loss of topsoil, and contamination of local water resources. All of these activities result in poorer human health, exceptional health care costs that cannot be maintained, and serious abuse of animals.

FBA: The tobacco industry was sued based on its adverse health impacts and settled lawsuits with most of the states for hundreds of billions of dollars. Do you foresee the food industry coming under similar scrutiny or legal pressure related to foods or additives that might be linked to poor health?

Campbell: It is highly unlikely that it will be the food additives that cause the future health problems and their attendant costs. It is the choice of the food itself—plants, not animals. A reference is made in *PlantPure Nation* by a prominent family doctor that we now should begin to consider legislation to hold doctors responsible for not telling their patients about the health benefits of a whole-food, plant-based diet. Hopefully, this will encourage a national discussion of this matter.

I am of mixed opinion of this kind of mandate being directed from higher authority, because it may lead to legal consequences that do as much or more harm to the practice of medicine than it does good. I would prefer that (1) doctors get education in nutrition while in medical school (almost none at present!), (2) consumers be made aware of this information, and (3) programs and strategies be developed that adequately compensate doctors and serve the public the best possible information.

FBA: There seems to be a consensus that healthy food is more expensive. Why is this the case, and what could be done by the government and the food industry to make healthier food affordable and available to more Americans?

Campbell: Many consumers are now discovering that healthy food need not be more expensive. Some of the added costs are attributed to the purchase of organic produce. Not to discourage this practice (organic food tastes better and often is somewhat more nutritious), but it should be noted that the attendant health gains for organic foods are relatively minimal when compared with the primary practice of choosing the right produce in the first place. When total costs are factored into this equation, such as the costs to our society and our environment, it is far cheaper to produce and consume plant-based foods. Inform and educate consumers in a way that leads to greater demand for the right kind of food. During this transition, it may be useful to provide tax incentives for small farmers who can support local farmers markets. This issue also is considered in the film *PlantPure Nation*. ☠️

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**Editorial Policy**

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State and Local Government

by Caroline Johnson Levine

Removing State Cases to Federal Forums

Litigants in state courts often consider whether it is beneficial to seek adjudication of a case in a federal forum to obtain a favorable outcome pursuant to federal court case precedent. However, a party seeking removal of a state case into a federal forum must comply with federal procedural and statutory requirements. A recent U.S. Supreme Court ruling in *Dart Cherokee Basin Operating Company, LLC v. Owens*, 574 U.S. ———, 135 S.Ct. 547 (2014), eloquently explained whether proof of federal jurisdiction is required in the initial stages of a state class action seeking removal into federal court.

Brandon Owens was a royalty owner, who filed a class action in state court in order to “represent a class of royalty owners who were underpaid royalties from [Dart Cherokee Basin Operating Company, LLC] or [Cherokee Basin Pipeline, LLC’s] working interest Kansas wells.”¹ The petition alleged “breach of contract and unjust enrichment claims;” however, it “did not state a specific amount as to damages.”² Subsequently, Dart sought to remove the action to federal court in the U.S. District Court for the District of Kansas. To achieve federal jurisdiction, Dart relied on the Class Action Fairness Act (CAFA), which requires a party to file a notice of removal in federal court “containing a short and plain statement of the grounds for removal.”³ Dart pursued a federal adjudication of this state matter because “CAFA gives federal courts jurisdiction over certain class actions, defined in § 1332(d)(1), if the class has more than 100 members, the parties are minimally diverse, and the amount in controversy exceeds $5 million.”⁴

Dart alleged in its notice of removal that all three of CAFA’s requirements existed in this case and that the amount in controversy was satisfied because the “purported class members totaled more than $8.2 million.”⁵ However, Owens argued that the case should be remanded to state court because Dart’s notice of removal did not include any evidence that the amount in controversy actually exceeded $5 million dollars. Dart responded to Owens’ motion for remand by filing a declaration, which “included a detailed damages calculation indicating that the amount in controversy, sans interest, exceeded $11 million.”⁶

The District Court granted Owens’ motion for remand because that court believed that the U.S. Court of Appeals for the Tenth Circuit requires that a “court narrowly construes removal statutes, and all doubts must be resolved in favor of remand.”⁷ Specifically, the District Court held that “for removal to be proper, the defendant must set forth facts supporting the assertion that the amount in controversy is satisfied.”⁸ Further, the District Court held that

“[A]s specified in § 1446(a), a defendant’s notice of removal need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold. Evidence establishing the amount is required by § 1446(c)(2)(B) only when the plaintiff contests, or the court questions, the defendant’s allegation.” —Justice Ruth Bader Ginsburg, *Dart Cherokee Basin Operating Company, LLC v. Owens*, 574 U.S. ———, 135 S.Ct. 547, 554 (2014).

Kansas wells.”¹ The petition alleged “breach of contract and unjust enrichment claims;” however, it did “not state a specific amount as to damages.”² Subsequently, Dart sought to remove the action to federal court in the U.S. District Court for the District of Kansas. To achieve federal jurisdiction, Dart relied on the Class Action Fairness Act (CAFA), which requires a party to file a notice of removal in federal court “containing a short and plain statement of the grounds for removal.”³ Dart pursued a federal adjudication of this state matter because “CAFA gives federal courts jurisdiction over certain class actions, defined in § 1332(d)(1), if the class has more than 100 members, the parties are minimally diverse, and the amount in controversy exceeds $5 million.”⁴

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The Supreme Court “granted certiorari to resolve a division among the Circuits on the question presented,” where the U.S. Fourth Circuit Court of Appeals did not require affirmative proof in the petition or notice of removal, and the Seventh Circuit and Tenth Circuit did require proof in one of those pleadings. Further, if either party contests the alleged amount in controversy when not contested by the plaintiff, the defendant’s allegation is a plausible allegation that the amount in controversy exceeds the jurisdictional threshold. Evidence establishing the amount is required proof in one of those pleadings. Additionally, the Supreme Court found that the District Court erred in asserting that there is a presumption against removal into federal court. Importantly, the Supreme Court felt it was important to correct what it viewed as an abuse of discretion for the Tenth Circuit to deny Dart’s request for review. Doing so froze the governing rule in the circuit for this case and future CAFA removal notices, with no opportunity for defendants in Dart’s position responsibly to resist making the evidentiary submission. Therefore, the court found that “if the Circuit precedent on which the District Court relied misstated the law, as we hold it did, then the District Court’s order remanding this case to the state court is fatally infected by legal error.” Because the court has the authority to review the Tenth Circuit’s denial of Dart’s appeal of the District Court’s remand order, for abuse of discretion, the Supreme Court embraced the opportunity to “correct the erroneous view of the law the Tenth Circuit’s decision fastened on district courts within the Circuit’s domain.”

In Dart, the Supreme Court concluded that “as specified in § 1446(a), a defendant’s notice of removal need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold. Evidence establishing the amount is required by § 1446(c)(2)(B) only when the plaintiff contests, or the court questions, the defendant’s allegation.” Accordingly, the Supreme Court held that the removal statute, 28 U.S.C. § 1446, clearly provides that the required short and plain statement in the petition or notice of removal “need not contain evidentiary submissions.”

Endnotes
1See Owens v. Dart Cherokee Basin Operating Co., LLC, 2013 WL 2237740 at *1 (D. Kan.).
2Id.
4Id. at 552; see also § 1332(d)(2), (5)(B); see also Standard Fire Ins. Co. v. Knowles, 568 U.S. ——, 133 S.Ct. 1345, 1348, 185 L.Ed.2d 439 (2013).
5Id.
6Id.
7See Owens, 2013 WL 2237740 at *1, citing Martin v. Franklin Capital Corp., 251 F.3d 1284, 1289 (10th Cir. 2001).
9Id., citing Laughlin v. Kmart Corp., 50 F.3d 871, 873 (10th Cir. 1995).
10See Owens, 2013 WL 2237740 at *2.
11Id. at *5.
12See Dart Cherokee Basin Operating Co., LLC, 574 U.S. ——, 135 S.Ct. at 552.
14Id.
15Id. at 553.
16E.g. Ellenburg v. Spartan Motors Chassis Inc., 519 F.3d 192, 200 (4th Cir. 2008), Spivey v. Vertrue Inc., 528 F.3d 982, 986 (7th Cir. 2008) and Laughlin v. Kmart Corp., 50 F.3d 871, 873 (10th Cir. 1995).
17See Dart Cherokee Basin Operating Co., LLC, 574 U.S. ——, 135 S.Ct. at 553.
18Id.; see e.g., Mt. Healthy City Bd. of Ed. v. Doyle, 429 U.S. 274, 276, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977) (“[T]he sum claimed by the plaintiff controls if the claim is apparently made in good faith.”) (quoting St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 288, 58 S.Ct. 586, 82 L.Ed. 845 (1938).
19Id.; citing McPhail v. Deere & Co., 529 F.3d 947, 953 (2008) (requiring proof by defendant but not by plaintiff “bears no evident logical relationship either to the purpose of diversity jurisdiction, or to the principle that those who seek to invoke federal jurisdiction must establish its prerequisites”).
20Id. at 553-54 (Finding that this “provision, added to § 1446 as part of the Federal Courts Jurisdiction and Venue Clarification Act of 2011 (JVCA), clarifies the procedure in order when a defendant’s assertion of the amount in controversy is challenged. In such a case, both sides submit proof and the court decides, by a preponderance of the evidence, whether the amount-in-controversy requirement has been satisfied.”); 28 U.S.C. § 1446(c)(2)(B).
21Id. at 554; see also Standard Fire Ins. Co., 568 U.S. ——, 133 S.Ct. 1345, 185 L.Ed.2d 439 (2013).
22Id. at 557; see also n. 7 (“Caution is in order when attributing a basis to an unreasoned decision. But we have not insisted upon absolute certainty when that basis is fairly inferred from the record.”); see also Taylor v. McKeithen, 407 U.S. 191, 193, n. 2, 92 S.Ct. 1980, 32 L.Ed.2d 648 (1972) (per curiam) (rejecting “possible, but unlikely” basis for unreasoned decision); see also Nixon v. Fitzgerald, 457 U.S. 731, 742–743, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982) (facing an unreasoned court of appeals decision, we projected what the court of appeals “appears to have” reasoned).
23Id. at 558.
24Id. at 554.
The Push to Correct the Misclassification of Commercial Truck Drivers

Misclassification of workers as independent contractors has been a hot-button issue for the past few years. In September 2014, the U.S. Department of Labor awarded $10,225,183 to 19 states to implement or improve worker misclassification detection and enforcement initiatives. The misclassification inquiry has not ignored the trucking industry, where there has been a nationwide debate regarding the propriety of the independent contractor status of truck drivers. Increasingly, lawsuits and state legislation have pushed to classify these drivers as employees.

For employers, the classification of drivers as independent contractors carries the implications of not being required to pay unemployment insurance taxes, workers’ compensation premiums, and Social Security and Medicare contributions on behalf of those drivers. According to the U.S. Department of the Treasury, an employer can save approximately $3,710 per worker per year in employment taxes on an annual average of $43,007 in income paid per employee by classifying workers as independent contractors. However, because different state laws focus on different determinative factors of an independent contractor relationship, there is no single test or rule regarding how drivers should be classified.

In an effort to curb any misclassification of truck drivers as independent contractors, several states have recently entertained legislation specifically addressing the independent contractor status in the trucking industry. Last year, New York enacted a law applicable to all employers in the commercial-goods transportation industry that established certain criteria that must be met to be considered a separate business entity from the contractor to which services are provided. Under the New York State Commercial Goods Transportation Industry Fair Play Act (the “Act”), all workers in the commercial-goods transportation industry are presumed to be employees unless the employer can establish otherwise through the tests set forth in the Act. For drivers to legally qualify as independent contractors under the Act, their compensation from a transportation contractor must be reported on a Federal Income Tax Form 1099, and they must either qualify as a “separate business entity” or pass what is called the “ABC test.” To qualify as a separate business entity, a driver must satisfy all elements of an 11-part test:

1. The business entity (driver) is free to determine on its own the means and manner of providing services, limited only by requirements to meet the desired result or federal rule or regulation.
2. The business entity can exist even if its relationship with the contractor terminates.
3. The business entity has substantial capital investment in its own equipment and tools.
4. The business entity owns or leases the capital goods and bears the risk of loss and profit.
5. The business entity is free to perform services to others and the general public on a continuing basis.
6. The business entity receives a 1099 for services provided to the contractor.
7. There is a written contract between the business entity and contractor specifying their relationship as independent contractors or separate business entities.
8. If the services require a license or permit, the business entity pays for the license or permit under its own name, or, where permitted by law, pays for reasonable use of the contractor’s license or permit.
9. The business entity may hire its own employees without the contractor’s approval, subject to applicable statutory or regulatory requirements, and the business entity is not reimbursed by the contractor for payments it makes to its employees.
10. The business entity is not required to present itself as an employee of the contractor.
11. The business entity is free to perform similar services for others on whatever basis and whenever it chooses.

Any employer willfully violating the law is subject to monetary penalties as well as criminal prosecution. The Act also requires that all commercial goods transportation contractors conspicuously post

Tom Revnew is a shareholder with Seaton Peters & Revnew, P.A., where he represents employers in the connection with the full range of labor and employment law issues.
a Notice of Rights, which describes the responsibility of independent contractors to pay federal and state taxes and also explains the rights of employees to receive workers' compensation, unemployment benefits, minimum wage, overtime, and other federal and state workplace protections.

The alternative ABC test requires first that the driver be free from the control and direction of the contractor in performing services, both in the contract and in its actual, real-life application. Second, the service provided by the driver must be different from the services provided by the contractor or otherwise not part of the usual business of the contractor. Finally, the driver must be customarily engaged in carrying out the same services as an independent established trade or profession, rather than simply working for the contractor.

The New York legislation certainly represents the most thorough address of classification of truck drivers. Other states have made similar attempts. In 2013, both houses of the New Jersey legislature passed the Truck Operator Independent Contractor Act, which would have created a presumption that parcel delivery and drayage truck drivers in New Jersey were employees and not independent contractors unless they could satisfy a three-pronged statutory test for independent contractor status. However, Gov. Chris Christie vetoed the legislation. Similar bills defining independent contractor status within the trucking industry have been introduced but not passed in Georgia, Ohio, and Washington. In 2013, the Minnesota legislature entertained a bill that would amend the current Minnesota statute setting forth factors for finding that an operator is an independent contractor to include a presumption that a driver is an employee unless otherwise established, but the bill stalled.

Regardless of the existence of independent contractor legislation tailored to the trucking industry, and despite the differences in the independent contractor tests used by different states and agencies, recent court decisions have shown that the trend, no matter the set of factors used, is to find that truck drivers are employees rather than independent contractors. One set of decisions that fully illustrates this point are three cases that arose from 2010 litigation regarding whether FedEx drivers are employees.

In August 2014, the Ninth Circuit found in both Alexander v. FedEx Ground Package System Inc.⁴ (applying the California test for independent contractors) and in Slayman v. FedEx Ground Package System Inc.⁵ (applying the different set of Oregon factors) that FedEx had wrongfully classified approximately 2,300 drivers as independent contractors. California’s independent contractor test primarily utilizes a set of right-to-control factors, while Oregon utilizes a right-to-control test for illegal wage-deduction claims and an economic-realities test for unpaid overtime claims. The Ninth Circuit found that under both states’ tests, the FedEx drivers were employees, emphasizing the fact that FedEx had the right to control the physical appearance of drivers and their vehicles, the drivers’ workloads, and the use of the drivers’ vehicles when they were not delivering packages.

Subsequently, in October 2014, the Kansas Supreme Court in Craig v. FedEx Ground Package System Inc.⁶ reached the same conclusion while utilizing Kansas’ independent contractor tests. Kansas wage-payment law, a 20-factor test that is similar but not identical to the IRS’ independent contractor test, must be applied to determine whether drivers are employees or independent contractors. The Kansas test incorporates both right-to-control tests and economic-realities tests but focuses on an employer’s right of control. Although the Kansas test is different than the California and Oregon tests applied in the Ninth Circuit decisions, the result was the same, and the Kansas Supreme Court determined that “FedEx has established an employment relationship with its delivery drivers but dressed that relationship in independent contractor clothing.”⁷

Based upon the increased level of funding and enforcement initiatives by the U.S. Department of Labor aimed at preventing misclassification, the attempts by state legislatures to enact independent contractor legislation specific to the trucking industry, and recent court decisions, there is an obvious trend toward finding that truck drivers are employees rather than independent contractors.

Endnotes
⁶N.Y. Labor Law § 862-b(2).
⁷765 F.3d 981 (9th Cir. 2014).
⁸765 F.3d 1033 (9th Cir. 2014).
Southern and Eastern Districts of New York Honor Their Four Women Chief Judges

On March 4, the Women in the Law Committee in conjunction with the Southern and Eastern District Chapters of the FBA sponsored Meet the Chiefs. The event, held in the Thurgood Marshall Courthouse in downtown Manhattan, honored the four women chief judges in the Southern and Eastern Districts of New York. The idea for Meet the Chiefs developed from the experience of Olivera Medenica, president of the Southern District Chapter, and Danielle Lesser, chair of the Women in the Law Committee for the Southern District Chapter, at the FBA’s Women in the Law Conference in Washington, D.C., last summer. The panelists and discussions at that event highlighted the importance of promoting women’s progress in attaining leadership positions in the bench and bar. Medenica and Lesser sought to take that concept to promote the achievements of the chief judges of the Southern and Eastern Districts.

At the New York event, Chief Judge Loretta A. Preska of the Southern District, Chief Judge Carol Bagley Amon of the Eastern District, Chief Judge Cecelia G. Morris of the Southern District's Bankruptcy Court, and Chief Judge Carla E. Craig of the Eastern District's Bankruptcy Court were honored. FBA President Matthew Moreland introduced the evening and touched on the mission of the FBA and the broad initiatives it undertakes on behalf of the judiciary. Medenica introduced Chief Judge Robert A. Katzmann of the Second Circuit. Chief Judge Katzmann’s comments touched on the importance of women in the judiciary. Chief Magistrate Judge Frank Maas of the Southern District of New York and Chief Magistrate Judge Steven Gold of the Eastern District of New York then each made a special tribute to the chief judges in each chief magistrate judge’s district.

After the introductions, each chief judge spoke of her unique and individual journey to chief judge. Each shared her lessons learned and strategies for success. Chief Judge Preska spoke of her initial pursuit of math and science before deciding that law school made more sense from a career perspective. Chief Judge Amon spoke of being in the right place at the right time, with an opportunity presenting itself after she lamented about how boring her job was to a friend. Chief Judge Craig spent a year reviewing documents halfway across the country and never envisioned herself in her present position. Chief Judge Morris was born in west Texas and worked her way across the country as a clerk and then eventually to New York into a position as judge and then chief judge without any preconceived notions as to where her career would take her. The collective wisdom of these impressive women was to take the opportunity presented, even if that opportunity is not necessarily a perfect match with your ideal career path and although the timing of the opportunity may be inconvenient.

In the face of a challenging environment for women to attain judgeships as well as partnership and leadership positions in law firms and corporations, each chief judge’s experience was an individual journey that did not take a traditional path. The evening sent an empowering message to the men and women in the audience. The feedback from the lawyers in attendance was resoundingly positive, and the evening could serve as a template for other events in other FBA chapters around the country.

Danielle C. Lesser is the chair of the Women in the Law Committee for the Southern District Chapter. She also co-heads the business litigation department at Morrison Cohen LLP, a New York law firm that caters to the middle market.
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PHOTO 3: Adine Momoh, vice president for the 8th Circuit and Younger Lawyer Division board member; Ashley Belleau, former FBA national president; Judge Scott Stucky, U.S. Court of Appeals for the Armed Forces; Hon. Michael Newman, FBA treasurer; and Matthew Moreland, FBA national president
PHOTO 4: Hon. Michael Newman, FBA treasurer; and Peter McCabe
PHOTO 5: Hank Eigles and Simeon Baum, FBA Board of Directors
PHOTO 6: Amy Gell, SDNY Chapter government relations liaison; Karen Silberman, FBA executive director; Mary Morris, Memphis Mid-South Chapter president; and Ray Dowd, FBA Board of Director.
PHOTO 7: FISA Court CLE panel: Bruce Moyer, Hon. John D. Bates, Hon. Dee Benson, Professor Stephen Vladeck, Robert S. Litt, W. West Allen, FBA Government Relations Committee Chair PHOTO 8: Lucheon speaker Lyle Denniston receiving a gift from the FBA, presented by West Allen, Chair of the Government Relations Committee PHOTO 9: Robert Almonte II, National Delegate for the El Paso Chapter; Kristin Kimmelman, FBA Board of Directors; and Stephen Dennis, San Antonio Chapter President PHOTO 10: Wylie Stecklow, SDNY Chapter National Delegate; Katherine Gonzalez-Valentin, FBA Board of Directors; John Okray, Health Law Section Chair; Lainie Cohen; and Donna Frosco PHOTO 11: Vildan Teske and Adine Momoh, Vice President for the 8th Circuit and Younger Lawyer Division Board Member PHOTO 12: Bob DeSousa, former National President; and Bridget Montgomery, Vice President for the Third Circuit
During one of my recent mountain bike rides, I was listening to the U2 song “Every Breaking Wave”—off their *Songs of Innocence* album—in which Bono sings, “Every sailor knows that the sea is a friend made enemy.”

The FBA Transportation and Transportation Security Law Section helps the world move. We are a group of dedicated transport professionals educating the community, mentoring young lawyers and students, and helping clients and stakeholders navigate the many modes of transport. In this issue of *The Federal Lawyer*, our member-authored articles cover the hottest topics in transportation. Whether you’re moving by plane or transporting containers by rail, truck, or ship, a delicate balance of safety, security, commerce, and civil rights is at play. It is no easy task to satisfy all interests as the waves of this debate generate both opportunities and hazards.

Our early sailors and aviators knew this well, and these concerns continue into the 21st century. Let’s take the law on unmanned aircraft systems: Whether about the use of airspace or privacy concerns, this is a fresh, emerging issue. Two of the articles in this issue discuss the newly issued proposed rules by the FAA on drones and the pioneering presidential guidance issued the same day, as well as the privacy issues associated with drones.

We are fortunate to have topical diversity among our other submissions in this issue. Seasoned airport practitioner Dave Barnard from Foley and Lardner’s Boston office provides a comprehensive discussion and analysis of airports and the FAA reauthorization. Our section places great importance on mentorship within the profession, and Tulane Law student Rick Beaumont—who worked for the Federal Maritime Commission during his summers in law school—is a prime example of a promising transport lawyer involved in our section. He knows ships; Rick worked as a commercial fisherman in Alaska to help pay for school. He writes about the China shipping trade and provides an innovative analysis of the avenues to foreign investment in the Chinese shipping industry.

We also have a comparison article on the TSA civil enforcement program, as well as a freight rail article on recent regulatory and legislative developments in transporting crude oil. This issue also covers the great unknowns in regulating air ambulances and a survey of the Interstate Commerce Act and the Interstate Commerce Commission.

No transportation-themed issue would be complete without acknowledgement of—and appreciation for—the judicial arm of our profession. Jason Schlosberg, a Federal Rail Administration lawyer and former judicial clerk with the Department of Transportation Office of Administrative Law Judges, contributes a judicial profile of Hon. J.E. Sullivan, administrative law judge for the department.

As U2 so aptly sings: “Every breaking wave on the shore tells the next one there’ll be one more.” Whether it is intermodalism, unmanned aerial systems, or commercial space, we are riding the wave. I hope you enjoy this edition. Thank you for reading.

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Thomas Lehrich is chair of the Federal Bar Association’s Transportation and Transportation Security Law Section. He is the deputy inspector general and counsel for the Architect of the Capitol. Lehrich spent 10 years at the U.S. Department of Transportation serving as the chief counsel to the DOT inspector general and held senior legal posts with the Transportation Security Administration and the Federal Maritime Commission.
Social media is an important tool to communicate with your stakeholders. The effective use of new media develops opportunities to reach people outside your realm. While sites like Facebook, YouTube, and Twitter have been household names over the past several years, the notion that the majority of users are under 25 is no longer true. By sharing your message through new media, traditional media can pick up your story. We have found that a little effort and planning can create a huge impact.

With this in mind, the Transportation Section started its own Twitter account. Twitter is an unusual platform in that it is measured by followers. Our goal is to extend and enhance the influence of transport and our section. As we continue to expand, we seek out local and national transportation reporters—hopefully increasing the likelihood that they will follow us.

We tweet about upcoming Transportation Section meetings. We retweet items from the U.S. Department of Transportation and its modes. And when we spot an interesting transportation article, we retweet that as well. We also tweet about major events and hearings on Capitol Hill and even Supreme Court cases that affect transportation regulation.

Social media’s power lies in reaching the known and unknown. But—more important—social media reaches influencers. Traditional influencers like the press, policy professionals, and policymakers, plus new influencers like state/issue bloggers, organizers, and e-newsletter editors. By expanding our outreach to other influencers, our section becomes more influential in shaping transport.

Follow us on Twitter at @FBA_Trans and join the conversation today. Some of our most popular tweets follow.

Samuel Negatu is head tweeter for the Section. Originally from California, Negatu received his BA from the University of California–Santa Barbara and his J.D. from Washington University in St. Louis. He spent most of his law school summers working for the U.S. Department of Transportation. He is a congressional staffer at the U.S. House of Representatives. Copyright 2015 Samuel Negatu. All rights reserved. Thomas Lehrich is the chair of the Federal Bar Association’s Transportation and Transportation Security Law Section. He is the deputy inspector general and counsel for the Architect of the Capitol. Lehrich served for 10 years with the Department of Transportation as the chief counsel to the DOT Inspector General and held senior legal posts with the Transportation Security Administration and the Federal Maritime Commission.
SAVE THE DATE:
FBA’s Annual Transportation Security Law Forum
“Responding to Ebola and Other Public Health Threats”
May 14, 1-5pm, @TSA HQ

March 30 Brown Bag Lunch on Pipeline Transportation w/ presenters from @PHMSA_DOT, @TSA & @FERC.

After decades, La Guardia may allow long-haul flights to Los Angeles, San Francisco on.wsj.com/1DUKkSY

#OnThisDay in 1932, Amelia Earhart left Newfoundland to become 1st woman to fly solo across Atlantic Ocean #aviation

NTSB confirms preliminary data shows #Amtrak train speed exceeded 100 mph prior to derailment. Further calibrations are being conducted.

U.S. DoT and Transport Canada to Make Rail Car Safety Announcement - Tune in at 10:30 bit.ly/1FCclVs @AAR_FreightRail @CNN @WSJ

Our new tower is coming along with the installation of LED lights!! #SFO

Here’s a tip – don’t spoil your trip. Don’t fly your drone in DC. #NoDroneZone 1.usa.gov/1e1H3Zc #UAS #drones

With today’s steps, @USDOT @FEMA @EPA make transporting crude oil by rail safer. 1.usa.gov/1cDwBx9
A Brief Flight Through Federal Airport Law

By David Y. Bannard
In a recent interview in *The Federal Lawyer*, Dallas/Fort Worth International Airport’s general counsel, Elaine Flud Rodriguez, estimated that approximately 100 lawyers specialize in airport law and that many of them are in-house counsel at U.S. airports. Given the huge number of American lawyers, what makes U.S. airport law a specialized discipline and airport lawyers so rare?

Similar to many practices, airport law is a hybrid. A specific body of federal statutory and case law applies to airports and, in turn, these legal requirements affect almost every aspect of operations at an airport. Each agreement that an airport operator enters into with another party must take into account the specific legal requirements that are applicable to airports, in addition to the other myriad legal issues and requirements under local, state, and federal law. The purpose of this article is to provide a brief overview of the federal law that applies to U.S. airports and demonstrate its application through a few examples of applicable contractual requirements. But this is not a complete description of the area of practice, and the summaries below are just that—summaries. It’s a quick tour, so stow your carry-ons, fasten your seatbelt, and prepare for takeoff!

**Federal Legal Provisions Applicable to Airports**

**Federal Grant Assurances**

Perhaps the most significant legal requirements applicable to airports from a practitioner’s perspective are the federal grant assurances, which are primarily derived from 49 U.S.C. § 47107. Each airport that receives an Airport Improvement Program (AIP) grant from the Federal Aviation Administration (FAA) must enter into a grant agreement with the FAA. Included as conditions to the grant are a series of assurances that bind the recipient of the AIP grant, known as the airport sponsor, contractually for varying periods, generally the useful life of the asset financed with grant process but in some cases, in perpetuity. Periodically, Congress will amend Section 47107 to add additional requirements, and the current grant agreement now includes a list of 39 grant assurances, ranging from No. 1, general federal requirements to No. 39, competitive access. Several of the more significant grant assurances are highlighted below, but airport sponsors and their counsel must be familiar and comply with all 39 of the assurances.

**Airport Revenue Use**

The two grant assurances generating the most litigation and a significant body of case law are likely Grant Assurances Nos. 25 (Airport Revenues) and 22 (Economic Nondiscrimination). With limited exceptions, Grant Assurance No. 25 requires that all revenues generated by an airport must be expended for the capital or operating costs of the airport, the local airport system, or other local facilities that are owned or operated by the owner or operator of the airport and that are directly and substantially related to the actual air transportation of passengers or property or for noise mitigation purposes. This assurance, known as the “anti-diversion” requirement, essentially prohibits the use of airport revenue to support unrelated initiatives.

The genesis of the requirement stems from initiatives by various cities in the 1980s and 1990s to raise airport fees and use the additional revenue to support city services, such as citywide police or fire protection services. Airlines serving these airports protested that this proposed diversion of airport revenue was unfair and successfully obtained Congressional action resulting in enactment of this prohibition, not only with respect to airport sponsors receiving AIP grants; in 1996, the prohibition was broadened to apply to all U.S. airports on a permanent basis. In 1999 the FAA issued its *Policy and Procedures Regarding the Use of Airport Revenue* to help provide guidance regarding the permissible uses of such revenue.

Although many uses of airport revenue are clearly either permissible or impermissible, quite a number of gray areas require legal counsel. Examples include air service incentive programs, which are discussed below; projects that are intended to improve access to airports, such as mass transit or improved roadways; and off-airport projects to mitigate the impact of airport operations. Issues arising from access projects tend to revolve around whether or what portion of the project is directly and substantially related to air transportation. For example, use of airport funds to construct the BART station at San Francisco International Airport was permitted because the station was on airport property and exclusively serves airport passengers and workers. In contrast, the costs of elements of the light rail line that passes through Minneapolis–St. Paul International Airport from downtown Minneapolis to the Mall of America were prorated based on complex formulae tied to projected use by airport passengers compared to through riders. The FAA has developed complex criteria for determining which portions of such access projects are eligible for funding with airport revenue. In the case of mitigation, the environmental permitting process for airport projects can often result in requirements that an airport undertake certain measures designed to mitigate the impacts of airport construction. Where there is a sufficient nexus between the two projects, the FAA has generally found that no violation of the anti-diversion requirement exists.

**“Reasonable” Rates**

As noted above, another heavily litigated grant assurance is No. 22 which contains several important requirements, one of which mandates that the airport sponsor make the airport available as an airport for public use “on reasonable terms.” A line of cases stretching back to 1972 has helped to define what constitutes a “reasonable” charge for use of an airport and, in 1996, the FAA issued a policy clarifying
what constitutes reasonable rates and charges. This Rates Policy was promptly the subject of additional litigation and, in a series of cases, portions of the Rates Policy were held to be arbitrary and capricious and vacated by the U.S. Appeals Court for the District of Columbia, and the policy was remanded to the Secretary of the Department of Transportation. The Rates Policy has been modified since 1997 only once, to clarify certain terms, but the vacated provisions have not been reinstated. Accordingly, the line of cases, beginning with Evansville and continuing through the series of cases involving Los Angeles International Airport and the airline trade association, Airlines for America (formerly known as the Air Transport Association, or ATA) provides the majority of the current guidance regarding what constitutes a “reasonable” charge for the use of aeronautical facilities.

The determination of what constitutes a “reasonable” charge highlights the often-contentious issue between airport sponsors and airlines over which entity should have the final say in determining whether airport capital projects and operational undertakings are necessary or appropriate. When revenue bonds were issued to finance development of airport infrastructure at the beginning of the jet age, the credit of the tenant airlines was considered to be the best security, and many airports entered into use and lease agreements with their tenant airlines with terms of 30 years or longer to secure the bonds. These agreements tended to give a majority in interest (MII) of the tenant airlines the right to approve capital development projects at the airport, because the bonds were generally payable largely from airline landing fees and terminal rentals. Many of these agreements were so-called “residual” or “single cashbox” agreements pursuant to which the air carriers operating at the airport agreed to pay all capital and operating expenses net of all other revenues, essentially acting as the guarantor of the airport’s financial obligations.

Over time, airport sponsors diversified their revenue sources, and at many airports today, airline revenues are less than 50 percent of total revenues, with parking and concessions—such as rental cars and in-terminal food and beverage or news and gift retailers—generating substantial revenues. As airports developed more varied sources of revenues, compensatory agreements, where costs are allocated to multiple cost centers and airports accept the risk and reward of covering these costs from the various revenue sources, or hybrids of compensatory and residual structures, developed. During this period of time, financial analysis also became more sophisticated, and a variety of factors now goes into rating airport credits, including the local demand for air service (known as origin and destination, or O&D, traffic), the diversity of revenue sources, as well as the importance of the airport to the airlines serving it. In turn, many airports have negotiated use and lease agreements with their tenants carriers that give the airport sponsor more control over capital projects and programs or, in some cases, have done away with such long-term agreements altogether and imposed rates and charges for use of the airport by ordinance, and have relied on the local demand for air service to ensure that airlines will continue to serve the airport.

Self-Sustaining Requirement

In contrast to the requirement that fees charged to aeronautical users of an airport be “reasonable,” Grant Assurance No. 24 requires that airport sponsors maintain a fee and rental structure that will make the airport as self-sustaining as possible. Many airports have minimal or no commercial service and must instead generate revenues sufficient to operate the airport from private or business aviation tenants, known as general aviation (GA) users of the airport; other commercial aeronautical services, such as fixed base operators (FBOs) that service general aviation aircraft, banner towing, or crop dusting services; and from non-aeronautical tenants, ranging from farmers to solar-electric-generation facilities to aviation equipment manufacturers. Because airports often compete with neighboring airports for commercial service or for GA tenants, it is not always possible for the full cost of providing aeronautical assets and services to be passed through to the aeronautical users of such assets and services. The FAA has interpreted the “self-sustaining” requirement to mandate that airport sponsors charge non-aeronautical tenants fair market value for the use of airport land and facilities, while aeronautical tenants must only pay a “reasonable” rate.

Economic Nondiscrimination

The other critical requirement of Grant Assurance No. 22 is that an airport sponsor must make the airport available without unjust discrimination to all types, kinds and classes of aeronautical activities, including commercial aeronautical activities offering services to the public at the airport. Determining what constitutes “just” discrimination has led to a substantial body of decisional law through both administrative decisions under Part 16, as discussed below, and appeals court decisions.

In disputes between airport sponsors and aeronautical tenants, tenants often allege that any distinction made by the airport sponsor between the tenant and another similar aeronautical service provider constitutes unjust discrimination. For example, where one FBO has entered into a lease at an airport and, several years later, a second FBO commences operations, one of the two FBOs will often claim that it is the subject of unjust discrimination and thus seek lease terms as favorable as those granted to the rival FBO. The law, however, is that airport sponsors may justly differentiate between similarly situated tenants (or differing classes of tenants) based upon reasonable distinctions, such as the dates the leases were signed and current versus previous market conditions, services provided, and underlying lease requirements, such as where one FBO is required to construct its own facility while another occupies facilities owned by the airport sponsor. In contrast, where two tenants are substantially identical in the services provided and conditions of service, the airport sponsor cannot treat one significantly differently than the other. Thus, an airport sponsor must have reasonable, objective grounds for discriminating among its aeronautical tenants.

Exclusive Rights

Grant Assurance No. 23 prohibits the grant of exclusive rights by an airport sponsor. The FAA interprets this requirement to require an airport sponsor to lease space to an applicant to provide aeronautical services as long as such applicant can meet any reasonable minimum standards for such service(s) established by the airport sponsor and as long as there are either appropriate facilities or space to construct such facilities available, although the sponsor is not required to construct new facilities to accommodate a new entrant. An exclusive right may be conferred either by
UPCOMING SEMINARS

• Wednesday, July 22, 2015 (1–2 p.m. EDT)
Mindfulness and the Law: Using Mindfulness Practices to Increase Efficiency, Effectiveness, and Career Satisfaction
Clare Freeman, Office of the Federal Public Defender

• Wednesday, Aug. 19, 2015 (1–3 p.m. EDT)
Federal Indian Law 101
Hon. Elizabeth Kronk Warner, Associate Professor and Director, Tribal Law & Government Center, University of Kansas School of Law

• Wednesday, Oct. 14, 2015 (1–2 p.m. EDT)
The U.S. Supreme Court 2015-2016 Term: Decided & Pending Cases
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express agreement, by imposition of unreasonable standards or requirements or by other means. One exception to this rule is that where the airport sponsor exercises its proprietary rights to exclusively provide one or more aeronautical services, the sponsor is not required to accommodate a private provider for such services. Even if there are multiple providers of the same aeronautical services at an airport, however, if another potential provider of such services is ready, willing, and able to meet the applicable minimum standards and seeks to operate at an airport, the sponsor must accommodate such provider to the extent that space is reasonably available.

Civil Rights

In addition to the requirement under Grant Assurance No. 1 to comply with a litany of federal laws, regulations and executive orders described below, Grant Assurance No. 30 requires an airport sponsor to take measures to ensure that no person shall, on the grounds of race, creed, color, national origin, sex, age, or disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination in any activity conducted with, or benefiting from, federal AIP grant funding. Recent amendments to this assurance require that specific language be included in every contract or agreement subject to this requirement, which the FAA reads quite broadly. Thus, the airport sponsor must require its contractors and tenants to abide by these nondiscrimination provisions as well as complying with them itself.

In addition, Grant Assurance No. 37 requires airport sponsors to develop and undertake both disadvantaged business enterprise (DBE) and airport concessions disadvantaged business enterprise (ACDBE) programs consistent with the regulations promulgated at 49 CFR Parts 23 and 26. The DBE requirements apply to any contract for a project for which AIP grant proceeds are providing financial assistance and the ACDBE requirements are applicable to all concessions contracts at an airport. Thus, even in jurisdictions where an airport sponsor is prohibited from establishing requirements mandating a percentage of participation by DBEs or ACDBEs, the sponsor must establish goals for such participation based upon standards set forth in the regulations, and the airport sponsor must use good faith efforts to undertake programs and practices to meet such goals. Concessions agreements with a term of greater than five years that are conducted solely by a single business entity on the entire airport require FAA approval.

To assist in complying with these requirements, many airports have established significant outreach programs and sought means to encourage DBE and ACDBE participation in airport projects and concessions. Some of the more successful airport DBE and ACDBE programs have identified barriers to participation by DBEs and adopted means to mitigate such barriers. For example, many small businesses find obtaining payment and performance bonds difficult and expensive. Some airports have partnered with brokers and insurers to make such bonds more widely available, thus minimizing this impediment to participation by some DBEs. Once some of these barriers are removed, airports have found a larger pool of qualified DBE and ACDBE applicants with whom to contract. In addition, airport sponsors must develop goals for each procurement, include contractual requirements consistent with local law regarding DBE or ACDBE participation, and monitor the compliance of its contractors and concessionaires with such requirements.

Federal Law – Grant Assurance No. 1

As noted above, Grant Assurance No. 1 sets forth a laundry list of federal statutes, regulations, and executive orders with which a grant recipient must comply. These mandated provisions range from the Davis Bacon Act wage requirements to the Uniform Relocation Assistance and Real Property Acquisition Policies Act to the Clean Air Act to the Wild and Scenic Rivers Act. Many of these requirements relate to construction contracts funded with AIP grants, and the FAA and the U.S. Department of Transportation (DOT) have developed standard clauses addressing many of these legal requirements that must be incorporated into the applicable contracts.

Such a wide-ranging and diverse set of requirements presents myriad challenges to the practitioner. One of my responsibilities as an in-house lawyer for the Massachusetts Port Authority, the airport sponsor for three airports—Boston–Logan International, Hanscom Field, and Worcester Regional—was to deliver the legal opinion regarding Massport’s authority to enter into AIP grant agreements. The first time that I reviewed the list of legal requirements under Assurance No. 1, I was shocked and daunted by their scope. But as I checked with my colleagues regarding how Massport ensured compliance with these requirements, I was considerably heartened. Massport’s form construction documents, for example, included the requisite DOT provisions and were drafted to address the applicable legal requirements set forth in Assurance No. 1. Furthermore, Massport’s standard planning and permitting process required analysis of many of the other requirements that are set forth in the assurance. That is not to minimize the scope or challenge of compliance with these requirements; in order to effectively meet them, airports must develop standard forms of agreements, internal policies and procedures, and other practices that are designed to ensure compliance with these legal mandates, and then develop a process for ensuring that the effectiveness of the airport’s processes are checked on a regular basis.

Part 16

The FAA and DOT have developed a unique administrative adjudication process for addressing allegations that an airport sponsor has violated its grant assurances or certain other federal requirements relating to airports, set forth at 14 CFR Part 16. The Part 16 process is intended to provide for an expedited determination of such claims by the director of the FAA’s Office of Airport Compliance and Management Analysis. A Director’s Determination may be appealed to the FAA’s associate administrator for airports, and an Administrator’s Decision may be appealed to the U.S. Court of Appeals.

Part 16 permits the appointment of an administrative law judge and hearings in exceptional circumstances, but most actions under Part 16 are adjudicated entirely through written pleadings. Once a formal complaint has been filed, either by the FAA or a complainant, the respondent has 20 days from the date that the FAA has docketed the complaint and notified the respondent to either file a motion to dismiss or for summary judgment on the complaint or to file an answer. If a motion to dismiss or for summary judgment is filed, then the requirement to file an answer is tolled until the director either responds or 30 days passes after the filing. (The FAA is not required to respond to motions to dismiss or for summary judgment.) The respondent then has 20 days after the 30-day period.
passes to file an answer. The complainant then has 10 days to file a reply, and the respondent may then file a rebuttal within 10 days after the reply. Each such pleading may be accompanied by supporting documentation. The director is then required to render an initial determination within 120 days after the last pleading is filed. However, in practice, the FAA typically will extend the deadline. Decisions in Part 16 actions constitute a useful and significant body of law interpreting the grant assurances and other federal requirements applicable to airport sponsors.

Part 139

The FAA is charged by Congress with oversight of the safe operation of the U.S. aviation system. The FAA discharges this obligation with respect to airports that have scheduled or unscheduled commercial air service largely through the requirements codified at 14 CFR Part 139. Part 139 provides for regular inspection of airports by FAA inspectors as well as development of and compliance with an airport certification manual that addresses the many specific issues outlined in Part 139. In addition, Part 139 sets forth specific requirements regarding a range of issues relating to safety, including personnel training, aircraft rescue and firefighting, development and maintenance of records, development of an airport emergency plan, and maintenance of specified airport facilities. To host operations of commercial aircraft, airport sponsors must meet stated criteria, which escalate as the operations involved larger and more powerful aircraft. Thus, for example, an airport certified to accommodate scheduled commercial service with large jet aircraft must provide significantly greater airfield rescue and fire-fighting capacity than an airport licensed only to accommodate infrequent service by smaller aircraft.

PFCs

Airport sponsors are permitted to impose a charge of up to $4.50—known as a passenger facility charge, or PFC—on eligible departing passengers pursuant to 49 U.S.C. § 40117 (an amount Congress currently is debating increasing nearly two-fold). PFCs must be applied to finance capital projects that increase competition, improve safety and security or enhance capacity at the airport, or reduce noise exposure for residents and certain businesses near the airport. PFCs are collected by the seller of the ticket for air transportation and held by the air carriers until remitted to the applicable airport, although PFCs are considered to be held in trust by the carriers for the benefit of the airports. Treatment of PFCs when a carrier files for bankruptcy protection has now been clarified, but initially, the airports for whom the PFCs were collected were often in conflict with the trustee in bankruptcy over whether the carrier or the airports held title to the PFCs collected by the carrier.

To receive authority from the FAA to impose and use a PFC, an airport sponsor must undertake a substantial public process that includes consultation with the carriers operating at the airport, responding to the carriers’ comments, justifying the proposed projects, and obtaining a record of decision from the FAA. In addition, the FAA has promulgated regulations that specify the types of capital projects that are eligible for funding with PFCs as well as detail the PFC approval process. PFCs may also be used to pay debt-service costs for PFC-eligible projects and are a substantial source of funding for airport capital programs. To the extent that the capital cost of a project is funded with PFCs, those costs cannot be included in the rates and charges paid by the carriers for the use of that project, and an airport may not enter into an exclusive long-term lease of PFC financed facilities.

Transportation Security Law

Since the tragic events of Sep. 11, 2001, an entirely new body of law has been developed relating to airport security. The Aviation Transportation Security Act that created the Transportation Security Administration granted the TSA the ability to promulgate regulations to ensure the security of air travel. The TSA regulates both airport sponsors and air carriers, as well as other participants in the air transport system, through a complex set of publicly available regulations and restricted access security directives. Airports are required to develop an airport security plan that must then be approved by the TSA. Security sensitive information (SSI) (including security directives and the airport security plan) must be protected by airports and others possessing SSI and disseminated only to those persons meeting stated criteria. TSA staff monitors compliance with its regulations, security directives, and the airport security plan, and can issue fines or other penalties for violations.

Airport Law in Practice

The above brief tour provides an idea of the breadth and depth of the federal law applicable to airports, but is by no means complete. This section is intended to provide insight into how airports work to comply with those laws in their day-to-day operations. Set forth below are a few examples of typical airport agreements or programs and how the legal requirements noted above are often addressed.

Use and Lease Agreements

An airport use and lease agreement is perhaps the most important agreement that the sponsor of a commercial service airport will enter into, and the standard form is usually negotiated among a committee of the air carriers operating at the airport and the airport sponsor. Typically, the most heavily negotiated provisions in the agreement are the manner in which the landing fee and the terminal space rents are calculated. Where the airport and the airlines signing the agreement can agree on the methodology,

Such a wide-ranging and diverse set of requirements presents myriad challenges to the practitioner. One of my responsibilities as an in-house lawyer for the Massachusetts Port Authority, the airport sponsor for three airports—Boston–Logan International, Hanscom Field, and Worcester Regional—was to deliver the legal opinion regarding Massport’s authority to enter into AIP grant agreements.
such a rate methodology is de facto “reasonable.” Nevertheless, the development of a rate-making methodology for any airport is a complex task and usually involves certain compromises and close attention to the legal precedents regarding permissible rates and charges. Thus, the inclusion of certain charges—such as the allocation of general administrative costs among aeronautical cost centers, for which the carriers are responsible, and other cost centers, such as concessions or parking, that do not affect the airlines—can be the subject of intensive negotiations. Incentives to reach agreement may include, for example, sharing a portion of the concessions revenues with the airlines to reduce the landing fee in exchange for the signatory airlines agreeing to lease a certain amount of terminal space for a specified term, which may range from year to year to 30 years. Carriers that do not sign the agreement, known as nonsignatory carriers, typically pay a higher but also uniform rate for landing fees and use of terminal space. The FAA has found that the distinction between signatory carriers that are held to the terms of a lease and nonsignatory carriers that operate at will is not unjustly discriminatory. However, any carrier willing to enter into the use and lease agreement must be given the opportunity to do so.

Many, if not most, use and lease agreements are expressly subject and subordinate to the airport sponsor’s federal grant assurances, protecting the airport from claims under state law if an agreement must be modified to meet the airport’s grant assurance requirements. Most use and lease agreements also address many of the other legal requirements applicable to airports, either through sections that incorporate federally required clauses, such as nondiscrimination provisions, or reference compliance with applicable laws, as well as regulations or rules promulgated by the airport sponsor itself. Other legal requirements may be dealt with indirectly—for example, requiring single-engine taxiing or the use of preconditioned air and ground power at the gates to reduce emissions from jet engines (including the auxiliary power unit in most aircraft), helping the airport meet Clean Air Act standards. Because security requirements are, at least partially, SSI, the agreement will often require the air carrier to comply with the airport security plan but provide that the relevant provisions of the plan will be provided to the carrier separately. In addition, many agreements will require the air carrier to indemnify the airport sponsor against fines or other charges imposed by the TSA for security violations by the carrier’s personnel.

Some use and lease agreements are drafted as licenses to avoid transfer of real property rights to the carrier. In either case, however, these agreements typically reflect state law requirements and matters and address the range of issues typically addressed in a lease, including the lease (or license) of specified premises, payment of rent, term, terms relating to holding over after expiration of the term, permitted and prohibited uses of the premises, and the like. To meet both PFC and grant assurance requirements relating to accommodation of air carriers seeking to enter a new market, space is often leased on a “preferential use” basis, with the airport reserving the right to require the tenant to accommodate operations by other carriers when the gate is not scheduled for use by the tenant carrier. In addition, some airports have developed provisions granting the airport the right to relocate a carrier from one or more gates (or consolidate operations) to accommodate a new entrant carrier or expanded operations by another carrier, often based upon usage standards or operations per gate per day. Not surprisingly, one of the more contentious sections of most use and lease agreements, after the calculations of rates and charges and relocation rights, is responsibility for compliance with environmental laws, especially because state laws vary, sometimes significantly, from jurisdiction to jurisdiction.

Air Service Incentive Programs

As competition for nonstop air service to diverse markets increases and competition among domestic air carriers has decreased through recent mergers, airport sponsors have increasingly sought to entice additional service through the use of air-service incentive programs. The FAA’s Revenue Use Policy, however, bars the provision of direct subsidies to air carriers, finding that to be an impermissible use of airport revenue. Instead, the FAA has found that airports may waive aeronautical fees for limited periods to incent carriers to provide additional service, but the foregone costs must be recovered from a nonaeronautical source, such as parking revenues. In addition, any incentive that is offered must be available to any carrier willing to satisfy the stated conditions. Airports are free to develop relatively detailed conditions, such as specifying cities (or airports) to which the airport seeks direct service, but if two or more carriers are willing to provide the service desired, each of the carriers must receive the same incentives to avoid unjust discrimination.

Airport Construction Agreements

In addition to meeting state requirements for public construction contracts, airports must be mindful of and develop strong form agreements that are compliant with the wide range of federal requirements. As noted above, the FAA requires that a number of specific clauses, depending upon the dollar amount of the contract, be included in all construction contracts. In addition, even where specific language is not included, airports must develop provisions that address other applicable federal laws. Thus, for example, many construction contracts include very specific details regarding use of low-emission construction vehicles to meet State Implementation Plan goals under the Clean Air Act or include specific stop-
work and notification requirements if human remains are found, to meet the Native Graves Repatriation Act mandates.

**Conclusion**

Federal law specific to airports touches almost every aspect of the operation of airports in the United States. These requirements must be understood and included in the vast majority of agreements entered into and policies adopted by airports. These requirements supplement (and sometimes conflict with) standard provisions in these agreements, requiring airport lawyers to develop familiarity with both substantive state law requirements, such as real estate law or construction law, as well as the relevant federal requirements. The resulting hybrid is a rare bird—an airport lawyer.

David Bannard is a partner in the Boston office of Foley & Lardner LLP. He is chair of the firm’s airport services practice and former deputy chief legal counsel of the Massachusetts Port Authority.

**Endnotes**


\(^3\)Grant Assurance No. 25 (Revenue Use) applies in perpetuity to all airports receiving a grant after 1996. See 49 U.S.C. § 47133.


\(^5\)49 U.S.C. §§ 47107(b); 47133. See also FAA Airport Compliance Manual (Compliance Manual), Order 5190.6B (9/30/09) Chapter 15.


\(^7\)Policy and Procedures Concerning the Use of Airport Revenue (Revenue Use Policy), 64 Fed. Reg. 7696 (2/16/99).

\(^8\)Compliance Manual, § 15.9(i); AIP Handbook, Table P-3.

\(^9\)See also 49 U.S.C. § 40116(e)(2).


\(^12\)See 73 Fed. Reg. 40430 (7/14/08).


\(^15\)See Compliance Manual, Ch. 8.

\(^16\)Id., § 8.9.

\(^17\)49 CFR § 23.9.

\(^18\)Id. at § 23.25 (“You must maximize the use of race-neutral measures”).

\(^19\)Id. at § 23.57.

\(^20\)See Principles for Evaluating Long-Term Exclusive Agreements in the ACDBE Program, FAA Office of Civil Rights (6/10/13).

\(^21\)14 CFR § 16.31


\(^23\)14 CFR Part F.

\(^24\)14 CFR § 16.13.

\(^25\)14 CFR § 16.2.

\(^26\)Id.

\(^27\)14 CFR § 16.23 (e); (f).

\(^28\)Id at (g).

\(^29\)14 CFR § 16.31.

\(^30\)Part 16 decisions are available at the FAA’s website (www.faa.gov/airports). See also Airport Cooperative Research Program (ACRP) Legal Research Digest 21, “Compilation of DOT and FAA Airport Legal Determinations and Opinion Letters through December 2012”.


\(^32\)14 CFR §§ 139.201, et seq.

\(^33\)14 CFR §§ 139.301, et seq.

\(^34\)14 CFR §§ 139.315, et seq.

\(^35\)49 U.S.C. § 40117(a)(3); see also 49 CFR Part 158 (Part 158).

\(^36\)49 CFR §§ 158.41, et seq.

\(^37\)49 CFR §§ 158.21, et seq.

\(^38\)49 CFR § 158.13.


\(^40\)Pub. L. 107-71 (11/19/01).

\(^41\)49 CFR §§ 1500, et seq.

\(^42\)49 CFR §§ 1542.101, et seq.

\(^43\)49 CFR §§ 1520.1, et seq.

\(^44\)49 U.S.C. § 47129.

\(^45\)Rates Policy, § 3.1.1.

\(^46\)See 49 U.S.C. §§ 40117(k), 47106(f); Grant Assurance No. 39.

\(^47\)Revenue Use Policy, § VI.B.12.

\(^48\)Id, Revenue Use Policy § V.A.2.

\(^49\)Id.
Beyond shipyards, many parties have a commercial interest in newbuilding projects, or the ship construction industry. The purchaser will charter the vessel out in exchange for hire payments. The charters will subcharter the vessel or will use it to move cargo in exchange for freight payments. The lending company that provided the shipyard with funds sufficient to construct the vessel will earn interest on the loan. The mortgagee that financed the vessel’s purchase will earn transaction fees associated with the deal by lending money to the purchaser in order to pay the shipyard. Many parties attempt to benefit commercially and transfer risk within the notoriously volatile shipping markets. This article focuses on the financers and vessel management companies that grease the wheels of shipping’s newbuilding market through vessel purchases and leases.

While both vessel purchases and vessel leases are traditional arrangements for ship acquisition, this paper will look at advantages and disadvantages of each arrangement in the burgeoning shipping markets of China, where new legal and regulatory developments are unveiled constantly. This article will look at the possibility of foreign investment into positions of both the financer and the purchasing vessel management company and will determine whether the Shanghai (Pilot) Free Trade Zone is a welcoming environment for such investment.

What Is Vessel Lease Financing And How Does It Compare With Bank Equity Financing?

Vessel equity financing—a loan from a bank secured by a mortgage—perhaps is the most straightforward scheme to vessel acquisition. A prospective shipowner arranges with a shipyard to build a new vessel and with a bank to finance that acquisition. The purchase will be secured by a mortgage over the asset held by the bank, and the shipyard may require payments be made in installments under the building contract based upon elapse of time or upon achievement of construction objectives. Upon completion of the vessel, payment is fully transferred to the shipyard, and possession and ownership are transferred to the purchasing vessel management company with the bank a secured creditor holding a mortgage over the property.

Transactions of this sort are costly. While achievable by the largest shipping companies, many small and medium-size shipping companies lack access to the credit and the capital needed to arrange financing from a single bank positioned to accept a mortgage from a company with little else to offer as collateral besides the vessel under construction. Worldwide, stricter capital requirements imposed by Basel III have caused banks to reduce exposure to the shipping sector and to replenish their capital buffers, resulting in less cash available to lend to vessel purchasers.¹ This has driven innovative financing and leasing methods for vessel acquisition.

Identifying adequate security to finance a newbuilding project is problematic. Vessel owning companies tend to be arranged as single-ship companies to limit their liability to any judgment creditors to the single asset. Thus, financing for newbuilding projects is secured by the company’s sole asset: the partly completed vessel. A vessel under construction is not a vessel until it is delivered, and the shipyard’s rights to payment arise only upon completion: “The buyer has no liability to pay 90% of the price if the ship is 90%
A ship purchaser defaulting during the construction period thus leaves its creditor with an unfulfilled order for a vessel and an incomplete construction project for which it is difficult to find an alternate purchaser.

Securing a loan to purchase an existing vessel is much easier. The vessel purchaser will obtain financing through a bank and give the bank a mortgage over the asset to secure its loan. If the vessel owner defaults, the creditor must enforce the mortgage to gain possession and ownership over the asset, an often lengthy and expensive litigious process, and the risk is passed on to the purchaser in the form of higher borrowing costs.

Lease financing does better to balance risks at a lower cost to the vessel management company. Under a leasing arrangement, the creditor retains ownership but releases its right to possession. Retaining ownership puts the creditor in a much more favorable position to regain possession in situations of default. Lease financing often achieves favorable results for all parties because it balances the risks more evenly than other types of ship financing.

Vessel leasing falls within the general legal and economic arena of asset financing but retains certain features unique to shipping. A prospective purchaser—for instance, a vessel management company—may have difficulty accessing bank equity to finance an outright purchase because of volatility in demand for new capacity, because of the purchaser's creditworthiness and available collateral, because of limitations imposed upon the purchaser's own balance sheet by regulatory agencies, by its own corporate governance, or by existing creditors. These and other difficulties have all contributed to a rise in popularity of alternative arrangements. Vessel operating companies that may be unable to pursue a bank equity financing arrangement may find lease financing is still a viable arrangement by which they may obtain additional cargo space for its fleet.

In addition to lowered transaction costs, leasing arrangements can make a deal commercially viable because of certain tax and accounting advantages the leasing company can utilize to offset limitations imposed by itself, by regulators, or by creditors. Instead of lending the vessel management company funds to purchase a vessel, the leasing company owns the vessel and realizes the asset as equity on its balance sheet. Also as owner, the vessel owning company is entitled to claim a significant tax benefit due to depreciation of the asset over its commercial life. Vessel management companies often operate at or near a loss, and a company without yearly profits greater than the tax credit cannot benefit in the same way by owning the vessel that a more profitable company can. So the right to offset vessel depreciation is worth more to the leasing company than it is to the less-solvent operator management company.

A ship management company in the business of pairing sub-charterers and operators with vessels may arrange for a long-term bareboat charter spanning the expected commercial life of the asset. Under a leasing arrangement, instead of purchasing the vessel, the vessel management company leases the vessel wherein the charterer's hire will cover the cost of the vessel and the leasing company's margin. The leasing company will be a special purpose vehicle (SPV) set up for the purpose of owning the asset and being
Vessel lease financing arrangements have certain advantages over traditional bank equity financed arrangements. Among them, the leasing company retains ownership of the asset.

markets—i.e., a bank—or a company with greater control over the transaction costs—i.e., a shipyard—is positioned better than an operator to lower transaction costs and fund the new build project more cheaply, permitting the lessee to devote its working capital to vessel management projects.7

Leasing arrangements can achieve lower transaction costs than equity financing because they promote greater specialization of both the lessee and lessor. The vessel management company remains focused upon chartering with shipping capacity, and the single-asset company remains solely focused upon capitalization in order to acquire ownership of the vessel. To accomplish this funding, the SPV may be capitalized by investment from its parent, by bond markets, or by equity markets, but in any event it must raise the full asset purchase price itself to remain legal isolation. Doing so also places the SPV in a position to securitize the asset or sell the vessel and the leasing rights without disturbing the underlying vessel operating and charter agreements. Through sale or securitization of certain rights, beneficial ownership of charter agreements can transfer without disturbing the underlying charter party.

Vessel lease financing arrangements have certain advantages over traditional bank equity financed arrangements. Among them, the leasing company retains ownership of the asset. Because it retains ownership of the asset, the leasing company is in a better position following default than a mortgagee, who must have perfected its security interest only then to foreclose and physically repossess the asset in order to exercise its security rights. Leasing may mean lower costs incurred by a trustee in bankruptcy, because leased assets are easier to repossess than mortgaged assets.9 In addition to lessen risk for the leasing company, the lessee can achieve and find greater stability through a lease financing arrangement than is available through bank equity financing where, as owner of the asset, it would be exposed to volatility.

The leasing company, as owner of the asset and obligee of the lease, can securitize and sell these rights to take advantage of market fluctuations and to manage its own portfolio. Securitization allows a company to transfer assets off the company's balance sheet and into a legal isolation vehicle, issuing to investors the right to receivables generated by the vessel under chartering agreements.

With vessel lease arrangements still relatively novel in China, one of the world's most important shipping markets, popularity has grown as the legal mechanics are tested and become better understood. This article will present a legal playbook for executing both a lease and an equity financing arrangement in China. Where possible, this article will identify opportunities by which foreign investors may enter the Chinese shipping market through these deals.

Bank Equity Financing Arrangements in China

With less capital available to close newbuilding deals, traditional equity financing deals are reserved for only the top credit risks—typically the largest state-owned entities. Equity financing deals in the People's Republic of China (PRC) typically include a shipbuilding refund guarantee to secure the purchaser against the shipyard's failure to deliver in accordance with the contract. For small and medium-size shipyards, providing a refund guarantee makes the transaction impractically expensive, so these entities must bear great risks or utilize innovative security methods.

An alternative to the shipbuilding refund guarantee is the construction mortgage.10 The Maritime Law of China recognized the right of a creditor to hold a mortgage interest over a vessel under construction.11 Pursuant to Article 14, for the mortgage to give the creditor a secured interest, the shipbuilding contract must be registered with the Maritime Safety Administration of China; otherwise, the creditor holds an unsecured interest over the construction project. The purchaser and the shipyard must meet citizenship requirements similar to those U.S. requirements for coastwise trade under the Jones Act.12

The Guaranty Law of the People's Republic of China, by way of Article 34(1)(6), outlines the procedures a creditor must follow to charge its security interest through a mortgage.13 The unregistered mortgage is effectively worthless, so the creditor must follow the registration procedures to secure its position; a party registering its mortgage is secured from the date of execution, but a party failing to register its mortgage remains unsecured and may not defend claims raised by third parties.14

While a creditor's substantive right to charge a construction mortgage over a vessel under construction exists pursuant to the Maritime Law of China, the Property Law of the People's Republic of China 2007 also reaffirms the right to secure a shipbuilding project with a construction mortgage. In a priority contest, the mortgage made pursuant to the Property Law 2007 trumps a mortgage entered into under the Maritime Law of China, because the Property Law derives its authority directly from the Constitution out of a basic interest for upholding economic order, while the Maritime Law arose from an interest in regulating, promoting, and developing maritime transport relations and securing the rights of parties concerned.15

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owns and possesses the vessel subject to their creditor’s security interest. Discussed thus far has been a procedure for securing a creditor’s rights to a vessel through a registered construction mortgage over the vessel to give the lender executable rights over the property in case of the purchaser’s default. Almost exclusively available to state-owned entities, the smaller shipping companies have been benefiting from innovative risk-allocation arrangements such as lease financing. A vessel leasing arrangement provides for a legally more streamlined approach to bank equity-financed acquisition of vessels that puts a lesser strain upon vessel managers to negotiate legally complex financing arrangements with banks, thereby allowing them to devote greater resources to pairing charters with appropriate vessels.

Lease Financing in China — Now a Viable Option, Soon To Be a Popular One

China is an important center of ship finance. In 2009, the shipping portfolio of Industrial and Commercial Bank of China (ICBC) grew to $7.8 billion. In that year alone, ICBC closed 45 new shipping transactions totaling $2.3 billion. Minsheng Financial Leasing, rapidly becoming one of the most important lease financing companies in China’s domestic market, entered an agreement with Shanghai Guodian Shipping, a subsidiary of Fujian Guohang Ocean Shipping, to deliver 18 Panamax bulk carriers under a financial leasing arrangement. Rongsheng Heavy Industries Group Holdings, a Chinese heavy industries group and shipbuilder, announced that the first of the Minsheng-commissioned Panamax bulkers was delivered after three years on Oct. 28, 2011. Before taking delivery, the Tianjin free trade zone (FTZ)-based Minsheng placed a bullish order for 10 additional Panamax vessels in 2010 and subsequently sought Chinese candidates for lease financing. ICBC is still one of the largest Chinese vessel leasing companies, offering an array of solutions applicable to the shipping sector including: (1) financial lease for new equipment, (2) operating lease for new equipment, (3) sale-and-leaseback financing, (4) international synthetic lease, and (5) trust lease and securitization.

Leasing companies may be funded by capital markets. Shanghai-based Sinochem owns a subsidiary, Far East Horizon, that provides financial leasing services supporting major Chinese industries. The Securities Regulatory Commission in 2011 permitted the Chinese-owned subsidiary to access global equity by listing publicly in Hong Kong.

Chinese banks are becoming shipowners by creating leasing arms that fund newbuild projects and maintain ownership over the asset. The leasing arm can permit ship managers to charter the vessel out, putting the bank-owned asset to work and receiving the benefit through contracts-for-hire rather than through complicated procedures for mortgage. Maintaining ownership of the asset minimizes judicial intervention to repossess the vessel. Leasing companies may be an arm of a bank and thus positioned to obtain high credit ratings or credit enhancement. Leasing companies may be an arm of a shipyard or shipbuilding company and thus take advantage of favorable pricing over the asset and collapse its profit margin with the shipbuilder’s margin.

In China, leasing companies must be licensed to engage in ship-leasing arrangements. In 2007, the China Banking Regulatory Commission (CBRC) began granting financial institutions licenses to lease ships. In 2011, at least 17 bank-affiliated companies were registered under the CBRC scheme to offer finance leasing solutions across aviation, heavy machinery, medical, and shipping industries. By 2009, the leasing volume reached $2.9 billion. By 2011, 17 bank-affiliated financial leasing companies had been issued licenses and were supervised by the CBRC, but these 17 were not limited to ship leasing and instead included licenses to lease aviation, heavy machinery, medical equipment, and the like. With leasing’s popularity has come innovative leasing arrangements that include a cross-border vessel finance lease through an SPV established in the Tianjin FTZ to act as the vessel’s owner contracting for construction with a Korean shipyard and a Marshall Islands bareboat charterer.

It is worth noting that two types of leases typically are arranged for assets such as ships, aircraft, heavy equipment, and the like: finance leases and operational leases. Finance leases are arranged for the commercial life of the asset. They end in a transfer of ownership from the lessor to the lessee, or they conclude with a lessee’s option to purchase the asset for a nominal cost or in some other way the finance lease lasts for the span of the asset’s functional life. Operational leases are short-term, and the same asset may be leased out once again after a lease is concluded. Operational leases may solve immediate capacity shortfalls by bridging other issues caused by uncertainty. Insofar as it is concerned with leases, this paper is primarily concerned with finance leases.

Lease Financing Arrangements Have Advantages for Both the Lessor and the Leasing Company

Beyond simplifying legal processes to obtain a secure position, shipowners may find entering ship-leasing arrangements to be prudent business decisions. Despite China’s global importance to both import and export markets as well as its growing shipping sector, small and medium-size Chinese shipowners are considered unbankable by domestic banks, so these companies benefit from alternative forms of vessel acquisition arrangements, such as lease financing.

The leasing company, having both right of ownership over the asset and right to collect lease payments, can take advantage of market fluctuation by selling its ownership rights and leaving intact any underlying charters. The leasing company can be positioned to securitize its vessels and the right to collect payment on the lease arrangements.

For the leasing company to achieve such benefits, it must be a bankruptcy-remote vehicle, it must acquire ownership of the ship through a real true and irrevocable sale, and receivables owed through its rights to collect lease payments may be assigned but may not be reached by a parent company.

Two Competing Schemes for PRC Financial Leasing Companies

There are two competing schemes in the PRC under which companies may register to conduct finance leasing transactions. The CBRC issued the Measures for the Administration of Lease Financing Companies (effective March 1, 2007), which was revised by Order [2014] No. 3 of the CBRC (effective on March 13, 2014), and herein will be called the CRBC scheme. China’s Ministry of Commerce (MOFCOM) issued the Measures for the Administration of Foreign-Capital Lease Industry, which became effective on March 5, 2005, and herein will be called the MOFCOM scheme.
Small to medium-size nonbank leasing companies may also engage in ship-leasing operations more easily under the MOFCOM scheme without need for a license from the CBRC. The CBRC scheme targets large financial institutions, requiring its principal investors to hold at least 50 percent of the company’s registered capital on hand, while the MOFCOM scheme is more investor-friendly and is better suited for manufacturers and privately funded financial leasing companies, requiring still at least US $5 million in assets and three years experience in lease financing. Neither the CBRC scheme nor the MOFCOM scheme places any cap on foreign investor shareholdings in a finance leasing company.

The two schemes have drastically different capital requirements, and thus a ship management company looking to undertake a lease financing enterprise is better suited for the MOFCOM scheme’s lower capital requirements. While there is nothing in the CBRC scheme to make investors concerned that vessels are not assets suitable for lease financing under the scheme, the MOFCOM scheme specifically names “vessels” as property that may be leased under the scheme.

One of the primary reasons to participate in ship lease financing arrangements rather than purchasing a ship through a bank equity financing arrangement is for ease of balance sheet management. The lease appears as debt rather than equity for the party in possession of the ship. The lessor ship management company may document the lease as a credit asset or an account receivable. The lease arrangement puts both parties at a tax advantage over a vessel sale position. Sale-leaseback arrangements may be undertaken by entities such as shipyards to take advantage of this tax credit. The sale-leaseback arrangement may also attract shipyards in need of immediate capital to fund their next build project. Sale-leaseback arrangements are specifically permitted under both the CBRC scheme and the MOFCOM scheme.

Foreign investors can take part in either scheme, however the MOFCOM scheme applies only to foreign-capital enterprises that establish a limited liability company or a joint-stock limited company within China and must take the form of a Chinese-foreign equity joint venture, a Chinese-foreign contractual joint venture, or a solely foreign-capital enterprise. The CBRC scheme may be utilized by certain foreign entities as well. While banks are specifically prohibited from being lease financing companies under the CBRC scheme, commercial banks may be the major investor in a lease financing company and may be registered in China or abroad. The CBRC scheme also permits the major investor to be a leasing company registered in the PRC or abroad or a large domestic manufacturer of products suitable for leasing. Thus, the CBRC scheme is attractive to domestic or foreign banks, to domestic or foreign companies already in the business of lease financing, and to domestic manufacturers of products suitable for lease financing arrangements, such as state-owned shipyards, looking to invest in a lease financing arm.

Entities with foreign equity interests exceeding 50 percent are prohibited from registering vessels on the PRC registry.
Under the CSRC scheme, investors entrust funds to a securities company pursuant to a fund contract. The fund manager uses the entrusted funds to purchase assets, and the manager issues asset-backed securities to a maximum of 200 investors. The asset-backed securities evidence the purchaser’s beneficial interest in the underlying assets, and the securities can be traded and purchased by qualified foreign and domestic investors alike on stock exchanges such as the Shanghai and Shenzhen exchanges and over-the-counter market places approved by the CSRC.

The 2014 CSRC regulations are based on the PRC Securities Investment Funds Law, which incorporates the Trust Law of the PRC. Under the CSRC scheme, Article 5 asserts that assets entrusted into the scheme are legal isolation; however, there is reason to question how courts, especially those in foreign jurisdictions, will interpret the status of assets entrusted into the CSRC scheme, which is premised upon a set of administrative regulations incorporating statutory law. While the regulations assert that assets are remote from their originator’s estate for insolvency purposes, the statutory law is less clear.

Assets become bankruptcy-remote upon a real true sale when the previous owner has discharged both ownership and possession of the assets. Translations of the PRC Trust Law contemplate entrustment as a discharge of possession but do not clearly and undisputedly discharge ownership. While courts in the PRC have interpreted the Trust Law to provide legal isolation to assets entrusted under Article 2, it is less clear whether Western courts will find assets to be remote from the estate in bankruptcy when those assets have been discharged for purposes of possession but not for ownership, and when the only clear guidance on the issue comes in an administrative regulation, not a statutory law.

While securitization is a helpful and popular device used in the Western shipping markets, the two schemes available for investment in China do not provide the certainty and wide accessibility necessary for securitization to be useful to PRC shipping markets.

Opportunity for Foreign Investment in the Free Trade Zones

Foreign investment into leasing companies is possible in the PRC. While Tianjin has long been an attractive forum for single-ship SPVs, and novel leasing ventures, the CBRC scheme has given rise to strong competition from the Shenzhen Wianhai Economic Zone and the Shanghai Pilot Free Trade Zone, where financial leasing is a stated priority. Under the CBRC scheme, unlike the general policy throughout the PRC, where all business actions are prohibited except for those the government has occasioned to specifically permit, the Shanghai FTZ operates on the more practical “negative list” approach, wherein business and foreign investment actions are permitted unless specifically restricted by the government. Foreign investment into the leasing industry is regulated to promote healthy development and to minimize business risk. The PRC’s Ministry of Commerce procedures regulating and administering foreign investment into the leasing industry specifically permit foreign investment into the PRC’s ship-leasing industry because the regulations govern leased property for transportation such as vessels and motor vessels. MOFCOM is responsible for examining and administering foreign investment into the leasing industry, which should be made through limited liability companies or limited through share purchase.

Under the MOFCOM scheme, foreign investors of a foreign-invested leasing company must have assets grossing at least US $5 million. But under the PRC’s general scheme for the Shanghai FTZ, there is no minimum registered capital requirement for standalone single ship SPVs that have been established by financial leasing companies located in the FTZ. Foreign-invested companies may participate in several different forms of lease financing, such as direct leasing, subleasing, and trust leasing. It is suspected that financial leasing companies registered under the CBRC scheme may establish SPVs in the Shanghai FTZ; however, the industry awaits more detailed announcements from the CBRC regarding nonbank financial institutions operating in the FTZ.

Ship-leasing companies operating in the PRC can lease vessels to foreign-owned companies. In fact, PRC has encouraged exportation of leased ships as a means to encourage development of local harbors, the vessel construction industry, and the financial leasing industry. In 2010 the State Administration of Taxation of the PRC offered a one-year export tax refund to those leasing companies registered in Tianjin and licensed to conduct financial leasing. Tianjin-based leasing companies engaged in financial leasing arrangements—those in which the terms are for the useful life of the vessel and by which the lessee is transferred ownership at the expiration of the term—may apply also for export valued-added tax (VAT) refunds. In the Shanghai FTZ, a pilot export tax refund is available as a project subsidiary to finance leasing companies incorporated in the FTZ. An import-level VAT exemption is available specifically for aircraft finance leasing companies for overseas purchases, but the VAT exemption has yet to be extended to other sectors.

Financial leasing was an activity removed from the restricted category of MOFCOM’s 2011 guidance catalog for foreign investors, and thus the activity is now permitted for foreign investors.
Minsheng’s leasing arm, China’s “most ambitious lessor,” is based in the Tianjin FTZ.\textsuperscript{76} Financial leasing companies have been permitted in the Shanghai Pilot FTZ as well. Foreign-invested banks may qualify to set up enterprises in the Shanghai FTZ.\textsuperscript{77} Qualifying nonbank and private capital entities may set up finance leasing may qualify to set up enterprises in the Shanghai FTZ.\textsuperscript{77} Qualified in the Shanghai Pilot FTZ as well. Foreign-invested banks of Ships\textsuperscript{]} (promulgated by Decree No. 155 of the State Council, Order No. 64 of the President of the PRC, Nov. 7, 1992, effective 28th Meeting of the Standing Comm. of the Seventh Nat’l People’s Cong. (China).\textsuperscript{14} Id. at Article 43.


\textsuperscript{16}Rodricks Wong, Dealmaker of the Year Award—ICBC, Marine Money, Feb./Mar. 2010, at 18.

\textsuperscript{17}Id.


\textsuperscript{22}Chinese Finance Leasing Firm Debut in Hong Kong, CHINA L. & PRACT., Apr. 2011.

\textsuperscript{23}[Measures for the Administration of Lease Financing Companies] (promulgated by the CBRC on Jan. 23, 2007, effective Mar. 1, 2007) [EXPIRED] (China).


\textsuperscript{25}Id.

\textsuperscript{26}Id.

\textsuperscript{27}Id. at 6.


\textsuperscript{29}Finance Leasing with Chinese Characteristics, EUROMONEY TRADING LIMITED, Jul./Aug. 2007, at sec. 2.

\textsuperscript{30}Compare the MOFCOM Scheme’s capital requirement of at least US $5 million in assets or capital (Article 7), with the CBRC Scheme’s capital requirement of at least RMB80 billion (approximately $12.9 billion) (Article 9(3)), RMB5 billion (approximately $806 million) (Article 10(2)), or RMB10 billion (approximately $1.6 billion) (Article 11(2)).

\textsuperscript{31}Article 6(2) [Measures for the Administration of Foreign-Capital Lease Industry] (promulgated by the first executive meeting of the Ministry of Commerce on Jan. 21, 2005, effective Mar. 5, 2005) (China).


\textsuperscript{33}Articles 5 [Measures for the Administration of Foreign-Capital Lease Industry] (promulgated by the first executive meeting of the Ministry of Commerce on Jan. 21, 2005, effective Mar. 5, 2005) (China).

\textsuperscript{34}Articles 2-3 [Measures for the Administration of Foreign-Capital Lease Industry] (promulgated by the first executive meeting of the Ministry of Commerce on Jan. 21, 2005, effective

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Endnotes

1\textsuperscript{nat’l Ship Finance Through Ireland, MAPLES AND CALDER UPDATE (Nov. 11, 2013), www.maplesandcalder.com.}


4Id.


6Id.

7See Id. at 67.

8First Ship Lease Trust is a Singapore-registered company that owns a portfolio of 23 ships, 16 of which are engaged in long-term lease finance arrangements, and the seven remaining ships are on shorter-term operational leases. This company is funded in part publically via the Singapore Exchange Security’s main board.


10This approach is not straightforward. The approach to securing its rights requires a creditor to comply with provisions from the Maritime Law of the PRC, the Regulations of the People’s Republic of China Governing the Registration of Ships, the Guaranty Law of the People’s Republic of China, the Registration of Mortgages by Notaries Public Procedures 2002, and the Security Law of the People’s Republic of China.


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senior class of securities is issued to investors and a subordinate class of securities is held by the sponsor.


55 Article 3 specifically includes "account receivables [and] creditors' right under lease."


6See Update on Incentives for Companies To Enter the Shanghai FTZ — The Jury Is Still Out, RHK LEGAL CORPORATE ADVISORS (Oct. 13, 2014).


6Id. at Article 6(2).

6Id. at Article 3.

6King & Wood Mallesons, Changes to the Financial Services Market in Shanghai FTZ, SHANGHAI FTZ SERIES (Nov. 2013) No. 3, at 3; Ernst & Young, A Milestone for China’s New Wave of Economic Reform — Shanghai Pilot Free Trade Zone, CHINA TAX & INVESTMENT NEWS (Sept. 30, 2013) No. 2013005, at 4.


6Id. at Article 6(2).

6Id. at Article 4.

6Id. at Article 3.


6Id. at Article 6(2).

6Id. at Article 4.

6Id. at Article 3.

6King & Wood Mallesons, Changes to the Financial Services Market in Shanghai FTZ, SHANGHAI FTZ SERIES (Nov. 2013) No. 3, at 3.

6Id. at Article 6(2).

6Id. at Article 4.

6Id. at Article 3.

6Id. at Article 5.

6King & Wood Mallesons, Changes to the Financial Services Market in Shanghai FTZ, SHANGHAI FTZ SERIES (Nov. 2013) No. 3, at 3.

6Id. at Article 6(2).

6Id. at Article 4.

6Id. at Article 3.


6Id. at Article 6(2).

6Id. at Article 4.

6Id. at Article 3.

6Id. at Article 5.

6King & Wood Mallesons, Changes to the Financial Services Market in Shanghai FTZ, SHANGHAI FTZ SERIES (Nov. 2013) No. 3, at 3.
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By just looking at Judge J. E. Sullivan, you get the feeling that she does not belong in Washington, D.C. She exudes a peaceful, independent spirit, reminiscent of her original home within the Pacific Northwest. Her speech pattern—deliberate, paced and thoughtful—contrasts with her adopted city’s relative manic energy. But, beneath her gentle veneer bubble, passionate feelings about judicial independence, particularly in the administrative courts.

In a variety of ways, the Office of Hearings at the U.S. Department of Transportation reflects the larger world of administrative law judge (ALJ) offices across the nation. Often called the “hidden judiciary,” ALJs often toil in the shadows of the executive branch agencies for which they preside. At the DOT, ALJs hear a variety of cases and draft decisions concerning certain operating administrations, such as the Federal Aviation Administration (FAA) and the Federal Motor Carrier Safety Administration (FMCSA).

However, the media rarely reports on—and I suspect that even the majority of employees at the department are unaware of—such cases. By design, the Office of Hearings is isolated from the politics of agency decision making. Organizationally, it sits as an office under the assistant secretary for administration, removed from the influence of those upon which it makes decisions. The office is even physically remote, located a couple of blocks down M Street Southeast from headquarters, with a view of South Capitol Street. “We are very insulated from the agencies that litigate before us,” says Judge Sullivan. “The first time I usually see an agency’s attorneys is when they appear before me in court.”

Previously, after serving as a criminal defense trial lawyer and as a deputy prosecuting attorney, Judge Sullivan served for 19 years in Washington state, first on a state trial court of general jurisdiction and later as an industrial insurance appeals judge. In 2008, she became an ALJ with the Social Security Administration, which houses the vast majority of the country’s 1,400 ALJs. By contrast, the Department’s Office of Hearings employs three ALJs. While

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Jason Schlosberg is an attorney for the Federal Railroad Administration at the U.S. Department of Transportation, where he drafts and enforces regulations concerning the implementation and use of safety technologies. He previously worked in the Office of Hearings for Judges Yoder, Kolko, Goodwin, and Benkin and practiced telecommunications law at a law firm now known as Drinker Biddle & Reath LLP.
the chief ALJ, Judge Ronnie A. Yoder, presides over most cases heard in Washington, D.C., and their colleague, Judge Richard Goodwin, is responsible for cases mostly heard west of the Mississippi, Judge Sullivan’s docket concerns cases closer to, but outside of, the capital. Having joined the office in 2011, Judge Sullivan is its most recent hire.

“I love the work here,” she says. She believes it includes a wonderful variety of different procedural and substantive issues among the department’s many operating administrations, more commonly known internally as “modes.” Judge Sullivan speculates that 90 percent of her docket comprises of aviation safety cases, the vast majority of which arise from the FAA and involve anything from passenger behavior to aircraft airworthiness. They recently received a case involving the transport of a World War II B-17 bomber aircraft.

The remaining cases primarily concern enforcement of motor carrier regulations. The office has seen a sudden surge in out-of-service orders being issued by FMCSA and contested before an ALJ. FMCSA issues such orders when it believes a business practice reaches the level of an imminent hazard to public safety. The respondent business has to immediately shut down, including stopping all en route trucks and finding replacement drivers from other companies, and has a right to emergency hearing within 10 days. While the office may receive one such case every eight to 10 years, it has seen at least six in the past four years. One particular case involved a person using his father’s name to develop a shell company and avoid enforcement of an earlier out-of-service order against his former company resulting from a fatality. The respondent, however, continued to use the same truck with the same business name and DOT identification number on its side.

In addition to having its own substantive safety regulations, each mode has its own procedural rules for hearings before ALJs. “Procedural rules are important,” Judge Sullivan states. “They allow us to offer each other and the people we serve a way of dispute resolution that is civilized, peaceful, and nonviolent. We are privileged with the task of providing to our people this kind, sophisticated dispute resolution process that is unique and for future generations to use and improve upon.” She looks at the rules of procedure and evidence as tools for lawyers to provide the best possible panoply of options for his or her client. Judge Sullivan sees the varying procedural rules among modes as a result of each agency determining the very best tools for those within its unique enforcement process.

For instance, she notes that under the FAA’s procedural rules, hearsay is admissible and it is the trier of fact’s responsibility to weigh the evidence. But how does this work when reviewing a motion for summary judgment? Judge Sullivan has a very active pretrial motion practice of which many take advantage. She asks, “How do you address hearsay in a summary judgment proceeding when the court is not allowed to weigh evidence? It must only determine material facts and whether such material facts as provided by the evidence raise a genuine issue. When you have those types of gaps, you have to look to guidance. I think that all of the tools can be utilized in harmony with each other and obviously there can be some differences on how or when the tools can be used. I have no problem using the tools that are before me.”

Beyond each mode’s own procedural rules, each ALJ has the authority to administer each proceeding and to render an independent decision. To conduct hearings on behalf of their respective agencies, ALJs have been statutorily provided with the power to, *inter alia*, “regulate the course of the hearing.”1 ALJs have utilized that broad delegation of power to support their judicial activities not otherwise explicitly provided for in the Administrative Procedure Act (APA) or in agency rules.2 For instance, the First Circuit has held that the ALJ’s power to regulate the course of a hearing commits the decision whether to allow cross-examination to the ALJ’s discretion.3

The U.S. Supreme Court has also recognized the need for ALJ independence in procedural and substantive decision making. For instance, in *Butz v. Economou*, ALJs were afforded decisional independence because of their judicial roles and despite the fact that they are agency employees. While the *Butz* court limited its discussion to the issue of decisional independence, it did so under the assumption that such independence is necessary to afford proper due process and to maintain the integrity of the process.4

Unsurprisingly, Judge Sullivan takes the notion of ALJ independence very seriously. She credits Chief Judge Yoder with insulating her from the administrative and financial decisions imposed by the department onto the Office of Hearings. She also believes that the department has maintained a commitment to support the judicial process. This was not the case, however, when she presided over cases at the SSA. According to Judge Sullivan, “Instead of engaging in responsible stewardship and management of a meaningful federal adjudication program, SSA management has substituted a factory-type ‘production’ process. This mistaken approach has allowed SSA management to present Congress and the American public with some impressive ‘production’ statistics. But these statistics have been achieved by causing incalculable damage to a meaningful adjudication system.” Judge Sullivan contends that such an environment provides for too many poorly considered and rushed decisions concerning disability benefits.

By no means has Judge Sullivan enjoyed her stay at the department while forgetting the pressures that threaten the independence of her ALJ colleagues elsewhere. She has testified in an individual capacity before the Subcommittee on Energy Policy, Healthcare and Entitlements to the House of Representative’s Committee on Oversight and Government Reform. At this congressional hearing, she criticized SSA’s mistaken emphasis on “production goals” within the adjudication offices, citing an SSA document that defines “full productivity” for an ALJ with less than a year on the job to include scheduling and hearing a minimum of 50 cases per month. Management and mentors systematically “encourage” meeting these goals. In reality,
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says Judge Sullivan, meaningful adjudication (i.e., the totality of a judge’s work) takes time and involves complex work processes that do not fit well within such an environment. The decision-maker must have the time and resources necessary to become fully informed about the issues and the parties’ positions. In one particular case, under the SSA’s system, Judge Sullivan was only able to review 35 pages of a 2,000-page medical records involving at least 10 different types of medical components. “When you remove from the court the time and/or resources that allow it to be educated and informed, you remove from the public its right to fair, impartial, and educated justice.”

Judge Sullivan also appears to link such pressure to a larger criticism against the judicial system, claiming that recent years have seen unprecedented and troubling attacks on administrative and Article III court judges. “It is not an easy job to maintain a place of safety that all parties perceive to be fair and even handed,” says Judge Sullivan. “There are going to be times that a decision-maker will make a decision that someone will disagree with. To attack people for doing their job or to attack the process, or to try to control it, is an attack against the citizen’s right to a fair and just tribunal. It is a back-door attack, but it is still an attack.” Judge Sullivan believes that each citizen has an obligation to uphold the confidence of the bench, which should be held apart from the strifes of public disagreement regarding other things. “The dispute resolution and court system should be, and is, the crown jewel of our country,” she says.

Endnotes

5 U.S.C. § 556(c)(5).
2 See, e.g., Moore v. Dept. of State, 15 M.S.P.R. 488, 490 (June 16, 1983).
3 Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, 880 (1st Cir. 1978) (citing 5 U.S.C. § 556(c)(5), (c)(7), and (d), and Attorney General’s Manual on the Administrative Procedure Act 78 (1947)).
4 Butz v. Economou, 438 U.S. 478, 511-12 (1978) (“Absolute immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation.”). Any concern that ALJs may abuse such contempt powers is without merit. ALJs are decisionally independent from their respective agencies and can only be removed for good cause. See Butz v. Economou, 438 U.S. 478, 514 (1978). Further, the Supreme Court already recognizes that administrative adjudications contain many of the same safeguards available in the federal judicial process, and therefore, “the risk of an unconstitutional act by one presiding at an agency hearing is clearly outweighed by the importance of preserving the independent judgment of these men and women.” See Butz v. Economou, 438 U.S. 478, 512-14 (1978).
TRANSPORTATION BY THE NUMBERS

1.25 MILLION
Rail freight carloads per week on American railroads

2.6 MILLION
Miles of pipelines in the United States

545
Active Certificates of Waiver or Authorization for public unmanned aircraft in 2013 (last year reported)

13,182 MILLION
Tons of freight transported by truck in 2012 (last year reported)

71,690
Vessel calls by vessels over 1,000 tons at all U.S. ports in 2012 (last year reported)

46 STATES
Have banned texting while driving

NINE
Commercial spaceports currently licensed by the Federal Aviation Administration

16,227 MILLION
Gallons of fuel consumed by U.S. airline carriers in 2014

On Feb. 15, the Federal Aviation Administration (FAA) proposed regulations addressing the operation of unmanned aircraft systems (UAS), certification of their operators, registration, and display of registration markings. These regulations would eliminate the need for an airworthiness certification and prohibit UAS from posing a danger to the National Airspace System. This article summarizes the new rules for small UAS proposed by the Department of Transportation (DOT) and the FAA.

The FAA has approved the use of UAS on a case-by-case basis. Businesses are required to apply for a special permit directly from the FAA, and governmental agencies are required to apply for a Certificate of Waiver or Authorization (COA) from the FAA. About 28 companies have been granted this special permit, and approximately 600 COAs have been approved by the FAA.

UAS often have a camera mounted to the body; this camera provides an important utility for both businesses and public entities. They may also be mounted with telecommunications equipment to temporarily enhance and extend communications signals. It is expected that as operational costs drop and technology advances, UAS will have a transformative impact on the fields of urban infrastructure management, farming, and disaster response. The FAA outlines the following possible uses for UAS:

- Crop monitoring/inspection
- Research and development
- Educational/academic uses
- Power-line/pipeline inspection in hilly or mountainous terrain
- Antenna inspections
- Aiding certain rescue operations, such as locating avalanche victims
- Bridge inspections
- Aerial photography
- Wildlife nesting-area evaluations

Proposed Regulations

The FAA has authority to regulate UAS. See 49 U.S.C. § 40103(b) (1) and (2) and 49 U.S.C. § 44701(a) (5). This rule-making was promulgated under the authority described in the FAA Modernization and Reform Act of 2012 (Public Law 112-95). Section 333 of Public Law 112-95 directs the Secretary of Transportation to determine whether “certain unmanned aircraft systems may operate safely in the national airspace system.” If the secretary determines, pursuant to Section 333, that certain unmanned aircraft systems may operate safely in the national airspace system, then the secretary must “establish requirements for the safe operation of such aircraft systems in the national airspace system.” The proposed UAS rule regulates nongovernmental users and nonrecreational activities.

The FAA defines a series of baseline limitations for UAS:

- Maximum weight must be less than 55 pounds
- Maximum air speed is 100 mph (87 knots)
- Maximum altitude is 500 feet above ground level
- Minimum weather visibility is 3 miles from the control station
The operator, or a visual observer, must have visual line of sight to the aircraft at all times. The visual observer may communicate with the operator via radio. However, the operator must at all times be able to have visual line of sight. Visual line of sight is defined as meaning human eyesight unaided by devices except corrective lenses. This also applies to the use of “see and avoid” first-person cameras, which may be used but only as long as visual line of sight is maintained. The UAS may never be allowed to fly over people on the ground except for those directly involved in the use of the aircraft. The operator and visual observer must follow all alcohol and drug prohibitions and should not operate the aircraft if they become aware of any physical or mental condition that would impair their ability to safely pilot the aircraft. The operator must inspect the aircraft prior to usage and may not fly more than one UAS at a time. UAS may only operate in the daylight hours defined as official sunrise to official sunset, local time.

Operators of UAS must be at least 17 and pass an aeronautical knowledge test at an FAA-approved knowledge testing center. They must then submit to a vetting process by the Transportation Security Administration and take a recurrent aeronautical knowledge test every 24 months. Operators must conduct a preflight inspection before every flight to ensure that the aircraft is safe and report to the FAA any accidents that result in injury or property damage within 10 days. They must also agree to submit the UAS to the FAA, upon request, for inspection or testing. The UAS must have the same markings required of all aircraft, though they may be reduced in size to fit the aircraft.

UAS Presidential Memorandum

Prior to the release of the proposed rules, the president issued a memorandum directing that all UAS operations comply with U.S. law regarding privacy, civil rights, and civil liberties. The memorandum is significant, as it delineates the White House’s expectations for the government’s current and future UAS use and how the UAS-collected data across the nation will ultimately be authorized. The president ordered that all governmental use of UAS must follow the Privacy Act of 1974 (5 U.S.C. § 552a). This contemplates that all personally identifiable information (PII) will be used transparently, follow proper accountability procedures, and should not violate privacy laws.

The memorandum directs that by June 23, a stakeholder engagement process should be used to develop a framework for the commercial use of UAS. The Commerce Department will lead the new multistakeholder engagement process across agencies and the private sector to develop and publish UAS-related privacy best practices. The agencies must formulate appropriate UAS policies and procedures and reexamine them every three years. Agencies have 180 days to report on this initial implementation. Such reports must be published in one year.

The proposed regulations are an important step in advancing the commercial use and safety of UAS.

Thomas Lehrich is chair of the Federal Bar Association’s Transportation and Transportation Security Law Section. He is the deputy inspector general and counsel for the Architect of the Capitol. Lehrich spent 10 years at the U.S. Department of Transportation serving as the chief counsel to the DOT inspector general and held senior legal posts with the Transportation Security Administration and the Federal Maritime Commission. Matthew Hersey is a student at Georgetown University in the School of Continuing Studies. © 2015 Thomas Lehrich. All rights reserved.
Is Legislation Needed To Prevent
As the push to integrate unmanned aircraft systems (UAS) into the national airspace system (NAS) has increased, concerns about their impact on privacy has grown. Some of this concern may be due to the natural fear of any new technology. But there actually do seem to be differences between UAS and other aircraft that could make it easier for UAS to intrude into the private lives of citizens. In particular, since UAS do not need to fit a human inside, they can be very small and could therefore descend to very low levels unobtrusively.

Laws already are designed to protect people’s privacy. But these laws may not be sufficient to fully address the privacy issues raised by UAS.

For the purposes of evaluating privacy laws and their relation to UAS, unmanned aircraft can be divided into two types. The first, government aircraft, includes all police and other law enforcement aircraft and are typically referred to in aviation law as public aircraft. The second, civil aircraft, includes all other aircraft, such as those belonging to private citizens and corporations.

Government Aircraft
Legal Background

Citizens are protected from governmental intrusion into their private life by the Fourth Amendment to the U.S. Constitution. In essence, this amendment means that the police can invade one’s privacy only if they first obtain a warrant. The Fourth Amendment requires the federal government to obtain a warrant before it can search a person or that person’s “houses, papers, and effects.” The warrant requirement has been extended to cover intrusions by state and local government by the 14th Amendment to the Constitution. Several court decisions have also extended Fourth Amendment protections to cover the curtilage of the home, meaning the lawn and garden surrounding the home, including any structures located thereon.

To decide whether the warrant requirement of the Fourth Amendment applies in an individual case, courts first look to determine whether a “search” has occurred. For example, if a police officer is walking on a public street and looks into an open window of a home and sees a crime being committed, that is not a search, and no warrant is required. The rationale is that people have no reasonable expectation of privacy if they leave their windows open to plain view from a public street, and police cannot be expected to avert their eyes whenever they walk by. Likewise, if the police are flying in the navigable airspace and look down and see a crime being committed, that is not a search, and no warrant is required. The courts have viewed the navigable airspace as analogous to a public street, and anything in plain view from that vantage point can be observed without first obtaining a warrant.

Reliance on the location of the aircraft in the navigable airspace is a useful legal standard governing aerial surveillance by fixed-wing aircraft because it effectively imposes objective altitude requirements regarding when a search would require a warrant. If a fixed-wing law enforcement aircraft were to descend below the minimum altitudes of the navigable airspace, the police, under current law, would have to get a warrant before they could observe the people or activity below.

However, the navigable airspace standard does not work as well in the case of helicopters. FAA rules generally allow a helicopter to descend to any level that is not hazardous. Therefore, when faced with a case involving a law enforcement helicopter, the U.S. Supreme Court had to come up with a new standard for determining when the Fourth Amendment warrant requirement would apply. It decided that a law enforcement helicopter flying at 400 feet did not need a warrant to observe activity below, because flying helicopters at that altitude (1) was permitted by law and FAA regulations, (2) was not rare, (3) did not reveal any intimate details connected with the use of the home or curtilage, and (4) did not cause any undue...
noise, wind, dust, or threat of injury.\textsuperscript{3}

Various lower courts have taken the standard enunciated by the U.S. Supreme Court and reached differing conclusions. At least one court has found that a helicopter conducting aerial surveillance as low as 100 feet was not a search and did not require a warrant.\textsuperscript{4} Another court decided that aerial surveillance at 200 feet was a search and did require a warrant.\textsuperscript{5}

Even if a consistent interpretation of the Supreme Court’s standard could be developed, it would not seem to fit well in the case of UAS. In all likelihood, law and FAA regulations will permit small UAS to fly at very low altitudes; such flights will not be rare; and due to their small size, these UAS will not cause undue noise, wind, dust, or threat of injury. Therefore, trying to apply existing case law to UAS is not likely to be effective in restricting privacy intrusions by government UAS.

It might be possible to wait for a UAS case to wind its way through the courts to establish a better standard for aerial surveillance by government UAS. This, however, is likely to take years.

### If no federal agency is prepared to issue regulations to fill the privacy gap, Congress should consider legislation to address privacy concerns now.

That is not likely to reassure those who are concerned about UAS threats to privacy now.

Another approach would be for a government agency to issue a regulation to address the privacy issue. The FAA might seem the logical agency to do that. But the GAO reports\textsuperscript{6} that “FAA officials and others have suggested that regulating privacy issues in connection with equipment carried on UAS, such as surveillance sensors that do not affect safety, is outside the FAA’s mission, which is primarily focused on aviation safety.” The GAO went on to state that “[w]hile it is not clear what entity should be responsible for addressing privacy concerns across the federal government, many stakeholders believe that there should be federal regulations for the types of allowable uses of UAS to specifically protect the privacy of individuals.”

The president recently issued a memorandum to address privacy issues raised by government UAS.\textsuperscript{7} But this memorandum does not apply to UAS operated by state and local governments. For federal UAS, it does not explicitly limit what they can do but rather generally requires them to comply with privacy protections and to provide notice to the public about where they are authorized to operate.

### Legislative Options

If no federal agency is prepared to issue regulations to fill the privacy gap, Congress should consider legislation to address privacy concerns now. Two options are suggested below. The goal of these options is not to break new ground or provide more privacy rights than now exist. Rather, the goal is to extend existing rights to protect people from privacy intrusion by government UAS.

#### Option I

1. No unmanned aircraft operated by or on behalf of any federal, state, or local agency may operate at less than 400 feet above the ground for the purpose of observation, surveillance, or the search of a person’s house, papers, or effects unless a warrant has been issued authorizing such observation, surveillance, or search.
2. Paragraph 1 shall not apply in the case of an emergency where there is an imminent risk to life or property.
3. For the purposes of Paragraph 1, the term “unmanned aircraft” means an aircraft that is operated without the possibility of direct human intervention from within or on the aircraft.\textsuperscript{8}

A few observations about the above option should be made. This option does not prevent a government UAS from descending below 400 feet. If the UAS was not conducting a search but instead was engaged in pipeline monitoring or border security, it could descend to any level. Even if it were engaged in law enforcement, it could still descend below 400 feet if it obtained a warrant or if there was an emergency. Also, the 400-foot standard is an objective standard, but the exact number chosen here is somewhat arbitrary. It was chosen because that was the altitude that the Supreme Court expressly found acceptable in the Riley case involving a search by a helicopter. But the Court left open the possibility that a lower altitude might be acceptable in certain cases, and lower courts have approved observations without a warrant at lower altitudes.

#### Option II

1. No unmanned aircraft operated by or on behalf of any federal, state, or local government may operate at an altitude and in an area that is likely to enable a person to use the unmanned aircraft to view any intimate details connected with the use of a home or curtilage and with the intention of observing such details unless a warrant has been issued authorizing such observation.
2. Paragraph 1 shall not apply in the case of an emergency where there is an imminent risk to life or property.
3. For the purpose of Paragraph 1, the term “curtilage” means the area encompassing the grounds and buildings immediately surrounding a home or building that is used in the daily activities of domestic life.
4. For the purposes of Paragraph 1, the term “unmanned aircraft” means an aircraft that is operated without the possibility of direct human intervention from within or on the aircraft.

A few observations should be made about this option. The phrase “intimate details connected with the use of a home or curtilage” was derived from the Riley case that addressed a search by a helicopter. Unlike the 400-foot standard in Option 1, this “view any intimate details” standard is not an objective one and would require further refinement in the courts. However,
it does seem to address the problem that people are most concerned about—that a UAS could fly low and peer into their windows or otherwise observe intimate details of their life.

This option would not prohibit government UAS from flying low to engage in other activities as long as it is not done with the intention of peering into an area where there is an expectation of privacy.

If one of the options above were enacted into law and a government UAS did not comply, the typical sanction would be that any evidence it helped the government obtain would not be admissible in a court of law.

Civil Aircraft
Legal Background

Unlike government aircraft, there is no provision in the Constitution that explicitly protects citizens from intrusions by civil aircraft. Rather, various common law theories have been developed through the courts to protect the privacy of citizens.

One such theory is the tort of trespass. This tort is designed to prohibit one from intruding on or through the property of another. Originally, courts viewed one’s property as including the airspace above it, extending all the way to the heavens. However, this view began to break down with the invention of the airplane. Now it seems that courts view one’s property as including only such airspace as one uses (such as by constructing a house or other building on it) or as extending only up to the navigable airspace. Under this view, if an aircraft flew over one’s property but beneath the navigable airspace, it could be considered a trespass. But, as noted above, this navigable airspace limit does not seem to work well to limit flights by either helicopters or UAS.

Another theory of law that could protect people from UAS is the tort of nuisance. This tort is designed to prohibit one from interfering with another’s use and enjoyment of his or her property. Unlike trespass, which gives the property owner the absolute right to keep others off his land or out of his airspace, nuisance involves a balancing of the owner’s right to the use and enjoyment of his property against the needs of another to use the airspace. Applying the nuisance theory of law, courts have tended to allow over-flights of property unless the flights were so low as to bother or threaten people on the ground. As such, this is similar to the standard used by the Supreme Court in the Riley case, where it allowed a helicopter to fly at 400 feet as long as it did not cause any undue noise, wind, dust, or threat of injury. As noted above, however, this idea of a UAS as a potential nuisance might be hard to apply in a case involving a small and relatively quiet UAS.

A final common law theory is the more recently developed tort of invasion of privacy. There are several versions of this tort, but the one most relevant here prohibits a person from intentionally intruding upon the solitude or seclusion of another or upon the other’s private affairs if the intrusion would be considered highly offensive by a reasonable person. So, for example, this would prohibit one from peering into the windows of a private home. It has also been held to prohibit journalists from intruding, by either physical or electronic means, into the seclusion of another while gathering news. This tort theory could be effective in protecting citizens from intrusions by UAS in areas where people have a reasonable expectation of privacy, such as their homes. However, this tort, like any tort, requires people to go to court to ensure that their rights are respected. Many people are reluctant to undergo the time and expense of the judicial process especially where, as here, the monetary damages that they could expect to receive for an invasion of privacy are uncertain at best.

As with government aircraft, better privacy protection could probably be provided through laws or regulations than by reliance on the courts.

The FAA could issue a safety rule for UAS that would have the effect of addressing the privacy issue. For example, it could define the navigable airspace for UAS, or establish minimum safe altitudes for UAS, or require all UAS, even small ones, to fly under instrument flight rules (IFR). These would all have the effect of keeping UAS above a specified level and away from homes and other congested areas. However, it is unclear whether the FAA would take such action without a clear safety justification, especially since it is likely to undermine the business case for the small UAS.

The presidential UAS memorandum also addressed privacy issues raised by civil aircraft. But it did not impose any requirements—it merely directed the National Telecommunications and Information Administration to consult with stakeholders to develop best practices.

Legislative Options: General

Another option would be for Congress to pass a law to provide protection from privacy intrusion by UAS. Given the interstate nature of air transportation, Congress would be justified in addressing UAS privacy issues and preempts any contrary state action. Even if Congress decided to leave this matter to the states, there would be value here in offering some model statutes that states could consider. Many states already have anti-intrusion laws designed to protect the privacy of its citizens. An example is this law from Massachusetts:

“Section 1B. A person shall have a right against unreasonable, substantial or serious interference with his privacy. The superior court shall have jurisdiction in equity to enforce such right and in connection therewith to award damages.”

This Massachusetts law could be interpreted to cover invasions of privacy by UAS but, by its terms, does not apply to UAS specifically. It would be possible, however, to draft a statute that would cover privacy invasions by UAS specifically.

Legislative Options: Advantages

One of the advantages of pursuing the legislative option is that a subsection could be included in any such law to empower a federal or state prosecutor to get involved and prosecute a UAS operator for privacy violations. That would overcome one of the main problems with the common law remedies described above, in that the common law remedies all require individuals to sue in court to vindicate their rights, something that most people have neither the time nor money to do. By contrast, legislation could authorize the government to go into court on behalf of the aggrieved individual and seek fines or other penalties against the offending UAS operator. The fines in the draft legislation set forth below are quite modest. But they could be made tougher. Civil fines for violating other aviation laws often run much higher. Harsher criminal penalties could also be imposed if deemed appropriate.
Legislative Options: Paparazzi Model

An existing anti-intrusion law could be used as a model and be modified to apply specifically to UAS. For example, an anti-paparazzi law could be modified in this way. The lengthy California Anti-Paparazzi Statute at California Civil Code, § 1708.8, is a good example. It could be modified to prohibit an owner or operator of an unmanned aircraft from using that aircraft, or any equipment on board that aircraft, to attempt to capture, in a manner that is offensive to a reasonable person, any type of visual image or other physical impression of a person engaging in a personal or familial activity under circumstances in which that person had a reasonable expectation of privacy, regardless of whether there is a physical trespass.

A paparazzi statute like this may be a particularly appropriate model, because the use of UAS by paparazzi seems to be one of the areas of great concern. (An article in the Dec. 10, 2012, issue of Newsweek magazine described potential paparazzi use of UAS as “very frightening” and “very inevitable.”)

Legislative Options: Peeping Tom Model

Another model that could be modified to cover UAS is a peeping Tom law. The following is based on the peeping Tom law in South Carolina Code 16-17-470:

1. It shall be unlawful for a person to operate an unmanned aircraft in order to be an eavesdropper or a peeping tom on, above, or about the premises of another or to fly over or about the premises of another for the purpose of becoming an eavesdropper or a peeping Tom.

2. The term "peeping Tom," as used in this section, is defined as a person who uses an unmanned aircraft to look through windows, doors, or other similar places on, above, or about the premises of another for the purpose of spying upon or invading the privacy of another and any other conduct of a similar nature that tends to invade the privacy of others. The term "peeping Tom" also includes any person who employs the use of video or audio equipment for the purposes set forth in this section.

3. A person who violates the provisions of this section is guilty of a misdemeanor and, upon conviction, must be fined not more than $500 or imprisoned not more than three years, or both.

4. The provisions of subsection (1) do not apply to:
   (a) viewing, photographing, videotaping, or filming by personnel of the Department of Corrections or of a county, municipal, or local jail or detention center or correctional facility for security purposes or during investigation of alleged misconduct by a person in the custody of the Department of Corrections or a county, municipal, or local jail or detention center or correctional facility;
   (b) security surveillance for the purposes of decreasing or prosecuting theft, shoplifting, or other security surveillance measures in bona fide business establishments;
   (c) any official law enforcement activities authorized by law;
   (d) private detectives and investigators conducting surveillance in the ordinary course of business; or
   (e) any bona fide news gathering activities.

5. In addition to any other punishment prescribed by this section or other provision of law, a person procuring photographs, audio recordings, video recordings, digital electronic files, or films in violation of this section shall immediately forfeit all items. These items must be destroyed when no longer required for evidentiary purposes.

6. For the purposes of this section, “unmanned aircraft” means an aircraft that is operated without the possibility of direct human intervention from within or on the aircraft.

Legislative Options: Harassment Model

As a general rule, one has a right to privacy only when in a place where one has a reasonable expectation of privacy. This means that usually the right to privacy does not apply when one is out in public. However, some are concerned that a UAS could be used to follow people in public and that, at the very least, this would be annoying. If there is a desire to address this concern, it might be more effective to do so using an anti-harassment statute as a model rather than a privacy statute. One such statute is the New York State Penal Law, section 240.26. If modified to apply specifically to UAS, it could read as follows:

1. An operator of an unmanned aircraft shall not, with the intent to harass, annoy, or alarm another person, use that aircraft to (a) follow that person in or about a public place or places or (b) engage in a course of conduct or repeatedly commit acts which alarm or seriously annoy such other person and which serve no legitimate purpose.

2. A violation of section (1) is punishable by a fine not to exceed $2,000 or imprisonment not to exceed one year, or both.

3. For the purposes of this section, “unmanned aircraft” means an aircraft that is operated without the possibility of direct human intervention from within or on the aircraft.

Related Issues and Remedies

Image-Enhancing Equipment

An additional concern with UAS is that not only could they be used to spy on people, but they could do so with sophisticated technical equipment.

The general rule is that it is not an invasion of privacy to see something from an aircraft with the naked eye if the aircraft is in a place where it has the right to be. In the Ciraolo case involving the fixed-wing aircraft, the Supreme Court stated that the “Fourth Amendment simply does not require the police traveling in the public airways at this altitude to obtain a warrant in order to observe what is visible to the naked eye.” This raised the question of whether the Court would have considered it an invasion of privacy if something more powerful than the naked eye had been used.

The Supreme Court began to answer this question in the case of Dow Chemical Co. v. United States, 476 U.S. 227 (1986). There, the government used a powerful camera to observe Dow Chemical’s facilities from the air. The Court stated, at page 238, that the “mere fact that human vision is enhanced somewhat, at least to the degree here, does not give rise to constitutional problems.” So the use of enhanced vision technologies is not necessarily an invasion of privacy. But the Dow Chemical case involved the surveillance of an industrial facility. It remained unclear whether a similar search of a home or the use of more powerful equipment would be permitted.

In 2001 in Kyllo v. United States, 533 U.S. 27 (2001), the Supreme Court decided the government had gone too far. In that case, the Court stated that the government’s use of a thermal-
It may be fair to conclude that the law will permit the use of an image-enhancing device as long as it is commonly available to the public, such as binoculars or a telephoto lens, and it is not used to look inside a home.

found that it may be an invasion of privacy to use a powerful lens or image-enhancing equipment to look inside a home.

Determining whether the use of image-enhancing equipment is an invasion of privacy seems to depend on two factors. The first is whether it is being used to observe a home rather than an area where there is a lesser expectation of privacy, and the second is whether the image-enhancing equipment is commonly available to the public or highly sophisticated surveillance equipment not generally available to the public.

It may be fair to conclude that the law will permit the use of an image-enhancing device as long as it is commonly available to the public, such as binoculars or a telephoto lens, and it is not used to look inside a home. A prohibition on sophisticated image-enhancing devices to look inside a home could be added to any of the draft legislative proposals suggested above. However, the concerns about image-enhancing equipment are not peculiar to UAS. The same concerns should exist whether the image-enhancing equipment is attached to a UAS, a helicopter, a fixed-wing aircraft, an auto, or in a window across the street. The question is whether there is any justification for a law restricting image-enhancing equipment on UAS if the same restrictions are not also placed at least on other types of aircraft.

Special Lighting

One of the characteristics of UAS that makes them particularly troublesome from a privacy standpoint is that they can be small and unobtrusive. This means that they could spy on someone without that person even realizing it. The above draft legislation is designed to prevent that. But failing that, another approach would be to at least warn people that a UAS is hovering above them. Regulations could require UAS to flash lights or sound beeps when they descend below a specified level. The FAA already has extensive regulations on aircraft lighting in 14 CFR Part 23. Those regulations exist for safety reasons. FAA might want to consider a lighting requirement for low-flying UAS to warn people of their presence. There might be a safety justification for this as well a privacy benefit.

Self-help

Some have suggested that they would shoot down a UAS that was watching or bothering them. This issue arose on Nov. 19, 2012, when lehighvalleylive.com reported that a hunter had shot down a UAS being operated by the group known as Showing Animals Respect and Kindness. This group was using the UAS to film a pigeon shoot in Perry Township, Pennsylvania.

As a general rule, one may use reasonable force to defend one’s property but may not use deadly force unless it is necessary to protect oneself or one’s family from physical harm. However, it is unlikely that an invasion of privacy by a UAS would justify shooting it down, because an invasion of privacy is not a physical harm. On the other hand, the cases where deadly force was found excessive involved instances where the intruder who was shot was a person, not a machine, such as a UAS. So it is possible that a court could take a more permissive view on the use of deadly force against a UAS than it would against a human intruder. However, since a damaged UAS could crash and hit someone on the ground or start a fire, it would seem that calling the police or seeking remedies through the courts would be the more prudent course. In the Pennsylvania hunting case, the state police reportedly characterized the shoot-down of the UAS as “criminal mischief.” It should also be noted that some states, although not Pennsylvania, have laws that protect hunters from harassment, although those statutes do not mention UAS specifically, perhaps because the UAS technology is so new. See, for example, the Sportsman’s Rights Act, Texas Parks & Wildlife Code § 62.0125.

Conclusion

Several bills have been introduced in Congress, and some have been enacted, that are designed to protect a person’s privacy. Those bills and laws tend to involve protecting the privacy of personal information that has already been collected rather than restricting how the information is collected in the first place.

Existing privacy rules governing aircraft do not seem to fit the type of operations that small, unmanned aircraft could provide. Given this gap in the law, action is needed to ensure that the privacy of American citizens is protected. Waiting for the courts to rule definitively on this issue may take years. Therefore, legislative action is the best way to reassure the public and facilitate the integration of UAS into the national airspace system.

David E. Schaffer received his BA in political science from Colgate University and his JD from Boston University Law School. He practiced federal aviation law in Washington, D.C., for more than 25 years with the federal government, first with the Civil Aeronautics Board from 1978 to 1984 and then with the Aviation Subcommittee of the U.S. House of Representatives from 1984 to 2004. From 1994 to 2004, he was chief counsel and staff director of that subcommittee. Since 2004, he has been in private practice specializing in aviation law and consulting to several government agencies as well as representing various aviation interests. He can be contacted at dschaffer2@cox.net.

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RECENT REGULATORY AND LEGISLATIVE DEVELOPMENTS INVOLVING TRANSPORTATION OF CRUDE OIL AND HAZARDOUS COMMODITIES BY RAIL

BY KATHRYN J. GAINNEY AND NINA S. THANAWALA

Federal regulatory agencies continue to grapple with issues relating to transportation of crude oil and hazardous materials by rail. The subject of transportation of hazardous commodities has always attracted interest from members of Congress, states, and the public, but this interest has increased in recent years. This article summarizes recent regulatory and legislative developments relating to the transportation of crude oil or hazardous commodities by rail.

The regulatory developments include three rulemaking proceedings. The Pipeline and Hazardous Materials Safety Administration (PHMSA), in coordination with the Federal Railroad Administration (FRA), published final rules involving the transportation of crude oil by rail, including design standards for tank cars. PHMSA also requested comments on its proposal to incorporate certain special permits into the Hazardous Materials Regulations. FRA proposed rules relating to the securement of unattended equipment. This article also summarizes FRA’s railworthiness directive involving tank cars equipped with certain valves sold by an affiliate of a tank car company.

The recent legislative developments include several bills pend-
ing before U.S. House and Senate committees and subcommittees relating to the transportation of hazardous materials. The House Subcommittee on Railroads, Pipelines, and Hazardous Materials also recently held a hearing on “Oversight of Ongoing Rail, Pipeline, and Hazmat Rulemakings.”

**Regulatory Proposals**

**Tank Car Design Standards**

One high-profile regulatory development relating to the transportation of crude oil by rail involves a notice of proposed rulemaking by PHMSA, in coordination with FRA, issued in the summer of 2014. PHMSA requested comments on several proposals relating to the transportation of crude oil by rail, including proposals concerning design standards for new tank cars, retrofitting existing tank cars, and braking systems. In addition, PHMSA requested comments on its proposal to define a “high-hazard flammable train” as a “single train containing 20 or more tank carloads of Class 3 (flammable liquid) material.” PHMSA further proposed timelines for discontinuing the use of DOT-111 tank cars in “high hazard flammable trains” to transport Class 3 flammable liquids, depending upon the packing group classification. PHMSA also sought comments regarding its proposed speed restrictions for “high-hazard flammable trains.” PHMSA additionally proposed to amend its rules to require a railroad operating “high-hazard flammable trains” to perform rail routing analyses. PHMSA advanced several proposed rules relating to classification, packaging, and testing of mined gases and liquids, including crude oil. PHMSA also proposed to require a railroad to notify state emergency response commissions if it transports a train with 1 million gallons or more (i.e., approximately 35 tank cars) of crude oil from the Bakken shale formation in the Williston Basin, which is located in North Dakota, South Dakota, and Montana, and Saskatchewan and Manitoba, Canada.

PHMSA released its final rules on May 1, 2015. In its final rules, PHMSA defined a “high-hazard flammable train” as a train with “20 or more loaded tank cars of a Class 3 flammable liquid in a continuous block or 35 or more loaded tank cars of a Class 3 flammable liquid across the entire train.” For tank cars constructed after October 1, 2015 used in a “high-hazard flammable train”, PHMSA required such new tank cars to conform to “Option 2” in the 2014 NPRM, which was the “AAR 2014 Tank Car,” subject to the “enhanced braking requirements.” For existing tank cars used in a “high-hazard flammable train,” PHMSA required such existing tank cars to be retrofitted “to specifications equivalent to Option 3” in the 2014 NPRM, which was the “enhanced CPC 1232 tank car.” The retrofit schedule depends upon the tank car type and the packing group. With respect to braking systems, PHMSA required a “high-hazard flammable train” operating in excess of 30 miles per hour to be operated with “either a two-way end-of-train [ ] device … or a distributed power system.”

The final rules required electronically controlled pneumatic braking systems be equipped on locomotives and tank cars used on a “high-hazard flammable unit train,” which is defined in the final rules as a “single train transporting 70 or more loaded tank cars containing Class 3 flammable liquid,” when such trains are operated in excess of 30 miles per hour by 2021 if the “high-hazard flammable unit train” is “deemed suitable for adoption” into the Hazardous Materials Regulations, 49 C.F.R. parts 171-180. Special permits allow variances from the current Hazardous Materials Regulations. PHMSA stated that a provision in the Moving Ahead for Progress in the 21st Century Act (MAP-21) legislation “required PHMSA to review and analyze [special permits] that have been in continuous effect for a 10-year period to determine which ones may be converted into the [Hazardous Materials Regulations].” PHMSA conducted a review of its special permits and identified a subset of special permits as appropriate for “incorporation into the [Hazardous Materials Regulations]” because they “have broad applicability, fit into the scope of the HMR, will increase flexibility in transportation, and provide an equivalent level of safety to the current regulations.” Some of the special permits deemed suitable for adoption relate to rail transportation. Comments were submitted in March.

**Special Permits**

PHMSA began a notice of proposed rulemaking (NPRM) seeking comments on the agency’s identification of special permits that it “deemed suitable for adoption” into the Hazardous Materials Regulations. PHMSA stated that a provision in the Moving Ahead for Progress in the 21st Century Act (MAP-21) legislation “required PHMSA to review and analyze [special permits] that have been in continuous effect for a 10-year period to determine which ones may be converted into the [Hazardous Materials Regulations].” PHMSA also proposed to amend its rules to require a railroad operating “high-hazard flammable trains” to transport Class 3 flammable liquids, depending upon the packing group. With respect to braking systems, PHMSA required a “high-hazard flammable train” as a maximum speed of 40 miles per hour when “high-hazard flammable trains” travel in “high threat urban areas,” which are defined in federal regulations, unless “all tank cars containing a Class 3 flammable liquid meet or exceed” the design standards for new tank cars or retrofitting existing tank cars discussed above. With respect to rail routing analyses, the final rules require a railroad operating “high-hazard flammable trains” to perform an annual rail routing analysis. PHMSA did not adopt its proposed notification requirement. The agency “instead us[ed] as a substitute the contact information language requirement that is already part of the additional planning requirements for rail transportation … that now applies to [“high-hazard flammable trains”].”

**Securement of Unattended Equipment**

The FRA initiated a rulemaking involving the securement of “unattended equipment,” which is defined in federal regulations as “equipment left standing and unmanned in such a manner that the brake system of the equipment cannot be readily controlled by a qualified person.” FRA explained in part that its proposals would “ensure that each locomotive left unattended outside of a yard be equipped with an operative exterior locking mechanism and that such locks be applied on the controlling locomotive cab door when a train is transporting tank cars loaded with certain hazardous materials.”

FRA stated that its proposals would “codify many of the requirements already included in Emergency Order 28, “Establishing Additional Requirements for Attendance and Securement of Certain Freight Trains and Vehicles on Mainline Track or Mainline Siding Outside of a Yard or Terminal,” published in August 2013.” Emergency Order 28 “requir[ed] railroads to implement additional procedures to ensure the proper securement of equipment containing certain types and amounts of hazardous materials when left unattended.” FRA’s proposals would “amend existing regulations to include additional securement requirements for unattended equipment, primarily for trains transporting poisonous by inhalation hazardous materials or large volumes of Division 2.1 (flammable gases), Class 3 (flammable or combustible liquids, including crude oil and ethanol), and Class 1.1 or 1.2 (explosives) hazardous materials.” FRA also proposed “additional communication requirements relating to job briefings and securement verification.” Comments were submitted in November 2014.
The FRA has issued a railworthiness directive relating to tank cars equipped with certain valves sold by McKenzie Valve and Machining, an affiliate of Union Tank Car Company (UTLX). During an investigation, FRA found that “certain closure plugs installed on the [McKenzie] 3-inch valves cause mechanical damage to the valves, which leads to the destruction of the valves’ seal integrity and that the 3-inch valves, as well as similarly-designed 1-inch and 2-inch valves provided by this manufacturer, are not approved for use on tank cars.” Federal regulations provide that “all valves applied to tank cars must be of an approved design.” FRA stated that the “continued use of railroad tank cars equipped with the unapproved McKenzie [ ] threaded ball valves (including the 1-inch, 2-inch, and 3-inch [ ] valves) to transport hazardous materials by rail in the United States presents an unsafe operating condition … [and] violates the requirements of the [Hazardous Materials Regulations]” because the valves are not “currently approved for use on railroad tank cars.”

FRA thus issued the directive “to tank car owners of tank cars equipped with McKenzie valves.” The directive contained different provisions depending upon whether the valve was 3 inches or smaller. With respect to tank cars equipped with 3-inch McKenzie valves, tank car owners should remove a car with a valve “configured with a 3-inch standalone plug … until that valve is replaced with an approved valve …” In addition, “any tank car equipped with an unapproved 3-inch McKenzie valve is prohibited from being offered into transportation (whether loaded or residue) after May 12, 2015.”

With respect to tank cars equipped with 1- and 2-inch McKenzie valves, the directive states that tank car owners should remove a car if the valve “shows evidence of mechanical damage … until that valve is replaced with an approved valve.” In addition, the directive provides that “[e]ven if a valve is not damaged, a tank car equipped with an unapproved 1-inch or 2-inch McKenzie valve is prohibited from being offered into transportation (whether loaded or residue) after June 11, 2015.” The directive further states that after the McKenzie valves have been replaced, “tank car owners may load the cars with hazardous materials and offer those cars for transportation.” The directive contains an alternative for tank cars equipped with 1- or 2-inch McKenzie valves if McKenzie obtains approval for using those valves on DOT-111 tank cars.

### Legislative Proposals

Aside from recent regulatory developments involving the rail transportation of crude oil and hazardous materials, several legislative proposals are also under consideration. Most of these proposals are in committee.

#### Proposals Relating to Emergency Responders

Some proposals involve training and resources for emergency responders. For example, the Senate budget resolution passed in March would establish a “deficit-neutral reserve fund” for “training and resources for emergency responders responding to hazardous materials incidents on railroads.”


#### Senate Committee’s Proposed Crude-By-Rail Safety Act

The U.S. Senate Committee on Commerce, Science and Transportation is currently considering S. 859, which is the “Crude-by-Rail Safety Act.” Among other provisions, S. 859 would require the Secretary of Transportation to “immediately prohibit” the use of legacy DOT-111 tank cars and unjacketed CPC-1232 tank cars to transport oil by rail. The definition of “oil” in S. 859 includes “oil of any kind or in any form, including crude, petroleum, fuel oil, sludge, oil refuse, oil mixed with wastes other than dredged spoil, any bitumen or bituminous mixture, oil derived from a bitumen or bituminous mixture, any oil derived from kerogen-bearing sources, developing oils, and emerging oils.” S. 859 would also require DOT to establish standards to retrofit jacketed CPC-1232 tank cars that could be used to transport crude oil and ethanol after being retrofitted as proposed in the 2014 NPRM as Option 3 of Table 2, which PHMSA described as the “enhanced CPC-1232 tank car.”

S. 859 would provide that DOT-111 tank cars and unjacketed CPC-1232 tank cars could be used to transport crude oil and ethanol after being retrofitted as proposed in the 2014 NPRM as Option 3 of Table 2, which PHMSA described as the “enhanced CPC-1232 tank car.”

S. 859 would also mandate that DOT promulgate a new rule requiring that “all new tank cars designed to transport a Class 3 flammable liquid that are constructed after October 1, 2015, meet or exceed the design standards set forth under option 1 of table 2 in [the 2014 NPRM],” which was described as the “PHMSA and FRA Designed Tank Car.” S. 859 would also require that a “high-hazard flammable train,” which is defined as “a single train transporting 20 or more tank cars loaded with a Class 3 flammable liquid,” use “electronically controlled pneumatic brakes” by a deadline to be set by DOT.

S. 859 contains other provisions relating to the transportation of crude oil by rail, including provisions relating to the development of standards for volatility in crude oil shipped by rail, oil spill response plans, and disclosure of information to state and local emergency response commissions along proposed routes.

### House Subcommittee’s Proposed Bills

The U.S. House Subcommittee on Railroads, Pipelines, and Hazardous Materials is considering two bills relating to the transporta-
tion of hazardous materials by rail. H.R. 1290 would provide for a study by the Transportation Research Board of the National Academy of Sciences on the costs and impact of rerouting trains transporting hazardous materials to avoid urban areas designated by the Bureau of the Census as having a population greater than 30,000.\textsuperscript{34}

H.R. 505 would require DOT to establish a Hazardous Materials Information Advisory Committee to recommend best practices for modernizing and standardizing “electronic shipping papers,” as well as for ensuring access to the papers by emergency responders.\textsuperscript{35} An electronic shipping paper is defined as “an electronic version of the physical shipping paper.”\textsuperscript{36}

House Subcommittee Hearing on Pending Agency Rulemakings

Finally, the House Subcommittee on Railroads, Pipelines, and Hazardous Materials recently held a hearing on “Oversight of Ongoing Rail, Pipeline, and Hazmat Rulemakings.”\textsuperscript{37} The subcommittee heard testimony from the acting administrator of FRA, the acting administrator of PHMSA, and the chairman of the National Transportation Safety Board regarding the status of their regulatory efforts relating to the transportation of hazardous materials.

Conclusion

As discussed above, PHMSA and FRA are currently grappling with numerous issues relating to the transportation of crude oil and hazardous commodities by rail. Several legislative proposals relating to the rail transportation of crude oil and hazardous commodities are under consideration, but most of these proposals are in committee or in subcommittee.

Kathryn J. Gainey is of counsel in Steptoe & Johnson’s Washington, D.C., office, where she is a member of the firm’s transportation group. She can be reached at (202) 429-6253 or kgainey@steptoe.com. She concentrates her practice on transportation regulatory and litigation matters. She is a member of the board of directors of the Federal Bar Association’s Transportation and Transportation Security Law Section, as well as the Association of Transportation Law Professionals. Nina S. Thanawala is an associate in Steptoe & Johnson’s Washington, D.C., office, where she is a member of the firm’s litigation department. She can be reached at (202) 429-6490 or nathanawala@steptoe.com. © 2015 Kathryn J. Gainey. All rights reserved.

Endnotes


\textsuperscript{2}2014 NPRM at 45,040.


\textsuperscript{4}Notice of Proposed Rulemaking, Hazardous Materials: Adoption of Special Permits (MAP-21) (RRR), Docket No. PHMSA-2013-0042, 80 Fed. Reg. 5,340, 5,348 (Jan. 30, 2015). Table 8 identifies the special permits that PHMSA deemed “suitable for proposed adoption.” Id. Table 9 identifies the special permits that PHMSA deemed “not suitable for proposed adoption.” Id. at 5,353.

\textsuperscript{5}Id. at 5,341.


\textsuperscript{7}Id. at 53,357.


\textsuperscript{9}FRA NPRM at 53,357.

\textsuperscript{10}Id.

\textsuperscript{11}Id. at 53,356.


\textsuperscript{13}Id.

\textsuperscript{14}Id.

\textsuperscript{15}Id. at 14,028.

\textsuperscript{16}Id. at 14,028-14,029.

\textsuperscript{17}Id. at 14,029.

\textsuperscript{18}Id.

\textsuperscript{19}Id.

\textsuperscript{20}Id.

\textsuperscript{21}S. Con. Res. 11 § 399fff, 114th Cong. (2015); S. Con. Res. 11: An original concurrent resolution setting forth the congressional budget for the United States Government for fiscal year and setting forth the appropriate budgetary levels for fiscal years 2017 through 2025, www.govtrack.us/congress/bills/114/sconres11 (last visited Apr. 15, 2015).


\textsuperscript{25}Id. § 4(a)(1)-(2).

\textsuperscript{26}Id. § 2(2).

\textsuperscript{27}Id. § 4(a)(4); 2014 NPRM at 45,019.

\textsuperscript{28}Crude-By-Rail Safety Act § 4(a)(5).

\textsuperscript{29}Id. § 2(1).

\textsuperscript{30}Id. §§ 2(1), 3(e).

\textsuperscript{31}Id. §§ 3, 8, 9.

\textsuperscript{32}To provide for a study by the Transportation Research Board of the National Academies on the impact of diverting certain freight rail traffic to avoid urban areas, and for other purposes, H.R. 1290, 114th Cong. (2015).


\textsuperscript{34}Id. § 3.

Without exaggeration, the *mother* of all federal regulatory programs has got to be the Act to Regulate Commerce and its progeny, the Interstate Commerce Commission (ICC). Spanning the centuries from 1887, the institution withstood more than 100 years of changing times to 1995 and now resides post-sunset within the Surface Transportation Board and the U.S. Department of Transportation. But what a history … worthy of a review of its highlights here.

Spawned by public outrage at the conduct of the railroads and their willingness and ability to exact exorbitant rates for cargo transportation, Congress reacted in 1887 with establishment of the first independent regulatory agency—the ICC, which had authority to regulate the interstate rates charged by railroads, to ensure that the rates would be just and reasonable. Significantly, the new statute required the railroads to make their rates public, file them with the new ICC, and most important, adhere to the published tariffs. But after that auspicious start, the ICC expanded greatly, existed as a regulatory powerhouse in the 1940s and 50s, and then began a regulatory decline into the 80s and 90s.

The Formative Years

While the initiating act established a comprehensive regulatory regime over the rail industry (giving the ICC authority to regulate interstate rail rates; prohibiting the railroads from not only discriminating in rates or services between persons, localities or traffic but also from charging a higher rate for a shorter distance that was included within a longer haul over the same line in the same direction), the Congress also gave the new agency expanded powers as new issues arose. In 1893, the ICC was given jurisdiction over rail safety. After a couple U.S. Supreme Court cases deprived the commission of its ability to effect future rail rates, Congress moved by expanding ICC jurisdiction. With the passage of the Elkins Act in 1903 and the Hepburn Act in 1906, the ICC could prohibit rebates; could impose civil and criminal penalties for intentional acts of discrimination and intentional violations of published tariffs; was given jurisdiction of express, sleeping-car, and steamship companies, as well as fuel pipelines; could determine and prescribe maximum rates; and could establish through-routes and joint rates among noncompeting carriers and prescribe their divisions; and forbade the issuance of free passes except for clergy. In 1910 Congress passed the Mann-Elkins Act, which gave the commission, on its own motion, the power to suspend rail tariffs pending an investigation of their lawfulness. And during the period from 1889 until World War I, the power of the ICC was further enhanced.

Following World War I, the trucking industry enjoyed tremendous growth. In 1904, there were but 700 trucks operating in the United States, most powered by steam and electrical engines. After the war, in 1918, the nation had more than 600,000 trucks. But with problems surrounding over-capacity, highway safety, labor rates, customer service, and bankruptcies, many states were moved to regulate motor carriers, limit entry, and establish requirements that rates be reasonable. However in 1925, the Supreme Court handed down a decision that stripped the states of their ability to regulate interstate trucker movement. Bus operations were also of significant national concern (“wildcatters” were cutting rates below compensatory levels and victimizing customers). Reacting to a clear need for legislation, Congress promulgated the Motor Carrier Act of 1935, adding bus and trucking companies to the ICC jurisdiction, giving it authority over entry and rates of motor carriers of passengers and commodities, with added power to establish requirements for the qualifications of drivers, maximum hours of service, and standards of equipment.

Advances in transportation equipment and facilities fashioned transportation industry trends. Due to the development of a national highway system in the 1920s (hard-surface roads), along with the pneumatic tire, the internal combustion engine, and assembly-line production, motor carriers became an increasingly viable competitor to railroads. With the advent of the auto, urban transit also began to decline; bus and rail began to experience a loss of ridership in the 1930s.

Three years after adding motor carriers to ICC jurisdiction, Congress added airlines to the federal regulatory regime with the creation of the Civil Aeronautics Act of 1938 and a new regulatory body, the Civil Aeronautics Authority (a year later changed to the Civil Aeronautics Board), modeled after its older sibling, the ICC. The economic regulation of transportation, whether by the ICC over the surface modes, or the CAB of airlines, embraced three principal clusters of activities: (1) carrier entry and exit in that the agency prescribed what routes the carrier could serve; (2) the appropriate price that the carrier could charge for the transport services; and (3) antitrust immunity for acceptable carrier mergers, acquisitions, consolidations, interlocking directorates, and intercarrier agreements (with states that regulated the intrastate aspects of the industries often undertaking the same oversight).

The Transportation Act of 1940 extended ICC jurisdiction to water carriers; the Transportation Act of 1942 added ICC jurisdiction over freight forwarders.

By 1952, the ICC had jurisdiction over railroads, ferries, pipelines, bridges, internal and coastal shipping, trucks, and interstate...
bus lines. The Transportation Act of 1958 gave the ICC jurisdiction over passenger train discontinuances, previously under the authority of the state commissions (state authorities had allowed discontinuance of through trains with states).

The Zenith

At a snapshot of its regulatory reach, it was expertly estimated in the mid 1970s that the ICC had jurisdiction over some 18,000 rail, motor, and water carriers, brokers, and freight forwarders. The ICC had a maximum of 2,700 employees at its peak, with a high mark of 11 commissioners and the largest numbers of administrative law judges of any federal agency. The largest number of proceedings before the ICC involved motor carriers, which comprised the largest single mode of transportation subject to ICC jurisdiction (more than 17,000).

The ICC served as a model structure for other regulatory agencies. The ICC commissioners and their staffs were full-time regulators who could have no economic ties to the industries they regulated. And, like the ICC, later agencies tended to be organized as multiheaded, independent commissions with staggered terms for the commissioners. The other federal level agencies patterned after the ICC include:

- Federal Trade Commission (1914)
- Federal Communications Commission (1934)
- U.S. Securities and Exchange Commission (1934)
- National Labor Relations Board (1935)
- Civil Aeronautics Board (1938)
- Postal Regulatory Commission (1970)
In recent decades, this regulatory structure of independent federal agencies has gone out of fashion; the agencies created after the 1970s generally have single heads appointed by the president and are divisions inside executive cabinet departments (for example, the Occupational Safety and Health Administration (1970) or the Transportation Security Administration (2002)). The trend was the same at the state level, though less pronounced.21

No ICC review, however brief, would be complete without discussion of its infamous yak fat case. Recollect that ICC regulations required trucking companies to file their rates, or “tariffs,” with the ICC 30 days before they became effective. Anyone was allowed to protest these rates, including competing companies or the railroads. The Hilt Truck Line of Omaha had ICC authority to haul meat to Chicago and was approached by a customer who wanted it to haul drums of lard in the market. Hilt submitted an application to the ICC to haul the product, and the railroads protested, in customary fashion, claiming that they were serving the customer and the area already. Fed up with railroad opposition to every trucking rate filed, Hilt then filed a bogus tariff seeking to haul 80,000-pound truckload lots of Tibetan yak fat to Chicago at 45 cents per 100 pounds. Of course, several railroads protested the application. The railroads claimed that they were already hauling millions of tons of yak fat, and that allowing a trucking company in would cut into their business. The railroads also claimed that the truckers could not haul yak fat for the rate they proposed and that the lower rate would devastate the market. Of course, the ICC rubber stamped the railroads’ protest and ruled in their favor. The story appeared in various newspapers and business magazines. In truth, there was not a single yak within 10,000 miles of Omaha. The yak fat issue ultimately became one of the prime arguments for deregulating the trucking industry and an example of what was wrong with the excessive procedural morass into which the ICC had degenerated.24

The Decline

In the matter of rail mergers, the ICC functioned at a slow pace. Proceedings in connection with the proposed merger of the Chicago, Rock Island & Pacific Railroad and Union Pacific Railroad dragged on for 10 years, during which time the Rock Island fell apart and ceased to be the desirable merger partner that UP had courted. Over-regulation of railroads reached the point that the ICC could (and did) require railroads that lost money to continue operations. In 1962, President John Kennedy delivered a message on transportation to Congress in which he criticized the regulatory structure, which resulted in successor Lyndon Johnson establishing the U. S. Department of Transportation in 1966. The DOT was to develop and coordinate policies that would encourage a national transportation system. Some rate-making and regulatory functions remained with the ICC. However, the Federal Railroad Administration would be born out of the DOT for the sole purpose of dealing with railroad affairs, with a focus on safety.25

By the mid-1970s, the political mood in Washington had shifted against economic regulation. Regulatory failure took much of the blame for the anemic state of the rail industry. To restore the health of the rail industry, Congress passed the Regional Rail Reorganization [3R] Act of 1973, the Rail Road Revitalization and Reform [4R] Act of 1976, and the Staggers Rail Act of 1980. Collectively, the legislation limited the ICC’s jurisdiction over rail rate-making, circumscribing its ability to regulate rates unless the traffic in question was “market dominant.” Rail exit from unprofitable markets also became easier. The legislation also partially exempted state jurisdiction over rail rates and operations.26 Railroads were free to raise or lower rates at will unless, with respect to an increase, the rates would be lowered below a “reasonable minimum.”

In the mid-1970s, retailer Sears Roebuck led a public relations campaign against the onerous paperwork and costly burdens of regulation, and somehow trucking became a focus of the regulatory reform campaign.27 After lengthy hearings in 1980, Congress passed both the Motor Carrier Act and the Household Goods Transportation Act to liberalize entry and rates of trucking companies. Although not intended to create deregulation, the new legislation was so interpreted by the existing ICC commissioners.28 By 1979 the ICC was granting 98 percent of the applications filed for motor carrier operating authority.29 The Bus Regulatory Reform Act of 1982 significantly liberalized entry, exit, and pricing of the U.S. bus industry and largely preempted the states.30 The Surface Freight Forwarder Deregulation Act of 1986 deregulated freight forwarders, other than those handling household goods. The Trucking Industry Regulatory Reform Act of 1994 removed most of the remaining barriers to entry in the trucking industry (except regulation of safety and insurance) and eliminated the requirement of tariff filing.31 With strong lobbying by United Parcel Service, Kentucky’s largest employer, Sen. Wendell Ford (D.-Ky., 1974–99) added a rider to the FAA Authorization Act of 1994 preempting state regulation of intrastate motor carriers.32 Five years later, Congress passed the Motor Carrier Safety Improvement Act of 1999, which created a new Motor Carrier Safety Administration within DOT.

Federal regulation of the transportation sector of the U.S. economy has served various purposes, namely, to remedy market deficiencies (such as lack of effective competition, or to remedy destructive competition), to override the market to achieve broader social purposes, and to ensure uniformity in the face of regulatory efforts by the states.33

In the late 1970s and early 1980s, Congress began to pare and refine federal transportation regulation to reflect contemporary industry conditions and evolving ideological attitudes. The result was to reduce significantly the federal presence in the interstate transportation industry.34

The policy objectives driving transportation regulation changed significantly from those of 1887. Congress initially instituted regulation under the ICC largely to protect the public from the monopolistic abuses of the railroads. Between 1920 and 1975, however, the goal of the national transportation policy shifted to protection of the transportation industry from the deleterious consequences of unconstrained competition. Then, just as market failure had given rise to economic regulation, regulatory failure gave rise to deregulation.35 Thus, in the last quarter of the 20th century and into the 21st, regulatory policy was meant to stimulate competition to enhance consumer welfare. Managed competition across a number of infrastructure industries was dropped in favor of market forces. Transportation, as the first major industry to be regulated, and nearly a century later the first to be deregulated, has been at the forefront of this dramatic evolution in economic policy. Legislative regulatory reform began in the railroad industry and continued, as highlighted above, through the air, motor carrier, bus, and freight forwarder industries. The ICC Termination Act of 1995 sunsetted the ICC, deregulated and amended certain
functions, and transferred jurisdiction over rail, motor, bus, broker, freight forwarder and pipeline services to the newly created Surface Transportation Board and DOT.

As Professor Paul Stephen Dempsey, Ph.D., astutely observes:

In the 19th century, market failure gave birth to transport regulation. The public interest in transportation was deemed paramount. Nearly a century after economic regulation was born, an expanding, even inflationary economy, coupled with a perceived failure of the regulatory mechanism, gave birth to deregulation. Undoubtedly, the pendulum of American policy will swing again. Like transportation itself, public policy in this vital industry is in perpetual movement. 36

Indeed, transportation is in an ever-dynamic state. 37

Bernard F. Diederich received his bachelor of arts in economics from St. Norbert College in DePere, Wisconsin, and his J.D. from Marquette University Law School in Milwaukee. He practiced federal regulatory law in Washington, D.C., for more than 40 years with the federal government, with the Civil Aeronautics Board from 1970 to 1984 (regulating the airlines,) and with the U.S. Department of Transportation from 1985 to 2010 (after CAB sunset, deregulating the airlines). He has been an active member of the Federal Bar Association and its Transportation & Transportation Security Law Section since the early 1970s, serving in numerous positions at the national and section level. He is now in private practice specializing in air ambulance law. He can be contacted at bfd1955@aol.com. The author would like to thank and commend friend and colleague Paul Dempsey for the wealth of expert research and writings that he has devoted to the history and evolution of the transportation sector of the United States. He continues to serve as a professor at McGill University.

Endnotes
2. Id. §§ 11-12.
3. Id. § 6.
4. Id. § 4.
9. Id. 15.
11. Id. 269.
15. Dempsey, Transportation History, supra note 10, at 274.
16. Id. 276.
17. Dempsey, Social & Economic Consequences, supra note 8, at 18.
19. Id. at 294.
22. Id. at 340.
23. Interstate Commerce Commission, Wikipedia.
24. Dempsey, Transportation History, supra note 10, at 328;
25. Id.
27. Id. at 342.
28. Id. at 343.
29. Id. at 347.
33. Dempsey, Transportation History, supra note 10, at 364.
34. Id.
36. Id. at 366. See also Paul Stephan Dempsey, The Rise and Fall of the Interstate Commerce Commission: The Tortuous Path from Regulation to Deregulation of America’s Infrastructure, 95 Marquette University Law School 1151-1189 (2012).
The special-emergency services of an air ambulance are unique, complex, little understood, and often misunderstood. Let’s take a closer look at the complexities of this life-or-death-emergency air-transportation service. We will briefly review the definition of an air ambulance operator, the various types of operators as well as the various types of their operations, some of the regulatory difficulties they face, and ultimately the problems that threaten their smooth operation and very existence.

PARSING THE POSSIBILITIES

While not intending to be overly legal, attention to the legal underpinnings of the air ambulance is essential to properly understanding its role in the air-transport system. An air ambulance is first and foremost an air carrier and is authorized as such by the Federal Aviation Administration (FAA) and U.S. Department of Transportation (DOT) for safety and economics, respectively.

**Air Carrier**

Air carrier is the statutory term defined in the U.S. Transportation Code (49 USC §§ 101 et seq.) as any person who undertakes to engage in air transportation, meaning the carriage of persons as a common carrier for compensation or hire. Although the term common carrier is not defined in the Code, it is an old and well-established term (at common law) that has been defined in numerous decisions of the Interstate Commerce Commission, the Civil Aeronautics Board (CAB), DOT, and the courts. Briefly, a common carrier is defined as one that holds itself out to undertake for hire, by any means whether directly or indirectly (further discussion of indirect below), the transportation of passengers or property from place to place and so invites the patronage of the public. The principal determinant is the holding out test, that is, whether the person holds itself out to serve, within the limits of its facilities, anyone who applies for its services. A holding out of services may be evinced by any means—classically, advertising. But even in the absence of advertising, a carrier’s course of conduct, indicating a willingness to serve indiscriminately all who apply for service or the mere fact that it provides services for all who apply, is sufficient to support a holding-out finding.

Ultimately, the Transportation Code requires that an air carrier may provide air transportation only if it holds DOT authority for such transportation. 49 USC § 41101.
Although the term air transportation is statutorily defined to include only interstate movements, foreign movements, and the carriage of mail (see 49 USC § 40102(a)(5)), that definition is incomplete when considering modifications from legislative history and case law. An operator might not carry any interstate passengers over state borders and still be an authorized air carrier. The fact that a carrier does not carry traffic over state boundaries is not dispositive of the issue. If an operator obtains air-carrier authorization from the department, to include exemption authority under 14 CFR Part 298, it is thereafter an authorized air carrier regardless of the territorial location of its day-to-day flights. At the time of the Airline Deregulation Act of 1978,6 Congress made clear that federal-state jurisdiction over air carriers, as existed earlier in some instances at the CAB, was ended and that DOT was directed, through the federal-preemption provision (discussed below), to fully occupy the economic regulation of air carriers.8 See also 14 CFR § 399.111. Thus, an air ambulance operating on a purely intrastate basis is an air carrier, entitled to the preemption protections, where it holds DOT-air-carrier authority and yet never crosses a state line.7

A question might arise over the element of compensation or hire in any determination of common-carrier status, yet it's always secondary to the holding-out test and in any case is generally mercurial and noncompelling. No absolute definition of the term is statutorily provided; case law suggests that compensation does not necessarily include an element of profit, whereas hire does; however, profit or loss has no bearing on the issue; and the furnishing of a transportation service on a gratuitous basis could under certain circumstances be in common carriage.9

In any case, the common-carrier tests and standards are not meant to be talismanic but only to help agencies, as well as individuals, determine if the subject activity is truly of a nonpublic nature to be left free of government concern and oversight, or whether it has grown and crossed into the commercial world, dealing with members of the general public and providing them with a service that substantially competes with other regulated companies and thus should be uniformly regulated under the established rules for the safety and benefit of all. In a seminal common-carriage case, the CAB pursued an unauthorized carrier claiming that as long as it had competing commercially in the market for the patronage of the general public, it was immaterial that the service offered would be substantially competing with other regulated companies and providing them with a service that necessarily include an element of profit, whereas hire does; however, profit or loss has no bearing on the issue; and the furnishing of a transportation service on a gratuitous basis could under certain circumstances be in common carriage.9

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Federal Preemption

After CAB sunset and airline deregulation, the relationship between air carriers and the various states in which they operate changed dramatically. While CAB, in some instances, shared economic regulation of the airlines with the states, in the post-world of the Airline Deregulation Act of 1984, and in particular its federal-preemption provision, the states are subject to an express-preemption measure that prohibits them from "exact[ing] or enforce[ing] any provision that "relates to" the "prices, routes, or services" of an air carrier in the sale and operation of its air-transportation services. 49 USC § 41713. Note that the provision at 41713 contains an express-preemption provision devoid of the inexact weighing and balancing in other preemption types (implied, filed, conflict, frustration-of-purpose/obstacle). As mentioned, the legislative history of 41713 makes it clear that Congress intended to end dual federal-state economic regulation of airlines. Further, Congress sought to ensure that the resulting voids (after exit of the fuller federal regulatory regime of the CAB) would not be filled by a state seeking to continue the same or similar utility-type regulations.11 Congress enacted the provision to allow the marketplace to establish airline prices, routes, and services.

As discussed further below, some have claimed that the federal-preemption provision makes the air ambulance mix of federal and state-regulated aspects a most difficult arrangement and have sought to nullify. Whatever their leanings, the law is clear and the arrangement has worked for these 35-plus years. An exchange at the Supreme Court level on that issue of carrier preemption is instructive. During Supreme Court oral argument in the important Rowe case12, Justice Antonin Scalia asked counsel for the concerned carriers (FedEx and UPS) why they had acquiesced in the errant moves by the states (Maine and New York) to require them to make customer checks for minors who might have ordered cigarettes in violation of a state health prohibition before making any package deliveries. Scalia then answered his own rhetorical question in effect saying, “I know, you wanted to go-along/get-along. … But you can’t engage in such an attempted modification of federal preemption law with impunity … even under threat of state criminal penalties. … The provision is there to keep carrier/consumer costs at low levels. … Consumers may well have rights to challenge any such carrier action and get money damages.” Justices Samuel Alito, Anthony Kennedy, and John G. Roberts then joined in by lecturing that carriers (especially the dominant ones) under federal-preemption standards cannot simply accede to the state in activities preempted by law (thus determining for themselves the new scope of the preemption standards) to the possible detriment of smaller carriers, producing a new kind of transportation service that would not have existed in the normal marketplace.13 That is clearly not permitted.

Air and Medical Parts With Multiple Oversight

To add some of the uniqueness in a typical air-ambulance-aircraft operation, it is important to understand that air-ambulance operations are a combination of air and medical subparts. The “front” of the operation is that of an air carrier, with the speed and mobility that only it can provide. The “back” of the operation is that of a mini-medical emergency room, with the equipment and personnel that are so important in that golden hour between trauma and full medical attention that can save lives.

Even more unique than federal air-carrier entry authorization is the fact that, with the combination of air and medical subparts, the air ambulance comes under a special regulatory mix. While the air-carrier part is subject to exclusive federal authority for its FAA air-carrier safety and DOT economic authority14, the medical part is subject to a wide range of both federal and state authorities. DOT and FAA have never exercised any preemptive jurisdiction over the medical part as an air-carrier service but instead have made clear that the key medical aspects are under state jurisdiction
(with some federal jurisdiction at the Department of Health and Human Services due to the pervasive HHS Medicare and Medicaid programs). At the state level, an array of units oversee air ambulance medical aspects, typically ranging from a state medical office to regional ones and even local ones. While the mix can be harmonious, it has produced some issues regarding possible overreach by the state units in derogation of the 41713 preemption provisions.

Types of Operators/Operations

In an approximate review of overall air-ambulance operations, helicopters are about three-quarters of the industry, and the remaining 20-plus percent are fixed-wing aircraft. Slightly over half of industry operations are interfacility (hospital to hospital) transfers, while about one-third are on-scene responses to an accident or injury, and slightly more than 10 percent of industry operations include organ, medical-supply, and specialty-medical-team transport.

Direct and Indirect Air Carriers

Due to the broad statutory definition of an air carrier, including any person who either directly or indirectly engages in holding out air-transportation services, an air carrier may be either a direct or an indirect one. A direct air carrier is the traditional airline we all know and use, owning/leasing its equipment, employing numerous support people, and operating in its own right as a true entrepreneurial risk-taker in the direct pricing and offering of its services. An indirect air carrier is not so engaged in the airline operational side of the business, and, while holding out an air service to the public in its own name (thus a statutory air carrier), does not operate its own aircraft and crew but contracts for the "lift" of a direct air carrier to supply its actual air-transport movement. The more familiar type of indirect air carrier is an air freight forwarder, who offers a cargo transportation service to the public but has no aircraft or pilots of its own and instead contracts with a direct air carrier for freight movement. See 14 CFR Part 296.

The air-ambulance industry has its own direct and indirect air carriers. The air ambulance operating as a direct air carrier must have FAA Part 121 (large aircraft) or Part 135 (smaller aircraft) safety authority as well as Office of the Secretary of Transportation (OST) economic authority under either a carrier/class-specific order or a Part 298 air taxi exemption authorization. See 14 CFR Parts 121, 135 & 298. The Part 298 authorization process for direct air ambulances is fairly simple, requiring the mere filing of an application form with the FAA and the maintenance of prescribed levels of liability insurance. Of course, the FAA safety review leading to the issuance of particular direct air ambulance op specs (operating specifications) and FAA safety authorization is more pronounced.

The process for indirect air ambulance authorization is quite simple, because the CAB (later followed by DOT) has by order issued a blanket economic exemption authorization to all prospectives allowing them to hold out, arrange, and coordinate the air ambulance services of a direct air ambulance. CAB/DOT Order 83-1-36 (in Docket 41218) (1983). To obtain and hold the authorization of Order 83-1-36, the indirect air-ambulance operator must comply with the two key provisions of the order. First, it must use only a direct air carrier holding FAA and DOT air-ambulance authority, and second, it must provide safe and adequate service, equipment, and facilities in the conduct of the operations. In that they have no aircraft or crews, the FAA does not require any safety authorizations for indirect air ambulances. Indirect air carriers must be distinguished from mere sales agents of air carriers who, while they are offering air transportation, are not doing so in their own right. Such agents are not engaged in any entrepreneurial function or any risk-taking in the direct sale of the transportation, have no capital investment in the precise product, and at the end of the day can simply put the air-transportation service “back on the shelf” without any loss if it is unsold.

Air Ambulance Services

A listing of the numerous levels of air ambulance services might be helpful to establish the wide array involved. In advancing degree of complexity, an air ambulance service might involve:

- A direct air ambulance responding to a call to transport from hospital to hospital a critically ill patient, along with a full medical team and appropriate supplies and equipment.
- An indirect air ambulance responding to a call to transport a critically ill patient, as well as arrange for a full medical team with appropriate supplies and equipment, on a direct air ambulance for a cross-country flight.
- A rotary-wing direct air-ambulance operator responding to a remote accident scene, with full medical teams, supplies, and equipment, carrying numerous patients to various sites for emergency treatment, for extended periods.
- Full hospital operating-room-in-the-sky operations.

Basic Air Ambulance Models

Beginning in the early 1970s, the industry has grown along three basic operational models (listed from present to past prevalent types).

1. Community-based operations feature an independent operator setting up a base in a community and serving multiple medical facilities and localities. The operator usually holds the FAA operating certificate and employs the medical and flight crews.

2. Hospital-based operations typically involve a hospital providing medical services and staff and contracting for aviation operations. In this scenario, the aviation operator would hold the FAA certificate. Less common, the hospital owns the aircraft and conducts all aspects of the operation. Depending on state
medical triage requirements and the condition of the patient, the hospital-based aircraft may transport the patient to the affiliated hospital or some other appropriate facility. This was the prevalent helicopter model from the 1970s to about 2004.

3. Government operations are air medical operations owned and operated by a government entity, typically a city or a county. Of the three models, they are the least prevalent. Typically, government operators own their own aircraft, although they may contract for aviation services, which may be dual-purposed for police and fire operations. In most cases they do not bill for services.\(^{21}\)

Air ambulance operations are not only a specialized air-transportation service but also a varied one. They run the gamut from direct to indirect air-carrier operators, from fixed-wing to rotary-wing aircraft, from full planeload scheduled to individual charter flights, from mere body-part to critical patient and medical team transport, and from accident scene/trauma center to cross-country hospital/hospital runs.

The elements of an air-ambulance operation may be diverse, where such items as aircraft ownership, provision of crews, holding out of services, etc., are unique and may thus call for a review of all the facts surrounding the operation in question and consideration of the various elements as a whole to make an accurate determination of air carrier status. But such has always been the situation in air carrier/common carrier cases.

**Medical Requirements**

DOT (both FAA and OST) has requirements for an air ambulance to properly operate its specialized air-transportation service qua air carrier. While not at all pervasive, they also touch upon medical requirements.

DOT standards are not always exact. While OST has no precise medical standards for air-ambulance operators—other than its universal “safe and adequate service” standard for all air carriers (never applied in any case to a medical situation)—and the FAA claims none as well, the fact is that the FAA’s inspectors do expect some minimum equipment, personnel, and training standards in the medical area. While some minimum requirements do exist, the better inquiry is into the essence of the service. Ultimately, air-ambulance operations are special, based primarily on their medical services component, albeit not under strict DOT regulation as to the medical aspects, but they are accorded special air-operating consideration (low altitudes, immediate clearance, etc.) and are reviewed by FAA inspectors for the general adequacy of their medical features.

The essence of an air-ambulance operation, not listed in DOT standards but assumed in the nature of the service, is that it holds out a special air transportation service, providing not only the authority but the ability to quickly transport critically-ill patients (as well as body parts) over varying distances, with unspecified but locally-determined medical attention, to points both near and far, from points both simple and extreme, with special/emergency clearance often given to the operators by air-traffic handlers. As in air-carrier operations reviewed and approved at OST, the FAA reviews and approves a particular direct air-ambulance operation proposed against the proposal offered by the particular operator to ensure that it is operationally safe, with appropriate yet fairly generic op specs. Conversely, a carrier that is not air ambulance approved by the FAA has that negative fact listed in its ops specs.

The OST and FAA do not heavily involve themselves in the nonaviation component of the air-ambulance service. The OST has no medical standards. The FAA has some minimum medical standards. While both agencies have no detailed medical standards, the medical component is no less a part of the typical air-ambulance operation. The medical aspects may range from minor to major in any one flight. However, the medical component is a key part of the combined air-operation/medical-service package.

OST has no medical requirements for the direct air ambulance, under either Part 298 exemption authorizations or individual fitness approvals. OST requires only that its indirect air ambulances, authorized by the blanket exemption of Order 83-1-36, provide “safe and adequate service, equipment and facilities in the conduct of the operations.”

While the FAA generally claims no medical standards for its air-ambulance operators, it does have some virtual standards. Understand that when an operator proposes a particular air-ambulance service, the FAA must review and approve the medical aspects at least to the extent of its air-safety aspects and to merit its special air-ambulance designation. The FAA Ops Inspectors Handbook (Order 8400.10 ch. 11, March 13, 1997, ch. 5, § 1, ¶ 1337) describes that an air ambulance aircraft must be equipped with at least medical oxygen; suction; and a stretcher, isolette, or other approved patient restraint/container device.

Despite this listing, FAA has virtually no set medical-equipment standards for air ambulances.

That FAA publication goes on to describe that an air-ambulance operation is one in which the holding out to the public is one “providing air transportation to a person with a health condition that requires medical personnel including, but not limited to, advertising, solicitation, association with a hospital or medical-care provider.” The FAA allows that while standard air carriers may transport medical personnel as passengers who are accompanying a sick or injured person, along with in-flight patient-care equipment, they may do so solely for the patient’s comfort. If any medical care provider has determined that the medical personnel are required for the patient’s safety, the flight is deemed an air-ambulance operation.

The FAA presents (Ops Inspectors Handbook, ch. 5, § 4) that while medical personnel and flight crew are involved in two distinct operations, medical personnel may be considered crew members at the discretion of the operator. But if the operator desires to consider the medical personnel as crew members, they must complete initial and recurrent training programs. Additionally, all medical personnel must perform some duty in an air-ambulance aircraft that relates to the operation of the aircraft, such as assisting the flight crew in seeing and avoiding other aircraft, evaluating a landing site, coordinating with ground personnel at a landing site, and emergency shutdown of aircraft systems in a crash.

Further, the FAA provides “information and guidance” to air-ambulance operators in the form of advisory circulars (see AC 135-14A and 135-15A) describing “levels of medical care” for operators. It describes:

- Basic Life Support (BLS) as care by the air medical provider through at least one medical person who is trained and experienced in providing care of a specified minimum level, such as recognizing respiratory and cardiac arrest, starting and maintain-
Pricing of Services

To gain a better understanding of the manner in which air-ambulance operators handle payment for their services, especially when dealing with an indigent patient, let’s follow the money in a typical helicopter emergency-medical service.

Most emergency air ambulances operate on a 24/7/365 basis and must price their services in a way that will recover the so-called cost of readiness: staffing the aircraft around the clock with a pilot and two medical attendants. Further, air ambulances have little control over the volume of transports they will do or how many of the completed transports they will get paid for. When setting their prices, they must estimate their volume and mix of paying and nonpaying transports.

Because of the nature of this particular subset of air-ambulance operations—namely, emergencies—the air-ambulance operator has no advance occasion to determine the patient’s ability to pay. Within literally minutes, the air ambulance responds to the call of the dispatcher and picks up the patient at the accident/incident scene, without any opportunity or ability to make any determination of the patient’s ability to ultimately pay for the expensive air-ambulance service. The need for such a rapid-response service is not his determination but that of the paramedic on the scene or, in the case of an emergency transport between hospitals, the physician who is treating the patient. The particular determination is made devoid of financial considerations. While a nonemergency air-ambulance transport may be made with financial considerations playing some part, that is simply not the case in a life-or-death situation where the golden hour between time of accident and time of appropriate medical care is critical. This is not to suggest that the emergency air-evacuation service is provided free of charge. The average air-ambulance-transport charge can be more than $35,000. 22 The cost makes it easily one of the most expensive trips you’ll ever take.

While the nature of the upfront emergency situation does not permit advance-pay consideration, it can be fully addressed/pursued by the air ambulance operator after the service is rendered. The operator is possessed of full rights to recover his charges and will use all methods to do so. Those methods of course start with a simple billing of the patient or the patient’s health insurance by the operator. Medicare covers air-ambulance transportation. But Medicare coverage may not be applicable. If Medicare payments are available, they generally do not fully cover the operator’s expenses, much less their charges. If no insurance coverage is involved, the air-ambulance operator is left with pursuing normal collection measures to recover its unpaid bill. In a great number of cases, the air operator is unable to collect anything for the transport and must absorb the cost, which can only be recovered by increasing the charges to those who can and do pay for it.

Subscription Service

In a unique situation called subscription-service coverage, a potential patient may have purchased a form of insurance giving them protection against any out-of-pocket air-ambulance expenses for air-ambulance transport not covered by insurance or Medicare. For an annual charge in the range of $50 to $100, patients have the peace of mind knowing that in a time of crisis they won’t have the added worry of another big expense.

Turbulent Skies

While the dual air medical-ambulance service, with its multiple oversight agencies, operates smoothly in the vast majority of daily instances, there are some exceptions. The industry is dynamic, and its basic operations have undergone substantial growth and changes from its early beginnings in the 1970s through a period of expensive hospital-based operation to the existing flexible, community-based one. The industry expanded rapidly with the support provided by inclusion of air-ambulance coverage under Medicare.

Deregulated Versus Regulated

Along the way some detractors were troubled with the mix resulting from a deregulated, open-market air mode and a tightly regulated, utility-type medical one. They claim that the two regimes are like mixing oil and water and cannot successfully endure. They claim that inherent medical necessities require a 24/7, go-anywhere service, but under strict carrier rate and operational controls with a limited number of operators. They see the only realistic solution as a return of the air ambulance as air carrier to a previous CAB-like regime of entry, rate, and route regulation, as well as a positioning of such controls at state levels. 23 They say that Congress, when placing

Most emergency air ambulance operators operate on a 24/7/365 basis and must price their services in a way that will recover the so-called cost of readiness, staffing the aircraft around the clock with a pilot and two medical attendants.

Advanced Life Support (ALS) as care with a least two trained and experienced medical persons who can not only perform the basics (BLS) but also emergency critical care, such as endotracheal intubation, closed-chest cardiac compression, dysrhythmia recognition and treatment, defibrillation, etc.
states under the 41713 preemption provisions, was not focused on the resulting difficulties of properly managing a large and expensive state health program. They seek amendments to 41713 that would allow states to limit air-ambulance-market entry, establish specific routes/zones for carriers, set carrier prices, and coordinate air-ambulance operations with other medically-related activities. DOT has clearly and repeatedly taken the position in court cases, and in individual air-ambulance advisory-opinion letters (more than a dozen from 1986 to present\textsuperscript{25}), that air ambulances are air carriers, are protected by the full reach of the 41713 preemption provisions, and thus cannot be limited by the states in market entry, cannot have their prices regulated, cannot have their route operations restricted, cannot be restricted regarding operational hours, and cannot be restricted in numerous other areas (such as liability insurance, safety equipment, etc.) for which the DOT has prescribed federal standards.\textsuperscript{25}

**States Operating as Air Ambulances**

A confusing area of air-ambulance law exists where states and local government units may be conducting air-ambulance operations with so-called public aircraft with FAA-safety and OST-economic oversight that is far short of that applicable to authorized air ambulances carrying members of the general public in common carriage.\textsuperscript{26}

As touched on above, in the formative days of the air-ambulance industry, several state units operated air-ambulance services. The public aircraft were owned and operated by a state or local government unit. Several highly-visible public-aircraft accidents during the 1990s called into question the validity of the then-established aviation-safety laws permitting the transportation of passengers by government agencies without FAA oversight and safety compliance. In perhaps the most prominent of these accidents, the governor of South Dakota and seven other people were killed on a state-operated aircraft. In reaction, Congress changed federal law in 1994 to narrow significantly the definition of public aircraft. In the words of Sen. Larry Pressler of South Dakota, a principal advocate, the purpose of these public-aircraft amendments “is to mandate that FAA safety regulations, directives, and orders issued for civil aircraft be made applicable to all government-owned, nonmilitary aircraft engaged in passenger transport.”\textsuperscript{27} Some governmental units may yet be conducting air-ambulance operations, transporting the general public under the lesser and inapplicable public-aircraft standards, with erratic guidance from the FAA as a partial factor.\textsuperscript{28}

The raison d’etre of the FAA/OST carrier-licensing requirements and gradations is simple yet critical. The greater the expected usage of the operator’s aircraft as well as the level/scope of its operations, the greater the requirements, moving from simple, general aviation to full common carriage. It is both reasonable and a good regulatory system, that a weekend dentist flying for pure pleasure or even a charter carrier for prize racehorses moving from Kentucky to Saudi Arabia has quite a different operation than an airline with wide-body aircraft operating 24/7 with literally hundreds of thousands of customers annually traveling to every corner of the world. Those differences compel the differences in safety and economics under DOT regulatory requirements. The ultimate point is that the general public is entitled to air-ambulance operations at the highest level of safety and economics (full safety, full insurance, and other Part 298 protections). Operations as a public aircraft require none of those protections.

**Deep Pockets**

Because of their popularity and high cost, air-ambulance operations have unfortunately become the focus of strapped states and counties seeking to address ever-rising budget costs. What was $300 for a monitoring fee last year can be $3,000 this year, with demands for $30,000 and more next year. Patient-transport fees can be demanded for each patient transported to a hospital. Individual counties may seek a fee for dispatch services to help defray the cost of maintaining their restricted 911 emergency network for air and ground ambulances. While the county’s stated intent is simply one of dividing the costs in a fair and balanced manner among all of the ambulance users, the basic fact is that air and ground ambulances are under quite disparate regulatory regimes and should not be grouped under one-fee fairness standard. Moreover, some counties have attempted to control air-ambulance routes and services by requiring that they operate in only certain assigned geographic zones (EOAs, or exclusive operating areas) and operate 24/7.

Dating back to the mid-1950s, the Interstate Commerce Commission (ICC)—then charged with regulating all ground carriers, including ground ambulances—decided \textit{sua sponte} that it would no longer assume jurisdiction over ground ambulances and thus effectively de-regulated them from ongoing federal oversight.\textsuperscript{29} On the other hand, Congress/DOT has made it clear that it has and maintains plenary safety and economic jurisdiction of air ambulances. Thus, while ground ambulances operate under virtually no federal oversight, that is not true of air ambulances, where federal requirements are fairly extensive.\textsuperscript{30} The differences are quite substantive. While a ground ambulance might properly accept an EOA designation and thus enjoy a high referral level in return for its high dispatch fee, an air ambulance by virtue of the 41713 preemption provision cannot be properly provided a “no competition” EOA award for the exclusive referrals it would receive. A state agency is preempted by 41713 from limiting air-ambulance-market entry through an EOA scheme or likely a restrictive dispatch service with the same end.\textsuperscript{31}

Other provisions of the transportation code also present obstacles to any state viewing an air ambulance as a \textit{golden goose}. The so-called Anti-Head Tax Act provision (AHTA) prohibits any state or unit of a state from levying or collecting any fee or other charge, directly or indirectly, on the sale of air transportation.\textsuperscript{32} It is designed to limit state and local taxation of aviation. DOT has interpreted the provision to prohibit state charges on air carriers for such purposes as helping states defray expenses of a state cargo-inspection program.\textsuperscript{31} DOT has also held that a state or local fine imposed upon a carrier for a violation of a local-carrier requirement or certain state program fees are a direct charge on the sale of the carrier’s air transportation and are prohibited by the AHTA.\textsuperscript{34} While the AHTA lists certain air-carrier taxes that are unobjectionable, it prohibits any charges on individual travelers (and freight) as well as the gross receipts from the sale of that transportation.\textsuperscript{35}

While any quick determination of air-carrier-tax liability is risky, state charges on air ambulances for county services with any reasonable connection to the sale and operation of its air-ambulance services, with a facial tie to passenger sales volume, would appear to raise substantive AHTA-liability issues. They relate to the sale of air transportation; they involve a state unit; and they are not excused by inclusion in the statutory listing of unobjectionable charges.
Blue Skies

Much like a good liability insurance policy, a healthy air-ambulance industry is something most people don’t focus on till they need it—and when they do, it is essential. Like anything of value, it cannot be neglected but must be properly maintained lest it not be ready and able to deliver when called upon. Our national air-ambulance system is healthy and vibrant but also constantly being tested. We can celebrate it but we must defend it (against over taxation and over regulation) to maintain its fully ready status.

Anyone who grew up on a diet of Sunday night MASH episodes saw the life-or-death benefits of air-ambulance services at their earliest, best, and most extreme. Anyone who watched the front page of their newspaper in recent months saw the priceless benefits of quick air-ambulance movements for deadly Ebola patients from one stricken part of the world to a curative part. Anyone who undertakes a summer off-road trek in the backcountry knows the utility of never being out of air ambulance reach. And anyone who travels the roads and might find themselves in a vehicle accident has to appreciate the relief that only an air ambulance might provide.

While some would put the air-ambulance system under heavy financial or re-regulatory pressures with demands for extreme charges and revamped operations, it should be clear that the system, much like our overall medical system, is at a world-best level and should be allowed to advance on its present course.

While some have pictured problems in the air-ambulance business, a more balanced review would note that over the 35-plus years of air carrier deregulation, reliance on marketplace factors to set such key production factors as availability and price has produced a high and desirable level of price/service options for the benefit of the public. The air-ambulance industry has grown substantially over that period. Air safety has improved, not decreased, under the open market structure. Arguments of the detractors for legislative change were at times based on statements that were anecdotal, inconsistent, and simply repeats of general attacks on airline deregulation. All should thus be most reluctant to forsake the proven, flexible marketplace system for a return to a failed one of expensive, oppressive regulatory restraints.

It remains for all of us to stay informed about and protective of that priceless national asset, not perfect but now well-honed through 40 years of testing, and productively advancing.

Bernard F. Diederich received his bachelor of arts in economics from St. Norbert College in DePere, Wisconsin and his J.D. from Marquette University Law School in Milwaukee. He practiced federal regulatory law in Washington, D.C., for more than 40 years with the federal government, with the Civil Aeronautics Board from 1970 to 1984 (regulating the airlines) and with the U.S. Department of Transportation from 1985 to 2010 (after CAB sunset, deregulating the airlines). He has been an active member of the Federal Bar Association and its Transportation & Transportation Security Law Section since the early 1970s, serving in numerous positions at the national and section level. He is now in private practice specializing in air ambulance law. He can be contacted at bfd1955@aol.com.

Endnotes

1Simply stated, after the sunset of the CAB in 1984 (which regulated air-carrier entry and industry economics) those functions were largely transferred to DOT. Safety jurisdiction continued and remained with the FAA, a modal administration within DOT. To gain air-carrier status, a prospective must obtain both FAA safety authority as well as DOT economic authority. Beginning at CAB, and continuing at DOT, air-carrier economic authority can take several forms, ranging from the full and formal air-carrier certificate (albeit in a much reduced level of procedure, post-CAB sunset) to the so-called exemption authority (see 14 CFR Part 298), applicable to air ambulances, where minimum steps (filing of a form and the maintenance of requisite insurance; exempted from more onerous requirements) will establish air-ambulance economic operating authority. As a technical matter, the administrative functions surrounding air ambulance exemption authority were transferred from DOT (Office of the Secretary) to FAA more than 10 years ago.

249 USC §§ 40102(a)(2), (a)(5) & (a)(25).


7See DOT letter discussing issue and leaving virtually no argument for state regulation of DOT-authorized air ambulances operating purely intrastate transportation. Letter of DOT Deputy Assistant General Counsel James R. Dann to Texas Assistant General Counsel Donald Jansky, Feb. 20, 2007.


9Under a little-known or used provision of the transportation code, an individual air carrier has specific federal-court standing to bring its own injunctive action against a competing carrier for engaging in “unauthorized air transportation.” The competing carrier is an “interested person” (previously termed a “party in interest”) in a suit to enforce the Code requirement of a DOT authorization to provide air transportation as an air carrier. 49 USC §§ 46108 & 41101(a)(1). See CAB amicus briefs in Monarch Travel Services Inc. v. Associated Cultural Clubs Inc., 466 F. 2d 552 (9 C.A. 1972).
authority, it is subject to DOT-enforcement action.

To be clear, the unit within DOT that directly deals with air-carrier economic-issues transfers, reclassified from CAB at its sunset, is within the Office of the Secretary, hereinafter OST or DOT (except for Part 298 exemption authorizations moved from OST to FAA; see note 2 supra).


Estimates of air-ambulance industry expert, Bill Bryant, a principal in the consulting firm of Sierra Health Group, in Golden, Colo.

DOT has a number of insurance requirements in place for air ambulances. Under DOT regulations at 14 CFR Part 205, air ambulances must maintain minimum-prescribed levels of accident-liability insurance. Any additional state requirement for such accident-liability insurance would be preempted. There are nevertheless a number of other insurable interests in an air-ambulance operation, such as emergency medical-service providers in an air-ambulance operation, which are not covered by DOT and could thus be properly subject to state requirements. Note that failure to maintain proper insurance violates DOT Part 205 and, by operation of law, renders a carrier’s authority ineffective and subjects the carrier and its principals to DOT-enforcement action. See 14 CFR Part 205 and white paper at DOT Notice to Airlines and Companies Writing Aviation Insurance Policies, May 16, 2003.

Of course where an operator is holding out an air-ambulance service, either direct or indirect, without appropriate FAA/OST authority, it is subject to DOT-enforcement action. See remedial DOT-enforcement action and orders to cease and desist as well as collection of civil penalties issued against violating indirect air-carrier operators at:

- Order 2009-4-17, April 27, 2009, in Docket 2009-0001.

For an expert and helpful guide to the nuances involved in parsing out directs, indirects, agents, and brokers in air transportation, see DOT white paper The Role of Air Charter Brokers in Arranging Air Transportation, DOT Office of Aviation Enforcement and Proceedings, Oct. 8, 2004.

Descriptions of industry expert Bryant, supra note 16.

Estimate of industry expert Bryant, supra note 16.

See testimony of Thomas Judge on behalf of the Patient First Air Ambulance Alliance before the House Transportation and Infrastructure Committee, Aviation Subcommittee, April 22, 2009.

The DOT letters are issued by a law office within their Office of General Counsel. A partial listing, with copies of the letters, can be found at www.dot.gov/mission/administrations/general-counsel/elibrary. A further partial, summary listing can be found in a GAO report on air ambulances, Air Ambulance: Effects of Industry Changes on Services Are Unclear, GAO-10-907, Sept. 2010, at Appendix III. A review of the key court cases, as well as DOT and state attorneys general opinion letters related to the air-ambulance industry, especially preemption issues, can be found in the GAO report at Appendix III, Tables 4 and 5. The report states that the DOT opinions have helped to clarify the relationship between federal and state oversight and regulation of the air ambulance industry. See report at opening statement.

For a thorough review of the air-ambulance preemption provisions, see R. Michael Scarano Jr. and Bill Bryant, Federal Preemption of State Regulation Over Air Ambulances, 28 Air Medical Journal 77 (2009).

Aircraft used by U.S. operators can be roughly classified as either: (1) public aircraft for the military and public operators or (2) civil aircraft for all the other operators. See 49 USC § 40102(a)(17) and (41). While local governments may engage in full air-ambulance operations as an air carrier, they might avoid virtually all FAA and OST requirements where they fashion their operations so that their aircraft fit the restrictive definition of so-called public aircraft and thus need only comply with Part 91 (FAA’s very general aircraft-operation requirements), avoiding other DOT requirements—most important, fitness reviews, insurance requirements, and other safety requirements. See 14 CFR Parts 91, 204, 205, 121 and 135. By fitting within the public aircraft definition/regime, the governmental unit might avoid any question that they are engaged in common carriage and thus subject to the full regulatory requirements therein involved. Under the transportation code, public aircraft (pertinent here) are ones that are operated in the performance of a governmental function—namely a litany of purposes with a public service bent, including search-and-rescue as well as other governmental functions—but not for compensation, namely as a commercial operator or an air carrier, and never carrying the general public unless acting as crew members or “whose presence is required to perform or is associated with the performance of a governmental function.” 49 USC § 40125(a) & (b).

140 Cong. Rec. S14419-S14420 Oct. 6, 1994 (statement of...

See expert review of the issues by former FAA attorney Irene Howie, Curing the Confusion: Who Regulates Government Air Medical Flight Safety?, 22 THE AIR & SPACE LAWYER 3 (2009). States such as Maryland and county units in the states of Florida, New York, California and Pennsylvania may continue to transport members of the general public under so-called public aircraft operations.

Dennis Common Carrier Application, 63 MOTOR CARRIER CASES 66, at 69 (1954).

In the classic description of the close federal/airline industry connection, Justice Robert H. Jackson in Northwest Airlines v. Minnesota, 322 U.S. 292, 303 (1944) described: “Federal control is intensive and exclusive. Planes do not wander about the sky like vagrant clouds. They move only by Federal permission, subject to Federal inspection, in the hands of Federally certified personnel, and under an intricate system of Federal commands.” In contrast to areas historically subject to state regulation, operations of an air carrier engaged in air transportation have always been intensively and virtually exclusively regulated by the federal government. DOT Order 99-9-27 at 44.

In addition, as mentioned, because of the dual air/medical nature of an air-ambulance operation, and the resulting medical services jurisdiction of HHS, that department has requirements that may apply under its Medicare/Medicaid programs. An HHS statute makes it a crime for parties on either side of a transaction to “offer, pay, solicit or receive” any remuneration to purposefully induce the referral of Medicare/Medicaid air ambulance services. 42 USC § 1320-Tb(h). The Office of Inspector General (OIG) at HHS cautions that inflated payments to a state in return for access to emergency medical service patients may constitute a prohibited kickback. 68 Fed. Reg. 14245, at 14253 (2003). Restricted state 911 dispatch service programs, with inflated fees demanded of air-ambulances in return for program access, may raise serious air-ambulance-liability issues.


Id. at 18.

The AHTA lists acceptable state taxes on air carriers as: property taxes (if no higher than similar companies), net income taxes, franchise taxes, or sales or use taxes on the sale of goods or services (such as jet fuel). But see detailed discussion of close questions surrounding such fuel taxes at 58 JOURNAL OF AIR LAW & COMMERCE 103 (1992).

The operating companies are supported by dozens of trade associations, such as AAMS, Association of Air Medical Services; CAMTS, Commission of Accreditation of Medical Transport Services; AMOA, Air Medical Operators Association; HAI, Helicopter Assoc. Int’l; NPAA, Nonprofit Air Ambulance Alliance; NASEMSO, National Assoc. of State EMS Officials; IAFP, Int’l Assoc. of Flight Paramedics; and others.

The TV hit ran for 11 years (1972 to 83) with the lifesaving times and antics of the 4077th Mobile Army Surgical Hospital (MASH) unit in South Korea, highlighted by such things as company clerk “Radar” O’Reilly’s uncanny ability to hear incoming helicopters with patients in advance of anyone, expanding slightly the lifesaving golden hour for quick treatment. The final episode became the most-watched TV show in American history, with 106 million viewers.

While the immediate Ebola threat subsided, the specter of such a repeat disaster remains and haunts many, with extra precautions and procedures continuing behind the scenes. See Ebola Guidance for Airlines on the Internet.

In a recent, significant FAA rule-making proceeding to strengthen air ambulance safety requirements (FAA docket 2010-0982), the FAA had occasion to report on the size of U.S. helicopter emergency-medical service (HEMS) operations. During 2003 to 2008, the industry underwent a 54 percent increase in the number of helicopters in operation. In 2009, some 74 HEMS operators flew approximately 850 helicopters, with the operators ranging in size from one aircraft to the largest operator being the 10th largest air carrier in the nation.

AIRCRAFT continued from page 57

Endnotes


214 C.F.R. § 91.119.


4United States v. Boyster, 436 F.3d 986 (8th Cir. 2006).


6“The Unmanned Aircraft Systems” GAO-12-981, September 2012, p.36.


This definition is derived from section 331(8) of the FAA Modernization and Reform Act of 2012 (Public Law 112-95, 126 Stat 72, Feb. 14, 2012).


8Dieteman v. Time Inc., 449 F.2d 245 (9th Cir. 1971); Am. Jur. 2d, Privacy § 50.

9See M. Ryan Calo, The Drone as Privacy Catalyst, 64 STAN L. REV. ONLINE 29 (2011) (“Tort recovery founders on the question of damages.”)

10See 49 U.S.C. 46301, where fines of $25,000 per violation or per flight are typical.

11See, for example, 49 U.S.C. 46311, where imprisonment for two years is the penalty for unlawful disclosure of information.


13Am Jur 2D, Assault and Battery, § 60.
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JOHNSON V. UNITED STATES (13-7120) (REARGUMENT)

Court Below: U.S. Court of Appeals, Eighth Circuit
Oral Argument: April 20, 2015

Is the “residual clause” in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2) (B)(ii), unconstitutionally vague?

The Federal Bureau of Investigation started investigating Samuel James Johnson’s participation in the Aryan Liberation Movement (Movement) in 2010. Johnson intended to counterfeit U.S. currency to support the activities of the Movement. Johnson repeatedly told undercover agents that he manufactured explosives for the Movement and showed agents a large collection of weapons, including an AK-47 rifle. Because he possessed these firearms, Johnson was arrested in April 2012.

Johnson was charged with six counts in his eventual indictment—four counts of being an armed career criminal in possession of a firearm and two counts of being a felon in possession of ammunition.

Johnson pled guilty to one count of being an armed career criminal in possession of a firearm. Under the Armed Career Criminal Act (ACCA), Johnson qualified as an armed career criminal—due to three violent felony convictions—and was subject to a mandatory minimum 15-year prison term. Johnson challenged the classification of his prior felonies as violent felonies, but the district court ruled that all three felonies were violent. Additionally, Johnson argued that the ACCA is unconstitutionally vague, but the court disagreed. The district court sentenced Johnson to 180 months in prison.

Johnson appealed to the U.S. Court of Appeals for the Eighth Circuit, arguing that the court should not consider his convictions for attempted simple robbery and possession of a short-barreled shotgun violent felonies under the ACCA, and that the ACCA is unconstitutionally vague. The Eighth Circuit ruled that the district court properly classified Johnson’s past convictions as violent felonies under the ACCA. The court reasoned that, under the statute, a crime is a violent felony if it “otherwise involves conduct that presents a serious potential risk of physical injury to another.” According to Eighth Circuit precedent, possession of a short-barreled shotgun falls into this “residual clause” of the ACCA. Additionally, the court held that attempted simple robbery is a violent felony. The Eighth Circuit also ruled that the ACCA was not unconstitutionally vague.

Finally, Johnson appealed to the U.S. Supreme Court, which granted certiorari to determine whether possession of a short-barreled shotgun falls into this “residual clause” of the ACCA. The court held that attempted simple robbery is a violent felony. The Eighth Circuit also ruled that the ACCA was not unconstitutionally vague.

Discussion

Upon rehearing this case, the Supreme Court will have the opportunity to consider if the residual clause contained in the ACCA is unconstitutionally vague. Johnson argues that the residual clause is unconstitutionally vague and undermines due process. Nevertheless, the United States argues that the residual clause is not unconstitutionally vague and does not violate due process. This case may implicate the ability of people to conform their conduct to the law, the uniformity of sentencing across the nation, and the interplay of the legislative and judiciary branches.

ADEQUATE NOTICE AND UNIFORMITY

Supporting Johnson, amici the National Association of Criminal Defense Lawyers (NACDL) argues that the residual clause of the ACCA is unconstitutionally vague regarding all of its potential applications, including inchoate offenses, battery against a law enforcement officer, and statutory rape. The NACDL explains that “[n]umerous circuit splits persist, leaving the courts, litigants, and the public unable to surmise which predicate offenses are included within the residual clause or why.” More broadly, the NACDL asserts that the residual clause fails to adequately inform a defendant of the riskiness of his or her conduct. As a consequence, a defendant, the NACDL claims, is left with uncertainty about the sentence or consequences of certain criminal conduct.

The United States, in opposition, urges a “categorical approach” when determining the applicability of the residual clause to cases like Johnson’s. The categorical approach, the United States argues, makes the ACCA’s application “more predictable and uniform than … statute[s] that impose criminal liability or sentencing consequences for risky conduct” on a case-by-case basis. The categorical approach, according to the United States, contemplates whether a defendant’s specific behavior falls within the general category of crimes contemplated by the ACCA. Because review of whether an offense falls under the residual clause is left to appellate courts, the United States argues that such review allows for predictable and consistent application to offenders. The United States further explains that such appellate determinations put defendants on notice regarding whether their actions in one state may constitute a predicate offense in another state.

THE ROLE OF THE JUDICIARY

The NACDL, in support of Johnson, contends that inquiries into a statute’s vagueness are necessary for “preserving the separate roles of the legislature and the judiciary.” Vague statutes and laws,
the NACDL argues, undermine the relationship between the government and its people when legislatures require judges to determine the conduct that triggers severe penalties under vague statutes. Ideally, the NACDL explains, the people give elected officials power to decide what conduct gives rise to severe penalties.

On the other hand, the United States contends that judges are in the best position to make determinations about severity of risk and the conduct applicable to particular convictions. The United States argues that under a categorical standard, judges are equipped to make well-reasoned decisions regarding whether the offense ordinarily causes a serious threat of injury as well as a “common sense judgment” regarding the riskiness of the particular conduct in question. The United States points out that in making both decisions, judges may rely on legislative judgments, empirical data, and case law in addition to their own common sense judgment.

Analysis

With this rehearing, the Court will consider whether the text of the residual clause of the ACCA is unconstitutionally vague. Johnson argues that the residual clause is unconstitutional, contending that the statute’s language is vague, courts lack clarity in interpreting the clause, and the clause violates due process. The United States counters that the standard for finding a statute unconstitutional is high, and that—because the ACCA’s residual clause has clear language and interpretations of the ACCA are reviewed de novo by an appellate court—the statute is constitutional.

TEXTUAL VAGUENESS

Johnson argues that because the language of the ACCA’s residual clause is vague and unclear, it is unconstitutional. Johnson contends that the lack of clarity leads to subjective interpretations by the courts because they are left without textual guidance from the statute. In particular, Johnson first credits vagueness to the inclusion of the word “otherwise” directly following four concrete examples of crimes that fall within the clause. Johnson explains that the Supreme Court treats the word “otherwise” to mean that the level or risk “must be the same as the enumerated offenses that precede it.” Therefore, Johnson argues that the Court’s interpretation of the word “otherwise” is different from its dictionary and common definition of “in a different way or manner.”

The United States, however, counters that the language used in the residual clause is not ambiguous, and even if it were, it does not meet the standard to be deemed unconstitutional. The United States contends that the residual clause is not unconstitutional because the standard requires Johnson to show that the statute “could not intelligibly be construed to apply to any offenses...” To do so, the United States notes, the Supreme Court would have to overturn prior precedent, which weighs against finding the statute unconstitutional. To Johnson’s argument regarding including the word “otherwise” after four enumerated offenses, the United States maintains that the statute is precise, not vague. Furthermore, the United States contends that even if the risk of the enumerated offenses varies, this does not make the residual clause uninterpretable. The United States supports its argument by referencing numerous federal statutes and over two hundred state statutes that use similar language to that of the residual clause when defining a level of risk.

DUE PROCESS

Johnson argues that the residual clause is so vague that it violates the “vagueness doctrine” and, in turn, due process. First, Johnson argues that because the residual clause is unclear, it prevents people from being informed of what conduct is prohibited. Johnson contends that this is unconstitutional because the due process requires fair notice. Second, Johnson believes that the vagueness of the residual clause leads to arbitrary and subjective interpretations by judges, which raises both due process and Sixth Amendment concerns. Finally, Johnson contends that the ambiguity of the residual clause leads to separation of powers issues. Johnson argues that it should be Congress’s role to specify and fix the language of the residual clause. To keep the clause’s language as is, Johnson argues, would force the Supreme Court to overstep its “bounds of judicial interpretation.”

The United States counters that the residual clause does not raise due process concerns. The United States asserts that the fair notice principle should not apply in this instance since there is “a higher standard for sentencing provisions”, and the ACCA relates to sentencing. The United States contends that notice should be given to assist the innocent and ordinary citizens—not to assist criminals in choosing to commit an offense that has lesser consequences. Finally, the United States maintains that because the ACCA presents a question of law, arbitrary enforcement of the residual clause is impossible since the district court’s decision is reviewed de novo by an appellate court, and even the Supreme Court.

Conclusion

This case will decide whether the residual clause of the ACCA is unconstitutionally vague. Johnson argues that because the text of the clause is ambiguous and the clause has led to interpretive disparities among courts, it is unconstitutional and violates due process. Nevertheless, the United States counters that even if the language is vague, the standard to find it unconstitutional is high and the residual clause does not meet this threshold. In support of Johnson, the NACDL argues that if the Court finds the clause constitutional, it will continue to be particularly difficult to apply the ACCA to certain offenses, such as inchoate offenses, battery against an officer, and statutory rape. The United States, however, argues that finding the clause unconstitutional and failing to use a categorical approach would lead to a general lack of uniformity amongst the courts.

The outcome of this case may implicate the uniformity of sentencing across different states, the interplay of the legislative and judiciary branches, and the ability of people to identify the consequences of certain types of unlawful conduct.

Written by Cesie Alvarez, Njeri Chasseau, and Shaun Martinez. Edited by Rose Petoskey.

OBERGEFELL V. HODGES (14-556); TANCO V. HASLAM (14-562); DEBOER V. SNYDER (14-571); BOURKE V. BESHEAR (14-574)

Court Below: U.S. Court of Appeals, Sixth Circuit

Oral Argument: April 28, 2015

Does the Fourteenth Amendment require states to license or recognize
same-sex marriages lawfully performed and licensed out-of-state?

For 22 years, Petitioner James Obergefell and his late partner, John Arthur, lived together in a committed relationship in Cincinnati, Ohio, until Arthur’s passing on Oct. 22, 2013. On July 11, 2013, Obergefell and Arthur married on a Maryland farm. That same day, the newly married couple returned to Cincinnati. In 2013, Obergefell and Arthur’s marriage was legally recognized in Maryland and by the federal government as confirmed by the U.S. Supreme Court in United States v. Windsor. However, various Ohio state laws forbid same-sex marriage. Following Arthur’s passing, and in accordance with Ohio law, Arthur’s death record (1) failed to record Obergefell as Arthur’s “surviving spouse” and (2) listed Arthur as “unmarried” at the time of his death.

In 2013, Obergefell filed suit against respondent Richard Hodges, director of the Ohio Department of Health. Obergefell argued that Ohio laws failing to recognize out-of-state same-sex marriages are unconstitutional. The district court ruled in favor of Obergefell, and ordered the local Ohio Registrar of death certificates to reject a death certificate for Arthur that failed to record Arthur’s marital status as “married” and to list Obergefell as his surviving spouse at the time of death. The district court reasoned that the Fourteenth Amendment protects a “fundamental right to keep existing marital relationships intact” and that Ohio failed to satisfactorily justify its refusal to recognize same-sex marriage under both a heightened intermediate scrutiny review and a less rigorous rational basis review.

On appeal, the U.S. Court of Appeals for the Sixth Circuit reversed the district court ruling.

On Jan. 16, 2015, the U.S. Supreme Court granted certiorari—consolidating this case with Tanco v. Haslam, DeBoer v. Snyder, and Bourke v. Beshear—to determine whether the Fourteenth Amendment requires a state to (1) recognize lawfully licensed same-sex marriages performed out-of-state and (2) grant same-sex marriage licenses.

**Discussion**

The Supreme Court’s decision in this case may clarify whether the Fourteenth Amendment requires states to (1) recognize out-of-state same-sex marriages and (2) license a marriage between same-sex couples. Though only one of the consolidated cases, Obergefell’s and Hodges’ arguments are generally representative of the views advocated by the parties in Tanco v. Haslam and Bourke v. Beshear regarding their respective state’s laws that do not recognize out-of-state same-sex marriage licenses. Deboer, the petitioner in a consolidated case, argues that the Court should require states to license same-sex marriage under principles of due process and equal protection. The respondent in Deboer, Richard Snyder, counters that nothing in the Fourteenth Amendment’s history or plain text meaning requires states to license same-sex marriages. The Supreme Court’s ruling in these cases—in addition to having potentially profound effects on the rights of same-sex couples—will implicate the rights of those related to them.

**THE RIGHTS OF CHILDREN OF SAME-SEX COUPLES**

Obergefell and supporting amici argue that Ohio’s recognition ban diminish the rights of children of same-sex parents by depriving them of legal, financial, and societal benefits. The Family Equality Council contends that the legalization of same-sex marriage has provided “powerful emotional and psychological benefits” for tens of thousands of children in America. Similarly, the American Psychological Association (APA) maintains that hundreds of studies confirm that important factors—parental warmth, consistency, and security—do not depend on a parent’s gender or sexual orientation. The APA highlights scientific studies confirming that same-sex parents are equally as capable as heterosexual parents and that the children of same-sex and heterosexual couples are equally psychologically healthy.

Hodges and supporting amici, however, argue that reversing Ohio’s recognition ban would threaten biological parents’ rights to determine how to rear their children. Alabama Governor Bentley (Bentley) argues that extending legal recognition to same-sex couples would be detrimental because father-child relationships are non-existent absent heterosexual marriages. Bentley contends that children’s rights can only be achieved after a heterosexual marriage “formally bind[s] the husband-father to his wife and child, and impose[s] on him the responsibilities of fatherhood.” Similarly, the Ruth Institute argues that the public purpose of marriage is to preserve biological parent-child relationships by binding natural mothers and fathers to their children. The Ruth Institute fears that a ruling for Obergefell would detach “the biological definition of ‘parent’ from its legal definition” by disparaging natural parents’ legal status and jeopardizing children’s rights to know their natural parents.

**DO ALTERNATIVE LEGAL UNIONS GRANT SUFFICIENT LEGAL PROTECTION?**

The American Bar Association (ABA) argues that legal substitutes to marriage are inadequate ways to re-create rights and obligations automatically created through marriage. The ABA contends that examples of rights that many same-sex couples cannot adequately exercise without recognition of same-sex marriage include: inheriting, directing the burial of a partner’s remains, making medical decisions on behalf of one’s partner, and childrearing. The ABA contends that even with adequate legal counsel, same-sex couples who cannot marry will never enjoy the same presumption of legal parenthood.

However, Idaho Gov. “Butch” Otter counters that alternative arrangements for people who identify as gay—single parenting, step parenting, cohabitation, or adoption—provide enormous societal benefits. Relatedly, in Bourke v. Beshear, one of the consolidated cases, respondent Kentucky Gov. Steve Beshear argues that same-sex couples may face no additional burden than some heterosexual couples. As an example, Beshear notes that heterosexual marriage between first cousins is legal in California but not in Kentucky.

**Analysis**

The Supreme Court will contemplate whether the Fourteenth Amendment requires a state to recognize lawfully licensed, out-of-state same-sex marriages. Though only one of the consolidated cases, Obergefell’s and Hodges’ arguments are representative of the general views, advocated by the parties in Tanco v. Haslam and Bourke v. Beshear, regarding their respective state’s laws that do not recognize out-of-state same-sex marriage licenses. Obergefell contends that Hodges cannot defend Ohio’s marriage-recognition
laws under United States v. Windsor or under the applicable heightened scrutiny standard. However, Hodges counters that the Windsor ruling permits Ohio’s decision not to recognize out-of-state marriages and protects various rationales, such as local democracy. Additionally, in a consolidated case, Deboer argues that the Constitution demands that the Court require states to license same-sex marriage under principles of due process and equal protection. However, Snyder counters that nothing in the Fourteenth Amendment’s history or plain text requires states to license same-sex marriage.

**ARE OHIO’S MARRIAGE RECOGNITION LAWS CONSTITUTIONAL UNDER WINDSOR?**

Obergefell argues that Ohio’s marriage recognition laws are unconstitutional under the Supreme Court’s ruling in Windsor. Obergfell explains that the Windsor Court found the Defense of Marriage Act (DOMA) unconstitutional because the “design, purpose, and effect” of DOMA was to “single[ ] out ‘same-sex marriages made lawful by … the States[] for ‘restrictions and disabilities.’” Obergfell believes that the plain text of Ohio’s recognition laws similarly—and unconstitutionally—“single[ ] out same-sex couples. Additionally, Obergfell emphasizes that the Windsor Court struck down DOMA because the “practical effect” of that law was to disadvantage and stigmatize lawful same-sex marriages. Like DOMA, Obergfell contends, the Ohio recognition laws interfere with same-sex married couples’ and their families’ personal matters (such as amassing legal documents that heterosexual couples do not need).

Hodges counters that Windsor does not require states to recognize out-of-state same-sex marriages. Hodges resists extending the Windsor Court’s interpretation of the Fifth Amendment (invalidating DOMA) to reading a “freestanding marriage-recognition right” into the Fourteenth Amendment. Such a reading, Hodges claims, violates the Full Faith and Credit Clause and the “public-policy exception,” the latter of which permits states to not “apply another State’s law in violation of its own legitimate public policy.” Hodges explains that the Fourteenth Amendment, a more “generalized” source of constitutional protection, cannot create a fundamental right (such as marriage recognition) if the Full Faith and Credit Clause (a more specific and explicit source) does not recognize such a right.

**DO OHIO’S MARRIAGE RECOGNITION LAWS SATISFY THE APPLICABLE STANDARD OF REVIEW?**

Obergefell argues that Ohio’s recognition laws are subject to heightened scrutiny because they discriminate based on sexual orientation and gender. In the alternative, Obergfell argues that Ohio’s marriage recognition laws fail to satisfy rational basis review because Obergefell rejects the notion that “a state majority’s desire to withhold marriage rights from same-sex couples … ‘bear[s] a rational relationship to an independent and legitimate legislative end.’”

Hodges counters that Ohio’s recognition laws do not warrant heightened scrutiny because they do not infringe a “fundamental right” or discriminate against a “suspect” class. To support his position, Hodges contends that “the right to marry has never included same-sex marriage.” Hodges also maintains that Ohio’s recognition laws are gender neutral because Obergefell has failed to show that Ohio “enacted the law with discriminatory intent toward one gender.” In the context of rational-basis review, Hodges maintains that Ohio has multiple rational grounds for its refusal to recognize lawful out-of-state same-sex marriages, including preserving the “democratic choice” of the state’s legislature and citizens.

**DOES THE FOURTEENTH AMENDMENT REQUIRE STATES TO GRANT SAME-SEX MARRIAGE LICENSES?**

Deboer contends that the Fourteenth Amendment demands that states license same-sex marriage.

More specifically, in addition to the equal protection arguments (somewhat similar to Obergfell’s arguments in favor of a heightened standard of review), Deboer submits that restricting the right of same-sex couples to marry violates the long-recognized, fundamental freedom to marry, which is a potential violation of substantive due process.

In opposition, however, Snyder counters that nothing in the Fourteenth Amendment’s history or plain text meaning requires states to license same-sex marriage. Snyder maintains that rather than the Court vis-à-vis the Constitution requiring states to license same-sex marriage, states—through popular vote, state constitutional amendments, or statutes—are the appropriate democratic processes for licensing same-sex marriage. Finally, in addition to disagreeing with Deboer regarding equal protection violations, in response to Deboer’s due process argument, Snyder submits that “[t]here is no substantive-due-process right to a particular marriage definition.”

**Conclusion**

In this case, the Supreme Court may decide whether the Fourteenth Amendment mandates that a state recognize legally licensed same-sex marriages performed out-of-state. Obergfell argues that Ohio’s failure to recognize same-sex marriage is unconstitutional and inconsistent with Windsor. Hodges counters that in accordance with Windsor and federalism principles, states have the authority to ban recognition of lawfully performed same-sex marriages performed in another state. The Court may also determine whether the Constitution requires a state to license same-sex marriage without that state licensing same-sex marriage on its own terms. Deboer contends that the Fourteenth Amendment demands that states license same-sex marriage. However, Snyder argues that the judiciary is not the appropriate means for states to license same-sex marriage; rather, states may approve same-sex marriage through popular vote or legislative action. The Supreme Court’s decision in these cases may have significant implications on the rights of same-sex individuals and their children.

Written by Alice Chung and Allison Eitman. Edited by Daniel Rosales.

**GLOSSIP V. GROSS (14-7955)**

Court Below: U.S. Court of Appeals, Tenth Circuit

**Oral Argument: April 29, 2015**

The U.S. Supreme Court will determine three issues: (1) whether a state violates the Eighth Amendment when the state uses a three-drug protocol for executions, where the first drug does not always relieve the prisoner from pain and or put the prisoner in a deep state of unconsciousness; (2) whether Baze v. Rees is the proper
standard for obtaining a stay of execution; and (3) whether a prisoner challenging a state’s lethal injection protocol is required to establish the availability of alternative drugs. Glossip contends that midazolam is incapable of reliably rendering prisoners unconscious and creates a substantial risk of harm that violates the Eighth Amendment, that the standard for obtaining a stay of execution should continue to be “a significant possibility of success on the merits” as established in Baze, and that prisoners should not be required to establish the availability of alternative drugs. Gross counters that using midazolam does not create a substantial risk of harm since it is highly likely to render prisoners unconscious and insensitive, that Baze clearly established a heightened stay request standard, and that establishing the availability of alternative drugs is required post-Baze. The Supreme Court’s decision will potentially affect the availability of certain execution methods as well as address the acceptability of lethal injection protocols that potentially result in a lingering and painful death. Full text available at: www.law.cornell.edu/supct/cert/14-7955.

Written by Michael Duke and Edward Flores. Edited by Oscar Lopez.

HORNE V. U.S. DEPARTMENT OF AGRICULTURE (14275)
Court Below: U.S. Court of Appeals for the Ninth Circuit
Oral Argument: April 22, 2015

This case presents the U.S. Supreme Court with the opportunity to clarify what constitutes a taking. The Hornes argue that the Marketing Order, requiring raisin handlers to deliver a reserve portion of a growers’ crop to the government, constitutes a categorical taking under the Fifth Amendment. The U.S. Department of Agriculture, on the other hand, argues that the reserve requirement is simply a time-use limitation that is lawful and does not require just compensation under the Fifth Amendment. This case will have important implications for property owners generally and will affect the government’s options regarding how to regulate agriculture in ways to protect producers and consumers. Full text available at: www.law.cornell.edu/supct/cert/14-275.

Written by Andrew Huynh and Mary Beth Picarella. Edited by Jacob Brandler.

KINGSLEY V. HENDRICKSON (146368)
Court Below: U.S. Court of Appeals for the Seventh Circuit
Oral Argument: April 27, 2015

The U.S. Supreme Court will decide whether a pretrial detainee’s § 1983 excessive force claim requires a showing that the force used by the state actor was objectively unreasonable and that the use of force was deliberate. Petitioner Michael Kingsley argues that an excessive force claim brought by a pretrial detainee requires only a showing that the force used was objectively unreasonable. Respondents, represented by Stan Hendrickson, argue that an excessive force claim brought by a pretrial detainee requires a showing of the state actor’s subjective intent to be reckless or deliberate. The Court’s decision will impact the means by which pretrial detainees bring excessive-force claims and the policies that govern prisoners. Full text available at: www.law.cornell.edu/supct/cert/14-6368.


MATA V. HOLDER (14185)
Court Below: U.S. Court of Appeals for the Fifth Circuit
Oral Argument: April 29, 2015

The U.S. Supreme Court will determine whether the courts of appeals have jurisdiction to review final orders of removal and BIA decisions on motions to reopen via statute. Holder agrees with Mata that the Fifth Circuit mischaracterized Mata’s request to reopen and that Congress provided courts of appeals a statutory basis upon which to review final orders of removal and BIA decisions on motions to reopen. Holder further contends that courts should apply a deferential abuse-of-discretion standard in reviewing agency determinations. The Supreme Court’s ruling implicates the due process rights of noncitizens and the fairness and substantive legality of the immigration system. Full text available at www.law.cornell.edu/supct/cert/14-185.

Written by Aida Nieto and Cesar Sanchez. Edited by Paul Kang.

MCFADDEN V. UNITED STATES (14378)
Court Below: U.S. Court of Appeals for the Fourth Circuit
Oral Argument: April 21, 2015

The U.S. Supreme Court will determine whether—to obtain a conviction under the Analogue Act—the government must prove the defendant had knowledge that a substance the defendant was distributing was a controlled substance analogue. McFadden claims that under the Analogue Act, the government must prove a defendant’s knowledge of the illegal nature of a substance by showing that the defendant knew the substance was substantially similar to a controlled substance. The United States agrees with McFadden in that Analogue Act violations can be proven by demonstrating the defendant’s knowledge of the illegal nature of a substance, but the United States counters that knowledge of illegality can be proven through circumstantial evidence. The Supreme Court’s decision will clarify a long-standing circuit split over the mens rea requirement the government must satisfy to prosecute Analogue Act violations, which will have further implications on the government’s ability to target street-level dealers under the Analogue Act. Full text available at www.law.cornell.edu/supct/cert/14-378.

Written by Jee H. Kim and Mateo de la Torre. Edited by Oscar Lopez.
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Goodbye Mike, Hello Judge: My Journey for Justice
By Myron H. Bright

Reviewed by Dennis M. Kelly

Judge Myron H. Bright was appointed by President Lyndon Johnson in 1968 and is now the longest serving judge on the U.S. Court of Appeals for the Eighth Circuit. Still active at age 96, he has heard more than 6,500 cases in more than 46 years on the bench. His autobiography is a fascinating account of the often contentious process behind some of his major decisions. It is also a compelling story of a soldier, lawyer, and judge, told with the wisdom of almost a century of life.

Born in 1919, the son of Jewish immigrants, Bright was raised on the Iron Range of Minnesota. He spent his early years working in his father’s store in Eveleth, Minnesota, where he learned to appreciate the ethnic diversity of a community of immigrants who worked in the mines. In 1939, he enrolled at the University of Minnesota Law School but soon interrupted his studies for service in the U.S. Army Air Corps in India.

As one of the increasingly fewer members of the “greatest generation,” Bright shares his remarkable personal recollections of his World War II days. Many of his experiences involved courts martial, such as the one of a soldier charged with using a military vehicle without permission. The soldier, whom Bright defended, said that he had responded to a request for help in retrieving a stranded vehicle, thus supporting a defense of implied consent to use the military vehicle in an emergency. The soldier, however, did not remember the name of the person who had sought his help. So Lt. Bright placed a notice on a billboard and waited for the witness to come forward. The witness just appeared, and the soldier was found not guilty. Some months later, Bright learned that the testimony had been false, that it was “a put-up job.” He couldn’t believe that he had been so easily deceived. But the lesson served him well over the years: “Don’t trust your client or his witnesses to tell the truth; they may lie. Dig out the facts. Find the truth.”

Bright completed law school after the war and began a successful career as a trial lawyer in Fargo, North Dakota. The first five years was a learning period of trying and often losing cases despite long hours and careful preparation. “By losing cases, I learned,” he writes. He adds that a lawyer should not tell a jury what to do. “Show them the road. Let them decide. Statements such as ‘is that reasonable?’ or, after mentioning an important fact, ‘what do you think?’ often got the jury agreeing with me.”

Bright and his wife, Fritzie, were liberal Democrats in historically Republican North Dakota. Having established a reputation as a trial lawyer, Bright, with Fritzie’s strong support, jumped into the world of politics in the late 1950s, an endeavor for which Fritzie possessed a natural flair. They were essential in bringing about the close and unexpected election to the U.S. Senate of Democrat Quentin Burdick in 1960, and the election of a Democratic governor, William Guy. In 1960, they also led the charge in Fargo for John F. Kennedy for President. Those were exciting times, and, more than 50 years later, Bright remembers even seemingly insignificant events. One involved North Dakota’s blue laws, which barred the sale of alcohol on Sundays. Candidate Kennedy liked to have two bottles of Heineken beer with his dinner, but his Fargo hotel could not provide them on Sundays. Fritzie’s trip to a local store on Saturday solved the problem, and Kennedy’s visit was a great success.

With Senator Burdick’s strong support, President Johnson nominated Bright to the Eighth Circuit. He recounts in detail his 1968 meeting at the White House with Johnson and Burdick—the Rose Garden tour; the room with three portable television sets, each tuned to a different network; and the quintessential Johnsonian advice: “When you’re a circuit judge, while you can’t be active in politics, you better get your cousins and kinsmen to remember the man who got you where you are.”

Goodbye Mike, Hello Judge centers on Bright’s career on the bench. He brought to the court a liberal judicial philosophy and a determination to “stand up and be counted” when he knew he was right. Often in the minority, particularly in later years, he has left a lasting imprint on the law, in cases such as Reserve Mining Co. v. EPA, 514 F.2d 492 (8th Cir. 1975), which balanced a scientifically uncertain rush to close a Minnesota mine for environmental reasons and the hardship to potentially displaced workers, whose plight he knew all too well from his years on the Iron Range.

“Having known of and felt unfair discrimination myself, I have a concern that I should do all that I can do to limit or eradicate wrongful discrimination under law.” In Green v. McDonnell Douglas Corp., 463 F.2d 337 (8th Cir. 1972), Bright formulated the rule that the U.S. Supreme Court unanimously adopted in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Once the plaintiff in a Title VII case demonstrates that he belongs to a racial minority; that he applied and was qualified for a job for which the employer was seeking applicants; and that, despite his qualifications, he was rejected and the employer continued to seek applicants, then the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for the rejection and to show by competent evidence that the reasons were not pretextual. Green was a criti-
cal step in the fight against employment discrimination and truly deserves the appellation "landmark case," having been cited more than 132,000 times by courts throughout the country.

Bright tells the remarkable story of James Dean Walker, who was wrongfully convicted of the 1963 murder of an Arkansas police officer and sentenced to death. Walker was freed in 1985 because of Bright’s refusal to give up when he knew he was right. *Walker v. Lockhart*, 763 F.2d 942 (8th Cir. 1985). Bright comments, “I don’t know anybody who can get any more pleasure than I did from feeling that there was a life saved.” A South Dakota prisoner—a habitual offender sentenced to life without parole for passing a bad check—also benefited from the judge’s refusal to tolerate injustice. *Helm v. Solem*, 684 F.2d 582 (8th Cir. 1982). Although it was his seventh nonviolent felony, the penalty did not fit the crime. Against the existing precedent, Bright found the sentence cruel and unusual. He writes: “An imaginative judge seeking to do justice in a case even when precedent seems against a proper result must and should find a way to do justice within the law.” Bright was vindicated and surprised when the Supreme Court affirmed that decision in *Solem v. Helm*, 463 U.S. 277 (1983).

Given his aversion to unjustifiable prison sentences, it is not surprising that Bright’s biggest disappointment is the lack of progress pushing back on the federal sentencing guidelines, particularly as they apply to Native Americans, who are subject to federal penalties for crimes committed on reservations that may be vastly disproportionate to state court sentences. He wrote a series of opinions demonstrating the unreasonableness of the guidelines, which in this book he calls “part of a topsy-turvy world of sentencing.” He complains that many district court judges still follow them, even though they are now merely advisory.

Goodbye Mike, Hello Judge is a highly readable account of a life that witnessed almost a century of our country’s history. Bright reveals a profound appreciation of our American system of justice and a compassionate idealism. He may serve as a model for the legal profession for many years to come.

Dennis M. Kelly is a retired partner of Jones Day, where he spent his entire career after he clerked for Judge Bright in 1968–69.

**THE EMBATTLED CONSTITUTION**

**EDITED BY NORMAN DORSEN WITH CATHERINE DEJULIO**


**Reviewed by Paul Vamvas**

The Embattled Constitution is the fourth volume of the James Madison lectures given at New York University Law School by U.S. Supreme Court justices and federal judges. Justice Hugo Black gave the first lecture in 1960. Professor Norman Dorsen has directed the series since 1977 and is the editor of this collection, which is drawn from lectures given between 2002 and 2013.

Dorsen writes that each of the four volumes’ titles reflects the period in which it was published. The first volume, *The Great Rights*, reflected, Dorsen believes, “the only period in American history when a majority of Justices were determined to expand civil liberties in many spheres, including free speech, religious liberty, racial justice, privacy, and criminal justice.” The second volume, *The Evolving Constitution*, included talks “that looked forward to the judicial protections eventually accorded women and, much later, homosexuals; and there was analysis of statutory rights accorded the elderly and physically disabled.” Next came *The Unpredictable Constitution*, addressing “limits on Congress’s power to legislate under the Commerce Clause” and “other difficult and uncertain issues.” And now arrives *The Embattled Constitution*, which Dorsen believes “appears at a time when the two wings of the Supreme Court have become more intensely divided, with the four Justices in each camp locked in on certain types of cases.”

Two of the 11 lectures in *The Embattled Constitution* have been expanded into books. Justice Stephen Breyer’s lecture, here titled “Our Democratic Constitution,” became the basis for his book *Active Liberty*. And Judge Robert A. Katz’s lecture, here called “Statutes,” was expanded upon and published in 2014 as *Judging Statutes*, which I reviewed in the March 2015 issue of *The Federal Lawyer*.

Two other lectures are paeans to great jurists: Justice John Marshall Harlan and Judge Henry Friendly of the U.S. Court of Appeals for the Second Circuit. Both are movingly written and, in addition to paying tribute to the judges, make larger points about the nature of judging and finding the balance between tradition and adaptation.

The remaining seven lectures offer views, analyses, and arguments about a broad range of topics concerning judges, courts, and the Constitution. Although these lectures were written years apart, they have some common themes and constitute what might be viewed as almost a conversation across the years among the various authors. One question that several of them raise is the proper role of the courts.

Judge David Tatel looks at the question of “activist judges” through the lens of two of the Supreme Court’s post-*Brown v. Board of Education* school desegregation decisions. He begins by criticizing the term “activist judge” as a misnomer usually used to describe a jurist who has reached a decision the critic doesn’t like and that seems to the critic to suggest a political agenda on the judge’s part. Tatel argues that the true measure of whether a judicial decision is legitimate is much more complicated. The variables in his judicial algorithm include whether the decision was consistent with principles of stare decisis, faithful to the constitutional and statutory text and to the intent of the drafters, applied the proper standard of review to lower court fact-finding, limited...
the issues resolved to those raised by the parties, avoided unnecessary dicta, and, finally, openly and rationally explained its results. Even following these rules assiduously, Tatel concedes, won’t standardize judicial decision-making, but it will help federal courts avoid intruding on the policymaking function.

Such intrusion is what Tatel charges the Court with in the two post-Brown decisions: Board of Education v. Dowell (1991) and Missouri v. Jenkins (1995). He concludes that the majority in both cases failed to explain why it (1) overruled the precedent it did, (2) discarded lower court fact-finding and (3) engaged in fact-finding of its own. In short, it violated a number of the variables in his algorithm.

In his 2005 lecture, Judge Pierre Leval of the U.S. Court of Appeals for the Second Circuit attacks what he says has become the habit of judges when they cite precedent of treating dicta as holdings. Why does that matter, he asks? Because he believes “that courts are more likely to exercise flawed, ill-considered judgment, more likely to overlook salutary cautions and contraindications, more likely to pronounce flawed rules, when uttering dicta than when deciding their cases.” This, he adds, “increases the likelihood that the law we produce will be bad law.” Echoing some of Tatel’s concerns, Leval says that citing dicta as if they were holdings undermines the important role of stare decisis. That, in turn, reduces the consistency of the law that is at the heart of the judiciary’s role under the Constitution to decide only cases and controversies. Without the chain of reasoning reaching back through the case law, the courts’ authority to establish law does not exist. Leval compares a court’s deciding a case based on dicta to its publishing a compendium of rules to govern a particular type of case. That’s not its job.

Judge Diane Wood’s 2003 contribution is brief but significant. Her focus is on nothing less than the role of “Our Eighteenth-Century Constitution in the Twenty-First-Century World.” “Is this eighteenth-century document, along with its eighteenth-century Bill of Rights and its other seventeen Amendments still up to the job,” she asks? And she answers immediately that “[o]ne’s answer depends critically on which model of constitutional interpretation one chooses: the originalist approach or the dynamic approach.”

If it were interpreted literally in the 21st century, Wood argues, our 18th-century Constitution would not be up to the job; it would be “a woefully inadequate document for the American people today.” Historical change, such as the rise of the administrative state during the New Deal era, has required the Constitution to evolve in a dynamic fashion. “The literal Constitution,” Wood writes, “would require a radical restructuring of the administrative state, placing a nearly unbearable legislative burden on the Congress to specify in detail exactly what powers it was conferring on executive branch agencies and to monitor the minutiae through some kind of oversight mechanism.” If we did not take a dynamic approach to interpreting the Constitution, we would have to make constant amendments to it that “would ultimately devalue the Constitution and make it the same kind of repository of special interest rules that one can observe in all too many state constitutions.” But the existence of the debate between the originalist and dynamic approaches to constitutional interpretation, Wood writes, “does not imply that one side’s position is illegitimate, unpatriotic, or otherwise unworthy, while the other side’s position is foreordained.” Indeed, she believes that the debate is inevitable.

I’ll briefly mention three other contributions to this volume. Judge Guido Calabresi argues for restoring a workable balance between state and federal courts. Judge M. Blane Michael asks whether “the Fourth Amendment—designed in the musty age of paper—[can] offer any meaningful privacy protection today for personal electronic data.” Judge Marsha Berzon suggests that the “federal courts have conflated the sensible desire for clear legislative direction with respect to enforcement of federal laws with the more dubious proposition that similar congressional authority is required for judicial enforcement of constitutional guarantees.”

The Embattled Constitution is an intellectual feast for those with an appetite for intelligent analysis of broad constitutional issues. Although you never know what you are going to get when you turn the page, you can be sure that it will be satisfying and filling.

Paul Vamvas is a lawyer with the federal government in Washington, D.C.

A HISTORY OF THE TWENTIETH CENTURY IN 100 MAPS
BY TIM BRYARS AND TOM HARPER
The University of Chicago Press, Chicago, IL, 2014. 240 pages, $45.00.

Reviewed by Henry S. Cohn

It has been said that history is nothing more than chronology and geography. Two British specialists in antiquarian maps, Tim Bryars and Tom Harper, aim to prove this point with their book, A History of the Twentieth Century in 100 Maps, setting forth maps that serve as historic markers of the 20th century. Bryars and Harper acknowledge, however, that, as Susan Schulten showed in Mapping The Nation (which I reviewed in the August 2013 issue of The Federal Lawyer), the term “map” today encompasses more than the “metes and bounds” map of earlier eras. Maps today may translate data into visual form, and they may be thematic rather than geographical. Instead of mapping locations, they may map, for example, crime, disease, or temperature. As Schulten wrote in her book, maps may serve as “tools of spatial analysis, inquiry, administration, and control.”

Bryars and Harper take the reader through a variety of 20th century maps—both traditional and unconventional. The maps they selected are printed on a variety of materials: on standard paper, a cloth handkerchief, a book’s endpapers, a greeting card, or a postcard. The maps may be issued by a government or a commercial enterprise. The maps’ topics range from official planning documents to tourism recommendations. A History of the Twentieth Century in 100 Maps is a joint publication venture of the British Library and the Chicago Press, and most of the maps have a British perspective.

As one might expect in light of the bellicosity of the 20th century, the majority of the maps have some link to war or terrorism. The earliest of these is a 1900 map of Bloemfontein, the capital city of the Orange Free State, South Africa, at the time of the Boer War. Several maps are from World War I, including one from the first day of fighting at the Somme. A propaganda document entitled “What Germany Wants,” which was aimed at a British audience in 1916, highlights Germany’s far-reaching territorial claims.
A colorful map of the time shows breeds of dogs and other animals representing each European country. The map maker chose the bulldog for Britain, the poodle for France, the dachshund for Germany, and the bear for Russia. A map that is not in the book but is on the cover of the Nov. 30, 2014, issue of The New York Times Book Review distorts each country into a shape of a caricature of a person from that country.

A map from the Spanish Civil War and a map offering Nazi suggestions for a tour of Nuremberg portend the approach of World War II. To illustrate the war, the authors have chosen, among others, a Japanese map used in the Pearl Harbor attack, a German map of occupied Paris, a Luftwaffe map of bomb damage in London, a D-Day map for the invasion of Caen, and a map of occupied Berlin.

After World War II, wars became more regionalized, and the book includes maps of the Suez invasion of 1956, the 1961 Bay of Pigs incident, Margaret Thatcher’s 1982 war to retake the Falkland Islands, and the 1991 Gulf War. The book’s postscript contains an excellent map drawn a few days after Sept. 11, 2001, showing the destruction, building-by-building, at Ground Zero, as well as the progress in removing the debris.

Bryars and Harper also pay attention to the international efforts to redefine countries’ boundaries that occurred after various wars. These include an unsuccessful proposal in 1920 to expand Greece’s boundaries at the expense of Turkey. In 1947, an effort was made to resolve a crisis on the border of India and Pakistan in the Bengal region. Two maps illustrate the British Mandate in Palestine, one showing land settlement and immigration in 1930 and another showing Jerusalem in 1942, cleverly drawn on the palm of a hand.

Scientific innovation and discoveries also marked the 20th century. As to these, the authors set forth maps relating to nuclear testing and the dangers of nuclear power plants, including the Chernobyl meltdown. They include a map of Sir Ernest Shackleton’s 1914 expedition to the South Pole, the path of a solar eclipse from 1927, and a photograph of the moon’s surface from 1968. A color map from 1995 shows early Internet traffic.

Several maps relate to English royalty. In 1936, when Edward VIII was awaiting his coronation, a fabric map of the king’s dominions was manufactured with a flag background and a photograph of the anticipated king. When the map became available to the public in 1937, it was obsolete, because Edward had resigned before he officially accepted the crown. Bryars and Harper also include a map from 1977, issued for Queen Elizabeth’s Silver Jubilee and pointing out where beacon fires were to be lit in celebration. These fires were to recall similar fires set in 1588 to warn of a possible invasion by the Spanish Armada. Perhaps the saddest of these royal maps dates from 1997, setting forth the details of Princess Diana’s funeral procession. The authors argue that maps are not always cold, lifeless documents but can also bring out warm, human emotions.

The book brims with maps that depict the development of 20th-century society. These include E.H. Shepard’s 1926 map of the Hundred Acre Wood from the endpapers of Winnie-the-Pooh, and a map reducing the stories of the Lord of the Rings to one page. Maps show railroad tours of England to various inns in 1949 and similar tours made by automobile in 1981. A 1974 map assisted tourists who were looking for early Beatles sites in Liverpool.

The 1918 “Ancient Mappe of Fairyland” places many children’s stories in a countryside format. The authors observe that this map might have been drawn to lift the spirits of people who had suffered in bomb-blasted Europe. A cartoon map of continental Europe, published by the British satire publisher, Viz, at the end of the 20th century, takes a no-holds-barred look at Europe, with its public nudity and pill-popping, and the authors find that some aspects of contemporary life now overstep the line of good taste. A History of the Twentieth Century in 100 Maps succeeds in showing how maps depict the brutalities and wonders of the last century.

Henry S. Cohn is a judge of the Connecticut Superior Court.

**BECOMING STEVE JOBS: THE EVOLUTION OF A RECKLESS UPSTART INTO A VISIONARY LEADER**

By Brent Schlender and Rick Tetzeli


Reviewed by Christopher Faille

Our own day has seen a revival of a debate once thought to have been settled—even dismissed from further respectable discussion: the debate over the role of extraordinary individuals in the broad movement of history.

The English sage Thomas Carlyle kicked off this debate in 1840 with his book, _On Heroes, Hero-Worship, and the Heroic in History_. He believed that history is in essence a series of biographies, and he offered capsule versions of several. The heroes he discussed included Mahomet (his spelling), as well as Shakespeare, John Knox, Rousseau, and Napoleon.

Thirty-two years later, Carlyle's view brought a riposte from Herbert Spencer. Spencer, who at the peak of his own renown might have been considered a fit addition to lists of heroes, criticized the whole notion that extraordinary individuals shape history. “Before he can remake his society,” Spencer wrote, “his society must make him.”

In 1880, William James entered this fray, with a lecture to the Harvard Natural History Society titled “Great Men, Great Thoughts, and the Environment.” James, answering both Spencer and Spencer’s Canadian disciple, Grant Allen, said that the chief reason that a community changes from one generation to the next is indeed to be found in the “accumulated influences of individuals, of their examples, their initiatives, and their decisions … the Grants and the Bismarcks, the Joneses and the Smiths.”
Remember Jones and Smith

There is a difference between James’ individualism and Carlyle’s. James’ use of those Anglo-American paradigms of anonymity, Jones and Smith, was his way of acknowledging, I submit, that individuals who don’t get into the history books nonetheless play a part in the transformations that it is the duty of a historian to record, and that part of a historian’s role is to uncover and chronicle the obscure folks of whom this is so. Despite this difference, James was in important respects closer to Carlyle than to Spencer.

As for Grant and Bismarck, the obvious comment to make is that these were quite contemporary references: The latter was the chancellor of Germany when James gave his lecture, and the former had stepped down as President of the United States three years before. But that isn’t the whole reason for the coupling. In his lecture, James didn’t bother mentioning the incumbent President, Rutherford B. Hayes, at all. Some Presidents move their world more than others.

It is a plausible hypothesis that it was not in fact by virtue of his presidency that Grant made James’ short list. Grant was there as the fellow who had sat at the winner’s side of the table at Appomattox in 1865. His name is coupled here with Bismarck’s because Grant as a general had reunited a nation a decade before Bismarck brought together a passel of German-speaking principalities and made of them a nation-state in the center of Europe, taking the word “center” in every sense. Each was a standout in the broad trend of nation-state consolidation.

Notwithstanding James’ answer to Spencer, something akin to Spencer’s view prevailed over the following decades. By 1943, when Sidney Hook published The Hero in History, the debate was essentially over. Hook’s concern was with the self-defined heroism of the fascist leaders of his day. Hook sought to place in context the way that Hitler and Mussolini saw themselves as storming the heavens, presuming that all one needs to do that is, in Hook’s phrase, “a good will or a strong one.” Such heaven-storming and its consequences had cast a rather unflattering retrospective light upon Carlyle’s conceptions of a century before.

An Old Issue in a New Guise

Since then, the question of the role of the individual in history has been resurrected. The publication of two thick and serious volumes about Steve Jobs within four years of Jobs’ death in October 2011 tells us something about the form the debate may now take. We nowadays look for extraordinary individuals at some distance from political capitals or battlefields. But we still, or again, see the development of new technologies and industries, and the rise and fall of multinational corporations within those industries, as the consequence of the contributions of individuals.

With all that as preface, I come at last to the book under review: Becoming Steve Jobs: The Evolution of a Reckless Upstart into a Visionary Leader, by Brent Schlender and Rick Tetzeli. Schlender and Tetzeli seek to improve Jobs’ reputation, which in their view was unfairly maligned by the first biography of him, Steve Jobs, by Walter Isaacson, which I reviewed in these pages in July 2012. Isaacson contributed to a view of Jobs as a sometimes loathsome human being whose intense focus on product development nonetheless made a great and creative contribution to contemporary life as well as a lot of money for him and Apple stockholders. Schlender and Tetzeli agree about the positives there, but want to dial way back on Isaacson’s portrayal of Jobs-as-jerk.

Schlender and Tetzeli seek to improve Jobs’ reputation by making a distinction between the early and the late Jobs. The early Jobs, the founder of Apple and its product-development guru during the early years (1976 to 1985), was in fact the man Isaacson portrays: both a visionary and a jackass. The birth in 1978, when Jobs was 23, of his daughter Lisa to girlfriend Chrisann Brennan was, Schlender and Tetzeli write, a “clarion call to accept adult responsibility,” a call that Jobs rejected, “as fully as he rejected” Lisa herself. In this incident, the negative aspects of his personality were “out of control.”

But there was more life to be lived. Jobs became a changed man (runs this new account) after and in part because he was fired from Apple by way of two emotionally charged boardroom confrontations in March and May of 1985. This firing was traumatic, because Jobs was a proud man who was known to the world as one of the founders of Apple and whose self-image was bound up with that identity.

If, as we’re often told, “pride goeth before a fall,” the fall can goeth before a reconstruction. That, according to Schlender and Tetzeli, is what happened. Jobs recreated himself after the trauma largely through another corporate vehicle, the innovative motion picture animator Pixar.

Jobs bought a majority stake in Pixar in 1986, buying it from George Lucas for $5 million, and capitalizing it with another $5 million. Pixar would both make Jobs a billionaire and give him the platform that allowed for his triumphant return to Apple. Pixar, if we may draw an analogy to the life of one of Carlyle’s heroes, was Elba.

Schlender and Tetzeli (who use the singular pronoun “I” for narrative convenience and as a reference to Schlender’s long, personal relationship with Jobs) write as follows:

When people list the many industries that Steve is said to have revolutionized, they often include the movies, since Pixar brought a whole new art form to the big screen. I’m not of that mind. John Lasseter and Ed Catmull are the men who brought 3-D computer graphics to the movies, and revived the art of animated storytelling.

That said, Steve did play a critical role in Pixar’s success. His influence was constrained, because Catmull and Lasseter were the ones shaping Pixar, not he. But that constraint, ironically, freed him to do what only he could do best, and he did it brilliantly. ... These are the years when his negotiating style gained a new subtlety—without losing its ballistic brashness. This is when he first started understanding the meaning of teamwork as something that’s far
more complicated than simply rallying small groups—without losing his capacity to lead and inspire. And this is where he started to develop patience—without losing any of his memorable, and motivating, edge.

If we think of Steve Jobs as a corporate equivalent of Napoleon, or of James’ choices, Grant and Bismarck, we can think of Lasseter and Catmull, respectively a director/screenwriter and a computer scientist, as the “Jones and Smith” of the rise of Pixar, and the geniuses behind its 1995 signature hit, Toy Story.

I don’t know whether Elba made Napoleon a new man. His second turn as emperor didn’t really last long in any event. But Jobs’ second turn as “emperor” at Apple was a good deal longer and had very memorable consequences.

Conclusion

How does all this fit into the debate with which we began? A scholar studying the development of the computer industry might wonder: What would have happened to Apple after 1997 if Steve Jobs had never purchased Pixar in 1986? Suppose Lucas had held out for more money than Jobs was willing to pay, and had found another buyer? Suppose (if the broad thesis of this book is right) that the collaboration with Lasseter and Catmull had never happened and thus had never had its transformative value? Suppose (in that universe, as in this one) that, while the Pixar team was receiving box-office gold and critical hurrahs for Toy Story, Apple was falling into trouble under the bumbling leadership of Gil Amelio?

Would somebody else have appeared, succeeded Amelio, and successfully restored Apple’s prominence? Or would the corporate vessel have sunk to the ocean’s floor? And what might have been the broader consequences of that?

Some revisionist industry historian may someday find some kind words to say about Amelio as a figure in Apple’s history. But Schlender and Tetzeli find none, and in this they are at one with Isaacson. Schlender and Tetzeli write of a public presentation Amelio once gave that included the following analogy:

Apple is a boat. There’s a hole in the boat, and it’s taking on water. But there’s also a treasure on board. And the problem is, everyone on board is rowing in different directions, so the boat is just standing still. My job is to get everyone rowing in the same direction.

The analogy left the audience puzzled, wondering why a captain would ignore the hole in the boat and focus on the rowing issue instead. It left some with the conviction that Amelio was the hole in the boat, and that Jobs might be the patch.

The second period of Jobs’ leadership saw the radical design of the new iMac, which helped push floppy disks toward extinction, and the development of the iBooks, a new style of laptop aimed at entrepreneurs, giving them a new combination of computing power and mobility. That was just the beginning—later developments in this period revolutionized the music industry as well as the mobile telephone market. Would any of that have happened had the Lucas and Jobs’ negotiations over Pixar failed?

That is the question with which Becoming Steve Jobs leaves us.

Christopher C. Faille graduated from Western New England College School of Law in 1982 and became a member of the Connecticut Bar soon thereafter. He is at work on a book that will make the quants of Wall Street intelligible to sociology majors.
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SIXTH CIRCUIT

Dayton Chapter Hosts Annual State of the Court Luncheon

On Feb. 27 the Dayton Chapter hosted its second annual State of the Court Luncheon at the Schuster Center in downtown Dayton, Ohio. Newly installed Chief Judge Edmund A. Sargus Jr. for the U.S. District Court for the Southern District of Ohio, updated the Dayton Chapter and local federal practitioners on court statistics and upcoming events throughout the Southern District of Ohio.

The day began with an overview of recent trends in attorney discipline, which was both entertaining and frightening. A panel including U.S. Trustee Patrick Layng and U.S. bankruptcy judges Mary Gorman, Thomas Lynch, and Cathleen Furay conducted an existential discussion of their own constitutionality after Wellness International Network v. Sharif.

A high point of the seminar was a discussion of court-aided settlement conferences and private mediation. The discussion was moderated by U.S. Magistrate Judge Iain Johnston and included input from Justice Jack O’Malley (ret.), formerly of the Illinois Appellate Court, and the chapter’s eponym, Magistrate Judge P. Michael Mahoney (ret.), both now working as private mediators.

The CLE portion of the meeting concluded with a presentation from the chief judge of the Northern District of Illinois, Rubén Castillo, entitled “Twelve Ways To Lose A Trial,” after which Judge Castillo presided over a brief business meeting of the Mahoney Chapter and swore in the new officers and directors. No sooner were the new officers and directors sworn than the meeting quickly adjourned in favor of a reception for the seminar participants.

Magistrate Judge Mike Mahoney, who is a member of the chapter, was the longest serving magistrate judge in the Seventh Circuit, having been on the bench for 38-plus years at the time he retired. When first appointed in 1976 at the age of 31, he was a part-time magistrate in the newly formed Western Division of the U.S. District Court for the Northern District of Illinois. He became a full-time magistrate judge in 1992. As is reflected by the name of the new chapter, Judge Mahoney is everything anyone could want in a federal magistrate judge.

SEVENTH CIRCUIT

P. Michael Mahoney (Rockford, Ill.) Chapter Holds First Kick-off Event

On March 20 the P. Michael Mahoney (Rockford, Ill.) Chapter held its inaugural CLE event in partnership with the Winnebago County Bar Association. A tremendous success, participants were treated to discussions on a variety of topics, from mandatory supervision to attorney disbarment, all presented by distinguished speakers.

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Chapter Exchange is compiled by Debbie Smith, chapters coordinator. Send your information to dsmith@fedbar.org. Visit www.fedbar.org for the latest chapter news and events.
IMMIGRATION LAW SECTION

On March 11, the Immigration Law Section and the District of Columbia Chapter presented their monthly Immigration Leadership Luncheon Series in Washington, D.C. The event featured speaker: Kuyomars “Q” Golparvar. Mr. Golparvar has been practicing immigration law since 2003 and has been with the federal government since 2004. Mr. Golparvar currently serves as the chief of the Immigration Law and Practice Division at the U.S. Department of Homeland Security’s Immigration and Customs Enforcement (ICE). He previously held positions as the senior advisor to the principal legal advisor for ICE, deputy chief counsel and Assistant Chief Counsel at ICE’s Office of Chief Counsel at the Eloy Detention Center in Eloy, Arizona. Mr. Golparvar has also been teaching immigration law at The George Washington University Law School since August 2013. Q received his BA in international affairs and Middle East studies in 1998 from The George Washington University, where he also served as student association president. He received his JD and Certificate in International and Comparative Law from the University of Pittsburgh’s School of Law in 2002. The immigration Leadership luncheons are generally held on the second Wednesday of every month at La Tasca Restaurant. The series is coordinated by Prakash Khatri, attorney, Washington, D.C.

TRANSPORTATION AND TRANSPORTATION SECURITY LAW

On March 30, the Transportation and Transportation Security Law Section held their “Pipeline Transportation: Perspectives on Safety Board on Safety, Security and Economics.” The program was held at the Department of Transportation Headquarters in Washington, D.C. Panelists included: Nils Nichols, director, Division of Pipeline Regulation, FERC; Vanessa Sutherland, chief counsel, PHMSA; and Jack Fox, Pipeline Industry Engagement Manager, TSA. Kathryn Gainey, FBA Transportation and Transportation Security Law Section treasurer, served as the moderator.

Transportation and Transportation Security Law Section: At the March event (l to r): Nils Nichols, director, Division of Pipeline Regulation, FERC; Vanessa Sutherland, chief counsel, PHMSA; and Jack Fox, Pipeline Industry Engagement Manager, TSA.

Immigration Law Section: At the March event (l to r): Kuyomars “Q” Golparvar, chief, Immigration Law and Practice Division Immigration and Customs Enforcement (ICE) U.S. Department of Homeland Security; Akhtar Golparvar; Mohammed Golparvar; Linda Golparvar; Sepideh Golparvar; Carey Devorsetz, FBA D.C. Chapter president; and Patricia Ryan, D.C. Chapter board member.
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