

The Federal Lawyer

May 2011

Volume 58 Number Four

**Transportation and
Transportation Security Law**



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President's Message

ASHLEY L. BELLEAU

FBA Acts to Break the Judicial Nominations and Confirmations Logjam

At our Annual Meeting in New Orleans in September 2010, we talked about how the “A” in FBA represents Action. Your Association continues to take action. The FBA continues to be engaged in the expansion of the dialogue on the judicial vacancy issue. To advance

public understanding of the vacancies issue, on February 28th the FBA co-sponsored with the Brookings Institution in Washington, D.C. a seminar focused on the judicial nominations and confirmation process, how it can work better, and what may lie ahead. This was the first time that the FBA had partnered with a Washington think tank in sponsoring and producing a program on a legal and public policy issue. The program content was excellent and the vacancies issue received thoughtful attention and discussion. Past President Bill LaForge skillfully moderated the first panel on “The Judicial Logjam, How It Came About and Its Impact Upon the Courts.” Long time members, the Honorable Royce C. Lamberth, Chief District Judge of the District of Columbia, and the Honorable W. Royal Furgeson, Jr., Senior District Judge of the Northern District of Texas, were powerful in their candor and description of the depth of the vacancies crisis and its impact on the administration of justice. The entire content of the program is accessible on the FBA website: www.fedbar.org/JudicialForum. Media coverage of the program was good and was picked up by a number of groups including Main Justice, The Blog of *Legal Times*, and the Lawfare Blog, among others.

However, the FBA's commitment to focus on this issue did not stop at co-sponsoring this excellent program. The initiatives growing out of the FBA-Brookings forum include sharing this program with our U.S. Senators. The FBA is sending a letter to all 100 Senators apprising them of the judicial vacancy issues with background information that links to the FBA-Brookings program. This short informational letter will be distributed to all 100 senators prior to our Circuit Vice-Presidents' “taking the Hill” on April 28th. This is the second year our Circuit Vice-Presidents have gone to the Hill to meet with Senators and Senate staff to discuss with them the FBA priority issues that are on our Government Relations Issues agenda, including judicial vacancies and funding of the federal courts. Our CVP Lobby Day on the Hill will precede our 9th Annual Chapter Leadership Training

program which will be conducted on April 29 -30th for our upcoming chapter leaders.

The FBA also is in the process of distributing an op-ed on judicial vacancies to newspapers across the country that will highlight the costly crisis in our federal courts. The goal is to educate the American public with respect to how these judicial vacancies impact their lives on an individual basis. Record caseloads in many federal judicial districts where vacancies exist cause trials to be delayed. Not only do the delays add to the costs of litigation for the party litigants, but the delays cost the individual taxpayer. For example, the cost to detain and house criminal defendants while awaiting trial increases the cost to be paid by the individual taxpayer. Just last year, the federal cost of pre-trial detention alone was \$1.4 billion, according to the Department of Justice.

Also, through the efforts of the Tucson and Phoenix Chapters, the *Arizona Republic* published in its Letters-to-Editor column a letter co-authored with Mark Hummels, Treasurer of the Phoenix Chapter, and Isaac Rothschild, Treasurer of the Tucson Chapter. Our letter to the editor urged the readers “to contact your Senators and Congress members to act immediately.” The District of Arizona has three judicial vacancies that have been deemed “judicial emergencies” with each judge in the Tucson courthouse handling more than 1200 criminal cases, in addition to a full docket of civil cases. This case overload means that all litigants now face an increasingly difficult time getting their day in court.

In addition to the judicial vacancy situation, the Association is expressing strong support for the Federal Judiciary's FY 2012 funding request. The Judiciary has demonstrated prudent judgment in its request to assure the best stewardship of its resources and the cost-efficient delivery of justice to all Americans throughout the federal court system. We are urging



MESSAGE continued on page 5

Free Speech and Really Free Speech

Recent Supreme Court decisions have shown strong support for traditional First Amendment rights.

Free Speech

In December 2010, the Animal Crush Video Prohibition Act of 2010 was signed into law. The law, which prohibits the creation, sale, marketing, advertising, exchange, and distribution of animal crush videos, was intended cure the defects in 18 U.S.C. § 48 (1999), which was held unconstitutional in *United States v. Stevens*, ___ U.S. ___, 130 S.Ct. 1577 (2010).

[AU: fill in]

Stevens involved a Virginia man who sold dog fighting videos. In April 2010, the U.S. Supreme Court, in an 8-1 ruling, affirmed the Third Circuit and overturned the 1999 law because it was too broad. The 1999 law prohibited the creation, sale, or possession for commercial gain of a depiction of a live animal being intentionally maimed, mutilated, tortured, wounded, or killed, if those actions violate federal or state law. The law exempted any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value. The Supreme Court declined to “establish a freewheeling authority to declare new categories of speech outside the scope of the First Amendment”—specifically, a new category of unprotected speech involving depictions of animal cruelty. As the lone dissenting voice, Justice Samuel Alito stated, “The animals used in crush videos are living creatures that experience excruciating pain. Our society has long banned such cruelty, which is illegal throughout the country.”

In response, Congress passed a narrower law targeting specific commercial activity. In the new statute, 18 U.S.C. § 48 (2010), **[AU: same number as the 1999 law??]** Congress found that “[T]here are certain extreme acts of animal cruelty that appeal to a specific sexual fetish,” and these acts are videotaped. According to Congress, an animal crush video—defined as any photograph, motion picture, recording, or electronic image that “depicts actual conduct in which 1 or more living non-human mammals, birds, reptiles, or amphibians is intentionally crushed, burned, drowned, suffocated, impaled, or otherwise subjected to serious bodily injury”—is obscene. The Animal Crush Video Prohibition Act **[AU: OK??]** prohibits the creation and distribution of animal crush videos and makes it unlawful to intentionally or knowingly sell, market, advertise, exchange, or distribute these videos by means of interstate or for-

eign commerce. The law exempts visual depictions of veterinary or agricultural husbandry practices; the slaughter of animals for food; or hunting, trapping, or fishing. The law also exempts the good faith distribution of an animal crush video to a law enforcement agency or a third party for analysis and referral to a law enforcement agency. The redrafted law raises new questions, however. Is the new law narrow enough to fight what some people are calling “animal porn?” Furthermore, because the videos do not, in fact, depict a sexual act, can the new law withstand a constitutional challenge on the basis that it is prohibiting obscene speech?

Really Free Speech

This March, in an 8-1 ruling, the Supreme Court decided *Snyder v. Phelps*, ___ U.S. ___, 131 S.Ct. **[AU: fill in]**1207 (2011), a case involving anti-homosexual picketing by church members at the funeral of Matthew Snyder, a military service member who was killed in the line of duty. The service member’s father sued the church and its members. Examining the content, form, and context of the speech, the Supreme Court determined that peaceful picketing in a public place dealing with a matter of public concern was entitled to “special protection” under the First Amendment. Dissenting once again, Justice Alito stated, “I fail to see why actionable speech should be immunized simply because it is interspersed with speech that is protected. The First Amendment allows recovery for defamatory statements that are interspersed with nondefamatory statements on matters of public concern, and there is no good reason why respondents’ attack on Matthew Snyder and his family should be treated differently.”

As this column awaits publication, the Supreme Court is expected to hand down a decision on another case involving free speech, *Schwarzenegger v. Entertainment Merchants Association*, No. 08-1448. **[AU: any update??]** At issue in the case is a California statute—which has never taken effect because of the the pending appeal—that requires violent video games to be labeled as such and bans the sale or rental of violent video games to minors. The Supreme Court is being asked to carve out a violence exception to the First Amendment. Based on the transcript of the oral argument, it appears that, in this ruling, the Supreme Court is again poised to show its support of traditional First Amendment rights. As Justice Antonin Scalia stated, “I am concerned with the First

Amendment, which says Congress shall make no law abridging the freedom of speech. And it was always understood that the freedom of speech did not include obscenity. It has never been understood that the freedom of speech did not include portrayals of violence.” Why would violence—and animated violence at that—be unprotected speech when such depictions are everywhere: in music, television, movies, and print media. Children of my generation spent countless hours playing “Mortal Kombat,” and none

of us have grown up to rip the spines out of other people in real life. Violence should not be the new obscenity when videos depicting violence to living animals and brutal verbal attacks on a military service member are ruled to be protected and specially protected speech. **TFL**

Julie China is a member of the editorial board of The Federal Lawyer.

MESSAGE *continued from page 3*

Congress to make the federal judicial system a high priority and provide the funds necessary for the federal courts to fulfill their constitutional and statutory responsibilities. An independent judiciary, established by Article III of the Constitution, is an essential element of our system of government. An underfunded judiciary cannot effectively administer justice, which lies at the bedrock of the people’s trust.

The Judiciary’s FY 2012 request reflects its smallest requested percentage increase on record. Its request is underscored by the exceptional workload challenges generated by increased bankruptcy case filings; significant caseloads in courts along the Southwest Border; and workload in the probation and pretrial services offices.

The Judiciary’s annual appropriation makes up about two-tenths of 1% (0.2%) of the federal budget. In FY 2010 the Federal Judiciary received approximately \$6.86 billion to fund its operations, including money to fund: the Supreme Court; appellate, district, and bankruptcy courts; probation and pretrial services operations; the jury system; court security; Defender Services to provide legal representation

to indigent criminal defendants; the United States Sentencing Commission; the Administrative Office of the U.S. Courts; and the Federal Judicial Center. For more information about judicial funding and the FBA’s efforts, see Bruce Moyer’s column, “Washington Watch: Budget Cuts Could Hurt the Federal Courts.”

Other initiatives that are in the works include the FBA possibly sponsoring a conference on the State of the Judiciary, reaching out to courts-coverage reporters and a meeting with Susan Davies, White House counsel for Judicial Vacancies, concerning the nominations pipeline.

Your Association continues to take the lead on issues that face federal practitioners and the bench. So stay tuned for more action updates over the next six months before we gather again at our next Annual Meeting in Chicago in September of 2011! **TFL**



The Foundation of the Federal Bar Association Names Recipient for 2011 Public Service Scholarship

The Foundation of the Federal Bar Association is pleased to announce that Hannah D. Duncan of Phoenix, Ariz., is this year’s recipient of the Foundation’s Public Service Scholarship. The Foundation received **xx** applications for this year’s scholarship.

Each year, one graduating high school senior planning to attend a four-year college or university wins the scholarship. At least one of the parents (or guardians) of the student must be a current federal government attorney or federal judge and a member of the Federal Bar Association. Applicants are evaluated on academic record, leadership recognition, school and community activities and service, and their compelling essay response.

The \$5,000 scholarship is funded by the Earl W. Kintner Memorial Fund. Earl W. Kintner was a distinguished member of the Federal Bar Association and two-time national president. His professional and civic leadership and dedication serve as a model to any aspiring academic.

| Sections and Divisions |

Section on Taxation

The 35th Annual Tax Law Conference was held in Washington, D.C., on Feb. 25, 2011. Some of the numerous highlights included presentations by William J. Wilkins, IRS chief counsel, who discussed the IRS's approach to the economic substance doctrine; Manal S. Corwin, international tax counsel at the Treasury Department, who defended the international tax provisions in President Obama's budget; John A. DiCicco, acting assistant attorney general of the Justice Department's Tax Division, who described the division's current initiatives, such as combating offshore tax evasion; and Michael Mundaca, assistant secretary for tax policy at the Treasury Department, who spoke about the need for consensus on corporate tax reform. Conference attendees received an update on tax legislation from chief tax counsels from the Senate Finance and House Ways and Means Committees.

Concurrent sessions throughout the day focused on critical developments in employee benefits and executive compensation, domestic corporate tax policy, international tax, tax practice and procedure, partnerships and pass-throughs, tax accounting and financial products. This year, the section launched the inaugural Donald C. Alexander Tax Law Writing Competition awards ceremony held during the conference. This year's first-place winner was Gail Eisenberg, St. Louis University School of Law; the second-place winner was Stephen Faivre, University of Georgia School of Law. This year's Tax Law Conference was chaired by James Kroger and Christian Wood.

The section's 35th Annual Tax Law Conference would not have been possible without the generous support of our sponsors. The elite sponsors for the 2011 conference included Baker & Hostetler; Bingham McCutchen LLP; Caplin & Drysdale Chartered;

Crowell & Moring LLP; Deloitte Tax LLP; Dewey and LeBoeuf LLP; Grant Thornton LLP; Hochman, Salkin, Rettig, Toscher & Perez PC; KPMG LLP; Mayer Brown LLP; Miller & Chevalier Chartered; Morrison & Foerster LLP; Skadden, Arps, Slate, Meagher & Flom LLP; and White & Case, LLP. Our sponsors included Baker & McKenzie LLP; Buchanan Ingersoll & Rooney PC; Goodwin Procter LLP; Ivins, Phillips & Barker Chartered; Jones Day LLP; Latham & Watkins LLP; Matheson Ormsby Prentice, McDermott Will & Emery LLP; Morgan, Lewis & Bockius LLP; PricewaterhouseCoopers LLP; and Steptoe & Johnson LLP. The Section on Taxation would like to thank the sponsors for their continued support.

The FBA Section on Taxation presents the Kenneth H. Liles Award annually to recognize individuals for outstanding service and dedication to tax policy and administration as well as for their contributions to the bar and the legal profession. Ken Liles founded the FBA's modern-day Section on Taxation and helped to establish its high standards for service to the Federal Bar as well as education and policy work. Past recipients of the award include present and former commissioners of the Internal Revenue Service, chief counsels for the Internal Revenue Service, assistant secretaries for tax policy at the U.S. Treasury Department, federal judges, chiefs of staff of the congressional Joint Committee on Taxation, and officials from the U.S. Justice Department.

At the conclusion of this year's annual Tax Law Conference on Feb. 25, 2011, the 2011 Liles award was awarded to the late Martin D. Ginsburg, who had been a professor of Law at Georgetown University Law Center and Of Counsel to

Fried, Frank, Harris, Shriver & Jacobson. U.S. Supreme Court Justice Ruth Bader Ginsburg accepted the award on behalf of her late husband. Professor Ginsburg's former colleagues and friends, Alan S. Kaden of Fried, Frank, Harris, Shriver & Jacobson and N. Jerold Cohen of Sutherland, Asbill, and Brennan, provided remarks on Professor Ginsburg's contribution to tax policy and administration as well as to the legal profession in general.

Labor & Employment Law Section

The Labor & Employment Law Section held its Fourth Biannual Conference in San Juan, Puerto Rico, on Feb. 18–19, 2011. For the first year, the Health Law Section joined the Labor & Employment Law Section in sponsoring a half-day CLE seminar on Saturday, Feb. 19. The panels included in the session were titled "The Essential EEO Update," "Wage Hour: Collective Actions vs. Class Actions," "Litigating Labor & Employment Law Cases," "Social Networking and Privacy in the Workplace," "EEOC Practice and Procedure," "E-Discovery, Spoliation of Evidence, and Technology Issues," "Hot Topics in the Tropic: Relevant Employment Law Issues for the First Circuit and Puerto Rican Attorneys," "Health Insurance Market Reform Under the Patient Protection and Affordable Care Act and the Grandfathered Health Plan Exemption," "Health Reform's Impact on Employer-Sponsored Group Health Plans and on Institutional Healthcare Providers," and "FMLA and ADA Update."

Section on Taxation: At the presentation of the 2011 Kenneth H. Liles Award—(l to r) Kari M. Larson, co-chair, 2011 Kenneth H. Liles Award; N. Jerold Cohen, partner, Sutherland, Asbill, and Brennan; Justice Ruth Bader Ginsburg, U.S. Supreme Court; Alan S. Kaden, partner, Fried, Frank, Harris, Shriver & Jacobson; and Mary W. Prosser, co-chair, 2011 Kenneth H. Liles Award.



Veterans Law Section

The Veterans Law Section, in conjunction with the New Orleans Chapter, presented a program entitled “Essentials of Helping Veterans Obtain Disability Compensation and Other Assistance” on March 23, 2011, at the Courthouse of the Eastern District of Louisiana. Speakers discussed the basics of assisting veterans in obtaining compensation for injuries and illness occurring while on active duty, with a particular emphasis on dealing with homeless veterans and those who have been discharged with other than honorable or punitive discharges. The featured speakers included Jim Richardson, former head of the Discharge Review Section Board for Correction of Naval Records and senior attorney adviser to the U.S. Court of Appeals for the Armed Forces; Carol Wild Scott, chair, Veterans Law Section; and Carrie Weletz, attorney at Bergmann & Moore LLC.

Government Contracts Section & Younger Lawyers Division

On March 31, 2011, the Government Contracts Section and the Younger Lawyers Division, in partnership with the Court of Federal Claims Bar Association and the George Washington University Law School, hosted a luncheon at which speakers discussed best practices [AU: OK?? Best practices for what—the court??]for the Court of Federal Claims. Featured speakers included Chief Judge Emily C. Hewitt and Judge Marian Blank

Horn, U.S. Court of Federal Claims; Dawn E. Goodman, trial attorney, Commercial Litigation Branch/National Courts Section at the U.S. Department of Justice; Kenneth Dintzer, assistant director, Commercial Litigation Branch/National Courts Section at the U.S. Department of Justice; and Stuart Nibley, partner, Dickstein Shapiro LLP. The section would like to thank Dickstein Shapiro LLP for hosting this successful event.

Indian Law Section

The 36th Annual Indian Law Conference convened in Santa Fe, N.M., at the Pueblo of Pojoaque on April 6–8, 2011. Because Native peoples have long been innovators in tribal governance, economic development, and cultural revitalization, this year’s conference took a deliberate look at some of the best practices in federal Indian law as a means of approaching challenges faced by American Indian, Alaska Native, and Native Hawaiian peoples.

Panel discussions covered Indian land and trust law, finance, criminal justice, gaming, and taxation. Each panel focused on a continuing legal challenge and the ways that tribes, agencies, legislators, courts, and others are responding to it. Other sessions addressed domestic and international advocacy, along with ethical considerations of in-house tribal legal counsel. Focus groups provided “nuts and bolts” information and strategies on water law; tribal fam-

ily, women, and children’s programs; religious freedoms; civil jurisdiction; and environmental justice. An exciting lineup of speakers from private practice, education, government, and tribal leadership provided the latest updates on these topics.

This year’s conference also featured plenary addresses by David Getches, dean of the University of Colorado Law School; Robert Odawi Porter, president of the Seneca Nation; Steffani Cochran, vice chair of the National Indian Gaming Commission; and Neal Katyal, acting solicitor of the United States. A special program honored the Native American Rights Fund’s 40th anniversary and its leadership role in best Indian law practices.

During the Friday luncheon, the annual Indian Law Awards were presented. Bill Wood received the Section Service Award for his exemplary work as editor of *Federal Indian Law*, the Indian Law Section’s newsletter. Alan Taradash was awarded the Lawrence R. Baca Lifetime Achievement Award for his more than two decades of work on behalf of Native Americans. The award is given to an attorney who has worked in the field of Indian law for more than 20 years and who has made significant contributions to the field.

The section would like to thank this year’s conference co-chairs: Kristen A. Carpenter, associate professor, University of Colorado Law School; Angela R.

SECTIONS continued on page 9



Indian Law Section: At the 36th Annual Indian Law Conference—(top left photo, l to r) (left photo, l to r) Elizabeth Kronk, chair, Indian Law Section; William Wood, Section Service Award winner; Lawrence R. Baca, chair emeritus, Indian Law Section; and Alan Taradash, Lawrence R. Baca Lifetime Achievement Award winner.



Government Contracts Section and the Younger Lawyers Division: At the Fourth Biannual Conference—(l to r): Stuart Nibley, Judge Marian Blank Horn, Dawn E. Goodman, Kenneth Dintzer and Chief Judge Emily C. Hewitt.

BRUCE MOYER

Budget Cuts Could Hurt the Federal Courts

The outcome of the budget talks in Washington could have big consequences for the federal courts. Congress approves the federal courts' budget and appropriates money for the judiciary to operate. Steep across-the-board funding cuts in the federal budget could dramatically affect how much money is made available for the operation of our federal courts.

The Federal Bar Association is working hard to convince Congress to avoid imposing deep funding cuts on the federal judiciary. In a recent letter to congressional leaders, FBA President Ashley Belleau urged restraint in reducing the federal courts' budget. A group of FBA circuit vice presidents met with staff of congressional offices in late April to continue to make the case.



The judicial branch's FY 2012 funding request is its smallest requested percentage increase on record. That request is dramatized by the exceptional workload challenges generated by increased bankruptcy case filings, significant caseloads in courts along the country's

southwestern border, and increased workload in the probation and pretrial services offices.

To understand the federal courts' funding situation, let's put the budget of the federal courts into perspective. The judiciary's annual appropriation from Congress is tiny. It makes up about two-tenths of 1 percent of the federal budget. By way of comparison, large agencies in the executive branch receive appropriations that are many times more than that received by the entire third branch.

In FY 2010, the federal judiciary received nearly \$7 billion to fund its various operations throughout the United States, including the U.S. Supreme Court; appellate, district, and bankruptcy courts; probation and pretrial services operations; the jury system; court security services; defender services to provide legal representation to indigent criminal defendants; the U.S. Sentencing Commission; the Administrative Office of the U.S. Courts; and the Federal Judicial Center.

A huge chunk of the judiciary's budget—approximately 80 percent—is allocated to salaries and rent. A significant portion of that is paid to the General Services Administration (GSA) to pay for leasing courthouse space, even though the federal government already owns these buildings. The judiciary also must make annual payments to the GSA for needed alterations and cyclical building maintenance. Although the GSA received stimulus money under the American Recovery and Reinvestment Act of 2009, the judiciary

did not receive any money for its own use.

The judiciary does not have programs or grants that it can cut in order to reduce its costs. Nor can the judiciary turn away the cases that arrive on its doorstep. The courts' operations also are deeply labor-intensive; consequently, major cuts in the judiciary's budget will require staffing cuts in those places where the greatest numbers of court employees work—in the clerks', probation, and pretrial services offices.

The last time the federal courts experienced deep budget cuts was in 2004. Those reductions resulted in a 6 percent decrease in the courts' workforce. Large budget cuts in 2012 could replay the 2004 experience:

- The construction of new courthouses and major renovation projects likely would be suspended or significantly reduced.
- Security improvements to better ensure the safety of judges, court staff, and the public are likely to be forestalled.
- The sentencing process could be jeopardized because of the lack of sufficient probation officers available to help judges fashion appropriate sentences.
- Payment of court-appointed counsel for indigent defendants, as required by the Constitution, could become unavailable.
- Testing and supervision of released prisoners may be reduced, resulting in a degradation of public safety.
- Victim advocacy responsibilities, including the determination of monetary losses and the collection of victim restitution and criminal fines, could be impaired.
- The costs of pretrial detention of criminal defendants could continue to increase, affecting the right of speedy prosecution.
- Jury payments for civil trials will likely run out, throwing into jeopardy the availability of trial by jury.

The FBA will continue to work with the judiciary to prevent these cuts. As FBA President Ashley Belleau recently told Congress: "The members of our association join with all Americans in their concern about growing federal debt and the need to assure a sustainable fiscal path for our nation. However, deep spending cuts in the federal budget, especially across-the-board cuts, would have a horrific impact on the federal court system and the administration of justice." **TFL**

Bruce Moyer is government relations counsel for the FBA. © 2011 Bruce Moyer. All rights reserved.

CALL FOR NOMINATIONS TO FBA ISSUES AGENDA

FBA members — as well as chapters, sections, and divisions — are invited to nominate issues for inclusion in the FBA Government Relations Issues Agenda for 2011–12.

The deadline for all agenda nominations is Friday, May 20.

The Issues Agenda, updated annually, provides the focus for the FBA's Government Relations program. It is a prioritized list of major areas of Congressional and/or Executive Branch activity that impact the federal legal system and federal jurisprudence. On the basis of nominations received, the FBA Government Relations Committee will prepare a proposed Issues Agenda for 2011–12 for approval by the FBA Board of Directors.

The current 2010–11 Issues Agenda is on the FBA Web site at: www.fedbar.org/IssuesAgenda. Items appearing on the current Issues Agenda automatically will be considered for renewal by the Government Relations Committee. In addition, new issues may be nominated by any FBA member, chapter, section, or division.

To nominate an issue for the Issues Agenda, please identify the issue in writing and briefly describe its merits, as well as its pertinence to the FBA and its stakeholders. Please send your nomination(s) by May 20 to:

Bruce Moyer
FBA Government Relations Counsel
E-mail: grc@fedbar.org

The Government Relations Committee will review all nominations and submit a proposed Issues Agenda to the FBA Board of Directors for consideration and approval later this summer.

SECTIONS *continued from page 7*

Riley, professor, University of California at Los Angeles School of Law, and director, UCLA American Indian Studies Center; Paul Spruhan, assistant attorney-general, Navajo Nation Department of Justice; and Tracy Toulou, director, Office of Tribal Justice, U.S. Department of Justice. Next year's conference will be held on April 19–20, 2012.

Immigration Law Section

On March 29, 2011, the Immigra-

tion Law Section, in partnership with the George Washington University Law School, held an Immigration Career Day. There have never been more career opportunities for attorneys in the growing field of immigration law than there are today. This event was held to inform law students and recent graduates about available opportunities in the field. Representatives from U.S. government agencies, law firms that practice immigration law, and selected nongovernmental organizations described their organizations and the type of

work performed and provided information on application requirements. The event was a huge success, with over 40 students attending. The section would like to thank the representatives who participated and George Washington University Law School for hosting the event and providing refreshments. **TFL**

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



Immigration Law Section: At the Immigration Career Day—(l to r) Elizabeth Stevens, assistant director, Office of Immigration Litigation, U.S. Department of Justice; Claire Kelly, conference coordinator; Larry Burman, vice chair, Immigration Law Section; Elizabeth Quinn, partner, Maggio & Kattar; Anjali Zielinski, Presidential Management Fellow, U.S. Department of Homeland Security; Andres Benach, partner, Duane Morris (above); Mark Shmueli, Law Office of Mark Shmueli (below); Michael Metzgar, associate counsel, Citizenship and Immigration Services, Department of Homeland Security; Nina Elliot, Office of the Chief Immigration Judge, Department of Justice.

FIFTH CIRCUIT

Mississippi Chapter

A generous crowd welcomed John Dowdy, the newly appointed U.S. attorney for the Southern District of Mississippi to the March luncheon meeting of the Mississippi Chapter. Mr. Dowdy spoke of his formative days as a law student working in in the U.S. Attorney’s Office and his developmental work there over the years. He shared his prosecutorial philosophy and noted the types of cases his office was seeing. Mr. Dowdy noted a new type of fraud case arising from the British Petroleum oil spill in the Gulf of Mexico—cases that involved the administrative claims process. Ryan Beckett, the treasurer of the Mississippi chapter, presented checks to the Mississippi’s law schools to be used for student scholarship awards on behalf of the chapter.

San Antonio Chapter

On March 23, 2011, approximately 100 women participated in an energy-packed mentoring luncheon for the students at Fox Tech’s Law Magnet Program at the San Antonio offices of Cox Smith. Local attorneys and legal professionals shared their experiences and gave advice to students. Inspirational speakers included Janae Florence, deputy chief of the San Antonio Police Department; Norma Guzman, enforcement supervisor at the Equal Employment Opportunity Commission (and Fox Tech alumna); and Capt. Jaclyn Shea, an attorney with the U.S. Air Force’s JAG Corps.

San Antonio Chapter: At the chapter’s mentoring luncheon—(right photo) Janae Florence, deputy chief of the San Antonio Police Department; (center right photo)—Norma Guzman, enforcement supervisor at the EEOC; (far right photo)—Capt. Jaclyn Shea, USAF JAG attorney.



Montana Chapter: At the chapter’s CLE seminar—(l to r) Judge Randy Smith of the Ninth Circuit and District Judges Sam Haddon, Donald Molloy, and Rick Cebull. Mike Cotter, U.S. attorney, is at the podium.

NINTH CIRCUIT

Montana Chapter

On March 11, the Montana Chapter hosted the Montana Federal Practice CLE seminar at Great Northern Hotel in Helena. Panelists included Judge Randy Smith of the Ninth Circuit; District Judges Sam Haddon, Donald Molloy, and Rick Cebull; and U.S. Attorney Mike Cotter.

Phoenix Chapter

On Feb. 17, 2011, the Phoenix Chapter and the Federal Litigation Section hosted a special presentation by Ray Dowd, vice president for the Second Circuit, entitled “Nazi-Looted Art in the Federal Courts: The Case of Schiele’s Dead City.” Attendees included members of the Phoenix Holocaust Survivors Association, who added to

the conversation by discussing their own experiences. Their comments and reflections offered a wonderful complement to Ray Dowd’s fascinating presentation. Rob Kohn, member of the Litigation Section’s board, and Judge Michelle Burns, member of the FBA’s national Board of Directors, member, were instrumental in bringing the event to Phoenix, and they were both present at the luncheon as well. In all, 100 people—including a representative of the Phoenix Art Museum—attended the successful and unique event. **TFL**

Chapter Exchange is compiled by Melissa Stevenson, FBA manager of chapters and circuits. Send your information to mstevenson@fedbar.org or Sections and Divisions, FBA, 1220 N. Fillmore Street, Suite 444, Arlington, VA 22201.



Richmond Chapter: At the chapter's Nov. 19, 2010, luncheon at the Bull & Bear Club with Gen. William Suter as guest of honor—(left photo, l to r) Andy Clark, chapter President; Steve Jackson, vice president for the Fourth Circuit; Collin Hite, past chapter president; and Gen. William Suter, guest of honor; (right photo) The group being sworn in to the U.S. Supreme Court by Gen. Suter at the November luncheon.



Capitol Hill Chapter: At the Feb. 3 special tour of the Supreme Court's newly renovated library— (left photo) Members of the Capitol Hill Chapter in the West Conference Room of the U.S. Supreme Court; (right photo) Tony Ogden, chapter president, thanks Judith Gaskell, the Supreme Court's librarian.



Mississippi Chapter: At the March meeting—(l to r) Kate Margolis of Bradley Arant, chapter secretary; Jim Rosenblatt, dean of the Mississippi College School of Law, chapter vice president; John Dowdy, U.S. attorney and guest speaker; and Ryan Beckett of Butler Snow, chapter treasurer, .

Phoenix Chapter: At the chapter's special presentation on Feb. 17— Monique Mendel, vice president of the Phoenix Holocaust Survivors Association; Rob Kohn, board member of the Federal Litigation Section; Nancy Fordonski, Holocaust survivor; Judge Michelle Burns, member of the FBA's national Board of Directors; Jeannette Grunfeld, Holocaust survivor; Ray Dowd, vice president for the Second Circuit; Ralph Schuster; Gert Schuster Holocaust survivor; and Joan Siver, president of the Phoenix Holocaust Survivors Association.

Internet Advertising: Two Competitors, One Trademark

Here's the Scenario: Your telephone rings, and your client is hopping mad. Her marketing team has just informed her that when they ran a Google search on the trademarked name of her principal product, the first results were "sponsored link" advertisements for her main competitor's similar product. "I want to file a lawsuit," she insists. "They're using *my* trademark to advertise my competition!" Is the competitor's behavior a clear violation of the federal Lanham Act, which offers legal protection against trademark infringement? Not according to a 2011 case from the Ninth Circuit Court of Appeals.



In *Network Automation v. Advanced System Concepts*, 2011 WL 815806, the Ninth Circuit examined facts similar to those behind hypothetical telephone call described above and reversed a preliminary injunction in favor of the trademark holder. In the case of advertising on the Internet, the law has been fairly slow to develop; however, given

that the Ninth Circuit is the home of Google and Microsoft, this particular appellate court has generated much of whatever law exists. The decision in *Network Automation v. Advanced System Concepts* will be an important guidepost going forward. With this new precedent, the Ninth Circuit reminded the parties and the district court that the Internet is no different from other commercial contexts: "the *sine qua non* of trademark infringement is consumer confusion." *Id.* at *1.

Initial Interest Confusion

The plaintiff in this case, Network Automation, argued that using its trademark as a sponsored link Advanced Systems' advertisement engendered "initial interest confusion," prompting consumers to visit the defendant's Web site instead of Network Automation's own site. The plaintiff contended that, even though customers would be aware that they were not buying the Network Automation product by the time they actually made their purchases, the diversion of these customers away from Network Automation's product they were searching for to begin with was

sufficient to constitute trademark infringement.

The Ninth Circuit disagreed with the lower court's ruling. Initial interest confusion is a recognized form of trademark infringement, and the Ninth Circuit pointed to several prior opinions in which the court found initial interest confusion arising from Internet advertising. But the standard for initial interest confusion is not merely diversion of consumers from one product to another. The standard is *likely confusion* by those consumers about which product they are buying. *Id.* at *8.

As consumers become more sophisticated online shoppers, the court noted, they have come to expect their Internet searches to involve trial and error. People understand that some of the links provided as search results that they click on will not be what they expected, and the users will not assume that the links are all affiliated with the trademark holder until they have seen the landing page—if then. *Id.* at *12.

The sponsored link advertisements in question in this case made no pretense of offering the trademarked product; they merely described a similar product available elsewhere. Moreover, both Google and Bing™ partition the pages that list their search results so that the paid advertisements appear on a separately labeled section. Accordingly, the Ninth Circuit found the sponsored link usage to be a form of comparative advertising.

Comparative Advertising

It would be wrong, said the Ninth Circuit, "to expand the initial interest confusion theory of trademark infringement beyond the realm of the misleading and deceptive to the context of legitimate comparative and contextual advertising." *Id.* at *7. Although the Lanham Act serves a purpose in protecting the intellectual property investment of trademark owners, the fundamental objective of the act is to protect the interests of the consuming public. In fact, the public also has a strong interest in comparative advertising. If there is a better or cheaper alternative to the product for which consumers are searching, they want to know about it.

When advertising links are clearly labeled and there is no pretense of affiliation between the advertiser and the trademark holder, the Ninth Circuit concluded, consumers are not misled; they are merely "confronted with choices among similar products." *Id.* at *9. And providing consumers with

accurate information about available choices is what trademark law is all about.

What Does It All Mean?

The law will continue to evolve and develop with respect to trademark rights when it comes to advertising on the Internet. But preventing all competitors from using one's trademark in online ads has clearly become more difficult.

In addition to sponsored link advertising, the legal principles hashed out in *Network Automation* often are at issue in metatag disputes—that is, cases in which one party uses another's trademark in its website's internal code. Because search engines use metatags to compile lists of search results, there is a possibility that the first party's website will appear when the user is searching for the second party's trademark. There have been plenty of disputes over whether this metatag usage of a trademark constitutes infringement. Although metatag usage alone will not result in a segregated sponsored link result, it will be interesting to see how the courts apply the reasoning of *Network Automation* in this context.

If your client is the competitor rather than the trademark holder, the important thing to remember is that the nondeceptive nature of the sponsored link advertisement is what saved the defendant in *Network Automation*. Clearly labeling the source of the competing product in Internet advertising will go a long way toward protecting the advertiser from a claim of trademark infringement. **TFL**

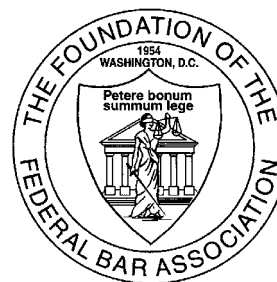
Lisa C. DeJaco is a litigator practicing with Wyatt Tarrant & Combs LLP in Louisville, Ky. In 2010 she was named one of the "Best Lawyers in Kentucky" for cases involving intellectual property.

Editorial Policy

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

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

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



Memorials and Remembrances *Gift Program*

With a tax-deductible gift to the Foundation of the Federal Bar Association, members of the legal profession, the public, business organizations, charitable trusts, or other foundations may create a memorial to a deceased person. Gifts may also be made in honor of someone, an anniversary, birthday, or any other occasion. Your gift helps fund educational and charitable programs that promote public understanding of the law and enhance the cause of justice.

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CHRISTOPHER E. PARKER

The Rising Tide of Social Media

Guess what? The manner in which employees communicate, both within and outside the workplace, has changed. It's not just e-mails and text messaging anymore, but a broad category of platforms collectively referred to as "social media." These media are now beginning to influence the workplace—the same workplace where we spend many of our waking hours before adjourning to discuss how this time was spent with our friends, family, and connections in cyberspace (known and unknown). Increased communication brings increased opportunity to offend and breach confidences in ways that may have a significant impact on a business. As with all things new, the courts and administrative agencies are hustling to respond and develop the legal landscape involved in using social media.



"Social media" is a broad term that generally includes various electronic and web-based means of disseminating or sharing information, including Facebook®, LinkedIn®, Twitter®,

MySpace®, YouTube®, blogs, chat rooms, wikis, photo-sharing sites, and more. The use of social media is becoming not only increasingly prevalent in the daily lives of people from all walks of life but also a greater presence in the daily business of many employers.

With employees using social media more frequently in both their private life and at their jobs, the lines between the uses are easily blurred. Are an employee's after-hours comments on a workplace incident subject to regulation or discipline? Where

does one draw the line when the screen name or identity of the individual posting the message is unknown or difficult to decipher? Does it make a difference if the employee clearly identifies himself or herself with the message? Is there a difference in what is considered an appropriate response to a comment about a co-worker as compared to company management? Some of the answers to these potential dilemmas are seemingly obvious; others

are not. Legal issues and challenges concerning social media in the workplace are currently winding their way through the court systems, and the legal outcomes are as uncertain as the myriad of fact patterns that may be presented.

The Use of Social Media

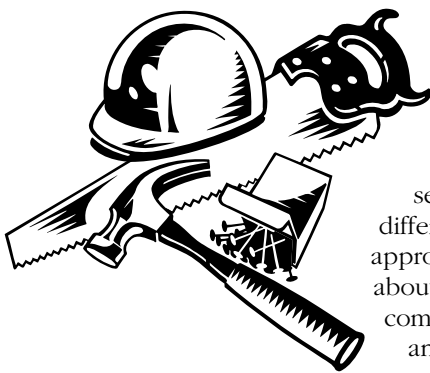
The prevalence of social media is quite clear. Facebook claims to have 500 million active users (www.facebook.com/press/info.php?statistics) and, even though the estimate is impossible to verify, there are over 70 million blogs, with almost 1.5 million being added each day. The utility of social media is not limited to the private lives of individuals. Businesses are increasingly using social media in advertising, marketing, communication, and decision-making related to employment issues.

Many employers now routinely use social-networking sites to conduct research about the backgrounds of job candidates. The information runs the gauntlet of potentially delicate information that is assembled about an applicant as part of the hiring process: alcohol use, social groups, religion, age, sexual preference, and the list goes on and on. To further complicate the issue, employees (or applicants) may feel a false sense of privacy or anonymity about the information they are sharing over the Internet, leading them to share too much information about themselves with their employer or too much information about their employer with others. The informality of social networking undoubtedly contributes to piecemeal bites (or perhaps "bytes") of information that may lead to inaccurate and unfortunate conclusions. Claims of invasion of privacy or unlawful discrimination abound.

Potential Effects of Social Media on the Relationship Between the Employer and the Employee

The terrain for potential claims relating to social media and its impact on the workplace is still in the development stage. The gut-level reaction most frequently observed from employees who learn that their employer has checked them out online is a claim of invasion of privacy. These claims, despite their naïveté when it comes to the Internet, can be (legally) frustrated by an employer's well-drafted policy advising applicants and employees of exactly how publicly accessible information may be used as part of the decision-making process in the workplace. A simple declaration that public sources of information, including social media portals, may be considered in the determination or evaluation of the applicant or employee may help dispel any expectation of privacy on the part of an employee.

Privacy claims are not the only landmine with which employers need to contend. The Stored Com-



munications Act, 18 U.S.C. 2701, protects the privacy of stored Internet communications. Although the protections do not apply to communications “readily accessible to the general public,” the main issue in the context of workplace disputes is how the employer gained access to the information. A case heard by the Fourth Circuit Court of Appeals—*Van Alstyne v. Electronic Scriptorium Ltd.*, 560 F.3d 199 (4th Cir. 2009)—involved an employer who was accused of violating the Stored Communications Act by improperly accessing an employee’s personal e-mail account. The employee discovered the e-mail “break-in” only when the employer tried to present the e-mails as evidence against the employee in a sexual harassment claim she had filed. In another case, the New Jersey District Court found that employers had violated the Stored Communications Act—but not the employee’s common law right to privacy—by gaining access to the employee’s chat group on MySpace without the employee’s authorization. The employer gained access to the chat group only after coercing another employee to provide the password. *Pietrylo v. Hillside Restaurant Group*, No. 06-5754 (FSH), 2009 WL 3128420 (D.N.J. Sept. 25, 2009). In both cases, the employer was found to have overstepped legal boundaries by gaining access to information that had been subject to security efforts without proper permission.

The Fair Credit Reporting Act requires the consent of an applicant or an employee before an employer can ask a “consumer reporting agency” or another third party to conduct a background check and produce a “consumer report” or other written report of its findings. Even though employers may use consumer reports that contain information from social-networking sites, they must disclose to their employees that such information was the basis for any adverse actions that may have been taken. The Fair Credit Reporting Act does *not* prevent employers from reviewing social-networking sites themselves; however, the act leaves a loophole for employers to do background checks.

The Electronic Communications Privacy Act makes it unlawful to listen to or observe the contents of a private communication without the permission of at least one party to the communication. In addition, the act prohibits parties from intentional interception, access, disclosure, or use of another party’s electronic communications. This law has been interpreted to include e-mail communications and may provide some protections for employees’ privacy. There are, however, exceptions that the employer may find helpful.

Potential Discrimination Claims Against the Employer

Even though the possibility of an unfiltered look at a job candidate may be tempting, the employer faces serious risks when using the Internet to investigate employees and job applicants. These risks include

the potential of discovering information that the employer is not allowed to ask in person or use in the selection or disciplinary process. Using Facebook as an example, many people have listed information for their personal profile that reveals their race, political affiliation, age, sexual orientation, national origin, and more. Status updates, tweets, and blogs may also reveal a person’s potential disabilities, past medical conditions, or the medical conditions of family members.

Potential Implications of Employees’ Postings and Social Media Content on the Employer

Employers must beware of confidential information to which employees have access through their jobs becoming public knowledge through employees’ use of social media, even in the apparent context of the employee’s role as a private individual. Not only can employees leak confidential information about their companies, they may knowingly or unknowingly publish confidential information about their employers’ clients or business associates. For example, if an employee works for a health care provider and later “tweets” about a patient at work, that employee could be disseminating information protected by the Health Insurance Portability and Accountability Act (HIPPA) creating serious liabilities for the employer. Other communications by employees may implicate federal copyright or trademark laws. Although many of these types of communications would be unexpected and subject to monitoring if they occurred within the workplace, the user’s theoretical anonymity when using the Internet and social media outlets can lead to unexpected consequences.

Guidelines issued by the Federal Trade Commission regarding endorsements and testimonials in advertising may have serious implications for an employee’s online activity. The guidelines require all endorsers, including employees, to disclose “material connections” between the endorser and the product or company about which they comment. Because material connections include employment relationships, if a company’s employee enjoys contributing to websites dedicated to product reviews, for example, and discusses a product produced by his or her employer, the employee may be considered an endorser and must then abide by the Federal Trade Commission’s guidelines. An employer can be held accountable for an employee’s actions every time the employee tweets or changes his or her Facebook status regarding a new product at work. A company may then face liability for any unsubstantiated or false claims made by employees, even if they are not authorized to make such comments.

This example further highlights the importance of having thoughtful technology use and confidentiality policies in place for both on-duty and off-duty use.

LABOR *continued on page 16*

Training employees about the potential consequences of their actions and the way to best use—or not to use—social media, even on their own time, may be just as important as properly disseminating a written policy. However, policies governing the use of a company's technology, which include off-duty activities, cannot simply ban social media use in its entirety. As discussed below, overbroad policies dealing with use of technology can create liabilities of their own for employers.

Protected Speech and Activity

When dealing with an employee who is using social media in a way the employer does not like or with which the employer does not want to be associated, many employers would simply prefer to terminate the employee who is using social media in that way. Although termination would often seem to be the ideal resolution for the employer in situations like this, employers must be careful when making this decision. Even though the First Amendment does not protect an employee of a private employer from termination or adverse action because of the content of online postings, the content of the postings and information may invoke other kinds of protection, such as Title VII of the Civil Rights Act of 1964. Depending on the content of the online communication, whistleblower protections under state and federal laws may also be triggered.

Recently, the National Labor Relations Board (NLRB) issued a complaint after an employee was fired from American Medical Response of Connecticut for posting negative comments about her supervisor on her Facebook page. The employer had a policy prohibiting employees from making disparaging remarks about the company or supervisors and from discussing the company “in any way” over the Internet, including via social networks, without advance permission. The NLRB argued that policies restricting an employee's right to criticize working conditions, including the right to publish such criticisms to co-workers, violates the National Labor Relations Act. Faced with further litigation with the NLRB, the case was settled in early February 2011, with the employer agreeing to refrain from limiting the rights of its employees to communicate on work-related issues away from the workplace.

What Should an Employer Do?

The legal arena surrounding the use of social media in the workplace is in the midst of what may be a lengthy evolution. Employers have to balance their own needs to protect their assets against the legal rights of their employees. Companies should strongly consider establishing clear policies regarding several work-related issues:

- use of the company's hardware, software, and computer systems;
- harassment, including via social media;
- trade secrets of the business;
- need for confidentiality, non-compete, and non-solicitation;
- use of social media and electronic communication during nonworking hours; and
- social networking and the Federal Communication Commission's requirements.

Employers' policies should prohibit employees from discussing, including through social media, company information that is confidential or proprietary; clients', partners', vendors', and suppliers' information that is confidential or proprietary; and information that has been embargoed, such as product launch dates or release dates; and pending organizations. At the same time, employers need to recognize that across-the-board restrictions on communications are subject to challenge. Policies related to use of technology and electronic communication should cover use of the company's intellectual property; sexual references; obscenity; reference to illegal drugs; disparagement of any race, religion, gender, age, sexual orientation, disability, or national origin; and the disparagement of the company's or competitors' products, services, executive leadership, employees, strategy, and business prospects.

One cautionary note must be made: The information provided in this column is intended to apply primarily to employment in the private sector. Employers in the public sector face additional limitations on the potential restraints that can be imposed based on the Constitution. As with all such issues, employment policies and decisions related to new issues raised by the widespread use of social media should be discussed with legal counsel, because the landscape is in a state of growth and rapid change. **TFL**

Christopher E. Parker is a member in the Atlanta office of Miller & Martin PLLC and serves as the vice-chair for the firm's labor and employment law practice. He is a former chair of the FBA Labor and Employment Law Section and a past president of the Atlanta Chapter of the FBA. Parker received B.S. and J.D. degrees from the Ohio State University. © 2011 Christopher E. Parker. All rights reserved.

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STEVEN D. TIBBETS

Who Are We to Argue? Annual Marshall Moot Court Program Provides Aspiring Lawyers an Opportunity to Ply Their Craft

During each spring since 1997, the Younger Lawyers Division (YLD) has hosted the Thurgood A. Marshall Memorial Moot Court Competition. This year, on March 17 and 18, 26 teams from around the country participated in the 14th annual installment of the competition. The oral argument rounds of this year's event were held in Washington, D.C., to coincide with the FBA's annual Midyear Meeting. The competition was a success, with participants and judges reporting that they enjoyed the sessions and learned a great deal. (In fact, the author of this column was left wishing that he had the superior oral advocacy skills the competitors demonstrated.)



Designed for two-person teams, the competition focused on written briefs submitted prior to the oral argument rounds and the scores assigned by judges during three rounds of oral argument competition. During the evening of Friday, March 18, the two final-

ist teams, both from the University of California Hastings College of the Law, presented their cases to the "United States Supreme Court," consisting of "Justices" Hon. Andrew S. Effron of the U.S. Court of Appeals for the Armed Forces, Kelle Acock, Younger Lawyers Division chair, Alfredo Castellanos, and Ashley L. Bel-leau, FBA national president.

The team of Angela McIsaac and Heidi Hansen (from University of California Hastings College of the Law) was declared the winners of the overall competition. The winners for "best brief" were Joy Albrecht and Andrew Camelotto of Seton Hall University. The winner of "best overall oralist" was Chris Bagi of the University of Dayton. What is more important is that every participant in the program had the opportunity to practice his or her advocacy skills and receive feedback from experienced practitioners. In addition, each participant received a free one-year membership in the FBA.

The YLD organizers of the event—Dan Strunk, Kelly Scalise, and myself—thank all the participants for their hard work and careful preparation and for making the competition a rewarding experience for everyone involved. In addition, we especially thank those who volunteered their time and energy to serve as judges and bailiffs (during the NCAA basketball tournament no less!). We would like to thank the Superior Court of the District of Columbia, the U.S.

Court of Federal Claims, and the U.S. Court of Appeals for the Armed Forces for hosting this year's competition. Finally, we thank the tireless and dedicated staff of the FBA, without whose efforts and dedication the competition could not have taken place. Congratulations to the 2011 winners. The Younger Lawyers Division looks forward to another terrific competition in 2012!

Steven D. Tibbets is an associate in the Washington, D.C., office of Reed Smith, where he focuses on government contracts law. He was a law clerk to Hon. Karla R. Spaulding of the U.S. District Court for the Middle District of Florida, and graduated from the University of Texas School of Law (J.D.) and Purdue University (B.A.).

2011 Thurgood Marshall Moot Court Competition Winners

Best Overall Oralist

1. Team 25, University of Dayton, Chris Bagi
2. Team 23, U.C. Hastings, Heidi Hansen
3. Team 17, St. Mary's University, Marion Reilly

Best Brief

1. Team 14, Seton Hall, Andrea Joy Albrecht and Andrew Camelotto
2. Team 23, U.C. Hastings, Angela McIsaac and Heidi Hansen
3. Team 16, St. John's University, Cameron Fee and Tracy Keeton

Team Champions

1. Team 23, U.C. Hastings, Angela McIsaac and Heidi Hansen
2. Team 24, U.C. Hastings, Taryn Hunter and Dakotah Benjamin
3. Team 1, Baylor University, Reagan Vernon and Pamela Sieja
4. Team 25, University of Dayton, Chris Bagi and Leslie Allen

Final Round Best Oralist

Team 24, U.C. Hastings, Taryn Hunter

Photos from the competition are on page 23.

Honors and Awards

John E. Schiller, a partner with Walter & Haverfield LLP in Cleveland, was honored for his professional rectitude by entrepreneur David H. Jacobs Jr., who donated \$1.5 million to the Maurer School of Law at Indiana University at Bloomington to endow the John E. Schiller Chair in Legal Ethics. Jacobs stated that he was inspired to make the gift after witnessing Schiller's "integrity, judgment, passionate belief in the legal system, and exceptional work ethic." Professor Hannah Buxbaum has been selected as the first professor to hold the John E. Schiller Chair.

Practitioners' News

Scott C. Clarkson was appointed by Chief Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit to fill a temporary judgeship approved by the Judicial Council of the Ninth Circuit in 2009. Clarkson was sworn into office on Jan. 20, 2011, and will have chambers in Santa Ana. Clarkson was the managing attorney at Clarkson, Gore & Marsella APLC in Torrance, Calif., and has been a practicing attorney for more than 20 years. He was a direct observer of and participant in the creation of the 1978 Bankruptcy Code in the U.S. House of Representatives. Since 1989, he has practiced at all levels of bankruptcy law and has worked with individuals as well as public and private corporations. Clarkson, who has worked as a litigator, was significantly involved in both the prosecution and defense of preference and fraudulent avoidance actions and recovery actions. He is a member of the Los Angeles County Bar Association and served as chair of its Bankruptcy Committee from 2004 to 2006 and chair of its Commercial Law and Bankruptcy Section from 2008 to 2009. Clarkson was also a member of the Bar Advisory Board Committee of the U.S. Bankruptcy Court for the Central District of California and is a member of the Federal Bar Association. A native of Houston, Texas, he received his B.A. from Indiana University in 1979 and his J.D. from George Mason University

School of Law in 1982. ... **Jeffrey T. Kuntz**, of the Fort Lauderdale office of GrayRobinson P.A., was recently promoted to senior associate at the law firm, where he has been an attorney since 2006. His practice in both the state and federal courts focuses on commercial litigation and appellate law as well as banking, finance, and ERISA and employee benefits. He holds memberships to the Florida Bar, Federal Bar Association, and American Bar Association. Kuntz was selected by *Super Lawyers* as a "Rising Star" for 2009 and 2010. He is also the author of the Florida Legal Blog (www.floridalegalblog.org), in which he analyzes decisions made by Florida's appellate courts and the Eleventh Circuit Court of Appeals. Aside from his professional affiliations, Kuntz is a member of the board of directors for Junior Achievement of South Florida and is a member of Emerge Broward. Kuntz earned his J.D. degree from Suffolk University Law School and undergraduate degree from Boston College.

Obituaries

Stanley Morton Fisher died Friday, Jan. 28, 2011, at his home in Beachwood, Ohio, at the age 82. During his lifetime, he served on several federal panels, won several inaugural awards, and led two national groups of lawyers. He was a member of both the Florida and Ohio bars. Fisher's professional achievements were a series of firsts: the first national president of the Federal Bar Association from Ohio; the first recipient of the Lifetime Achievement Award from the Northern District of Ohio Chapter of the Federal Bar Association; and the first Life Member of the Judicial Conference of the U.S. Court of Appeals for the Sixth Circuit. As national president of the FBA, he helped double the membership of the association by convincing to organize more events outside Washington, D.C., and to widen its ranks from federal employees to any lawyers handling federal matters. He also served as the national president of the American Counsel Association and a Life Member of the National Uniform Law Commis-

sion (having been appointed by three Ohio governors). Fisher served on national committees that updated the federal Uniform Trust Code, the Securities Act, the Limited Partnership Act, and the commercial code and testified about these codes to several state legislatures. He published many articles and taught at Cleveland State University Cleveland Marshall College of Law. In 1995, President Clinton appointed Fisher to the Federal Service Impasses Panel, which assists in negotiations with federal workers. After graduating from Oberlin College and University of Michigan Law School, he clerked for the U.S. Court of Appeals for the Sixth Circuit, first for Chief Judge Charles Simons and later for Judge Potter Stewart before Stewart was appointed to the U.S. Supreme Court. Fisher worked in several prominent Cleveland law firms, including Ulmer, Berne; Guren, Merritt; and Arter and Hadden. He handled antitrust cases, corporate litigation, estates, and more. From 1971 to 1974, he was also special counsel to Ohio's attorney general. He finished his career as Of Counsel with Budish, Solomon, Steiner and Peck, a firm led by former speaker of the Ohio House of Representatives, Armond Budish. Stan Fisher was perhaps most proud of being the starting offensive right tackle on the undefeated, untied 1944 New Philadelphia High School Quaker football team, where his coach during his freshman year was Woody Hayes (before Hayes went to coach Ohio State University's football team). In 2006, Fisher was honored by the New Philadelphia City Schools Quaker Foundation with the Special Alumnus Achievement Award. ... **Hon. Cynthia Holcomb Hall**, a distinguished senior judge of the U.S. Court of Appeals for the Ninth Circuit, died Saturday, Feb. 26, 2011, after a long and valiant battle with cancer. She was 82. Judge Hall served on the federal bench for 29 years. Nominated by President Reagan, she was appointed to the U.S. District Court for the Central District of California on Nov. 18, 1981, and then to the Ninth Circuit Court of

HEARSAY continued on page 20

Appeals on Oct. 4, 1984—the fifth woman to be appointed to the court. She assumed senior status in 1997 but continued to hear cases until her death. The only concession she made to her illness during the last year of her life was to participate in oral arguments by video from her chambers rather than travel to court. At the time of her death, she ranked 17th in seniority among the court's 47 active and senior judges. Colleagues remember Judge Hall not only as a judge with considerable legal talents but also as a woman of many interests, a world traveler, an avid gardener, and an accomplished photographer. Although Judge Hall authored many opinions, colleagues say she saw them as the product of a joint effort by the panel and would not want to be recognized individually for any of the opinions. Judge Hall was active in court governance, serving on various committees of the Judicial Conference of the United States and the Judicial Council of the Ninth Circuit (the governing body for federal courts in the western states). Of particular interest to her was the Judicial Conference's Committee on International Judicial Relations, which provided her the opportunity to work with members of the judiciary worldwide. In addition to her service in the judicial branch, Judge Hall served in the executive branch as a judge of the U.S. Tax Court from 1972 to 1981. She had worked in private practice in Beverly Hills from 1966 to 1972. Earlier in her career, Judge Hall was an attorney adviser in the U.S. Treasury Department's Office of the Tax Legislative Counsel (1964–1966); a trial attorney in the tax division of the U.S. Department of Justice (1960–1964); and a research assistant for the *Tax Law Review* (1959–1960). A Los Angeles native, Judge Hall received her A.B. from Stanford University in 1951 and her LL.B. from Stanford Law School in 1954. She also received an LL.M. from New York University School of Law in 1960. She clerked for the late Judge Richard H. Chambers of the Ninth Circuit Court of Appeals in from 1954 to 1955, and served in the U.S. Navy JAG Corps as a reserve lieutenant from 1951 to 1953. ... **Judge Albert E.**

Radcliffe died unexpectedly on Jan. 19, 2011, at the age of 63. He served on the bankruptcy court for 27 years. Judge Radcliffe was appointed as a part-time bankruptcy judge in December 1983 and was made a full-time bankruptcy judge in February 1988. He was reappointed to a second 14-year term in 2002. Judge Radcliffe served as chief bankruptcy judge for the District of Oregon from 1999 to 2005 and chaired the Ninth Circuit Conference of Chief Bankruptcy Judges from 2004 to 2005. He also served as a judge pro tem on the Ninth Circuit's Bankruptcy Appellate Panel and as a visiting bankruptcy judge in the Western District of Washington and the Central District of California. He was a member of the National Conference of Bankruptcy Judges. Before his appointment to the court, Judge Radcliffe worked in private practice and had extensive experience representing debtors, creditors, and trustees in bankruptcy proceedings. Judge Radcliffe was a great supporter of the Oregon Chapter of the FBA. He had served on the executive committee of the Oregon State Bar's Debtor/Creditor Section, which presented him with an Award of Merit in October 2010. He also taught as an adjunct professor at the University of Oregon School of Law, was active in the Lane County Bar Association, and was a member of the Roland K. Rodman American Inn of Court. An Oregon native who grew up in Eugene, Judge Radcliffe received his B.A. from the University of Oregon in 1969 and his J.D. from the University of Oregon School of Law in 1972. ... **Hon. David R. Thompson** of San Diego, an esteemed senior judge of the U.S. Court of Appeals for the Ninth Circuit, died after a sudden illness on Saturday, Feb. 19, 2011, at the age of 80. Nominated by President Reagan, Judge Thompson was appointed to the Ninth Circuit Court of Appeals on Dec. 17, 1985. He took senior status on Dec. 31, 1998, but continued to carry a substantial caseload while also serving as the court's coordinator of death penalty cases. At the time of his death, he ranked 19th in seniority among the court's 48 active and senior judges.

Notable opinions written by Judge Thompson include *Wood v. Ostrander*, a 1989 decision that established the standard for deliberate indifference in police misconduct cases; *Coleman v. McCormick*, a 1989 en banc ruling involving a Montana man sentenced to death under two different state sentencing schemes; *Oregonian Publishing Company v. U.S. District Court for the District of Oregon*, a 1990 decision involving a high-profile criminal case in which the defendant sought a sealed plea agreement with the government; and *Bunnell v. Sullivan*, a 1991 en banc ruling that established the standard for evaluating complaints of disabling pain in Social Security cases. In addition to his work on the bench, Judge Thompson also was active in court governance. From 2006 to 2009, he was the senior circuit judge representative to the Judicial Council of the Ninth Circuit. At the national level, he served on the Committee on the Administration of the Bankruptcy System from 1991 to 1999; during the last three years he served as committee chair. The committee advises the Judicial Conference of the United States, the judiciary's national governing body. Born in San Diego, Judge Thompson received his B.S. from the University of Southern California in 1952 and his LL.B. from the USC Law School in 1955. Following law school, he served in the Navy from 1955 until 1957. After his honorable discharge from military service, he began practicing law in San Diego. A substantial portion of his 28-year private practice was devoted to business litigation and general trial practice. Judge Thompson is a past president of the San Diego Chapter of the American Board of Trial Advocates and a former vice president of the San Diego County Bar Association. **TFL**

FBA Hearsay is compiled by Sarah Perlman, FBA communications coordinator. Send your information to sperlman@fedbar.org or FBA Hearsay, FBA, 1220 N. Fillmore Street, Suite 444, Arlington, VA 22201.

Abraham Lincoln and the Structure of Reason

Abraham Lincoln's words are the best evidence in cracking Lincoln's code. *Abraham Lincoln and the Structure of Reason* (reviewed in the February 2011 issue of *The Federal Lawyer*) reveals the hidden template Lincoln used post 1853 in his greatest speeches, in much of his writing, and in the latter portion of his law practice. The template is elegantly simple, and, with well-worth-it-effort, replicatable by attorneys, writers, and speakers. Harvard professor John Stauffer wrote, "It is a magnificent book, one of the few that read better and reveal new insights the second time around." In a private note to the authors, a U.S. Supreme Court justice described the book as "impressive." In e-mail to one of the authors of *Abraham Lincoln and the Structure of Reason*, Harold Holzer used the same word: "impressive".

Where did *The Federal Lawyer* review of *Abraham Lincoln and the Structure of Reason* go wrong?

The reviewer mistakenly states we argue that Lincoln used geometric principles "to craft his post 1849 speeches, legal arguments, and other writings." We found no Lincoln language prior to 1854 that demarcates into the six elements. Furthermore not everything after 1854 demarcates. An example of a writing that does not is the Emancipation Proclamation.

The reviewer makes other mistakes, for instance attributing to the authors a Pat Malone quotation about understatement in the Exposition of Lincoln's Second Inaugural. An Exposition is always going to be a relatively flat statement of fact. From our standpoint it was not an

understatement. It said and meant what it was supposed to. Its position is key. Every Lincoln writing demarcated in the book was written by Lincoln to prove a proposition. There is not space here to go into that, nor is there space to discuss other review mistakes. However Chapter 3, concerning Lincoln's constitutional overstatement ("Honest Abe?") must be discussed.

At Freeport, a year and a half before Cooper Union, Lincoln proved Stephen Douglas' popular sovereignty argument was politically inconsistent. At Cooper Union, Lincoln came from a different angle: a narrow and imaginative constitutional proof.

Either the Constitution and the proper division between state and federal authority are the same thing, in which case it is proper to focus solely on the Constitution. Or they are not the same thing, in which case the proposition still has to pass Constitutional muster. Stephen Douglas did not foresee Lincoln's creative Cooper Union argument when Douglas ended the *Harper's* article: "The principle, under our political system, is *that every distinct political Community, loyal to the Constitution and the Union, is entitled to all the rights, privileges, and immunities of self-government in respect to their local concerns and internal polity, subject only to the Constitution of the United States.*" (emphasis in the original)

Lincoln frames his analysis in the Exposition of Cooper Union: "What is the frame of Government under which we live? The answer must be: 'The Constitution of the United States.'" Lincoln then gets even more specific: "That Constitution consists of the original, framed in 1787, (under which the pres-

ent government first went into operation,) and twelve subsequently framed amendments, the first ten of which were framed in 1789."

The issue in Chapter 3 of *Abraham Lincoln and the Structure of Reason*, is what does "yes" mean. More precisely, what do three pre-Constitution votes to regulate slavery in the territories mean? The first third of Cooper Union is a verbal shell game. As an aside, three votes do not prove what could or could not be done under the Articles of Confederation. More to the point, there is no common denominator between the Articles of Confederation and the Constitution. One cannot add votes under one to votes under the other. It is as if Lincoln set out to prove the Pythagorean Theorem, but instead proved $18 + 3 = 21$.

When the three pre-Constitution votes were cast, those three future signers could not have considered whether their vote was "constitutional" under the Constitution, because it was not required to be.

$18/\text{Constitution} + 3/\text{Articles of Confederation} = \text{non sequitur}$

None of the book's core discoveries depend on Chapter 3. That said, Chapter 3 is L-1 Con Law. Kindly put, Lincoln's "demonstration" in the first third of the speech was misleading. Of the yes votes on legislation affecting slavery in the territories by the Constitution's signers that were cast when the Constitution was in effect, the total number of signers so voting is 18. That is less than half of the 39. Lincoln's demonstration fails.

David Hirsch and Dan Van Haften
Authors of *Abraham Lincoln and the Structure of Reason*

Judicial Profile Writers Wanted

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

Moot Court Competition • March 17–18, 2011



All participants pose for a group photo after the first round of arguments on March 17.



After the competition final round at the U.S. Court of Appeals for the Armed Forces—(l to r) “Justice” Alfredo Castellanos, Puerto Rico Chapter; competition first place winners Angela McIsaac and Heidi Hansen, U.C. Hastings; “Justice” Hon. Andrew Effron, U.S. Court of Appeals for the Armed Forces; competition second place winners Taryn Hunter and Dakotah Benjamin, U.C. Hastings; and “Justice” Ashley Belleau, FBA president.



After the competition final round—(l to r) Competition third place winners Pamela Sieja and Reagan Vernon with Hon. Andrew Effron, U.S. Court of Appeals for the Armed Forces.



At the post-final round reception at the U.S. Court of Appeals for the Armed Forces—(l to r) Kevin Maxim, Atlanta Chapter; John “Skip” Byrne Jr.; and Christine Varnado, vice president for the Fourth Circuit.



At the post-final round reception—(l to r) Steven Jackson, board of directors member; Richard Theis, board of directors members; Larry Westberg, Government Relations Committee member; and Sharon O’Grady, vice president for the Ninth Circuit.

FBA Midyear Meeting • March 18–19, 2011



At the post-final round reception at the U.S. Court of Appeals for the Armed Forces—(l to r) Mark Vincent, Utah Chapter; Jenifer Tomchak, Utah Chapter; and Jonathan Hafen, vice president for the Tenth Circuit.



At the reception following the Midyear Meeting—(l to r) Carol Wild Scott, Veterans Law Section chair; Joyce Kitchens, past national president; Brian Murphy, D.C. Chapter; Robert Mueller, past national president; and Adrienne Berry, past national president.



At the luncheon on Saturday, March 18—(l to r) Gen. William K. Suter receives a gift from FBA President Ashley Belleau on behalf of the FBA in recognition of his 20 years of service as clerk of the U.S. Supreme Court.



At the luncheon on Saturday, March 18—(l to r) Hon. D. Michael McBride III, board of directors member; Elizabeth Smith, board of directors member; Jeannie Suter; and Gen. William K. Suter, U.S. Supreme Court. All are Trinity University alumni.



At the reception following the Midyear Meeting—(l to r) Alan Harnisch, past national president; Martha Hardwick Hofmeister, national council appointed member; Kent Hofmeister, Sections and Divisions Council chair; and Ashleigh Jones, Corporate and Association Counsel Division chair.



At the reception following the Midyear Meeting—Stefanie Moon, Broward County Chapter; Richard Dellinger, vice president for the Eleventh Circuit; Ty Martin, FAMU College of Law student liaison for the Orlando Chapter; and Marilyn Moran, Orlando Chapter.

SAFETY Act Liability Protections for Air Cargo Screeners

By Alice Crowe

In August 2007, Congress enacted the Implementing the Recommendations of the 9/11 Commission Act of 2007 (the 9/11 Act),¹ which requires the Transportation Security Administration (TSA) to establish a system for screening all cargo transported on passenger aircraft within three years.² In response, the TSA developed the Certified Cargo Screening Program (CCSP), under which the TSA may certify entities in the cargo supply chain to screen cargo for unauthorized explosives at off-airport facilities.³ Some entities certified as Certified Cargo Screening Facilities (CCSFs) screen cargo by physical search, while others use technology approved by the TSA, such as X rays or explosive trace detection devices. The Department of Homeland Security (DHS) may designate CCSP screening measures as qualified anti-terrorism technology (QATT) under the Support Anti-Terrorism by Fostering Effective Technologies Act (the SAFETY Act).⁴ Once the DHS designates or certifies a technology, the seller of the technology enjoys certain liability protections under the SAFETY Act.

This article describes the key cargo screening provisions of, and policies underpinning, the 9/11 Act and the SAFETY Act as well as the domestic programs the DHS and TSA have established thereunder. The discussion also considers whether a CCSF that fails to detect an explosive in cargo because of human error or negligence nonetheless may benefit from the SAFETY Act's limits on liability. The article concludes that it is unlikely that human error would vitiate those liability protections. A CCSF that is negligent in its implementation of a designated QATT, however, may jeopardize its statutory protections from liability if its performance of cargo screening departs significantly from the specific methodology that provided the basis for its designation or certification by the DHS.

The 9/11 Act's "100 Percent Screening" Mandate

The Transportation Security Administration has implemented a multilayered, risk-based system for securing cargo transported on passenger aircraft.⁵ Approximately 10 million pounds of cargo are transported on passenger aircraft in the United States each day. U.S. aircraft operators and foreign air carriers operating at U.S. airports must ensure that cargo transported on passenger aircraft is screened as set forth in their TSA-approved security programs.⁶ Prior to the 9/11 Act, aircraft operators screened most cargo at the airport.⁷

The 9/11 Act requires that the system used to screen cargo provide a level of security "commensurate with the



level of security for the screening of passenger checked baggage" and directed that 100 percent of such cargo be screened not later than Aug. 3, 2010.⁸ The act defines "screening" as "a physical examination or non-intrusive method of assessing whether cargo poses a threat to transportation security. Methods include X-ray systems, explosive detection systems, explosive trace detection devices, explosive detection canine teams certified by the TSA or a physical search together with manifest verification."⁹

On Sept. 16, 2009, the TSA issued an Interim Final Rule establishing regulations to implement the statutory mandate to screen all cargo on passenger aircraft by Aug. 3, 2010.¹⁰ This rule applies only to cargo loaded in the United States and not to cargo loaded abroad and transported into the United States.¹¹ The TSA's objective was to develop a domestic program that could achieve "100 percent screening," while still allowing commerce to flow.¹² The agency concluded that the "100 percent screening" mandated by the 9/11 Act could not be achieved by relying solely on U.S. aircraft operators and foreign air carriers to conduct screening.¹³ Under the CCSP, facilities upstream in the air cargo supply chain—such as shippers, manufacturers, warehousing entities, distributors, third-party logistics companies, indirect air carriers, and independent cargo screening facilities—may apply to become a TSA-certified facility and screen cargo off-airport.¹⁴ A CCSF applicant must successfully undergo a TSA-conducted security threat assessment¹⁵ and submit to an evaluation of its facility by the TSA.¹⁶ Once certified, a CCSF must take the following measures:

- implement a TSA-approved standard security program;¹⁷

- ensure that key personnel with unescorted access to cargo undergo the required security threat assessment;¹⁸
- adhere to strict physical and access control measures for the storage, handling, and screening of cargo; and
- implement chain-of-custody measures to ensure the security of cargo as it moves through the supply chain, from the time of screening until loading onto passenger aircraft.¹⁹

The SAFETY Act

Congress passed the SAFETY Act in response to the terrorist attacks of Sept. 11, 2001. Realizing that “technological innovation is the Nation’s frontline defense against the terrorist threat,”²⁰ Congress intended the SAFETY Act to serve as a catalyst for private businesses to develop and market systems, devices, and services that could be used to combat terrorism.²¹ Congress recognized, however, that exposure to liability could inhibit companies from bringing such new technologies to market. This risk is inherent because an anti-terrorism technology or integrated system of technologies may be defeated even if it is operated as designed. The SAFETY Act provides “a narrow set of liability protections for manufacturers of these important technologies.”²² To receive these protections from liability arising from acts of terrorism at a site using an anti-terrorism technology, firms that manufacture or provide such technology must apply to the DHS for either “designation”²³ or “certification”²⁴ of the technology as a QATT.

“Designation” and “Certification” Protection

Technologies for which the DHS may extend SAFETY Act’s liability protections include “products, equipment, services (including support services), devices and other technology, (including information technology) designed, developed, modified, or procured for the specific purpose of preventing, detecting, identifying, or deterring acts of terrorism or limiting the harm such acts might otherwise cause.”²⁵ Both products and services are eligible to receive the same level of liability protection under the SAFETY Act. If, after a technical review, the DHS “designates” the technology as a QATT, the following protections apply to the seller:²⁶

- exclusive jurisdiction in federal courts for claims based on an “act of terrorism”²⁷ associated with deployment of a QATT;²⁸
- liability capped at an amount no greater than the limits of liability insurance that the DHS requires the seller to maintain as a condition of designation or certification;²⁹
- limitation on liability for noneconomic damages in proportion to the seller’s responsibility and only if the plaintiff has suffered physical harm;³⁰
- a complete bar on punitive damages or prejudgment interest;³¹ and
- reduction of the plaintiff’s recovery by the amount of any collateral source compensation, such as insurance benefits or government benefits.³²

The SAFETY Act’s limited liability protections extend to users and component providers of the technology through-

out the supply chain, both downstream and upstream.³³

The SAFETY Act provides that, before issuing a certification for a technology, the DHS will conduct a “comprehensive review of the design of such technology, and determine whether it will perform as intended, conforms to the Seller’s specification, and is safe for use as intended.”³⁴ A seller who qualifies for this DHS certification receives all of the above protections provided by “designation” as well as the added protection of a rebuttable presumption that a statutorily created “government contractor defense” applies to the certified QATT.³⁵ The government contractor defense is an affirmative defense that immunizes sellers from liability for claims “arising out of, or relating to, or resulting from an Act of Terrorism (as defined by the SAFETY Act) when QATTs have been deployed, and such claims result or may result in loss to the Seller.”³⁶ Certification entitles the seller to a presumption that such claims will be dismissed immediately.³⁷ This presumption can be overcome only by evidence showing that the seller acted fraudulently or with willful misconduct when submitting information to the DHS during the certification review process.³⁸ The government contractor defense is available not only to government contractors but also to those who sell to state and local governments or the private sector.³⁹

Once a technology has been certified, the DHS issues a certificate of conformance to the seller, and the technology is placed on the department’s published Approved Products List.⁴⁰ The DHS has issued significantly fewer certifications than designations.⁴¹ Through July 2010, a total of 175 SAFETY Act applications were filed and 57 SAFETY Act awards were approved, only nine of which were certifications.⁴² To date, all the approved SAFETY Act applications for CCSFs have been for designation only; none has received certification.

A certified cargo screening facility is eligible for designation as a qualified anti-terrorism technology under the CCSP. A CCSF that conducts screening by X ray, an explosive trace detection device, or a physical search may be a “seller” of that technology under the SAFETY Act. Once the TSA certifies a CCSF to screen cargo, the facility may apply for SAFETY Act protection.⁴³ As part of its review, the DHS evaluates a CCSF’s economic background, which includes financial information and risk exposure, and determines the liability cap for that facility. CCSFs may choose to obtain liability insurance equal to the liability cap or to self-insure. As long as the CCSF uses the QATT as described in the designation, that CCSF will receive the protections afforded by its designation under the SAFETY Act.⁴⁴

Do the SAFETY Act’s Liability Protections Extend to Aircraft Operators?

It is unclear whether an aircraft operator that accepts CCSF-screened cargo would be protected by the limitations on liability under the CCSF’s designation. As noted, the act creates an exclusive federal cause of action “for any claim for loss of property, personal injury, or death arising out of, relating to, or resulting from an act of terrorism when qualified anti-terrorism technologies have been deployed in defense against or response or recovery from such act and such claims result or may result in loss to the Seller.”⁴⁵ This

exclusive “Federal cause of action shall be brought only for claims for injuries that are proximately caused by Sellers that provide qualified antiterrorism technology.”⁴⁶ The DHS’s interpretation of the SAFETY Act is that (1) only one cause of action exists for loss of property, personal injury, or death for performance or nonperformance of the seller’s QATT in relation to an act of terrorism, and (2) such cause of action may be brought only against the seller of the QATT and may not be brought against the buyers, the buyers’ contractors, downstream users of the QATT, the seller’s suppliers or contractors, or any other person or entity.⁴⁷ Therefore, under this interpretation, an aircraft operator, as a downstream customer of the CCSF, would receive the protections of the SAFETY Act for claims relating to and within the scope of coverage of the CCSF’s designation. Because not all claims may be deemed to be within the scope of SAFETY Act designation, aircraft operators should consider obtaining additional protection, depending on their risk tolerance. In addition, an aircraft operator may apply for a separate designation for the screening processes it performs—that is, verification that the chain of custody is still intact prior to loading the cargo on passenger aircraft and rescreening of the cargo if the cargo shows signs of tampering. These important security functions may be independently eligible for designation under the SAFETY Act as a QATT.

Can Human Error or Negligence Defeat the SAFETY Act’s Protections?

It is axiomatic that no screening technology can prevent, mitigate, or respond to all types of terrorist acts and that sellers of technologies are likely to be subject to third-party liability claims if an act of terrorism occurs.⁴⁸ The SAFETY Act envisions the judicial system as the enforcement mechanism for SAFETY Act awards if an act of terrorism occurs and third-party lawsuits against sellers of QATTs ensue. In hearing a third-party lawsuit, it is likely that a court, in addition to considering the specific facts of a case, would analyze whether the seller used the QATT in accordance with the terms of its SAFETY Act designation or certification.

Because the Certified Cargo Screening Program is relatively new, courts have not yet adjudicated when a technology is “outside the scope of a designation or certification.” These will be among the most important questions courts will face when determining whether SAFETY Act protections apply, especially if a deviation in the technology—including any incidents related to human error or negligence—has occurred. Depending on the facts of a particular case, a court could find that the SAFETY Act’s protections apply even in the event of human error or negligence. The DHS’s SAFETY Act awards cover QATTs that are “within the scope,” meaning they are consistent with the award language in the description of the technology the DHS attaches as Exhibit A to its designation or certification documentation.⁴⁹ To ensure that sellers have fair notice of the scope of SAFETY Act coverage, an Exhibit A technology description is made as precise as possible.⁵⁰ A seller is required to notify the DHS if it makes (or intends to make) changes that cause the QATT to be outside the scope—that is, not as described in Exhibit A to its designation or certification.⁵¹ Modifications that do

not cause the QATT to be outside the scope of its Exhibit A description will not adversely affect coverage and they do not require that the DHS be notified of the change.⁵²

It is the seller’s obligation to ensure that any modification remains within the scope of its designation or certification. The seller bears the risk that SAFETY Act protections might not apply if a court were to rule that a deviation to the technology was outside the scope of the SAFETY Act award. Therefore, notice to the DHS of a potential modification is always a sound precaution for sellers. Moreover, as part of the technical evaluation, the DHS considers whether normal error rates for a technology would allow it to be considered “effective,” in accordance with the DHS’s criteria for designation and certification. Those criteria tolerate (and may even assume) a certain degree of potential error in the operation of the technology. The DHS examines how the seller mitigates the potential for human error by evaluating the seller’s training materials, quality assurance mechanisms, quality control audits, and best practices guidance and instructions.

Can Human Error or Negligence Defeat the SAFETY Act’s Protections for CCSFs?

Assuming that a CCSP designation is valid, to what extent could human error or negligence place a QATT outside the scope of the SAFETY Act’s liability protections? Would a CCSF forfeit its SAFETY Act protections if it had implemented all processes of the designated QATT but employed a screener who had failed to detect an explosive device displayed on an X-ray monitor? Would it matter whether the failure to detect the device was caused by human error or negligence? Again, the answer may depend on whether the screening actually carried out is within the scope of the designated QATT or whether, through human error or negligence, results in a “significant modification” in practice that renders the technology outside the scope of the QATT.⁵³ For example, in a situation in which the CCSF complies with all the requirements of the designated QATT, maintains the equipment according to the manufacturer’s instructions, trains the screener properly, and applies quality control measures, but the screener still fails to detect the explosive, a court could consider the QATT within the scope of its SAFETY Act award. In this scenario, the failure to detect the explosive device is based on human error and not on an actual modification that reduced the effectiveness of the technology. If the mistake was isolated and not part of a larger pattern of systemic negligence, a court could find that the CCSF would still be entitled to the SAFETY Act’s limitations on liability. In contrast, if the CCSF is negligent, fails to use proper screening protocols, does not maintain the equipment properly, and fails to train employees and implement quality controls, thereby reducing the effectiveness of the designated technology, the seller may bear the risk of losing SAFETY Act protections.⁵⁴

Conclusion

Technological innovation is the nation’s first line of defense against terrorism. The U.S. Congress passed the SAFETY Act to serve as a catalyst for businesses to develop systems to

combat terrorism. Congress recognized, however, that industry's fear of potential exposure to liability is likely to retard the development and deployment of effective anti-terrorism technologies. As a result, Congress included provisions in the SAFETY Act that would limit the liability of sellers of such technology if a terrorist incident occurs. Through the Certified Cargo Screening Program, the Department of Homeland Security has established a mechanism that may enable sellers of technologies to qualify for the SAFETY Act's liability protections, thus removing a potential significant barrier to the development of effective systems to combat terrorism. Ultimately, however, it is the courts that will determine the effectiveness of the SAFETY Act as they interpret the scope and applicability of the liability protection provided by the act, particularly in cases in which human error or negligence contributes to a screening failure. One would hope for security's sake that the courts' decisions will not inhibit companies from bringing new technologies to market. **TFL**

Alice Crowe is senior counsel at the Department of Homeland Security's Transportation Security Administration. The views reflected in this article are those of the author and do not represent the position of the TSA or the DHS. The author is grateful to Allison Jetton, Nicole Marcson, Bruce Davidson, Aida Stark, Ross Dembling, Mardi Thompson, and Francine Kerner for their valuable advice and assistance. This article was previously published in Volume 23, No. 4 of The Air & Space Lawyer, published by the American Bar Association Forum on Air and Space Law.

Endnotes

¹Pub. L. 110-53, 121 Stat. 266 (Aug. 3, 2007).
²Section 1602 of the 9/11 Act added 49 U.S.C. § 44901(g)(1) to require 100 percent screening (“[n]ot later than 3 years after the date of enactment of the [9/11 Act], the Secretary of Homeland Security shall establish a system to screen 100 percent of cargo transported on passenger aircraft operated by an air carrier or foreign air carrier in air transportation or intrastate air transportation to ensure the security of all such passenger aircraft carrying cargo.”).
³49 C.F.R. § 1540.5 (2009).
⁴6 U.S.C. §§ 441–44 (2006). The SAFETY Act was incorporated into the Homeland Security Act of 2002, 6 U.S.C.A. §§ 441–44.
⁵Air Cargo Screening, Interim Final Rule, 74 FED. REG. 47672, 47674 (Sept. 16, 2009) (to be codified at 49 C.F.R. pts. 1515, 1520, 1522, 1540, 1544, 1546, 1548, 1549).
⁶49 C.F.R. §§ 1544.205, 1546.205.
⁷74 FED. REG. at 47674.
⁸49 U.S.C. § 44901(g)(1)(2).
⁹*Id.* § 44901(g)(5). This section of the 9/11 Act further provides that the TSA may approve additional methods to ensure that air cargo does not pose a threat to transportation security.
¹⁰74 FED. REG. at 47672.
¹¹The TSA's current regulatory reach extends only to U.S. aircraft operators and foreign air carriers, it does not currently apply to host governments of other countries. The TSA is using diplomatic and other measures to strengthen

security for international inbound cargo destined for the United States.

¹²74 FED. REG. at 47674.
¹³*Id.* at 47673.
¹⁴*Id.* Although participation in the program is voluntary, once certified, a CCSF must screen cargo in accordance with TSA standards and must adhere to a TSA-approved security program.
¹⁵49 C.F.R. § 1549.111 (2009).
¹⁶*Id.* § 1549.7(2)(ii).
¹⁷*Id.* § 1549.7.
¹⁸*Id.* § 1549.111.
¹⁹*Id.* § 1549.101(d). The CCSP allows entities to screen cargo before it is consolidated. The CCSP includes a Screening Technology Pilot Program for evaluating the effectiveness of cargo screening technology such as X rays or electronic trace detection devices. The TSA will continue to evaluate technologies that allow for bulk screening of some types of consolidated cargo to eliminate the need to break down such cargo and screen it piece by piece. This search for technological advancement is an integral part of the CCSP.
²⁰H.R. Rep. No. 107-609 (2002), reprinted in 2002 U.S.C.C.A.N. 1352, 1399.
²¹Carlene V. McIntyre and Faith Tabafunda, *An Overview of the SAFETY Act – Liability Protection for Anti-terrorism Technologies*, 20 SUM AIR & SPACE LAW 1, 1(2005).
²²H.R. Rep. No. 107-609I at 1399 (2002). *See also* Regulations Implementing the Support Anti-terrorism by Fostering Effective Technologies Act of 2002 (the SAFETY Act), 71 FED. REG. 33147, 33148 (June 8, 2006) (to be codified at 6 C.F.R. pt. 25) (the purpose of the act “is to ensure that the threat of liability does not deter potential manufacturers or sellers of anti-terrorism technologies from developing, deploying, and commercializing technologies that could save lives”).
²³6 U.S.C. § 441(b); 6 C.F.R. § 25.6 (2006).
²⁴6 U.S.C. § 442(b); 6 C.F.R. §§ 25.8, 25.9 (2006).
²⁵6 U.S.C. § 444(1).
²⁶The DHS could also issue a Developmental Testing and Evaluation Designation for technologies that could serve as homeland security resources but require additional testing and evaluation. Such a designation would provide SAFETY Act liability protection for a limited term not longer than 36 months and usually limited to certain deployment sites. 6 C.F.R. § 25.4(f).
²⁷Section 25.2 of the DHS regulations defines an “act of terrorism” as “...any act determined to have met the following requirements ... :
(1) Is unlawful;
(2) Causes harm, including financial harm, to a person, property, or entity, in the United States, or in the case of a domestic United States air carrier or a United States-flag vessel (or a vessel based principally in the United States on which United States income tax is paid and whose insurance coverage is subject to regulation in the United States), in or outside the United States; and

The Rulemaking Road Show: Bringing the Public Notice and Comment Process to the Public

THE REGULATIONS THAT federal agencies develop through the rulemaking process affect all of us in every aspect of our lives. In the past year alone, the Department of Transportation (DOT) and its

agencies issued or proposed regulations prohibiting truck and motor coach drivers from texting while driving, increasing protections for airline passengers, setting fuel economy standards for cars and light trucks, and enhancing automobile safety. The rulemaking process is designed to involve the public in shaping these regulations. Agencies are required to publish proposed rules for public comment and to review and take those comments into account as the DOT develops the final rules. Theoretically, at least, the rulemaking process should be the forum in which the general public has the most influence and impact over our government's actions. Yet there are probably more Americans who have been struck by lightning than there are those who are familiar with the federal rulemaking process, let alone who participate in it.

On Jan. 21, 2009, President Obama issued a Memorandum on Transparency and Open Government, in which he committed to maintaining an unprecedented level of openness in government and to making the government both participatory and collaborative. As part of that effort, the *Federal Register*, which publishes proposed and final rules for public review, has launched a user-friendly, informative, and accessible website: www.federalregister.gov. But typical members of the public still may not know anything about the *Federal Register* and might not visit the website to see how proposed regulations might affect them. Even in controversial rulemakings, most substantive comments come from highly organized groups of stakeholders, not from the individual citizen who may have extremely useful information to share.

For a small government agency—for example, the Federal Motor Carrier Safety Administration (FMCSA)—involving the public presents a particular challenge. The FMCSA is a DOT agency that oversees the safety of commercial motor vehicles. The agency's mission—to prevent crashes, injuries, and fatalities involving large trucks and buses—touches the millions of Americans who travel on the nation's highways. The regulations the agency promulgates

directly affect the way several million truck and bus drivers operate. An agency that has such a broad impact on individual citizens and businesses is one that most needs to reach the public with its comment process. So, how does the FMCSA engage those truck and bus drivers as well as the traveling public in its regulatory process? The agency has done so by using innovative technologies to bring the rulemaking process to the public and by taking the FMCSA's show on the road.

Regulations 2.0

In spring 2010, FMCSA and DOT partnered with Cornell University's e-Rulemaking Initiative (CeRI) to explore ways to open the federal regulatory process to more effective citizen participation. In concert with Secretary of Transportation Ray LaHood's March 31, 2010, announcement of FMCSA's notice of proposed rulemaking (NPRM) banning texting by interstate truck and bus drivers, CeRI unveiled Regulation Room. Regulation Room, found at www.regulation-room.org, is an online environment that facilitates public participation that allows citizens to learn about the rulemaking process and provide effective feedback to the agency's decision-makers on a selected proposed rule.

The website provided information on FMCSA's NPRM related to texting while driving in order to allow visitors to the site to understand and comment on the proposed rule. To drive traffic to the site, CeRI employed a broad outreach plan that used press releases and e-mail, in addition to social media outlets like Twitter and Facebook. Secretary LaHood also highlighted the initiative on his own blog, Fast Lane, on his Facebook page, and on his Twitter account. The secretary focused on the importance of public involvement in rulemaking and encouraged people to post comments on the Regulation Room site.

During the 34 days that the site was open, it received almost 2,000 unique visitors, including many truck and bus drivers as well as members of the public. CeRI invited those visitors to comment on the NPRM and its components, discuss them, and react to them in real time. CeRI then prepared and posted a summary of those comments for the website's visitors to review for accuracy and to edit collaboratively. CeRI submitted the final summary to FMCSA's rulemaking docket in the name of the participants.

The pilot project proved to be a success. Members

of the public who might not have otherwise engaged in the rulemaking process reviewed the proposed rule and provided insightful comments. In fact, 94 percent of registered users reported that they had never before submitted comments for the federal rulemaking process. According to Professor Cynthia R. Farina, a professor at Cornell University Law School, “Everyone has the legal right to know about proposed new regulations and give the agency feedback, but few people are aware of their rights and fewer exercise them effectively. We are optimistic that Regulation Room will encourage more meaningful public involvement in the regulatory policy process.” Professor Farina commended the DOT and Secretary LaHood for their leadership in finding “innovative ways to inform and engage the public.”

The DOT has continued to work with CeRI, which subsequently hosted a discussion on the Office of the Secretary of Transportation’s NPRM dealing with the rights of airline passengers. That discussion attracted 19,320 unique visitors. Currently, FMCSA and CeRI are partnering again on a new NPRM, which proposes to require that electronic onboard recorders be used instead of paper logs for recording truck and bus drivers’ hours of service.

FMCSA’s Road Show

FMCSA has also brought the rulemaking process directly to the public. One of the agency’s most highly visible rulemakings addresses possible changes to its regulation related to trucking hours of service—a regulation that governs the number of hours that a truck driver can drive and work before being required to go off duty. With fatigue-related crashes and deaths a critical safety issue and with questions about the impact new rules might have on drivers, businesses, the enforcement community, and the general public, FMCSA sought as much input as possible *before* drafting an NPRM on trucking hours of service. Rather than limit the location of its public listening session to Washington, D.C., the FMCSA team traveled to sites across the country for additional listening sessions. In early 2010, the team held meetings in Los Angeles and Dallas in addition to sessions designed to encourage participation by truck drivers that were held at the Mid-America Trucking Show in Louisville, Ky., and at the nation’s largest truck stop in Davenport, Iowa. FMCSA also conducted a webcast of the sessions held in Washington and Louisville, streaming them live through the Internet.

On Feb. 17, 2011, after publishing the NPRM on trucking hours of service (75 FR 82170, Dec. 29, 2010), FMCSA held another listening session in the Washington, D.C., area. Once again, the agency broadcasted the entire session through live webcasts to enable public participation across the country. Nearly 7,000 people participated in that webcast. For 12 hours, FMCSA also hosted a user-friendly, interactive, online comment-and-question forum for

the public. In order to accommodate diverse work schedules as well as various time zones, the forum was held live from noon until midnight. The FMCSA employees who staffed the site took comments, facilitated engagement and discussion between commenters, and answered basic questions about the rule. Almost a thousand people logged onto the site and FMCSA received over 400 comments. The agency collected all the comments and questions it received during the listening session and from the public online forum and included them in the official docket for the NPRM dealing with trucking hours of service for further public review.

Fostering Debate

On another high-visibility rulemaking, FMCSA adapted the traditional notice and comment rulemaking process in order to increase public dialogue on the proposed rule. On Dec. 21, 2010, FMCSA published an NPRM that proposes to restrict the use of handheld mobile telephones—including handheld cell phones—by drivers of commercial motor vehicles while operating in interstate commerce (75 FR 80014). To facilitate vigorous discussion and feedback on that proposed rule, FMCSA offered both a traditional 60-day initial comment period as well as a 30-day reply period. That reply period allowed the public to respond to or comment on the comments that were made initially, instead of simply providing comments unilaterally. This interactive process is expected to provide the agency with more complete feedback and deeper insight into its proposal.

Rooting Out “Dumb” Regulations

The DOT and FMCSA have also engaged the public as they survey the current regulatory landscape for rules that may need to be revised or removed. On Jan. 18, 2011, President Obama issued Executive Order 13563 (76 FR 3821, Jan. 21, 2011), which outlined a plan to improve regulation and regulatory review. Executive Order 13563 reaffirms the governing principles of contemporary regulatory review, including Executive Order 12866, “Regulatory Planning and Review” (58 FR 51735), by requiring federal agencies to design cost-effective, evidence-based regulations that are compatible with economic growth, job creation, and competitiveness. Recognizing the importance of those principles to existing regulations as well as to new ones, Executive Order 13563 requires agencies to review existing significant rules to determine if they are “outmoded, ineffective, insufficient, or excessively burdensome.” As President Obama said in “Toward a 21st-Century Regulatory System” (*Wall Street Journal*, Jan. 18, 2011)—an opinion piece about that executive order—“we are also making it our mission to root out regulations that conflict, that are not worth the cost, or that are just plain dumb.”

RULEMAKING *continued on page 38*



The Legal Issues of Private Armed Security on Commercial Ships

By Grace Rodden and James Walsh III

Introduction

In 1765, William Blackstone wrote that piracy is a principal offense against the law of nations, and “every community has the right, by rule of self-defense to inflict punishment upon [pirates].”¹ Today, piracy in the Horn of Africa region presents a plethora of logistical and legal challenges to the international community. The pirates are working out of the failed state of Somalia near busy commercial traffic lanes surrounded by regional states with relatively small navies—a location that provides them with a large coastline from which to launch attacks as well as a sanctuary when they return.² International naval forces in the region patrol a large area of the ocean but have a limited number of ships, and even those are often too far away to prevent an attack by pirates—an attack that typically occurs in less than 30 minutes.

The Somali pirates are primarily interested in attacking opportunistic targets, regardless of flag state or citizenry of the crew, in order to kidnap crewmembers and seize vessels for ransom. These seizures present the commercial industry with a difficult choice: pay the ransom, knowing that these payments encourage and fund future attacks, or refuse to do so and thereby risk the safety of the crew and fate of the ship. The international community’s early failures to coordinate efforts to combat Somali piracy were attributable to an inadequate naval presence as well as an insufficient capacity and will to prosecute the perpetrators. This failure to combat the Somali piracy allowed the pirates to grow stronger, wealthier, and more daring.

However, decisive actions against piracy present other troubling problems. For example, the U.S. Navy launched a successful rescue operation of the U.S.-flagged *Maersk Alabama* that resulted in the death of three pirates. In response, the pirates assigned a team to launch retaliatory attacks on U.S.-flagged vessels and fired rocket-propelled gre-

nades on the U.S.-flagged *Liberty Sun*. This new threat of violence has prompted some merchant vessel owners to engage armed private security contractors (PSCs) for protection.

U.S. Piracy Law

The Define and Punish Clause, Article I, § 8, cl. 10, of the Constitution grants Congress the power “[t]o define and punish Piracies and Felonies committed on the high seas, and Offenses against the Law of Nations.” Defining piracy as specific acts or by reference to the law of nations has jurisdictional implications. Piracy, as defined by the law of nations, is a crime that can be prosecuted by any nation but is restricted to those acts defined by the international community to constitute acts of piracy. However, if Congress chooses to expand the definition of piracy beyond the law of nations, the effect would be to limit the jurisdiction of U.S. courts to those acts with a nexus to the United States. Congress has had mixed success in enacting legislation securing jurisdiction to prosecute acts of piracy.³

Congress’s first anti-piracy legislation, found in the Act of 1790, acts of murder and robbery on the high seas as punishable by death if those same acts committed on land “would by the laws of the United States be punishable by death.”⁴ In 1818, in *United States v. Palmer*⁵ the U.S. Supreme Court examined the Act of 1790 and held that robbery committed on the high seas constituted an act of piracy and is punishable by death despite the fact that robbery committed on land would not receive the death penalty. However, the Court narrowly construed the Act of 1790 as providing jurisdiction only over acts of “municipal” piracy requiring a nexus to the United States. Thus, acts of piracy by foreign citizens committed on vessels owned by foreign citizens were not punishable in U.S. courts.⁶

The following year, Congress addressed the *Palmer* decision by passing the Act of 1819.⁷ Section 5 of the Act

of 1819 referred to the crime of piracy “as [that] defined by the law of nations” and included language stating, “offenders shall be brought into or found in the United States.” The act intended to establish a broad proscription against piracy and to ensure that U.S. courts had jurisdiction over all acts of piracy regardless of any nexus to the United States. In *United States v. Smith*, the Supreme Court held that Congress properly exercised its constitutional authority to define and punish, through reference to the definition of piracy under the law of nations, and the Court declared that “piracy, by the law of nations, is robbery upon the sea.”⁸

The statutory definition of piracy has remained unchanged since 1819 and is codified under chapter 81 of Title 18 of the U.S. Code. § 1651 of Title 18 states: “Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterward brought into or found in the United States, shall be imprisoned for life.” Two recent decisions from the Eastern District of Virginia, *United States v. Said*⁹ and *United States v. Hasan*,¹⁰ have reached different interpretations of the definition of piracy under § 1651. In both cases, the defendants mistakenly fired on a U.S. naval vessel that they mistook for a merchant vessel. The issue before each court was whether firing on a vessel was an act of piracy under § 1651.

Each court differed as to whether Congress intended for § 1651 to remain static from the time of enactment or whether it could evolve along with international law. The court in *Said* focused on what piracy under the law of nations meant in 1819 and relied on the Supreme Court’s decision in *Smith*, concluding that piracy is robbery at sea. The court also stated that international law regarding piracy was unsettled and failed to provide an authoritative definition of piracy. In *Hasan*, the court held “that both the language of 18 U.S.C. § 1651 and Supreme Court [in *Smith*] indicate that the ‘law of nations’ connotes a changing body of law, and that the definition of piracy in 18 U.S.C. § 1651 must therefore be assessed according to the international consensus definition at the time of the alleged offense.”¹¹ Consequently, the *Hasan* court found that Article 101 of the 1982 United Nations Convention on Law of the Sea (UNCLOS) represented the current accepted definition of piracy under the law of nations and, as such, did not require an actual robbery at sea.¹²

International Piracy Law

Piracy is a universal crime and a violation of customary international law.¹³ The international law of piracy is found in both the UNCLOS and the 1958 Convention on the High Seas, each of which reflects customary international law in this regard.¹⁴ The UNCLOS defines piracy as “any illegal act] of violence or detention, or any act of depredation, committed for private ends by the crew or passengers of a private ship ... on the high seas.”¹⁵ Pirate ships are, in effect, an exception to the general rule that ships on the high seas fall under the exclusive jurisdiction of the ship’s flag state and require the consent of the flag state to be boarded, searched, and detained. International law allows for all states to board, search, and detain vessels and individuals

suspected of piracy,¹⁶ because pirates are recognized as “hostis humani generis”—an enemy to all mankind.¹⁷

The U.S. Response to Piracy

Consistent with a strong national interest in maritime security and ensuring freedom of the seas, in December 2008, the National Security Council (NSC) issued the “Countering Piracy off the Horn of Africa: Partnership and Action Plan,” which outlines strategies to prevent, disrupt, and punish pirates. The plan calls for facilitating a group of countries to share intelligence, to develop agreements to formalize custody and prosecution of pirates, and to encourage best management practices to enable vessels to avoid attacks by pirates. In addition, the plan encourages interested countries to conduct persistent and effective counter piracy operations to stop, capture, and punish the pirates. In this regard, the U.S. actively participates in Combined Task Force 151, a multinational naval force consisting of a coalition of approximately 20 nations that is dedicated to conducting counterpiracy operations under the mission-based mandate to deter, disrupt, and suppress piracy in the Gulf of Aden, the Arabian Sea, the Indian Ocean, and the Red Sea.¹⁸

The U.S. Maritime Administration (MarAd) is an agency that promotes, develops, and maintains a merchant marine capable of carrying waterborne commerce in peace and the necessary sealift support in times of war or national emergency. MarAd, which has a unique role among federal agencies, owns and operates a fleet of vessels and oversees several programs that provide support to U.S.-flagged vessels, many of which sail to the Gulf of Aden in support of Operation Enduring Freedom. The agency is capable of providing training platforms, timely information, and operational advice to owners and operators of U.S.-flagged ships in the Horn of Africa. In addition, the U.S. Merchant Marine Academy, which is operated by MarAd, provides counterpiracy training to the next generation of the U.S. merchant marine.

The Maritime Security Transportation Act of 2002 provides the U.S. Coast Guard with additional legal authority to regulate the safety and security of cargo, ships, and seafarers.¹⁹ Pursuant to the act, the Coast Guard has developed regulations requiring owners and operators of ships flying the U.S. flag to prepare Vessel Security Plans to assess and plan for security threats such as piracy; these plans are subject to Coast Guard review and approval. When specific security measures are reasonably necessary in order to deal with particular threats, the Coast Guard will issue a Maritime Security Directive, and Chapter 701 of the Maritime Security Transportation Act mandates that U.S. vessels comply with all these directives. Maritime Security Directive 104-6 (series) provides guidance to U.S. vessels engaged in voyages through high-risk waters and encourages U.S. vessels to consider using private security contractors. The Coast Guard has also developed piracy-related Port Security Advisories to provide additional guidance and direction to U.S. vessels operating in high-risk waters.²⁰

The International Response to Piracy

In 2008, the U.N. Security Council responded to the Somali pirate attacks on commercial ships by passing several resolutions under Chapter VII of the UN Charter, which authorized the use of force against the Somali pirates, who are considered a threat to international security.²¹ Piracy, by definition, occurs on the high seas. This definition initially caused difficulty for naval forces responding to the threat of attack when Somali pirates evaded capture by fleeing into the Somali territorial sea.²² The UN Security Council's Resolution 1816²³ and subsequent resolutions²⁴ authorized foreign forces to enter Somalia's territorial sea in order to apprehend pirates and those suspected of piracy.²⁵ Resolution 1816 also allowed the pursuit and capture of suspected pirates in Somalia's territorial waters.²⁶ Resolution 1838 authorized the patrol of the waters off the Horn of Africa by foreign naval vessels and aircraft and urged states to promulgate International Maritime Organization (IMO) guidelines to ships sailing under their nation's flag to take measures designed to prevent an act of piracy.²⁷ Resolution 1851 broadened the scope of Resolution 1816 and gave nations the right to take "all necessary measures" against piracy, including military use of force on Somali land.²⁸

While the UNCLOS's definition of piracy is broad, it does not expressly include other crimes that Somali pirates may commit at sea, such as attempt or conspiracy to commit piracy, kidnapping, and hostage-taking; murder; or hijacking of vessels.²⁹ Resolution 1846 endorsed the use of the 1988 Convention of Suppression of Unlawful Acts Against the Safety of Maritime Navigation as a means of extraditing and prosecuting Somali pirates for their crimes.³⁰ The Convention authorizes a ship's master to turn over those suspected of violating the Convention to a coastal state party and specifically addresses hostage-taking, hijacking, and murder committed by pirates.

The International Maritime Organization is also working to eradicate piracy. Since 1983, the IMO has adopted a series of resolutions providing governments, ship owners, and masters with guidance on measures to take to prevent or defend themselves against acts of piracy.³¹ This guidance includes having security plans in place before sailing, posting additional lookouts while transiting pirate-infested waters, using evasive steering maneuvers, installing physical barriers on the ship to deter attacks such as razor or electrified wire, and using other countermeasures such as water spray to keep pirates from boarding.³² In an effort to help combat the growing piracy problem off the Horn of Africa, the IMO produced the Code of Conduct Concerning the Repression of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and the Gulf of Aden—known as the Djibouti Code of Conduct—which is designed to facilitate the exchange of information between regional countries and forces and also furthering regional states' ability to prosecute pirates.³³

The IMO discourages placing arms on commercial ships. In its latest report, the IMO Maritime Security Council reaffirmed its stance against shipowners' use of PSCs for Gulf of Aden transits,³⁴ even though the IMO pre-

viously decided that the "carriage of firearms was a matter for flag States to decide."³⁵ The IMO has several reasons for its current position:

- The IMO is concerned that armed guards on ships will cause violence to escalate, resulting in more deaths and injuries to ships' crews.
- The use of force at sea by PSCs and by pirates may impose additional dangers to vessels, persons, and cargo (including flammable cargo and hazardous materials), and the IMO fears that some of the weapons used by PSCs and Somali pirates could cause a leak of hazardous material or even an explosion onboard.
- The rules governing PSC personnel's use of force are unclear.
- It is uncertain whether individual employees of a PSC and the PSC itself may be held accountable both civilly and criminally for wrongdoing resulting from the use of force.³⁶

Laws That Apply to Private Security Contractors

The use of PSCs on ships raises a number of potential legal scenarios. If a PSC uses force resulting in the death or injury of both crew and pirates, multiple states could assert jurisdiction over issues concerning the use of force. Legal standards and authorities differ from country to country, and countries have different standards for judging whether the PSC's personnel acted in self-defense or whether their use of force was necessary or proportional. Seizure of pirates and their pirate vessels can also pose a problem for PSCs and shipowners. When read together, Articles 105 and 107 of the UNCLOS suggest that only a government may seize pirates, pirate ships, and property onboard.³⁷ The draft commentary on these UNCLOS provisions states that a "seizure" within the meaning of the article "does not occur "... in the case of a merchant ship which has repulsed an attack by a pirate ship and, in exercising its right of self-defense, overpowers the pirate ship and subsequently hands it over to a warship or to the authorities of a coastal State."³⁸ However, since nations differ on how they choose to adjudicate piracy, acts of self-defense, and other harm arising from rightful and wrongful action of PRC personnel, shipowners and PSCs may potentially be held liable for acts of self-defense against attacks by pirates.³⁹

International law governing private security contractors is unclear. Because PSCs contract directly with private shipping companies, not with national governments, issues of oversight, transparency, liability, and abuse are potentially more complicated than they are in the case of previous alleged PSC abuses occurring under government contracts. It has been suggested that the Geneva Conventions and following Protocols governing state actions in armed conflict could apply in cases of piracy;⁴⁰ however, it is unclear whether such laws pertaining to government armed forces can be extended to PSCs.⁴¹

The laws of the nation whose flag is flown on ships and the laws of the shipping company's territorial state hold shipowners accountable for actions that take place onboard their vessels.⁴² These laws may be extended to

PSCs through contractual agreements.⁴³ Commentators and those in the shipping industry also suggest that international law norms may be applied and enforced through these contracts⁴⁴—for example, the contract could include a requirement that PSCs abide by relevant international and domestic legal regulations applicable to state actors.⁴⁵

The Montreux Document

In response to the increased use of PSCs, the government of Switzerland and the International Committee of the Red Cross, in collaboration with 17 participating nations, drafted the Montreux Document in an effort to better regulate the practices of PSCs.⁴⁶ The document, which contains rules and best practices for PSCs operating in areas of armed conflict⁴⁷ specifically addresses government-contracted PSCs but also calls for independently operating PSCs and PSCs contracted by nonstate parties to adopt the same practices. The Montreux Document clarifies private security contractors' international obligations consistent with the Geneva Conventions and other relevant international laws and defines states' obligations under existing human rights and humanitarian law. The document provides a mechanism for holding PSCs accountable for violating international and domestic laws and delineates the obligations of "Contracting States," "Territorial States," and "Home States," further clarifying when PSCs must follow international or domestic law. The Montreux Document does not specifically address PSCs on ships; however, applying the Montreux Document's overarching policy of oversight and compliance in the maritime context can facilitate using PSCs appropriately as a counterpiracy measure.

International Code of Conduct

In 2009, private security firms came together, with the assistance of the Swiss, American, and British governments, to endorse the principles of the Montreux Document and to create an International Code of Conduct for PSCs⁴⁸—an important step forward toward committing PSCs to abide by the rule of law, to respect human rights, and to follow the "Respect, Protect, Remedy" framework endorsed by the UN Human Rights Council and the Montreux Document. The International Code of Conduct is intended to be the basis of an independent governance and oversight mechanism to maintain and oversee the administration of the code of conduct. Governments and corporations employing PSCs may incorporate the International Code of Conduct in their service contracts if any violation of the code is seen as constituting a breach of contract. The creation and development of oversight mechanisms to ensure accountability may help alleviate uneasiness and uncertainties surrounding PSCs.

Support for the Use of Private Security Contractors

The use of PSCs increasingly has the approval of industry and the implicit approval of governments as a suitable alternative to a multinational naval coalition that is unable to protect every ship sailing in high-risk waters.⁴⁹ In a press release issued Feb. 11, 2011, the International Chamber of Shipping (ICS) implicitly acknowledged the beneficial use

of armed guards on ships to thwart pirates.⁵⁰ The press release stated that it is within the ship operator's discretion to place armed guards on ships, and that "ship operators must be able to retain all possible options available to deter attacks and defend their crews against piracy."⁵¹ The ICS maintains that individual states are responsible to eradicate piracy but believes that governments have not allocated the resources needed to fight piracy, thus requiring the increased use of armed security guards on ships.⁵²

Pirates are capable of capturing supertankers, such as the *Sirius Star*, and U.S.-flagged ships, like *Maersk Alabama*, and the multinational naval coalition has had limited success in deterring pirate attacks. PSCs arguably save the private shipping and insurance industries money by avoiding the need to transit via alternative and longer routes—often around the Cape of Good Hope. Some maritime insurance companies have declared the Gulf of Aden a "war risk" zone and charge higher premiums for transiting the area.⁵³ PSCs may serve to reassure insurance companies that the ship, crew, and cargo will arrive safely, thereby keeping costs down. Some insurance companies may offer discounts to shipowners that hire PSCs when transiting through pirate-laden waters. When an actual hijacking occurs, considerable costs are incurred for negotiations and ransom payments. In addition, if a state decides to attempt to recapture a hijacked vessel, the potential for damage to the vessel and loss of crewmembers' lives is high.⁵⁴

Armed security teams are often former members of the military and are highly trained in the proper handling of weapons and use of force during a crisis. Having PSCs onboard vessels sailing in high-risk waters, such as the Gulf of Aden, may deter pirates from attacking the ship, because, unlike before, ships are no longer unarmed and vulnerable, and, therefore, the pirates involved in face increased risks. For example, on March 9, 2011, pirates targeted the *Maersk Alabama* again. This time, however, the armed security force onboard fired warning shots, thereby foiling the attack.⁵⁵

Objections to Use of Private Security Contractors

Having the loosely regulated PSC industry enter into contracts with private shipowners raises some concerns among states, the international legal community, and private industry. The private contractual agreement arguably makes it easier for PSCs to evade compliance with international and domestic laws, and shipowners may ultimately be held responsible for actions taken by PSC personnel. PSCs operating under government contracts have been accused of human rights abuses, corruption, criminal violations, and disproportional use of force. When PSCs enter into contracts with governments, it is easier for governments to hold PSCs liable for violations of domestic and international laws. When PSCs enter into private contracts with private shipping companies operating in an international environment, PSCs may be able to escape liability because they are further removed from government control. Uncertainty exists over the rules governing the use of force and how PSCs may be held liable for excessive uses of force. Even though private industry may try to hold PSCs

liable contractually, it is unknown whether all jurisdictions will enforce the contract terms or otherwise hold PSCs accountable for wrongdoing. Moreover, the sometimes secretive nature of PSCs and their lack of transparency may make governments and international organizations reluctant to endorse the private shipping industry's use of PSCs, because governments have observed violations of international and domestic law by PSCs in the past.⁵⁶

Finally, international law and domestic laws of coastal states, including U.S. International Traffic in Arms Regulations, regulate the carrying of arms by PSCs on commercial ships.⁵⁷ In some countries, private gun ownership is illegal.⁵⁸ Other countries prohibit ships from entering their territory if arms are onboard and also ban the "loading or unloading" of firearms in a foreign port or within a coastal state's waters.⁵⁹ Shipping companies have resorted to flying arms off ships by helicopter or throwing weapons overboard prior to entering a port and purchasing new weapons later.⁶⁰ States and private industry are also concerned that PSCs will cause pirates to react with more violence toward the ship's crew. In addition, it is unknown whether PSCs will successfully ward off attacks—for example, in 2008, three private security contractors from a British firm jumped off the ship after pirates boarded it because the contractors feared that they would be killed because of their status as security guards.⁶¹

Conclusion

Piracy off the Horn of Africa will continue until the international community develops a comprehensive plan to deal with its root cause—lawlessness in the failed state of Somalia. Until law and order is restored in that country, the international community must increase its naval and diplomatic efforts and vigorously defend freedom of the seas through deterrence, disruption, and punishment of piracy. Even though using private security contractors may not be an ideal solution, it is one that should be considered when developing plans to protect the crews and ships navigating through high-risk waters. The risk of employing PSCs may be mitigated by a requirement by the states that PSCs abide by the best practices in the Montreux Document and by shipowners' incorporation of the International Code of Conduct in their contracts with firms that provide private security guards. **TFL**

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of the Maritime Administration, the Department of Transportation, or the United States.

Endnotes

¹William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND, Book 4, Ch 5 (1765).

²Lauren Ploch et al., Cong. Research Serv., R40528, PIRACY OFF THE HORN OF AFRICA 6 (2010) (found at www.fas.org/sgp/crs/row/R40528.pdf).

³Edwin D. Dickinson, *Is the Crime of Piracy Obsolete?* 38 HARV. L. REV. 345 (1925).

⁴Act of April 30, 1790, § 8; 1 Stat. 112.

⁵16 U.S. (3 Wheat.) 610 (1818).

⁶R. Chuck Mason, Cong. Research Serv., RL 41445, PIRACY: A LEGAL DEFINITION 1–2 (2010) (found at www.fas.org/sgp/crs/misc/R41445.pdf).

⁷Act of March 3, 1819, § 5; 3 Stat. 510.

⁸18 U.S. (5 Wheat.) 153, 162 (1820).

⁹*United States v. Said*, No. 2:10cr57, 2010 WL 3893761 (E.D. Va. Aug. 17, 2010).

¹⁰*United States v. Hasan*, No. 2:10cr56, 2010 WL 4281892 (E.D. Va. Oct. 29, 2010).

¹¹*Id.* at *21.

¹²United Nations Convention on the Law of the Sea Art. 101, Dec. 10, 1982, 1833 U.N.T.S.; *id.* at 57.

¹³James Kraska and Brian Wilson, *The Pirates of the Gulf of Aden: The Coalition is the Strategy*, 43 STAN. J. INT'L L. 241, 264 (2009).

¹⁴UNCLOS, *supra* note 12, Art. 101; United Nations Convention on the High Seas, Art. 15, Art. 101, Apr. 29, 1958, 13 UST 2312, 450 U.N.T.S. 82.

¹⁵UNCLOS, *supra* note 12, Art. 101.

¹⁶UNCLOS, *supra* note 12, Art. 110(2); *id.* at 400.

¹⁷J. Ashley Roach, *Countering Piracy Off Somalia: International Law and International Institutions*, 104 AM. J. INT'L L. 397, 400 (2010); Blackstone, *supra* note 1; Dana M. Parsons, *Protecting the Booty: Creating a Regulatory Framework to Govern Increased Use of Private Security Companies in the Fight Against Pirates*, 35 TUL. MAR. L. J. 153, 158 (2010).

¹⁸Staff of House Subcomm. on Coast Guard and Maritime Transp., House Comm. on Transp. & Infrastructure, 112th Cong., *Memorandum for Hearing on Assuring the Freedom of Americans on the High Seas: The U.S. Response to Piracy* 5 (Comm. Print 2011).

¹⁹The Maritime Security Transportation Act of 2002, Pub. L. No 107-295, 116 Stat 2064(2002).

²⁰Staff of House Comm. on Transp. & Infrastructure, 112th Cong., *U.S. Response to Piracy* 4-5 (Comm. Print 2011).

²¹United Nations Charter, Ch. VII; UN S.C. Res. 1816, UN Doc. S/RES/1816, ¶7(b) (June 2, 2008) (allowing entry into Somali territorial water under the permission of Somalia's transitional federated government and permission reported to the UN secretary-general); S.C. Res. 1851 U.N. Doc. S/RES/1851 (Dec. 16, 2008); UN S.C. Res. 1897 UN Doc. S/RES/1897 (Nov. 30, 2009), (authorizing operations against pirates "in Somalia"); UN S.C. Res. 1838 U.N. Doc S/RES/1838, (Oct. 7, 2008); *see also*, Eugene

Kontorovich, *International Legal Responses to Piracy off the Coast of Somalia*, 13 AM. SOC'Y INT'L L. INSIGHTS 2, ¶ 5 (2008), available at www.asil.org/insights090206.cfm; Kraska and Wilson, *supra* note 13, at 273–84; Roach, *supra* note 17, at 400–402; Parsons, *supra* note 17 at 165; Ploch, *supra* note 2, at 20–21.

²²Kraska and Wilson, *supra* note 13, at 273; Roach, *supra* note 17 at 400; Kontorovich, *supra* note 22, at ¶ 5.

²³UN S.C. Res. 1816, *supra* note 21.

²⁴See also UN S.C. Res. 1846, UN Doc. S/RES/1846 (Dec. 2, 2008), UN S.C. Res. 1897, UN Doc. S/RES/1897 (Nov. 30, 2009), UN S.C. Res. 1950, UN Doc. S/RES/1950 (Nov. 23, 2010) (resolution currently in force allowing entry into Somali territory).

²⁵Kraska and Wilson, *supra* note 13, at 273–74; Roach, *supra* note 17, at 400; Parsons, *supra* note 17, at 167; Ploch, *supra* note 2 at 20–21.

²⁶UN S.C. Res. 1816, *supra* note 21; UN S.C. Res. 1950, *supra* note 24; Kraska and Wilson, *supra* note 13, at 273–74; Roach, *supra* note 17, at 400; Parsons, *supra* note 17, at 166; Ploch, *supra* note 2, at 20–21.

²⁷UN S.C. Res. 1838, *supra* note 21, ¶ 6; Kraska and Wilson, *supra* note 13, at 274; Parsons, *supra* note 17, at 167.

²⁸UN S.C. Res. 1851, *supra* note 21 Kraska and Wilson, *supra* note 13 at 273–74, 281; Roach, *supra* note 17, at 400–01; Kontorovich, *supra* note 21, at ¶ 5–6; Parsons, *supra* note 17, at 166; Ploch, *supra* note 2, at 20–21.

²⁹UNCLOS, *supra* note 12 Art. 101; Kraska and Wilson, *supra* note 13, at 279–80; Roach, *supra* note 17, at 402–03.

³⁰UN S.C. Res. 1846 U.N. Doc. S/RES/1846 (Dec. 2, 2008); UN Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Arts. 3, 4, 7, and 8 (March 10, 1988), 1678 U.N.T.S. 222; Kraska and Wilson, *supra* note 13, at 279–81; Roach, *supra* note 17, at 407.

³¹See generally International Maritime Organization, *Measures to Prevent Acts of Piracy and Armed Robbery Against Ships*, IMO Assemb. Res. A.545(13) (Nov. 17, 1983); IMO, *Measures to Prevent and Suppress Piracy and Armed Robbery Against Ships*, IMO Assemb. Res. A.738(18) (Nov. 4, 1993); IMO, *Piracy and Armed Robbery Against Ships: Recommendations to Governments for Preventing and Suppressing Piracy and Armed Robbery Against Ships*, IMO Doc. MSC.1/Circ. 1333 (June 26, 2009) (most recent guidance); IMO, *Piracy and Armed Robbery Against Ships: Guidance to Ship Owners and Ship Operators, Shipmasters and Crews on Preventing and Suppressing Acts of Piracy and Armed Robbery Against Ships*, IMO Doc. MSC.1/Circ. 1334 (June 23, 2009) (most recent guidance); IMO, *Piracy and Armed Robbery Against Ships in Waters off the Coast of Somalia*, IMO Assembly Res. (Dec. 2, 2009) (most recent guidance); see also IMO, *Report of the Maritime Safety Committee on its Eighty Eighth Session* ¶18.42, IMO Doc. MSC 88/26 (Dec. 15, 2010) (IMO's most recent report on piracy); Kraska and Wilson, *supra* note 13, at 267–73; Roach, *supra* note 17, at 409–11; Ploch, *supra* note 2, at 27.

³²See IMO, *Best Management Practices to Deter Piracy in the Gulf of Aden and off the Coast of Somalia Developed by the Industry*, IMO Doc. MSC.1/Circ. 1335 (Sept. 29, 2009); IMO, *Piracy and Armed Robbery Against Ships in Waters off the Coast of Somalia*, IMO Doc. MSC.1/Circ. 1332 (June 16, 2009); Kraska and Wilson, *supra* note 13, at 261; Roach, *supra* note 17, at 409.

³³IMO Council Doc. C 102/14/ Annex to Attachment 1 (Apr. 3, 2009) (hereinafter cited as Djibouti Code of Conduct); Kraska and Wilson, *supra* note 13, at 270; Roach, *supra* note 17, at 409–411; Ploch, *supra* note 2, at 24.

³⁴IMO *Report of the Maritime Safety Committee on its Eighty Eighth Session*, *supra* note 31, at ¶18.48; IMO, *Piracy and Armed Robbery Against Ships: Guidance to Ship Owners and Ship Operators, Shipmasters and Crews on Preventing and Suppressing Acts of Piracy and Armed Robbery Against Ships*, *supra* note 31, at ¶¶ 61–63.

³⁵IMO, *Piracy and Armed Robbery Against Ships: Guidance to Ship Owners and Ship Operators, Shipmasters and Crews on Preventing and Suppressing Acts of Piracy and Armed Robbery Against Ships*, *supra* note 31 ¶ 63; Kraska and Wilson, *supra* note 13, at 262–63; Ploch, *supra* note 2, at 35.

³⁶See generally Kraska and Wilson, *supra* note 13; Parsons, *supra* note 17; Ploch, *supra* note 2.

³⁷UNCLOS, *supra* note 12, Arts. 105, 107.

³⁸Commentary on Draft Article 45, cmt. (2), in 1956 *International Law Commission on the Work of Its Eighth Session* [1956] 2 Y.B. INT'L L. COMM'N 253, 283 UN G.A.O.R., 11th Sess., Supp. No. 9, UN Doc. A/3159 (1956) (Draft Art. 45 is UNCLOS Art. 107); see also Kraska and Wilson, *supra* note 13, at 263; Roach, *supra* note 17, at 405.

³⁹See generally Parsons, *supra* note 17; Kraska and Wilson, *supra* note 13; Roach, *supra* note 17.

⁴⁰See generally Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Parsons, *supra* note 17, at 171; See also, Laura A. Dickinson, *Public Law Values in a Privatized World*, 31 YALE J. INT'L L. 383, 388 (2006) (explaining that in many cases, even states are not held accountable for failing to abide by public international law values because enforcement mechanisms are weak).

⁴¹Parsons, *supra* note 17, at 171.

⁴²Kraska and Wilson, *supra* note 13, at 262; Parsons, *supra* note 17, at 171.

⁴³Parsons, *supra* note 17, at 174.

⁴⁴*Id.*; Dickinson, *supra* note 40, at 401–03.

⁴⁵Parsons, *supra* note 17, at 174; Dickinson, *supra* note 40, at 401–03.

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The Crisis in Federal Transportation Programs

FOR MORE THAN 50 years, there was a consensus that users of our transportation system would pay the taxes necessary to support substantial federal programs for highway and transit. Most of the taxes paid by the users were taxes on gasoline and diesel fuel.

Recently, this consensus has been breaking down, and it has become clear that the public will not support any increase in the taxes now supporting federal transportation programs. The existing tax rate of 18.4 cents per gallon of gasoline, which was established in 1993, no longer produces enough revenue to support existing programs. Unless revenues can be increased, federal programs will have to be reduced by 20 percent or more. This reduction will come at a time when the demands placed on our transportation system are increasing and the condition of the system is deteriorating. In the face of nationwide budget constraints, the states are not in a position to pick up the slack through increased spending in their programs. The unfortunate outcome of a federal cutback will be increased congestion that will impose billions of dollars of added costs on drivers and shippers.

The Consensus

The consensus on which our system has been based for the past few decades began with legislation passed in 1956 that established the interstate highway system. This consensus consisted of several key expectations:

- The federal government would provide substantial assistance for the development of highways and transit.
- Users of the system would fund the federal programs through taxes and fees, which would have to be increased periodically to cover inflation.
- Because the federal program would be funded by user taxes and fees, funding for the program would not be subject to annual adjustments dictated by general budget policies. Rather, the federal program would be allowed to spend, over a period of 5 years or more, all the revenues contributed by users. Thus, because they could be confident that federal funds would be available, state and local governments would be able to establish multiyear

plans for transportation.

History of the Consensus

The consensus began in 1956 with passage of the National Interstate and Defense Highways Act, which committed the federal government to the construction of a 40,000-mile interstate highway system. According to estimates, it would take 13 years to complete the project. This undertaking and the program necessary to implement, oversee, and maintain it were to be funded with a federal gas tax of 3 cents per gallon that would be placed in the Highway Trust Fund.

Although it may not have been apparent in 1956, it soon became clear that because of the effect of inflation on expenses, revenues for the trust fund would have to be increased over time to keep the federal programs at their historic levels. Unfortunately, the main source of revenue for the trust fund—the gas tax—was set at a flat cents-per-gallon rate, which does not adjust automatically for inflation. Had gas taxes been set at a percentage of the cost per gallon, revenues would have increased automatically as gas prices rose over time.

Since 1956, the program has been reauthorized every five or six years, with overall funding increased to keep pace with inflation. However, inflation has not been the only obstacle the trust fund has faced. Over time, the programs supported by the fund have expanded to include transit and alternative transportation. To account for this increase in the type of programs supported by the trust fund, and to provide additional offsets for inflation, the gas tax has been raised periodically. The last increase in the gas tax (to the current rate of 18.4 cents per gallon) occurred in 1993—nearly two decades ago.

In recent years, the level of federal support for transportation infrastructure has not varied widely. Since 1990, the federal government has covered 20–30 percent of total public (federal, state, and local) spending for highways and transit, which ranged from \$125 billion to \$155 billion per year range, measured in constant 2009 dollars.¹

History of the Gas Tax

Until recently, a bipartisan consensus has existed that gas taxes should be increased periodically to support Highway Trust Fund programs at their historic levels. The gas tax was first established at one cent per gallon during the Hoover administration as a deficit reduction measure. When the Highway Trust

Fund was established in 1956 during the Eisenhower administration, the gas tax was increased to three cents per gallon, then later to four cents per gallon in 1959, with the proceeds going to the Highway Trust Fund.

In 1982, during the Reagan administration, the tax was increased to nine cents per gallon. President Reagan indicated his support for this increase in his weekly radio address broadcast Nov. 27, 1982, during which he was quoted as saying the following:

But let's face it. Lately, driving isn't half as much fun as it used to be. Time and wear have taken their toll on America's roads and highways. "We simply cannot allow this magnificent system to deteriorate beyond repair." [The expanded program] will be paid for by those of us who use the system, and [the five-cent increase] will cost the average car owner about \$30 a year. That's less than the cost of a couple of shock absorbers. Most important of all, it'll cost far less to act now than it would to delay until further damage is done.²

The gas tax also was increased during both the George H.W. Bush and Bill Clinton administrations. The most recent increase—in 1993—raised the tax to the current 18.4 cents per gallon.

In the years since 1993, tax issues have become so politically charged that neither party can support any revenue measure that can be called a tax increase. Proposed increases in the gas tax are given this label, despite arguments that the gas tax is in reality a user fee and that any increase will be only an adjustment for inflation.

In the early days of the Obama administration, Press Secretary Gibbs announced that the administration would not support any increase in the gas tax. The White House has maintained this position and also appears to be opposed to proposals that would increase trust fund revenues by replacing the gas tax with a charge for each mile driven. The Obama administration has supported an increase of \$231 billion in spending for transportation over six years but has not made any specific proposal for a tax increase, other than to state that the White House will work with Congress to find a way to increase the revenues of the Highway Trust Fund.³

Costs Resulting from the End of Consensus

The use of general fund revenue to support some of the programs now funded by the Highway Trust Fund has not received significant support. Therefore, this failure to increase the revenues paid into the Highway Trust Fund would appear to require substantial reductions in federal programs for highways and transit.

The Congressional Budget Office estimates that, if there is no increase in the gas tax, the revenues paid

into the fund over the next six years will be about \$90 billion below the level needed to cover the continuation of existing programs, indexed for inflation.⁴ Such a shortfall in funds would require cutting the programs by about 25 percent.

These cuts would come at a time when even the existing programs are widely perceived to be inadequate. A recent report issued by the Department of Transportation concluded that, in 2006, 43 percent of the national highway system's miles were rated as being below "good" ride quality. Other reports by the Department of Transportation also have concluded that nearly one out of every four highway bridges are structurally deficient or functionally obsolete and that more than 14,000 public transit vehicles are not in good condition.⁵

The deficiencies in the existing system impose substantial costs on individuals as well as businesses. The Texas Transportation Institute's 2009 report on urban mobility found that, in 2007, unnecessary congestion imposed costs of \$87 billion as a result of wasted fuel and added driving time for individuals. These costs were \$14 billion higher than the costs in 2004 were. Unnecessary delays also impose costs of billions of dollars a year on businesses. These delay-driven costs can mount extraordinarily quickly. Consider the following statistic: UPS has estimated that an increase of just five minutes in average driving time costs the company \$100 million year.⁶

Many believe that failure to increase funding for highways and transit will only make the current situation worse. The National Surface Transportation Policy and Revenue Study Commission concluded that, if infrastructure spending remains at current levels, drivers' delays on major highways will increase by more than 50 percent by 2020 and the physical condition of the nation's highway assets will "deteriorate significantly." The Obama administration and many members of Congress have concluded that beginning the process of making necessary improvements requires that funding for the federal highway system and transit programs be increased from the current six-year baseline level of \$223 billion to a level of \$450–\$500 billion.

Conclusion

The breakdown in the consensus for supporting federal transportation programs has blocked any long-term reauthorization of the programs for several years. Since the last long-term reauthorization ended in October 2009, the highway and transit programs have been continued at historic levels through a series of seven short-term extensions. However, these extensions were not a mere continuation of the status quo. Because levels in the extensions could not be supported by current tax levels, monetary infusions of \$35 billion have been transferred from the general

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fund to the Highway Trust Fund. These infusions will keep the fund solvent until the end of calendar year 2012.⁷

There is great pressure for Congress to make decisions before the end of 2011 on Highway Trust Fund programs for the next five to six years. There appears to be little appetite for any further infusion of general funds to support short-term extensions, but the best opportunity to make adjustments in funding mechanisms and to create program stability is at hand. As the 2012 presidential election approaches, political pressures will make it increasingly difficult to tackle the tough decisions required for long-term reauthorization.

In short, the next few months are critical to the future of federal transportation programs. Now is the time when interested practitioners and the public alike will discover whether the new consensus we need can be forged so that the country can improve its transportation system—a system that is crucial for enhancing the quality of citizens' lives and maintaining an efficient and productive economy. **TFL**

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Endnotes

¹See Report of the Congressional Budget Office, *Public Spending on Transportation and Water Infrastructure*, November 2010, Appendix A.

²Richard Weigoff, *Palace Coup: President Ronald Reagan and the Surface Transportation Assistance Act of 1982*, HIGHWAY HISTORY, Federal Highway Administration

³TRANSPORTATION WEEKLY, 8 (March 9, 2011).

⁴*Ibid.*

⁵Federal Highway Administration, *2008 Status of the Nation's Highways, Bridges and Transit: Conditions and Performance*, undated, pages 3-3, 3-18, and 3-28.

⁶James L. Oberstar, Former Representative, D-Minn., Remarks to the Transportation and Infrastructure Summit, August 10, 2010.

⁷See TRANSPORTATION WEEKLY, 8 (March 9, 2011).

RULEMAKING *continued from page 29*

On Feb. 16, 2011, the DOT published a notice of regulatory review (76 FR 8940) that invited public comment on how the department could most effectively implement Executive Order 13563. On March 14, 2011, the DOT hosted a Retrospective Regulatory Review public meeting in Washington, D.C. That meeting, in which the department's general counsel and the chief counsels of each DOT agency participated, was broadcast via a live webcast, allowing the panel to hear from a variety of speakers, both in person and by phone. In late March/early April, FMCSA sought similar feedback on existing regulations from its Motor Carrier Safety Advisory Committee, a committee that consists of representatives from safety advocacy groups, motor carriers, shippers, truck and bus associations, labor, and state motor carrier enforcement agencies. FMCSA held the April 1, 2011, portion of the advisory committee's public meeting during the 40th Anniversary Mid-America Truck Show in Louisville—the nation's most widely attended trucking convention and an ideal forum for receiving feedback from small businesses and independent truck drivers.

To allow for less formal submissions to the DOT and its agencies on regulatory review, the department created a website using IdeaScale, dotreview.ideascale.com. The blog-like, interactive website allows visitors to file their suggestions by transportation mode and to vote in support of other users' comments. The website is designed particularly for individuals and

small entities that might be uncomfortable or unfamiliar with the normal method of submitting comments to the DOT. The site also may assist participants in refining their suggestions and gathering additional information or data to support those suggestions.

As President Obama ordered, federal agencies must ensure that regulations protect the public interest and our safety, health, and environment while promoting economic growth. To do our jobs, federal regulators must leave the office, get out of Washington, D.C., and employ technology creatively so that they can hear the voices of experts, businesses, and the general public on how best to strike that balance. With these tools and with some creativity, even small agencies like the DOT's Federal Motor Carrier Safety Administration can take advantage of limited resources to engage the public in the critical work that agencies do. **TFL**

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2011 FBA AWARDS: CALL FOR NOMINATIONS

Earl W. Kintner Award for Distinguished Service

The Earl W. Kintner Award for Distinguished Service is presented annually to an FBA member who has displayed outstanding achievement, distinguished leadership, and participation in the activities of the Association's Chapters, Sections, Divisions, and Committees throughout the nation. The Award is named in honor of the late National President Earl W. Kintner, whose own high level of dedicated service will always serve as a goal of excellence.

Ilene and Michael Shaw Public Service Award

Made possible by the generous contributions of Ilene and Michael Shaw, the Federal Bar Association seeks each year to recognize the many public service programs sponsored by FBA chapters nationwide. Designed to assist and encourage members in providing service to their communities, the Ilene and Michael Shaw Public Service Award not only gives needed funds to continue such worthwhile efforts, but also provides seed money to plan and implement public service programs.

Ilene and Michael Shaw FBA Younger Lawyer Public Service Grant

These grants enable FBA chapters to provide service to the public through the development and implementation of public service projects and pro bono law related services. To encourage an increased and continued commitment to public service responsibility by young lawyers, these projects should be administered under the auspices of a chapter Younger Lawyer Committee. One chapter will be selected to receive a \$2,500 grant. All FBA chapters are encouraged to apply. However, chapters without an existing Younger Lawyer Committee will be required to establish one to administer the grant.

Elaine R. "Boots" Fisher Award

The Elaine R. "Boots" Fisher Award was established by the FBA Northern District of Ohio (Cleveland) Chapter as a memorial to the outstanding and unselfish contributions made by "Boots" Fisher to improve the quality of life and opportunities for all persons. The award is intended to stimulate, encourage, and recognize exemplary community, public, and charitable service by FBA members.

Chapter Activity Awards

The FBA recognizes the diligent work and accomplishments that outstanding FBA chapters have made throughout the year. Two levels of recognition will be awarded: (1) Presidential Achievement Awards and (2) Presidential Excellence Awards. Awards will be given to all chapters whose applications demonstrate that the chapter has fulfilled the established criteria. Winning chapters will be divided, based on chapter size: Group I (300

and more members); Group II (100-299 members); Group III (50-99 members); and Group IV (fewer than 50 members).

Additionally, Presidential Citation Awards may be given to those chapters that do not qualify for either of the Chapter Activity Awards categories, but have held an outstanding event or program in the last year.

Newsletter Recognition Awards

These awards recognize the best newsletters published by chapters in each of the four chapter groups, as well as those published by sections, divisions, and committees to stimulate and encourage continued production of these valuable communication tools. Any FBA chapter, section, division, or committee that has published at least two issues of its newsletter in the previous year, is eligible to enter. Judging of the newsletters will focus on overall sustained quality of the publication, and will emphasize service to the membership. Judges will also consider content, creativity, and design.

Younger Federal Lawyer Awards

The primary goal of this program is to encourage younger federal lawyers to attain high standards of professional achievement and to accord public recognition for outstanding performance. Any civilian or military attorney who is employed by the U.S. government shall be eligible to receive an award except for the following: no nominee will be considered if he or she has reached or will reach age thirty-six (36) before Sept. 9, 2011; no nominee will be considered if, at the time the award is presented, he or she has served with the government as an attorney less than three continuous years; no nominee will be considered for an award if the services constituting the primary basis for his or her nomination were required because of a political consideration.

Hon. Sarah T. Hughes Civil Rights Award

Named after the renowned federal district judge from Dallas, Texas, the Sarah T. Hughes Civil Rights Award was created to honor that man or woman who promotes the advancement of civil and human rights amongst us, and who exemplifies Judge Hughes' spirit and legacy of devoted service and leadership in the cause of equality. Judge Hughes was a pioneer in the fight for civil rights, due process, equal protection, and the rights of women.

How to Apply

If you need an application for any of these awards, please contact FBA headquarters at (571) 481-9100 or visit www.fedbar.org. **The deadline for receipt of all applications is July 11, 2011.** Each of these awards will be presented at separate functions during the 2011 Annual Meeting and Convention in Chicago. Award winners will be prominently recognized in *The Federal Lawyer* immediately following the convention.

THE INS AND OUTS OF FILING SIZE PROTESTS WITH THE SMALL BUSINESS ADMINISTRATION

BY STEVEN J. KOPRINCE



It's a situation familiar to any procurement attorney: An angry client is on the telephone, convinced that his or her company unfairly lost a government contract to a competitor. You are about to begin discussing protest options at the Government Accountability Office (GAO) and the Court of Federal Claims, when the client throws you a bit of a curveball. Rather than complaining about the agency's technical or price evaluations, the client tells you that the procurement was a set-aside for small businesses, and the client is convinced that the successful awardee is not a small business.

For contractors and procurement lawyers alike, the GAO is often the preferred forum for resolving procurement disputes. But in this case, there is a not-so-insignificant problem—the GAO lacks jurisdiction to hear challenges to the size status of a contract awardee. The same is true of the Court of Federal Claims. Instead, the U.S. Small Business Administration (SBA) has exclusive jurisdiction to determine whether the awardee of a small business set-aside contract is, in fact, small. You tell your client that he or she should file a “size protest,” asking the SBA to evaluate the awardee's eligibility.

Now what?

The amount of government contracts set aside for small businesses annually totals nearly \$100 million, and anecdotal evidence suggests that size protests are on the rise, as small businesses fight as hard as they can for every federal dollar in a difficult economic climate. If your client list includes small businesses that compete for government contracts, you owe it to yourself to understand how the SBA's size protest process works. Consider this article your “cheat sheet.”

Standing to File a Size Protest

Not just anyone can file a size protest; the protester must be an “interested party.” Unlike the setting in a bid protest with the GAO, a size protest with the SBA does not require the protester to be “next in line” for an award in order to be considered an interested party. Rather, a protest may be filed by “any offeror whom the contracting officer has not

eliminated for reasons unrelated to size.”¹ Thus, if an offeror finishes in sixth place, it may not have standing to file a protest with the GAO (depending on the nature of the protest), but it may file a size protest with the SBA.

However, an offeror is not an “interested party” if it has been eliminated from the competition for reasons that are not related to the size of the business. For instance, in *Size Appeal of Fitnet Purchasing Alliance*,² an offeror attempted to file a size protest, even though its proposal had been deemed technically unacceptable. The SBA's Office of Hearings and Appeals (OHA) held that the offeror was not an interested party and therefore was not eligible to pursue the protest.

In addition to disappointed offerors, the government agency's contracting officer, the SBA itself, and “other interested parties” may also file size protests.³ Of particular note, contracting officers and the SBA are not bound by the strict timeliness requirements that govern protests by other parties. For this reason, if a losing offeror fails to submit its own size protest in time, it may attempt to convince the contracting officer or SBA to “adopt” the putative protester's grounds of protest.

The OHA has held that an employee of a small business was an “other interested party,” even though he filed a size protest in his individual capacity, instead of on behalf of his company.⁴ In contrast, the OHA has consistently ruled that a subcontractor lacks standing to file a size protest, even though subcontractors are arguably very “interested,” since their subcontract awards depend on the prime contractor's award.⁵ A subcontractor must work with its prime contractor if it wishes to file a size protest.

Contents of a Size Protest

A size protest does not need to be in any particular form. However, in order to avoid dismissal, a size protest must be both “particular” and “specific.”

Particularity means that a size protest must relate to the party that has been awarded or proposed to be awarded a particular contract.⁶ Put another way, a protester cannot simply allege, in a vacuum, that one of its competitors is

not a small business. Instead, the protest must identify a particular solicitation under which the protested business is the awardee or proposed awardee; otherwise, the SBA will dismiss the protest.

In addition, a size protest must be “sufficiently specific to provide reasonable notice as to the grounds upon which the protested concern’s size is questioned.”⁷ The protester is required to provide “[s]ome basis for the belief or allegation stated in the protest.”⁸ It is not enough to baldly state that Business A is not small—rather, the protester must say *why* it believes that the business does not fall within the applicable size standard. In most cases, to back up its allegations, the protester must submit some third-party evidence, such as Dun & Bradstreet reports, Web site printouts, and so on.

The SBA will dismiss a protest if the protester asks the SBA to do the initial research itself. For instance, simply stating that the awardee’s size is questionable and “should be researched” is not enough to meet the specificity requirement.⁹ Nor is it enough to tell the SBA *where* to do the research. In one case, a protester asked the SBA to review the website of the business whose award was being protested, stating that the website contained evidence that the business was not small. The OHA held that the protest was not specific, writing “[i]f a protester is going to reference a website in its protests, the protester must identify information from that website and explain why that information demonstrates why the protested concern is other than small.”¹⁰

Timeliness of a Size Protest

Size protests must be filed with the SBA very quickly. The regulations require size protests to be *received* by the contracting officer (not *filed* with the officer) within five days (excluding Saturdays, Sundays, and legal holidays) after a specific event occurs. The date the five-day period begins depends on the type of contract:

- *Non-negotiated procurement or sale*: A size protest for a non-negotiated procurement must be received before the close of business on the fifth day after the opening of the bid or proposal.¹¹
- *Negotiated procurement*: A size protest for a negotiated procurement must be received before the close of business on the fifth day after the contracting officer has notified the protester of the identity of the prospective awardee.¹²
- *Long-term contracts*: For contracts with durations longer than five years (including option periods)—such as Multiple Award Schedule Contracts, Multiple Agency Contracts, and Government-Wide Acquisition Contracts—the following rules apply:
 - *Contracts*: Size protests of the contract award itself must be received before the close of business on the fifth day after receipt of notice of the identity of the prospective awardee or award.
 - *Option periods*: Size protests of the exercise of an option period must be received by the contracting officer prior to the close of business on the fifth day

after receipt of notice of the size certification made by the business whose award is being protested.

- *Individual orders*: Protests based on a size certification made in response to a contracting officer’s request for size certifications on an individual order must be received by the close of business on the fifth day after receipt of notice of the identity of the prospective awardee or award.¹³
- *Architectural/Engineering Services*: The OHA has held that, under Federal Acquisition Regulation (FAR) 36.6, the protest period for contracts for architectural/engineering services is triggered when the government informs offerors that one of their bids has been chosen for negotiation.¹⁴

In contrast to the SBA’s regulation, FAR 19.302 provides that a size protest under a Multiple Award Schedule is timely “if received by SBA at any time prior to the expiration of the contract period, including renewals.”¹⁵ Contractors should assume that the SBA will enforce its own regulation rather than the conflicting FAR provision.

Contractors anticipating a possible size protest must be vigilant, because the clock may start ticking even if the contractor has not been sent a formal, written notification of the agency’s proposed award to a competitor. Under the regulations, the five-day period begins when notification of award is received electronically. Prospective contractors should monitor FedBizOpps (fbo.gov), any agency-specific procurement website, and their e-mail accounts to ensure that they do not miss an announcement of a proposed award.

Sometimes, a government agency’s contracting officer may fail to give written notification of award, even if the solicitation and FAR require it. In such cases, the five-day protest clock begins upon the “oral notification of the contracting officer or authorized representative. . . .”¹⁶ Moreover, even if the contracting officer doesn’t directly provide a disappointed offeror with notice of any kind, the clock starts to run when the agency makes a public announcement or otherwise communicates the identity of the apparently successful offeror.¹⁷ Again, contractors contemplating a potential size protest must carefully monitor the agency’s public announcements.

Unlike in the GAO’s bid protest setting, the time to file a size protest with the SBA cannot be extended by requesting a post-award debriefing from the procuring agency. Even if an offeror requests a debriefing, the five-day clock keeps ticking.

A protest filed by any party (including the contracting officer) *before* the bid opening or notification to offerors of the selection of an apparently successful offeror will be dismissed as premature. The rule is designed to “prevent unnecessarily burdening businesses with size investigations and to focus SBA’s resources on businesses where it is clear they are the potential awardees.”¹⁸ The dismissal of a premature protest is typically “without prejudice”—that is, the protest may be filed again at the appropriate time.

Size Protest Filing Requirements

A disappointed offeror should *not* file its size protest

directly with the Small Business Administration. Rather, a size protest must be filed with the government's contracting officer responsible for the procurement.¹⁹ The contracting officer is required to forward the protest to the SBA. If the protester attempts to circumvent this process (even inadvertently) by filing its protest directly with the SBA, the SBA will dismiss the size protest.

A size protest must be delivered to the contracting officer by hand, by U.S. mail, by fax, by e-mail, or by any overnight delivery service, such as FedEx or UPS.²⁰ A protester can also "file" a size protest orally with the contracting officer by telephone. However, if the protester files a protest orally, the contracting officer must receive a confirming letter, postmarked no later than one day after the date of the telephone call, or within the initial five-day protest period discussed below. The letter must be either received by the contracting officer within the initial five-day period or postmarked no later than one day after the date of the telephone call.

As a practical matter, it is highly advisable for protesters to file using a method, such as an overnight delivery service, that guarantees delivery at a certain date and provides a third-party verification of receipt. Protesters should also consider e-mailing or faxing a copy of the protest to the contracting officer in case there are delivery problems. There are no penalties for filing a protest in multiple ways to ensure timely delivery.

The contracting officer must "promptly" forward the protest, together with certain additional information about the procurement and the offeror, to the SBA Government Contracting Office serving the area in which the offeror's headquarters (commonly known as the "area office") is located.²¹ The contracting officer must forward the protest to the SBA, even if he or she believes that the protest is untimely; the SBA, not the contracting officer, makes the decision about the timeliness of the protest.

Effect of Ongoing Size Protest on Procurement

Under the FAR's provisions regulating negotiated procurements, when a government agency sets aside a contract for small businesses, the contracting officer is supposed to give unsuccessful offerors a pre-award notice of the "apparently successful offeror" and the opportunity to contest the awardee's size prior to the contract being awarded. When the agency gives a pre-award notice and a disappointed offeror subsequently files a size protest, the contracting officer must temporarily stay the award, unless he or she determines in writing that the award must be made to in order to protect the public interest.²²

Unlike an override of the automatic stay in a GAO bid protest, the contracting officer does not need to go "up the chain of command" to override the stay of the size protest. If the SBA does not make its determination within 15 business days and the contracting officer does not grant the SBA an extension, the contracting officer may award the contract if he or she determines in writing that there is an immediate need to make award and that waiting for the SBA's size determination will be disadvantageous to the government.²³

It should be noted that this provision, which was added to the SBA's regulations by way of a Final Rule issued in February 2011 (and effective in March 2011), conflicts with the current FAR provision, which calls for a 10-day period and does not require written notice thereafter to make award.²⁴ The GAO has previously held that, in the event of a conflict regarding size provisions, the SBA's regulations are controlling. However, protesters should not assume that the contracting officer is aware of the revised SBA regulation or deems it controlling. Thus, protesters may wish to consider specifically informing contracting officers of the 15-day period and written notice requirements in conjunction with their protests.

Contracting officers are not always required to provide disappointed offers with pre-award notices, and even when pre-award notices are required, contracting officers sometimes neglect to provide them. If the agency awards the contract before a size protest is filed, the agency does not have to suspend performance of work under the contract because of the size protest (unlike the "automatic stay" that kicks in at the onset of many GAO protests). However, a protester is certainly entitled to ask the agency to voluntarily suspend performance pending the SBA's review.

Defending a Size Protest

After the protester submits the size protest, its work is essentially done, and the burden of defending the size status shifts to the business whose award has been protested. Upon receipt of the protest, the area office will notify the contracting officer, the business whose award has been protested, and the protester that the protest has been received. Together with notice of the protest, the SBA will require the protested business to:

- complete an SBA Standard Form 355;
- provide a written response to the protest allegations; and
- furnish other relevant documentation, such as tax returns, financial statements, and contracts, demonstrating its small business size status.²⁵

Importantly, once a size protest has passed the particularity and specificity hurdles, the burden shifts to the protested business to demonstrate that it is a small business.²⁶ Moreover, the protested business does not have much time to meet its burden—only *three business days* after receiving the protest, unless the SBA grants an extension. A protested business should immediately contact counsel upon receiving a size protest and begin the process of filling out Form 355 and gathering the requested documents. If the protested business fails to provide any of the requested information within the time allotted, the SBA may draw an "adverse inference" and assume that the information would be harmful to the protested business.

In crafting its response and deciding what other evidence to submit, the protested business should understand the differing weights the SBA assigns to certain forms of evidence. The SBA gives more weight to documents such as affidavits, which are signed under penalty of perjury, than to unsworn

documents. Because SBA Form 355 requires a protested business to sign under penalty of perjury, SBA will assign it greater weight than most other types of evidence.

However, the SBA also gives more weight to contemporaneous documents—that is, documents created before the protest was filed—than to information created after the protest. Even an affidavit created after a protest has been filed may be deemed less probative than contemporaneous records. Thus, companies engaged in set-aside contracting should be sure to put their best foot forward when it comes to creating subcontracts, teaming agreements, operating agreements, and the like, because a contradictory post hoc affidavit is unlikely to sway the SBA.

The SBA's Decision

After receiving a size protest, the SBA will issue a formal size determination within 15 business days—“if possible.”²⁷ In practice, the various Area Offices do not always meet the 15-day benchmark. Although the SBA attempts to process size protests as quickly as possible, in rare cases, protests have taken several months to resolve.

The formal determination of the size of a business will conclude either that the protested business is “small” or “other than small” under the size standard corresponding to the solicitation’s North American Industry Classification System (NAICS) code. The SBA must provide its size determination in writing and give the basis for its conclusions. The SBA will provide a copy of the size determination to the contracting officer, the protester, the protested business, and any affiliate or alleged affiliate.

Effect of the SBA's Decision on the Procurement

If the SBA determines that the protested business is small or dismisses the size protest, the agency’s contracting officer may proceed with awarding the contract if the award has been withheld until that time.²⁸ The protester may challenge the size determination by way of an appeal to the SBA’s Office of Hearings and Appeals or may ask the area office to reopen the issue in order to correct an error.

If the SBA finds that the protested business is “other than small,” the contracting officer may not award the contract if the award has previously been withheld.²⁹ In addition, under the SBA’s newly adopted regulations, the contracting officer *must* terminate an ongoing contract if the SBA concludes that the awardee is “other than small,” unless a timely OHA appeal is filed.³⁰

The SBA’s amended regulations go a step further than the GAO’s recent case law, which has required termination unless there are “countervailing reasons for allowing the award to remain in place,” such as the absence of another eligible offeror who can step in and perform the work that is under contract.³¹ Successful protesters would be wise to ensure that the government’s contracting officers are aware of the termination requirement and that the officers understand that the regulations no longer allow continued performance on the basis of “countervailing reasons.”

The SBA’s regulations strongly encourage a business whose award has been protested to appeal a negative outcome. If the protested business appeals an adverse

determination of size in time, the contracting officer does not need to terminate the award. Instead, the contracting officer only needs to “consider whether performance can be suspended” pending the OHA’s decision.³² The contracting officer is not required to suspend the contractor or even make a written determination that suspension would be impractical. In addition, if the OHA upholds the area office’s decision, the contracting officer may terminate the contract, but is not required to do so.

In other words, as long as the protested business appeals the area office’s decision to the OHA, the contracting officer has the discretion to allow the business to complete the entire base period of its contract as well as any option periods beginning prior to the contracting officer’s receipt of the OHA’s decision. However, if the OHA affirms the area office’s determination that the business is “other than small,” the contracting officer may not exercise any subsequent options.

Effect of Adverse Determination of Size on the Protested Business

If the area office determines that a business is “other than small” under a particular size standard, the business becomes ineligible to self-certify as small under the same size standard or one that is lower.³³ The SBA will add the business to its list of “other than small” companies, which is available on the SBA’s website (www.sba.gov/content/businesses-determined-other-small). However, the fact that the business is ineligible for the set-aside kicks in immediately upon the business’s receipt of the size determination, not when the business is added to the list. If the business subsequently self-certifies as a small business, it may face suspension, debarment, or criminal penalties.

In addition to being immediately unable to self-certify as small, the business must “immediately inform” the officials responsible for any pending procurement upon which the business self-certified as small prior to receiving the size determination.³⁴ The business is not required to withdraw pending proposals, but informing a contracting officer of an adverse size determination will certainly not improve a bidder’s chances of a future award. If the business decides to continue pursuing a pending procurement, it should consider telling procuring officials of any perceived errors in the size determination and let the officials know that the business plans to file an appeal with the OHA.

A business on the wrong end of a size determination has three options to reverse its fortunes (and regain its ability to self-certify as a small business). First, the business can ask the area office to reopen the decision in order to correct a mistake.³⁵ In practice, however, area offices seldom reconsider their decisions. Unless the area office makes a glaring error, the protested business would be wise to pursue a different path.

The protested business may also file an appeal with the OHA. If OHA reverses the adverse determination of size, the business regains its status as a small business. In addition, as discussed above, a timely appeal with the OHA may prevent termination of the ongoing contract. Thus, for many—and perhaps most—businesses whose award

has been protested, an appeal will be the best option, provided there is a good-faith basis to challenge the determination of size that has been made.

In some cases, however, an appeal is not a viable option. The SBA's regulations regarding the determination of the size of a business are complex, and sometimes even a well-intentioned business mistakenly believes it is a small business, when that is not actually the case. If an adverse determination of size is clearly correct, the protested business should not waste the OHA's time (or the company's own time) with a frivolous appeal. Instead, the business may attempt to "fix" the problems identified in the size determination and apply to the SBA for recertification as a small business.

As a very basic example, consider a case in which the SBA finds Company A large as a result of its affiliation with Company B, because the same individual—let's call him Bob—owns a majority stake in both companies. After receiving the size determination, Bob sells all of his interest in Company B. Now, Company A has a strong argument that the affiliation no longer exists, and consequently, it should be recertified as a small business.

To apply for recertification, a business should file an application for recertification with the area office in which the company's headquarters is located.³⁶ The business must include a current SBA Form 355 and an explanation of the changes it made in order to regain its size status—such as Bob's sale of his interest in Company B.

The SBA's evaluation of a company's request for recertification is considered a formal determination of size, meaning that the SBA should make its best efforts to resolve the matter within 15 business days. In practice, however, the time frame for requesting and receiving a recertification may vary considerably, depending on which area office hears the request and the SBA's current workload and staffing. Some contractors suspect that requests for reconsideration occasionally sink to the bottom of the area offices' "to-do" lists because no pending procurement hangs in the balance. A business that files a request for recertification should (politely) follow up with the area office on a regular basis to help keep the matter on the front burner.

The Contract-Specific Exception

There is one important exception to the rule that an adverse determination of size affects subsequent procurements: If the SBA based its decision *solely* on a contract-specific affiliation (the so-called "ostensible subcontractor" rule) or a violation of the "non-manufacturer rule," the business does not need to forgo future certifications or obtain recertification in order to bid on future procurements.³⁷ In these cases, the SBA considers the size problem to be limited to a specific contract, rather than an ongoing determination. The protested business should review its size determination carefully and contact the responsible SBA official if it is unsure as to whether this exception applies.

Some Final Thoughts

If you represent clients who bid on government contracts that are set aside for small businesses, it is important to make sure that the clients understand that they have

the right to protest awards to competitors they consider to be businesses that are "other than small." Often owners of small businesses can gain information about their competitors through the grapevine that, coupled with a little independent research, may amount to a successful size protest.

And, of course, your clients should understand that size protests work both ways. If a client is awarded a government contract that has been set aside for a small business, the company should be on the lookout for a size protest and call counsel immediately if one is filed. Given that an adverse determination of a company's size could put a client out of business as a "small" government contractor, defending a size protest is no time for a client to try to represent itself. **TFL**

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Endnotes

¹13 C.F.R. § 121.1001(a)(1)(i).

²*Size Appeal of Fitnet Purchasing Alliance*, SBA No. SIZ-5089 (2009).

³See 13 C.F.R. § 121.1001(a)(1); see also FAR 19.302(a).

⁴See *Size Appeal of Reiner, Reiner & Bendett P.C.*, SBA No. SIZ-4587 (2003) (concluding that an employee would suffer economic harm if the contract was not awarded to his employer and thus had standing to file a size protest).

⁵See, e.g., *Size Appeal of Omnisecc Int'l & Securiguard, Inc.*, SBA No. 3761 (1993), quoting *Size Appeals of Mela Assocs., Inc. & Encore Computer Corp.*, SBA No. 3632 (1992). It is debatable whether the rule prohibiting subcontractors from filing size protests is consistent with a case like *Reiner*, in which OHA broadly interpreted the "other interested parties" rule to confer standing upon an individual employee of a small business prime contractor. Nevertheless, OHA has long prohibited subcontractors from filing size protests and is unlikely to change course unless a regulatory change occurs.

⁶See 13 C.F.R. § 121.1007(a).

⁷13 C.F.R. § 121.1007(b); see also FAR 19.302(c)(2) (size protest must contain "specific, detailed evidence to support the allegation that the offeror is not small").

⁸*Id.*

⁹*Size Appeal of Val-Coast Inc.*, SBA No. SIZ-5031 (2009).

¹⁰*Id.*

¹¹See 13 C.F.R. § 121.1004(a)(1); see also FAR 19.302(d)(1).

¹²See 13 C.F.R. § 121.1004(a)(2); see also FAR 19.302(d)(1).

¹³See 13 C.F.R. § 121.1004(a)(3).

¹⁴See *Size Appeal of EA Eng'g, Sci. & Tech. Inc.*, SBA No. SIZ-4973 (2008).

¹⁵FAR 19.302(d)(3).

¹⁶13 C.F.R. § 121.1004(a)(5).

¹⁷See *id.*

¹⁸*Size Appeal of Taylor Consultants Inc.*, SBA No. SIZ-5050 (2009).

¹⁹See 13 C.F.R. § 121.1003; *see also* FAR 19.302(d)(1).

²⁰See 13 C.F.R. § 121.1005; *see also* FAR 19.302(d)(1)(ii). The FAR calls for submission “by hand, telegram, or letter.” FAR 19.302(d)(1)(ii). Although the SBA will likely enforce its own regulation permitting emailed or faxed size protests, protesters would be wise to provide hard copies to contracting officers, who are often more familiar with the FAR than the SBA’s regulations, to avoid unnecessary disputes.

²¹See 13 C.F.R. § 121.1006(a).

²²See 13 C.F.R. § 121.1009(a)(2); *see also* FAR 19.302(h)(1).

²³See 13 C.F.R. § 121.1009(a)(3).

²⁴See 76 Fed. Reg. 5680-01 (Feb. 2, 2011) (to be codified at 13 C.F.R. pts. 121, 124, 125, 126 & 134).

²⁵See 13 C.F.R. § 121.1008(a); *see also* FAR 19.302(f).

²⁶See 13 C.F.R. 121.1009; *see also* *Size Appeal of TPMC-Energy Solutions Envtl. Servs. 2009, LLC*, SBA No. SIZ-5109 (2010) (Area Office erred by requiring protester to prove that protested business was large, rather than requiring protested business to prove that it was small).

²⁷See 13 C.F.R. § 121.1009(a)(1).

²⁸See 13 C.F.R. § 121.1009(g).

²⁹See 13 C.F.R. § 121.1009(g)(2).

³⁰See 13 C.F.R. § 121.1009(g)(2)(i).

³¹*See, e.g., Greystones Consulting Group Inc.*, B-402835 (June 28, 2010).

³²13 C.F.R. § 121.1009(g)(ii).

³³See 13 C.F.R. § 121.1009(g)(5).

³⁴*See id.*

³⁵See 13 C.F.R. § 121.1009(h).

³⁶See 13 C.F.R. § 121.1010(a).

³⁷See 13 C.F.R. § 121.1010(b).

SAFETY ACT *continued from page 27*

(3) Uses or attempt to use instrumentalities, weapons or other methods designed or intended to cause mass destruction, injury or other loss to citizens or institutions of the United States.

6 C.F.R. § 25.2; *see also* 6 U.S.C. § 444.

²⁸6 U.S.C. § 442(a)(2).

²⁹*Id.* § 443(c).

³⁰*Id.* § 442(b)(2). The DHS defines noneconomic damages to mean damages for losses resulting from physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium, hedonic damages, injury to reputation, and any other nonpecuniary losses. 6 C.F.R. § 25.2.

³¹6 U.S.C. § 442(b)(1).

³²*Id.* § 442(c).

³³The SAFETY Act, 71 FED. REG. 33147, 33150 (June 8, 2006) (to be codified at 6 C.F.R. pt. 25) (“such cause of action may be brought only against the Seller of the QATT and may not be brought against the buyers, the buyers’ contractors, downstream users of the QATT, the Seller’s supplier or contractor, or any other person or entity...”).

³⁴6 U.S.C. § 442(d)(2). The act also provides that the seller of the technology will “conduct safety and hazard analyses” and supply such information to the Secretary. *Id.*

³⁵*Id.* § 442(d).

³⁶*Id.* § 442(a).

³⁷6 C.F.R. § 25.8(c) (2006).

³⁸6 U.S.C. § 442(d)(1).

³⁹*Id.*

⁴⁰The procedures for issuance of a designation and certification are set forth in 6 C.F.R. §§ 25.4(b), 25.6, and 25.9. QATTs that have been designated, but not certified, are not included on the Approved Products List.

⁴¹*See* U.S. Department of Homeland Security, Approved Product List for Homeland Security and Designations for Homeland Security, available at www.safetyact.gov (last visited Aug. 10, 2010).

⁴²*Id.*

⁴³On Aug. 31, 2010, the DHS issued a Block Designation for CCSFs, *see* www.safetyact.gov.

⁴⁴6 U.S.C. § 442 (2006).

⁴⁵*Id.* § 442(a)(1).

⁴⁶*Id.*

⁴⁷71 FED. REG. 33147, 33150 (June 8, 2006).

⁴⁸148 CONG. REC. S9200-02 (2002); 148 CONG. REC. S11012-02 (2002).

⁴⁹6 C.F.R. § 25.6(l)(2). The designation of a CCSF as QATT is described in the “Exhibit A,” a document provided to each CCSF when it is awarded SAFETY Act coverage. The description itself is confidential, but the DHS states that it is closely tied to the requirements for the CCSP, as contained in 49 C.F.R. Part 1549.

⁵⁰71 FED. REG. at 33153.

⁵¹6 C.F.R. § 25.6(l)(2).

⁵²*Id.* The DHS has stated that “[w]hile certain proposed significant modifications should require review, many routine or non-significant modifications will not.” 71 FED. REG. 33153 (June 8, 2006). The DHS elaborated: “When a Seller makes routine changes or modifications to a QATT such that the QATT remains *within the scope of the description* set forth in the applicable Designation or Certification, the Seller shall not be required to provide notice [to the DHS], and the changes or modifications *shall not adversely affect the force or effect of the Sellers QATT Designation or Certification.*” 6 C.F.R. § 25.6(l) (emphases added).

⁵³6 C.F.R. § 25.6(l)(2).

⁵⁴This outcome would be consistent with laws that regulate general liability insurance, for which coverage is provided for an “occurrence” defined as “an accident, including a continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.” COUCH ON INSURANCE (3rd ed. 2010), § 126:29. Thus, a mistake or unintentional negligence would be considered an “occurrence” and covered by insurance. Public policy compels refusal of coverage for intentional actions. *Farm-land Mut. Ins. Co. v. Scruggs*, 886 So. 2d 714, 721 (Miss. 2004).

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The screenshot shows the homepage of the Federal Bar Association website. At the top, there is a navigation bar with links for 'Join', 'About Us', 'For the Public', 'For the Media', 'Contact Us', and 'Site Map'. Below this is the main header with the FBA logo and the text 'Federal Bar Association - The premier bar association serving the federal practitioner and the federal judiciary'. A search bar is located on the right side of the header. Below the header is a secondary navigation bar with links for 'About Us', 'Calendar', 'CLE', 'Government Relations', 'Leadership', 'Membership', 'Publications', 'Resources', and 'Foundation of the FBA'. The main content area is divided into several sections: a 'Member Login' and 'Member Resources' sidebar on the left; a central banner for the 'FBA Chapter Leadership Training Program' (April 29-30, 2011) featuring 'Tools Information Networking' and 'Strategies for Success for Chapter Presidents'; and a right-hand sidebar with sections for 'LEADERSHIP Strategies for Success for Chapter Presidents', 'NATIONAL SEMINAR Register today for the 23rd Annual Insurance Tax Seminar', 'JOIN THE FBA Expand your connections. Expand your career. Join today!', and 'ADVOCACY Judge: "Senate is Injuring Federal Judiciary"'. Below the main content area, there is a 'NEWS FROM THE FBA' section with two articles: 'New FBA Sections' and 'FBA Foundation Announces Chapter Grant Program'. To the right of the news section is a 'For the Public' sidebar with links for 'About U.S. Federal Courts', 'Frequently Asked Questions', 'On the Supreme Court Docket', and 'Related Links'. Below that is a 'For the Media' sidebar with links for 'FBA News Archives', 'Press Releases', and 'FBA Fact Sheet'. At the bottom left, there is a 'Do It Now' section with links for 'Join', 'Membership Application', 'Buy from FBA Store', and 'Subscribe to The Federal Lawyer'.

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Q. Lawyers seem to be afflicted with a contagious disease: verbal diarrhea. I've just received a notice announcing that lawyers' organizations will "assemble together" to discuss a problem. My dictionary confirms what I already knew: The verb *assemble* means "to bring or gather together." So why on earth do you need to attach an unnecessary *together* to *assemble*?

A. Because the drafter wants to be *absolutely certain* to convey information *exactly right*, although neither *absolutely* nor *exactly* are necessary here. In fact, using those two adverbs to provide emphasis actually weakens *certain* and *right* by adding props.

Redundancy also occurs in the legal use of both numbers and writing to indicate amounts of money: "\$1,500.00 (one-thousand five hundred dollars)." Several readers e-mailed a preference for both numerical and written-out forms, but one reader added, "Maybe I am showing my age." Perhaps he is; that preference was common in the 20th century, but not in our more hurried lives. Current grammatical practice is to use numbers only. Dictionaries note: "The repetition is used only in legal documents."

Lawyers' love of verbiage is notorious. One legal critic paraphrased the 23rd Psalm as a lawyer would quote it: "The Lord is my external-internal integrative mechanism. He positions me in a nondecisional stance. He maximizes my adjustment...."

Another critic offered a lawyer's version of the offer, "Satisfaction or your money back": "The remittance of sums paid by customers purchasing articles in or of this establishment is hereby guaranteed in the event that such articles, or one or more thereof, shall be hereafter deemed unsatisfactory to or by the said customers."

In the Old English period (before the Norman Conquest), formulas were ritualistic; only their exact repetition would guarantee the desired effect. That expectation still exists. Lawyers use verbiage because they believe that using exactly the same language used in a previous case in which a favorable decision was awarded would improve the chance of receiving a favorable decision in the current case. So formulas, like "residue and remainder," and "null and

void and of no further force and effect" are still common in legal documents.

But many lawyers criticize these cumbersome and redundant formulas. For example, one attorney quoted the phrase, "This office, by and through the undersigned," and rhetorically asked, "Do you believe that language is somehow more weighty and dignified than 'I'?" And one candidate for public office recently commented on television, "What my opponent said was mistaken in every way, manner, shape, and form!" Is that statement stronger than the word *wrong*?

Lawyers have no monopoly on verbosity. Many people attach the adverb *back* to verbs that don't need it. You have probably heard "return an item back," "reply back," "answer back," and "I haven't heard back yet." None of those verbs needs an adverbial crutch. The addition of *back* is probably a result of analogy to phrases like "come back," "hurry back," and "call back," in which the adverb *back* is necessary to complete the idea. Recently, one reader criticized a phrase she often hears: *appealed against*. She correctly pointed out that *appeal* includes the meaning of *against*.

Readers have asked about the propriety of the expression, "Get it for free." Because *free* means "at or for no cost," *for* is obviously unnecessary. The ubiquitous adverb *up* is sometimes needed and sometimes gratuitous. In the phrase, "Turn up the sound," the adverb *up* completes the meaning of *turn*. So do the adverbs *on*, *off*, and *down* following *turn*.

The verb *load* can stand alone but seldom does; *onload* often replaces *load*; *offload* replaces *unload*; and the computer terms are *download* and *upload*. And if the expression "the reason why is because" doesn't annoy you, you may be one of the growing majority of educated speakers who are

addicted to that phrase.

On the other hand, the idiom "shrug your shoulders" is so established in English that nobody notices the redundant use of *shoulders*. (The verb *to shrug* means "to raise shoulders.") The word *consensus* means "agreement of opinion," but so many people say "consensus of opinion" that the phrase may soon become an idiom. Then *consensus* will come to mean only "opinion," just as *unique* has lost its original meaning of "one of a kind" and now means only "unusual." The word *hoi* in the phrase *hoi polloi* means "the"; yet almost everyone says "the hoi polloi" ("*the the hoi polloi*"). The phrase "at this point in time" makes me grit my teeth, but politicians love it.

On the other hand, the phrase "what it is is" seems redundant but isn't, because the noun phrase *what it is* serves as the subject of the sentence and the second *is* is the verb. (Substitute, for example, the noun *thunder* for *what it is*). However, many people say "the point is is" and "the fact is is"—both of which are redundant. Why do people add the second *is*? Probably by analogy to the phrase "what it is is."

I used to give my first-semester law students a list of wordy ("lawyerly") phrases and ask the students to shorten them. Here are some samples:

- The question as to whether ... = If
- Because of the fact that ... = Because
- The reason why is because ... = The reason is (that)
- In a similar nature to ... = Like
- During the time that ... = While
- At the time at which ... = When
- In the same way as ... = As

About language, most Americans seem to agree with Mae West, who (with regard to a different matter) said, "Too much of a good thing can be wonderful!" **TFL**

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

Arizona Free Enterprise v. Bennett (10-238); McComish v. Bennett (10-239) (consolidated)

Appealed from the U.S. Court of Appeals for the Ninth Circuit (May 21, 2010)

Oral argument: March 28, 2011

At issue in these consolidated cases is the constitutionality of Arizona's Citizens' Clean Elections Act. Petitioners—several past and present candidates for elected office and two political action committees—claim that the matching public funding provision of the act burdens the free speech of candidates who do not use public funding. The respondent, Ken Bennett, in his official capacity as Arizona's secretary of state, contends that the Citizens' Clean Election Act is designed to prevent corruption and does not impose any actual burden on protected political speech. The Ninth Circuit Court of Appeals held that the act did not violate the First Amendment because the act furthered a compelling government interest in preventing corruption. In resolving this question, the U.S. Supreme Court must strike a balance between the First Amendment right to protected political speech and clean election measures implemented by a state.

Background

In 1998, Arizona passed the Citizens' Clean Election Act, which created a framework through which the state provides public financing to candidates for statewide political offices. Under the act, candidates who choose to receive public funding for their campaigns may not accept campaign donations from private parties.

The petitioners—a group that includes six past and future Arizona political candidates and two political action committees (PACs)—challenge a

provision of the act that gives matching public funds to participating candidates when their nonparticipating opponents' private fund raising exceeds a statutorily prescribed amount. The petitioners allege that this matching funds provision violates their rights under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. The crux of the petitioners' suit is that the Citizens' Clean Election Act substantially burdens their exercise of political speech by effectively punishing them for raising enough funds to trigger the matching funds provision of the act.

The plaintiffs in the original suit—John McComish, Nancy McLain, Tony Bouie, and Robert Burns—all ran for seats in the Arizona House of Representatives. McComish complained that the act had forced “self-censorship” upon him by delaying fund-raising and promotional efforts to avoid triggering matching funds for his opponent. Similarly, McLain claimed that the provision imposed a “competitive disadvantage” on her campaign because she deliberately avoided raising enough money to trigger the provision. Tony Bouie's campaign triggered matching funds for his opponent, and he argued that the matching funds put him (Bouie) at a “continuous tactical disadvantage.”

McComish and the other petitioners sued Arizona in federal district court, which granted summary judgment in favor of McComish. The Ninth Circuit Court of Appeals reversed the ruling, concluding that the act did not violate the petitioners' First Amendment rights. The Ninth Circuit's opinion diverged from decisions made by the Eighth and Eleventh Circuit Courts that held that similar matching fund schemes violated the First Amendment.

Implications

This case will allow the Supreme

Court to settle a split among circuit courts over the question of whether matching public funding laws violate the First Amendment right to free speech. This ruling will have a direct impact on campaign fund raising and campaign contributions by political action committees.

Reducing Corruption in Public Elections

The petitioners—McComish, McLain, Bouie, and Burns—argue that the act's matching funds provision imposes a substantial burden on protected political speech. According to the petitioners, the act creates a significant disadvantage to candidates who do not participate in the matching funds program yet trigger the matching funds provision through traditional campaign fund raising and spending. Furthermore, the petitioners claim that by rewarding election opponents with matching funds, the act does not protect against actual or apparent corruption—Arizona's stated interest in passing the law. Thus, McComish and his co-petitioners conclude that the matching funds provision punishes traditional candidates without serving an anti-corruption purpose.

Arizona claims that the Citizens' Clean Election Act will prevent corruption in public elections and creates only potential, indirect burdens on protected speech. Arizona points out that, since the act was passed, campaign funding expenditures have consistently increased, which undermines the conclusion that the act will impede political speech in the future. Furthermore, Arizona claims that the act serves the interest of preventing actual and apparent corruption by minimizing the influence of PACs. Finally, Arizona notes that the act was born as a result of a long, undisputed history of corruption in the state and was passed as an affirmative mechanism to restore the public's faith in the electoral process.

Chilling Political Speech

The petitioners' central concern is that the act unfairly influences the strategic campaign choices of nonparticipating candidates. The Justice and Freedom

Fund argues that the act creates a chilling effect on independent advocacy associations that support nonparticipating candidates because their financial contributions may trigger public funding to their publicly funded opponents. Similarly, four former chairmen and one former commissioner of the Federal Election Commission argue that triggered public funding schemes result in government actors “micromanaging” the spending decisions of candidates and advocacy groups, thereby burdening protected speech. Thus, nonparticipating candidates are not able to raise funds freely and spend money without fearing that their campaign expenditures and political speech will trigger matching public funds.

A group of self-financed candidates for elected office in Arizona argue that the primary purpose of the act is not to “equalize electoral opportunities” but to assure that participating candidates will be competitive against well-funded nonparticipating opponents. The Committee for Economic Development agrees, adding that the act increases competition in elections, and—as is true in the marketplace—increased competition leads to better outcomes for the public. Furthermore, the Campaign Legal Center points out that the public funding scheme encourages participation by assuring that participating candidates will remain competitive against their privately funded, high-spending opponents.

Legal Arguments

In this case, the U.S. Supreme Court will decide whether the act violates the First Amendment rights of individual candidates for state office or independent expenditure groups. At the heart of the controversy is the matching funds provision of the act, which allows Arizona to provide publicly financed candidates with additional funds beyond the initial disbursement if, in the aggregate, privately financed candidates and their independent financial supporters spend more than the initial disbursement when running against the publicly financed candidate.

Level of Scrutiny

According to the petitioners, the matching funds provision triggers strict

scrutiny—the highest level of judicial scrutiny—because it penalizes independent financial supporters and privately financed candidates for spending money above the trigger amount. To withstand strict scrutiny, a state must prove that a piece of legislation is narrowly tailored to a compelling governmental interest. Petitioners liken the provision to the Millionaire’s Amendment in *Davis v. Federal Elections Commission*,¹ in which the Supreme Court held that a system in which political opponents received benefits when self-financed candidates spent their own money beyond a certain threshold created a “drag” on free speech and triggered strict scrutiny. Petitioners contend that the matching funds provision creates a similarly impermissible burden on free speech.

Petitioners also rely upon *Pacific Gas & Electric Co. v. Public Utilities Co.*, in which the Supreme Court held that the First Amendment is violated whenever the government forces private citizens “to help disseminate hostile views” in order to exercise their right to free speech. The *Pacific Gas* Court reasoned that, when the government mandates the dissemination of opposing views, citizens will limit their own speech in an effort to prevent the dissemination of views they oppose.

Furthermore, the petitioners argue that the regulation is content-based because it releases funds to publicly financed candidates when independent groups support a privately financed candidate, but matching funds will not be triggered if an independent group opposes a privately financed candidate. McComish and his co-petitioners contend that, because of this content-based government action, strict scrutiny should apply.

Arizona argues that the appropriate level of scrutiny is intermediate scrutiny. For the provision to survive intermediate scrutiny, a state must show that the statute is substantially related to a sufficiently important governmental interest. Arizona argues that this case is different from *Davis* because *McComish v. Bennett*, does not discriminate against any one candidate’s speech. Instead, the provision releases funds according to the total financial activity in the race and does not differentiate between self-funded and other privately funded candidates. Arizona attempts to differenti-

ate the present case from *Pacific Gas* because privately financed candidates are not forced to state things with which they disagree with nor are they forced to associate themselves in any way with their opponents’ messages. Arizona also contends that the provision is not content-based, because public funds are available to all publicly funded candidates regardless of the message they disseminate with those funds, and those funds are released based on financial reporting requirements that have been upheld in prior cases.

Governmental Interest and Relation of Means to that Interest

The petitioners argue that the government’s interest in enforcing the act is not even a sufficiently important interest under intermediate scrutiny, let alone a compelling interest under strict scrutiny. The petitioners argue that the main purpose of the law is to “level the playing field” or to ensure that the publicly financed candidate can be competitive with the privately financed candidate. McComish and his co-petitioners argue that burdening free speech for this reason is unjustifiable at both levels of scrutiny, because the government’s involvement in regulating speech is inherently suspect. They also contend that the interest in reducing actual corruption or the appearance of corruption in state elections is served only indirectly by the act. The petitioners further argue that strict contribution limits and public disclosure requirements by themselves are sufficient to ward off quid pro quo corruption.

Arizona responds that the government’s interest in fighting corruption is the main purpose of the Citizens’ Clean Election Act and is both sufficiently important and compelling. Arizona argues that quid pro quo corruption is a real problem than is widely acknowledged. Arizona claims that the public financing option eliminates even the appearance of such corruption and removes any coercive effect that dependence on private funds may put on a privately financed candidate. Arizona also stresses that the matching funds provision is essential to making public financing a viable option for political candidates. Without the op-

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tion of matching funds, the state would have to provide a lump sum, resulting in dramatic underfunding or overfunding of races.

Conclusion

The Supreme Court's decision in this case will clarify whether a public funding scheme for elections impermissibly violates the First Amendment when the state provides matching funds to a publicly financed candidate without placing any cap on spending for the privately financed candidate. The petitioners argue that this law violates their First Amendment right to speak without supporting the speech of their political opponents. Arizona argues that this law is a constitutional method of fighting actual and apparent political corruption. Full text is available at topics.law.cornell.edu/supct/cert/10-238. **TFL**

Prepared by James McHale and Alexander Malahoff. Edited by Joanna Chen.

Turner v. Rogers (10-10)

Appealed from the Supreme Court of South Carolina (March 29, 2010)

Oral argument: March 23, 2011

By the beginning of 2008, Michael Turner was \$6,000 behind in his child support payments. A South Carolina family court eventually ordered Turner to appear to explain his failure to make any payments for the past year and a half. Turner alleged that his personal and physical problems rendered him unable to pay. The family court imposed civil contempt sanctions as a result of Turner's failure to comply with the earlier court order to pay child support. Turner appealed his 12-month sentence, arguing that, because of the possibility that he would face imprisonment, the court should have provided him with counsel. The U.S. Supreme Court's decision is likely to determine whether indigent defendants in civil cases are entitled to representation in cases in which incarceration is a possibility. The Court could, however, determine that it does not have jurisdiction to hear the case.

Background

In January 2008, a South Carolina family court ordered Michael Turner, the petitioner, to appear in court to explain his failure to pay \$6,000 in child support to the respondent, Rebecca Rogers, the mother of Turner's child. Although Turner was indigent, he was not provided counsel at this hearing. The court found Turner in willful contempt as a result of his failure to abide by the court's earlier order to pay child support and sentenced him to 12 months in detention unless he paid the money owed immediately.

In Turner's appeal to the Supreme Court of South Carolina, he argued that the lower court's proceedings violated his Sixth and Fourteenth Amendment rights because the court sentenced him to one year in jail without appointing him an attorney. The court disagreed, stating that civil contempt sanctions do not provide the same protections as criminal contempt sanctions do. In addition, the family court was prepared to release Turner if he paid the money due at any time prior to the conclusion of his sentence; therefore, the Supreme Court of South Carolina found Turner was not entitled as a matter of constitutional right to appointed counsel, because the family court had not imposed a fixed or unconditional term of imprisonment. By the time the Supreme Court of South Carolina published its opinion in 2010, Turner had already served his one-year sentence.

Implications

Turner argues that a defendant needs counsel in order to present an effective defense in a civil contempt proceeding and to avoid erroneous incarceration. The Constitution Project agrees, noting that individuals in civil cases are often confronted with a more difficult burden of proof than defendants in criminal cases face. The Constitution Project explains that, in criminal cases, the government has the burden of establishing the commission of a crime, whereas in civil cases, the burden is on the defendant to prove that he or she is incapable of paying for legal representation.

Rogers, the respondent, counters that civil contempt cases are relatively simple

and there is little risk of an incorrect outcome; therefore, legal representation is unnecessary. In an amicus brief, nine states argue that, even if attorneys are present at trial, there is always a risk that a court may erroneously conclude that an individual is able to abide by a court order. A group of senators argue that guaranteeing counsel in civil contempt cases actually gives the noncustodial parent an unfair advantage over the custodial parent, who is not entitled to an attorney and often does not have one.

The United States notes that the government has an interest in avoiding the imprisonment of parents who are held in civil contempt, because incarcerated offenders are unlikely to have the financial resources needed to pay child support. Thus, the American Bar Association contends that attorneys may prove effective in advocating for reduced sanctions, allowing their clients to pay a portion of what they owe and avoid the costs of incarceration.

Rogers counters that actual incarceration rarely occurs because the mere threat of detention often results in payment of child support that is overdue. The senators warn that imposing counsel requirements might reduce the effectiveness of this technique and may actually discourage defendants from paying child support because defendants know that the court will provide them with an attorney if they are ever sued for child support.

The ABA argues that providing counsel supports a more efficient judicial system and asserts that, when individuals proceed without counsel, judges are often required to spend a great deal of time trying to understand the submissions, thereby slowing the progress of all cases on their dockets. In addition, the involvement of attorneys, says the ABA, may help reduce repeat offenses, court appearances, and postponements resulting from defendants' lack of preparation for proceedings.

The respondent contends that providing the right to counsel in this situation would not just lead to a greater financial burden on the states but also result in the courts being swarmed with litigants demanding their right to counsel in other types of civil cases

involving a risk of detention. The states agree, warning that, by requiring courts to provide attorneys in all cases involving the possibility of incarceration, the Court would open the door to similar arguments in habeas corpus cases. Moreover, the states argue that a conclusion that the Sixth Amendment applies in this context would make defendants entitled not only to attorneys but also to jury trials and additional evidentiary safeguards, thereby imposing even greater costs upon the states.

Legal Arguments

The Sixth Amendment provides that “in all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense.” This provision entitles criminal defendants to the right to counsel. The Sixth Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment. The Supreme Court maintains that the Due Process Clause requires not only that state felony criminal defendants be assured the right to counsel but also that, in certain civil matters, defendants be given the same right.

Due Process: Right to Counsel

Turner argues that indigent defendants facing incarceration through civil contempt hearings should have the right to appointed counsel under the Due Process Clause of the Fourteenth Amendment. Turner claims that the Court’s Sixth Amendment cases involving the right to counsel focus on the defendant’s need for the guidance that counsel provides and the seriousness of the stakes involved. Turner asserts that, in *In re Gault*, the U.S. Supreme Court determined that a juvenile is entitled to the right to counsel in civil juvenile delinquency hearings that may result in institutionalization. The Court reasoned the juvenile had a right to counsel, because the hearings could result in incarceration comparable to sentences handed down in felony prosecutions and because the juvenile requires counsel to navigate the law and present an adequate defense. Similarly, Turner asserts that, in *Vitek v. Jones*, the Court determined that prisoners have a right to counsel in civil commitment proceedings because commitment results

in a substantial restriction of liberties, and it was likely that defendants would require counsel to exercise and protect their rights adequately. Turner argues that these cases stand for the proposition that a defendant in a civil proceeding who faces incarceration has the right to counsel.

Rogers claims that Turner’s proposition is incorrect, because the due process does not create a presumptive right to counsel in civil cases that can lead to the defendant’s incarceration. Rogers explains that, in *Gagnon v. Scarpelli*, the Court held that minors do not have the right to counsel when facing commitment to a mental hospital. The Court found a “presumption that there is no right to appointed counsel in the absence of at least a potential deprivation of physical liberty.” Thus, Rogers asserts that potential incarceration is not in itself sufficient to create an exception to the general rule that defendants in civil cases do not have a right to counsel.

Rogers further argues that due process does not require the court to provide counsel to a defendant in a civil contempt hearing for failure to pay child support. To prove a complete defense to contempt, the defendant need only show that he or she cannot pay by bringing in tax forms or letters from an employer or a doctor. Rogers claims that defendants do not need counsel because their civil cases have relaxed procedural and evidentiary rules, and technical issues involving the statute of limitations or *res judicata* rarely arise. Rogers asserts that, if the defendant in a child support proceeding did have a right to counsel, then the proceedings would become unbalanced: the plaintiff who is seeking child support payments would not have a corresponding right to counsel and probably could not afford to hire a private attorney.

Jurisdiction

The petitioner argues that the U.S. Supreme Court has jurisdiction to decide the case. The Supreme Court generally has jurisdiction to review final decisions made by the highest state courts related to actual cases or controversies. According to Turner, the Court does not have the authority to hear cases that are moot, and a case is moot when

“the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.” *FEC v. Wisconsin Right to Life Inc.* provides an exception to this rule where “(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.” Turner asserts that his case fits under the first exception because civil contempt orders are short in duration. Moreover, because South Carolina requires the family court to initiate contempt proceedings when any child support account becomes past due, Turner claims it is virtually certain that he will face another contempt hearing.

On the other hand, the respondent asserts that the Supreme Court does not have jurisdiction because the case is moot. Rogers argues that an appeal usually is moot once the defendant has served his or her sentence, and Turner’s sentence ended two years before his case was brought to the U.S. Supreme Court. Rogers argues that this appeal also does not fit the exception to the case or controversy requirement. She notes that any defendant in a civil contempt case may seek a stay postponing imprisonment until the case is appealed, thereby preserving the controversy through the appeals process. Because Turner did not seek a stay, Rogers argues that the case became moot upon the completion of Turner’s sentence. Rogers also contends that the possibility that Turner could face another contempt hearing is a matter of pure speculation.

Conclusion

The Supreme Court’s decision in this case will determine whether indigent individuals facing civil contempt sanctions are entitled to court-appointed counsel. If the Court decides that individuals are entitled to representation in this situation, noncustodial parents might have a better opportunity to defend themselves against an alleged inability to comply with a court order. However, affirming an individual’s right to counsel might mean that courts should provide similar safeguards in other civil contexts

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in which a person's liberty rights are at stake, thereby increasing costs to the states. Full text is available at topics.law.cornell.edu/supct/cert/10-10. **TFL**

Prepared by Melissa Koven and Sarah Pruett. Edited by Joanna Chen.

Ashcroft v. Al-Kidd (10-98)

Appealed from the U.S. Court of Appeals for the Ninth Circuit (Sept. 4, 2009)

Oral argument: March 2, 2011

The FBI arrested Abdullah al-Kidd as a material witness in a terrorism case. Al-Kidd sued the former U.S. attorney general, John Ashcroft, alleging that he used the material witness statute, 18 U.S.C. § 3144, as a pretext to hold and investigate al-Kidd as a terrorism suspect in violation of his Fourth Amendment rights. Ashcroft asserts absolute immunity, claiming that the use of a material arrest warrant constituted a prosecutorial function. He also claims qualified immunity, on the grounds that there was no established constitutional violation for using a material arrest warrant at the time of the arrest. Al-Kidd contends that Ashcroft is not entitled to either form of immunity because the arrest had an investigative function, and no reasonable official could believe that a material witness warrant would authorize the arrest of a suspect without any intent to use the suspect as a witness. Full text is available at topics.law.cornell.edu/supct/cert/10-98. **TFL**

Prepared by Kelly Halford and Eric Schulman. Edited by Catherine Sub.

Board of Trustees of Leland Stanford Junior University v. Roche Molecular Systems Inc. (09-1159)

Appealed from the U.S. Court of Appeals for the Federal Circuit (Sept. 30, 2009)

Oral argument: Feb. 28, 2011

In the late 1980s, Dr. Mark Holodniy, a researcher at Stanford University, conducted part of his research at Cetus Corporation, a private biotechnology company. Holodniy's work, which was partially funded by the government,

resulted in an improved method for testing the effectiveness of HIV treatments. Over the next few years, Roche Molecular Systems, which owned Cetus, incorporated Holodniy's method into its publicly sold HIV testing kits. Simultaneously, Stanford began the process of patenting the invention under the Bayh-Dole Act. In 2005, Stanford sued Roche for patent infringement, arguing that the Bayh-Dole Act gave Stanford University the exclusive first right to acquire ownership of Holodniy's invention. The district court ruled for Stanford, but the Federal Circuit reversed, holding that an earlier agreement between Holodniy and Cetus trumped Stanford University's ownership rights. Now, the Supreme Court must decide whether the Bayh-Dole Act prevents individual inventors from assigning to third parties their ownership rights in federally funded inventions. Full text is available at topics.law.cornell.edu/supct/cert/09-1159. **TFL**

Prepared by Colin O'Regan and Edan Shertzer. Edited by Kate Hajjar.

Bond v. United States (09-1227)

Appealed from the U.S. Court of Appeals for Third Circuit (Sept. 17, 2009)

Oral argument: Feb. 22, 2011

Carol Anne Bond spread chemicals around the home of Myrlinda Haynes to seek revenge for Haynes' impregnation by Bond's husband. Bond was charged with several crimes, including use of a chemical weapon under 18 U.S.C. § 229(a)(1), a statute enacted by Congress under the Chemical Weapons Convention of 1993. Bond appealed to the Third Circuit Court of Appeals on several grounds, including a claim that § 229(a)(1) violates the Tenth Amendment because the police power to prosecute criminals is a power reserved to the states. The Third Circuit found that, as a private party attempting to claim a violation of state sovereignty under the Tenth Amendment, Bond lacked standing, and Bond now appeals the court's decision. In addition to resolving the question on standing, the decision may also have an impact on the scope of Congress' authority to enact statutes implement-

ing obligations imposed by international treaties. Full text is available at topics.law.cornell.edu/supct/cert/09-1227. **TFL**

Prepared by Sara Myers and John Sun. Edited by Eric Johnson.

Bullcoming v. New Mexico (09-10876)[AU: pls verify number]

Appealed from the Supreme Court of New Mexico (Feb. 12, 2010)

Oral argument: March 2, 2011

Following an arrest for driving while under the influence, Donald Bullcoming's blood was tested at the New Mexico Department of Health to determine his blood alcohol content. At trial, the laboratory's report was admitted into evidence, even though the analyst who performed the test was not a witness. Instead, another analyst from the Department of Health testified as to the laboratory's procedures and the machinery used to conduct the blood alcohol content. On appeal, Bullcoming argues that the information in the report was testimonial and, because the actual analyst was not a witness subject to cross-examination, the defendant's Sixth Amendment right to confront his accuser as violated. New Mexico contends that the report is not testimonial because the analyst who performed the test merely transcribed raw data and, even if it is testimonial, Bullcoming's confrontation rights were satisfied by the opportunity to retest the sample and cross-examine another analyst. Full text is available at topics.law.cornell.edu/supct/cert/09-10876. **TFL**

Prepared by Jacqueline Bendert and Rachel Sparks Bradley. Edited by Sarah Chon.

Camreta v. Greene (09-1454); Alford v. Greene (09-1478) (consolidated)

Appealed from the U.S. Court of Appeals for the Ninth Circuit (Oct. 12, 2010)

Oral argument: March 1, 2011

When the Oregon Department of Human Services received a report

of alleged abuse against a nine-year-old child, a caseworker and a police officer decided to interview the child at school, without parental consent or a warrant. After the charges against the child's father, Mr. Greene, were dropped, the child's mother, Mrs. Greene, sued the caseworker and officer for violating her daughter's Fourth Amendment right against unreasonable search or seizure. Mrs. Greene argues that probable cause is a necessary prerequisite to interviewing children about their alleged sexual abuse because the interviews may cause irreparable harm to the children. The caseworker and the police officer argue that reasonableness is the proper standard because it would be difficult to obtain probable cause when the child is often the only witness to the abuse. Full text is available at topics.law.cornell.edu/supct/cert/09-1478. **TFL**

Prepared by Sarah Pruett and Melissa Koven. Edited by Eric Johnson.

Freeman v. United States (09-10245)

Appealed from the U.S. Court of Appeals for the Sixth Circuit (Nov. 20, 2009)
Oral argument: Feb. 22, 2011

William Freeman was indicted on multiple charges, including the possession of crack cocaine. Freeman pleaded guilty and received a 106-month sentence under a plea agreement. Following Freeman's sentencing, the U.S. Sentencing Commission amended the Sentencing Guidelines, reducing the sentencing range for crack cocaine possession to eliminate disparities between crack cocaine and powder cocaine offenses. Under 18 U.S.C. § 3582(c)(2), a court may alter a sentence after its imposition if the Sentencing Commission lowers the sentencing range. The Sixth Circuit Court of Appeals rejected Freeman's request for a sentence reduction because the sentence was imposed under a plea agreement and therefore was not calculated under the Sentencing Guidelines. The Supreme Court granted certiorari to determine whether an individual whose sentence is imposed under a plea agreement may seek a sentence reduction following amendments to

the Sentencing Guidelines. Full text is available at topics.law.cornell.edu/supct/cert/09-10245. **TFL**

Prepared by Kristen Barnes and Jessica Meneses. Edited by Sarah Chon.

Global-Tech Appliances Inc. v. SEB S.A. (10-6)

Appealed from the U.S. Court of Appeals for the Federal Circuit (Feb. 5, 2010)
Oral argument: Feb. 23, 2011

SEB S.A. owns a patent for a deep fryer featuring an inexpensive insulated plastic outer shell. In 1997, Global-Tech Appliances Inc. developed and manufactured a deep fryer that copied SEB's deep fryer. SEB sued Global-Tech for patent infringement, and the jury found Global-Tech liable for direct and active inducement of patent infringement. Global-Tech appealed to the Court of Appeals for the Federal Circuit, which affirmed the decision, finding that Global-Tech acted with deliberate indifference to the risk of infringing SEB's patent. Global-Tech appealed, arguing that the Federal Circuit applied the wrong standard for the mental state element of actively inducing patent infringement under 35 U.S.C. § 271(b). Global-Tech asserts that the proper standard is "purposeful, culpable expression and conduct to encourage an infringement." On the other hand, SEB argues that a patent infringer does not need to have actual knowledge of a patent to be liable for actively inducing patent infringement. Full text is available at topics.law.cornell.edu/supct/cert/10-6. **TFL**

Prepared by Natanya DeWeese and James Rumpf. Edited by Joanna Chen.

Schindler Elevator Corp. v. United States, ex rel. Daniel Kirk (10-188)

Appealed from the U.S. Court of Appeals for the Second Circuit (April 6, 2010)
Oral argument: March 1, 2011

Daniel Kirk filed a qui tam suit against Schindler Elevator Corporation, alleging that Schindler violated the False Claims Act (FCA). Section 3730(e) (4) of the FCA expressly states that federal courts do not have jurisdiction

over claims based on "public disclosure of ... administrative ... report[s] ... or investigation[s]." Kirk's FCA claim used information requested from the Department of Labor under the Freedom of Information Act (FOIA). The district court dismissed the case, holding that information obtained through an FOIA request constitutes a "report" or "investigation" under the FCA, but the U.S. Court of Appeals for the Second Circuit reversed the district court's decision. Schindler now appeals, claiming that FOIA responses, by virtue of being produced by federal agencies, are "reports" or "investigations" and therefore fall under the FCA public disclosure bar. Full text is available at topics.law.cornell.edu/supct/cert/10-188. **TFL**

Prepared by James McHale and Alexander Malaboff. Edited by Joanna Chen.

United States v. DePierre (09-1533)

Appealed from the U.S. Court of Appeals for the First Circuit (March 17, 2010)
Oral argument: Feb. 28, 2011

The Anti-Drug Abuse Act of 1986 (ADAA) imposes a 10-year mandatory minimum prison sentence for offenses involving "50 grams or more of a substance ... which contains a cocaine base." Frantz DePierre was sentenced to 10 years in prison for distributing 50 grams or more of a substance that has a "cocaine base." The appeals court affirmed the sentence, holding that the term "cocaine base" covers all base forms of cocaine, including but not limited to, crack. DePierre argues that, in light of the purpose and language of the statute, "cocaine base" applies only to crack cocaine. The United States claims that interpreting the ADAA to include all chemical base forms of cocaine is consistent with the ADAA as a whole. The Supreme Court's decision in this case will resolve a circuit split by establishing the scope of "cocaine base" and will ultimately determine the mandatory minimum sentence lengths for offenses involving non-crack cocaine. Full text is available at topics.law.cornell.edu/supct/cert/09-1533. **TFL**

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Prepared by Justin Haddock and Omair Khan. Edited by Christopher Maier.

United States v. Tinklenberg (09-1498)

Appealed from the U.S. Court of Appeals for the Sixth Circuit (Sept. 3, 2009)

Oral argument: Feb. 22, 2011

The United States indicted Jason Tinklenberg for illegal possession of a handgun and materials used in the manufacture of methamphetamine. On the last business day before trial, Tinklenberg filed a motion to dismiss the indictment because of a violation of the Speedy Trial Act. The Speedy Trial Act requires certain federal criminal trials to begin within 70 days of the defendant's first appearance before the court, unless certain "delays," including the filing of pretrial motions, occur. The government argues that two of its pretrial motions qualify as excludable delays. Tinklenberg argues that, because these pretrial motions did not result in a postponement of the trial date, the Speedy Trial Act does not exclude them from the 70-day count. The Supreme Court's decision will settle which pretrial motions are excludable from the Speedy Trial Act's 70-day count and could affect the trial strategy of prosecutors and criminal defendants. Full text is available at topics.law.cornell.edu/supct/cert/09-1498. **TFL**

Prepared by So jung Choo and L. Sheldon Clark. Edited by Kate Hajjar.

CSX Transportation v. McBride (10-235)

Appealed from the U.S. Court of Appeals for the Seventh Circuit (March 16, 2010)

Oral argument: March 28, 2011

Robert McBride, a railroad engineer for CSX Transportation Inc., sued CSX under the Federal Employers' Liability Act (FELA), claiming that CSX was responsible for a hand injury that McBride suffered while operating the brakes of a train. In its appeal of the jury verdict in favor of McBride, CSX alleges that proximate causation is

required for recovery under the FELA. McBride contends that proximate causation is not the proper standard of causation, based on recent court rulings. CSX also argues that public policy supports using the proximate cause standard, whereas McBride argues that requiring proximate causation actually discourages employers from maintaining safe workplaces. The Supreme Court's ruling will elucidate the proper standard of causation required under the FELA. Full text is available at topics.law.cornell.edu/supct/cert/10-235. **TFL**

Prepared by So jung Choo and Eli Kirschner. Edited by Sarah Chon.

Davis v. United States (09-11328)

Appealed from the U.S. Court of Appeals for the Eleventh Circuit (March 11, 2010)

Oral argument: March 21, 2010

Officer Curtis Miller arrested Willie Davis after a routine traffic stop. Incidental to the arrest, Officer Miller searched Davis' vehicle and discovered a gun. Davis was subsequently charged with being a convicted felon in possession of a firearm. At trial, Davis filed a motion to suppress the evidence about the gun, but the motion was denied. While Davis' appeal was pending, the Supreme Court handed down its decision in *Arizona v. Gant*, which held that searches like the one conducted in Davis' case violate the Fourth Amendment. Davis argued on appeal that the retroactive application of *Gant* to his case should result in exclusion of the evidence. The Eleventh Circuit Court of Appeals ruled against Davis, who now appeals on the same grounds. The United States maintains that the evidence of the gun should not be suppressed because Officer Miller, in objectively reasonable good faith, believed his search was proper when he conducted it. Full text is available at topics.law.cornell.edu/supct/cert/09-11328. **TFL**

Prepared by Sara Myers and John Sun. Edited by Joanna Chen.

Duryea v. Guarnieri (09-1476)

Appealed from the U.S. Court of Appeals for the Third Circuit (Feb. 4, 2010)

Oral argument: March 22, 2011

In 2003, the borough of Duryea, Pa., fired its police chief, Charles J. Guarnieri Jr. Guarnieri filed a grievance, which led to arbitration and his eventual reinstatement. When Guarnieri returned to his position, Duryea issued a number of directives limiting the tasks he could do on the job. Guarnieri filed a second grievance, which led to modification of the directives. Subsequently, Guarnieri sued Duryea, alleging that the directives were issued in retaliation for his filing the grievance in 2002 and therefore violated his First Amendment right to petition. After a jury found for Guarnieri, Duryea appealed to the Third Circuit, which affirmed the jury's verdict. The Supreme Court granted certiorari to determine whether public employees may sue their employers for retaliation upon filing grievances based on private matters rather than issues of public concern. Full text is available at topics.law.cornell.edu/supct/cert/09-1476. **TFL**

Prepared by Kristen Barnes and Jessica Meneses. Edited by Sarah Chon.

Fowler v. United States (10-5443)

Appealed from the U.S. Court of Appeals for the Eleventh Circuit (April 14, 2010)

Oral argument: Mar. 29, 2011

Charles Fowler murdered a local police officer and was convicted under 18 U.S.C. § 1512(a)(1)(C), which makes it a federal crime to murder a witness to a federal crime with the intent of preventing that witness from communicating with federal law enforcement officials. Fowler challenged his conviction, arguing that the government did not show that the officer he had murdered was reasonably likely to communicate with federal authorities, had he not been killed. Fowler asserts that not requiring proof of a reasonable likelihood of such communication is inconsistent with the

statutory language and would disrupt the balance between state and federal criminal jurisdiction. The United States responds that requiring such a standard would undermine the statute's purpose of maintaining the integrity of the federal justice system. Full text is available at topics.law.cornell.edu/supct/cert/10-5443. **TFL**

Prepared by Teresa Lewi and Benjamin Rhode. Edited by Eric Johnson.

Fox v. Vice (10-114)

Appealed from the U.S. Court of Appeals for the Fifth Circuit (Jan. 19, 2010)

Oral argument: March 22, 2011

In 2005, Ricky D. Fox ran for police chief of Vinton, La., the respondent. During the campaign, Billy Ray Vice, the incumbent police chief, attempted to blackmail Fox and damage his public image. Fox won the election but sued Vice and the town of Vinton for attempting to derail his campaign. Among Fox's claims was an allegation that his federal civil rights had been violated. Following discovery, Vice and the town moved for summary judgment on the federal claim, which Fox withdrew; however, he continued to pursue his state-based tort claims. The defendants then moved to recover the attorneys' fees they had paid under 42 U.S.C. § 1988, arguing that Fox's federal claim was frivolous. The district court granted the defendants' motion, and the Fifth Circuit affirmed the decision on appeal. Fox argues that, in a case with factually intertwined claims, a defendant must prevail over an entire lawsuit in order to receive attorneys' fees. Vice and the town of Vinton, however, claim that nothing in 42 U.S.C. § 1988 prevents defendants from recovering attorneys' fees for individual frivolous claims. Full text is available at topics.law.cornell.edu/supct/cert/10-114. **TFL**

Prepared by Colin O'Regan and Edan Shertzer. Edited by Catherine Sub.

J.D.B. v. North Carolina (09-11121)

Appealed from the Supreme Court of North Carolina (Dec. 11, 2009)

Oral argument: March 23, 2011

J.D.B. was suspected of being involved in two break-ins when he was 13 years old. The police questioned him while he was at school without giving him a *Miranda* warning, and J.D.B. made incriminating statements. At his trial, J.D.B. moved to suppress those statements, arguing that he had been subjected to custodial interrogation. Specifically, J.D.B. argued that a court should take account of his age when determining whether he was in custody. The North Carolina trial court and appellate courts held that J.D.B. was not in custody for purposes of *Miranda* and allowed the statements into evidence. J.D.B. appealed to the Supreme Court, arguing that age should be a factor in determining whether he was in custody for *Miranda* purposes. North Carolina contends that age is a subjective factor and should not be part of the objective custody inquiry. Full text is available at topics.law.cornell.edu/supct/cert/09-11121. **TFL**

Prepared by Kelly Halford and Eric Schulman. Edited by Kate Hajjar.

Pliva Inc. v. Mensing (09-993); Actavis Elizabeth, LLC v. Mensing (09-1039); Actavis Inc. v. Demahy (09-1501) (consolidated)

Appealed from the U.S. Court of Appeals for the Eighth Circuit (Nov. 27, 2009); U.S. Court of Appeals for the Fifth Circuit (Jan. 8, 2010)

Oral argument: March 30, 2011

Doctors prescribed both Gladys Mensing and Julie Demahy the drug Reglan®. Each woman filled her prescription with the generic equivalent of the name brand drug. After long-term use of this drug, both Mensing and Demahy developed severe neurologic disorders. The women separately sued Pliva and Actavis, the manufacturers of the generic drug, under state law's "failure-to-warn" claims, alleging that the

drug's warning label had failed to warn them of the risks adequately. Pliva and Actavis argue that the Federal Food, Drug, and Cosmetic Act as well as the Food and Drug Administration's regulations pre-empt Mensing and Demahy's state law claims because it was impossible for the companies to comply with both federal law and state law. In deciding this case, the Supreme Court will weigh the costs of an additional burden on both generic drug manufacturers and the public against incentivizing manufacturers to create the safest drugs with the most complete warnings. Full text is available at topics.law.cornell.edu/supct/cert/09-993. **TFL**

Prepared by Jacqueline Bendert and Rachel Sparks Bradley. Edited by Sarah Chon.

Talk America v. Michigan Bell Telephone Co. (10-313); Isioгу v. Michigan Bell Telephone Co. (10-329) (consolidated)

Appealed from the U.S. Court of Appeals for the Sixth Circuit (Feb. 23, 2010)

Oral argument: March 30, 2011

The Telecommunications Act allows regulators to require that former telephone monopolies provide their competitors with access to incumbent telephone companies' local networks at a regulated rate. The Sixth Circuit, rejecting an argument filed by the Federal Communications Commission (FCC) in its amicus brief, determined that incumbent companies cannot be required to provide access to "entrance facilities"—that is, the cables that connect two local networks—at a regulated rate. AT&T, an incumbent telephone company, argues that competitors can build their own entrance facilities and therefore former monopolies do not need to provide access at a regulated rate. By contrast, various competitors maintain that, under the Telecommunications Act, AT&T is required to provide discounted access to its local infrastructure, and that access necessarily includes entrance facilities. The competitors also assert that the Sixth Circuit improperly over-

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ruled the FCC's interpretation of the act. The Supreme Court's decision in this case will affect the relationship between former monopolies and newer competitors in the telecommunications industry and may also have broader implications for the legal weight of agencies' amicus briefs. Full text is available at topics.law.cornell.edu/supct/cert/10-313. **TFL**

Prepared by L. Sheldon Clark and Omair Khan. Edited by Catherine Sub.

Tolentino v. New York (09-11556)

Appealed from the New York State Court of Appeals (March 30, 2010)

Oral argument: March 21, 2011

Following an automobile stop, New York police officers ran Jose Tolentino's driver's license through the Department of Motor Vehicles' database and discovered that his driver's license had been suspended and that at least 10 suspensions were for failure to answer a summons or to pay a fine. Tolentino was subsequently indicted for aggravated unlicensed operation of a motor vehicle. On appeal, Tolentino argues his DMV records must be suppressed because

the information provided was the fruit of an unlawful stop. New York argues that, even if the stop was unlawful, the exclusionary rule has never been applied to information the government already possessed, because such an application would be unreasonable. The Supreme Court will have to balance the cost of suppressing highly probative evidence against the potential benefit of discouraging police from conducting random automobile stops without probable cause. Full text is available at topics.law.cornell.edu/supct/cert/09-11556. **TFL**

Prepared by Priscilla Fasoro and Justin Haddock. Edited by Eric Johnson.

Wal-Mart Stores Inc. v. Betty Dukes (10-277)

Appealed from the U.S. Court of Appeals for the Ninth Circuit (April 26, 2010)

Oral argument: March 29, 2011

Betty Dukes and other women brought a Title VII employment discrimination suit against Wal-Mart Stores. The district court certified the class action, and the appeals court affirmed. Wal-Mart now appeals to the Supreme

Court, arguing that the class certification does not meet the requirements of Federal Rule of Civil Procedure 23(a). Wal-Mart also claims that class certification was improper under Federal Rule of Civil Procedure 23(b)(2), because the employees primarily seek monetary compensation in the form of back pay. However, the employees assert that they meet the requirements under Rule 23(a), because the class members share the common issue of discriminatory treatment under Wal-Mart policies. The employees further argue that class actions certified under Rule 23(b)(2) are not precluded from seeking monetary relief and deny that back pay is a form of monetary compensation. The Supreme Court's decision will affect the evidence required to bring an employment discrimination class action suit, the relief available to plaintiffs in a class action, and employers' willingness to settle cases in order to avoid liability in class actions. Full text is available at topics.law.cornell.edu/supct/cert/10-277. **TFL**

Prepared by Natanya DeWeese and James Rumpf. Edited by Joanna Chen.

⁴⁶Permanent Rep. of Switzerland to the United Nations, Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict, in letter dated Oct. 2, 2008, from the Permanent Rep. of Switzerland to the United Nations addressed to the Secretary-General, UN Doc. A/63/467-S/2008/636 (Oct. 6, 2008) (hereinafter cited as Montreux Document). There are 36 participating states, including the United States; *see also*, Parsons, *supra* note 17, at 172–75.

⁴⁷Montreux Document, *supra* note 46; Parsons, *supra* note 17, at 172–73.

⁴⁸International Code of Conduct for Private Security Companies and Private Military Companies (Nov. 9, 2010), available at www.icoc-psp.org/.

⁴⁹*See* Carolin Liss, *Privatizing the Fight Against Somali Pirates*, 1–18 (Murdoch University Asia Research Centre, Working Paper No. 152, 2008); Parsons, *supra* note 17, at 169, 176–77.

⁵⁰International Chamber of Shipping Press Release, *Shipping Industry Changes Stance on Armed Guards*, (Feb. 15, 2011).

⁵¹*Id.*

⁵²*Id.*; *see also* Kraska and Wilson, *supra* note 13, at 262 (explaining that many believe protection of commercial vessels is the responsibility of States); Liss, *supra* note 49, at 9.

⁵³Ploch, *supra* note 2, at 14; Parsons, *supra* note 17, at 176.

⁵⁴*See generally* Ploch, *supra* note 2; Liss, *supra* note 49; Parsons, *supra* note 17.

⁵⁵*Pirates Target the Maersk Alabama Again*, CNN World (Mar. 9, 2011), available at www.cnn.com/2011/WORLD/africa/03/09/somalia.pirates.maersk/index.html.

⁵⁶Parsons, *supra* note 17, at 174, 177; James Kraska and Brian Wilson, *Piracy Repression, Partnering and the Law*, 40 J. MAR. L. & COM. 43, 47–48 (2009).

⁵⁷Ploch, *supra* note 2, at 35–36; Kraska & Wilson, *supra* note 13, at 262–63; *Id.* at 177–78.

⁵⁸Kraska and Wilson, *supra* note 13, at 263.

⁵⁹*Id.* at 262–63; Parsons, *supra* note 17, at 169.

⁶⁰Staff of House Committee on Transportation and Infrastructure, 112th Cong., U.S. Response to Piracy 11 (Comm. Print 2011).

⁶¹Kraska and Wilson, *supra* note 13, at 263.

The Butterfly Collector

By Fred McGavran

Black Lawrence Press, Brooklyn, NY, 2009. 191 pages, \$16.00.

REVIEWED BY JOANN BACA

Sometimes lawyers *really* can write. Of course, most lawyers are adept at crafting pleadings, briefs, memoranda of law, contracts, wills, and the plethora of other legal documents that keep the wheels of civil and criminal justice spinning. Few, however, transform themselves from writers of the arcane, unadorned language of the law into authors of fiction that both frightens and stirs as well as Fred McGavran's *The Butterfly Collector*.

The Butterfly Collector is a collection of short fiction previously published in a variety of printed and online literary magazines. It offers readers 15 absorbing tales about characters as varied as a real estate agent, a beautician, an Episcopal priest, and, yes, a lawyer or two. Some of the stories take place almost entirely within a protagonist's dementia-fractured mind, some qualify as horror stories, some are ruminations on self-deception, and others almost defy description as flights of rare or quirky fantasy. The stories in this collection are unified, however, by writing of often poignant lyricism.

McGavran has a keen observer's eye for the foibles and dilemmas faced by those who have trudged or danced through unexamined lives, only to bump up against something that finally causes them to blink. Yet the stories do not devolve into mere reflections of middle-age ennui. Rather, they poke and discomfit the protagonists—and thereby the reader—with wry wit, piercing insight, and whimsical observation.

In the lives-of-quiet-desperation category, we meet "The Historian," a man so involved in his research and writings about ancient Rome that he misses some important hints about his wife's welfare. In one of the most deeply moving stories, "The Beautician,"

McGavran offers a seemingly simple tale about the kindly Cookie, who gets a call to do hair and makeup for a patient in a hospital's intensive care unit. As the tale unfolds, we learn the essential truth of Cookie's observation that "[w]hat we cover up is so much more important than what other people see." In "The Forgiveness of Edwin Watkins," a story about a judge whose heart literally and figuratively is the subject of the plot, McGavran almost offhandedly provides this nugget of an observation that is dead-on: "No trumpeter for the mighty or diagnostician for the dying is watched as closely as a federal judge's clerk on sentencing day." Even at his most macabre, as in "The Deer," McGavran can make the reader smile, if uncomfortably, with droll commentary such as, "Hunting accidents are difficult to explain when the intended prey kills a bystander."

McGavran's easy-to-digest writing style is disarming, yet deceptively so, for he can turn or twist a phrase with wicked delight. In "A Gracious Voice," McGavran displays his ability for effective character evocation with a wit that draws a drop of blood: "As a senior partner, he had reached the stage where he could criticize another lawyer's case, but no longer put together a good one himself." In "The Annunciation of Charles Spears," McGavran succinctly captures the eponymous character in one sentence: "Stooped, graying, Charles Spears had that tired, strained, tormented look that Episcopalians value in their clergy."

Not every story hits the mark. There are occasional misses when a story, such as "A Gracious Voice," gets tangled in dense, apparently unnecessary plot convolutions. Paradoxically, it is the few stories that focus on the legal profession that suffer the most from this sin. Yet this should not dissuade anyone from reading *The Butterfly Collector*, for even the stories that do not take flight suffer only in comparison to other stories in the collection that simply soar.

McGavran's discerning portraits might all be viewed as metaphors for what falls away and what remains or

what cannot be ignored and what we fear to see. He was an attorney and member of the Federal Bar Association for more than three decades, is a past president of the Cincinnati Chapter, and served on the association's Executive Committee for several years. One wonders, however, if he also moonlighted as an undercover psychologist, took a turn as Oberon's Puck, or was visited by the spirit of Edgar Allan Poe, for the sublime substance and confident style with which he crafts his short stories are an insightful amazement and an eerie delight. **TFL**

JoAnn Baca is retired from a career with the Federal Maritime Commission. Her husband, Laurence Baca, is the immediate past president of the Federal Bar Association.

Virtual Justice: The New Laws of Online Worlds

By Greg Lastowka

Yale University Press, New Haven, CT, 2010. 196 pages, \$27.50.

REVIEWED BY HEIDI BOGHOSIAN

Rare is the book that so artfully animates, engages, and provokes the creative and legal imagination as does *Virtual Justice: The New Laws of Online Worlds*. Starting with an examination of how computer technology is creating new places for social interaction, Greg Lastowka analogizes social and legal ordering to three different kinds of castles. The massive stone Welsh Cardiff Castle, Disney World's corporate theme park fantasy Cinderella Castle, and the Dagger Isle Castle in the imaginary online world of Britannia all "serve to introduce some basic observations about power, technology, artifice, and law." This creative foray establishes the pioneering tone for an important, understated, and—simply put—quite marvelous book.

Virtual worlds are online communities through which multiple com-

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puter users interact or role-play with one another in fantasy environments. Lastowka explains that virtual worlds share features with precursor digital games, such as the 1960s' Spacewar, in which, as Lastowska explains, "each competitor controlled a spaceship. ... The players navigated the ships on a flat plane around a central sun (with simulated gravity) and attempted to destroy each other with missiles." Spacewar became extremely popular because it enabled people to compete with one another within a computer simulation. In the 1970s, a computer programmer created Colossal Cave Adventure, or ADVENT for short, which was a computer game in which the player acquired possessions and followed instructions in order to move around different places in the cave.

Virtual worlds are similar to ADVENT in that "[t]hey simulate going to new places, solving problems, acquiring treasures, and trying to stay alive." Users appear as avatars, which are computer-generated graphic representations of a person or creature, or, as Lastowka calls them, "digital alter egos that both embody and enable users within the simulated space." Avatars inhabit and interact with other avatars in simulated environments. Some virtual worlds imitate real life, allowing users to buy property and furnish their "homes," and some are fantasies involving non-earthlike creatures. The avatar's appearance may itself become strategic, especially in fantasy games, in which an avatar can, for example, assume a gender that is different than its owner's. Or, in World of Warcraft, which is a "massively multiplayer online role-playing game" (MMORPG), the appearance of an avatar's body lets players know whether the avatar is a friend or an enemy. As the most-subscribed MMORPG in the world, World of Warcraft has more than 12 million subscribers and more than 60 percent of the MMORPG market. As Lastowka points out, "[t]he most compelling element of virtual worlds, it turns out, is not the powerful graphic technologies they employ but the very real social interactions that occur through that technology."

In *Virtual Justice*, Lastowka explicates how real-world laws have thus far been applied to, and are adapting to, the problems that arise from virtual world interactions. Lastowka is highly competent to write on the subject. A professor at Rutgers School of Law in Camden, N.J., he speaks and writes frequently on the subject of Internet law, and his research emphasizes the intersection of intellectual property and new technology. He served as defense co-counsel in *Intel v. Hamidi*, 71 P.3d 296 (2003), in which the Supreme Court of California declined to extend common-law claims of trespassing to the computer context, absent actual damage.

Owners of virtual games require game users to abide by terms of use agreements in order to play. Lastowka suggests that, governed by such agreements, virtual worlds have become their own jurisdictions:

What those visiting virtual worlds will find, legally, is something that resembles a new feudal order, with a separate and different set of rules governing their rights and duties. Virtual sovereigns are minting their own currencies, crafting and drawing wealth form their own societies, fine-tuning their own economies, and casting out those who dare to flaunt their decrees. All of this suggests that virtual worlds are becoming, in essence, separate jurisdictions governed by separate rules.

In the area of property rights, even though courts have acknowledged the existence of legal interests in virtual property, other issues, such as inheritance rights, are less clear. Lastowka describes how, after U.S. Marine Lance Corporal Justin Ellsworth was killed in Iraq, his parents wanted to see e-mail messages that he had written to friends at home, because he had told his father that he planned to make a scrapbook of them. However, because he had not told his father his password to his free Yahoo! e-mail account, his father had to hire a law-

yer and obtain a court order to obtain the e-mails from Yahoo!

In explaining the relationship between virtual worlds and laws enacted to address Internet technology, Lastowka notes that the rapid growth of the Internet has led to a consensus among lawyers and lawmakers that a new and specific body of legislation is needed. He explores virtual world law in the context of jurisdiction, noting that law in general "has been closely tied to spatial territory." Given that, what remedy did Qiu Chengwei, a Legend of Mir player, have when a virtual Dragon Saber he acquired through many hours of play, with a market value in China approximating nearly \$1,000, was stolen? A friend had asked if his avatar could borrow the Dragon Saber from Qiu's avatar; after Qiu lent it to him, his friend sold it to another player for real-world money. After Chinese law enforcement refused to prosecute Qiu's friend for theft, Qiu killed his friend and then turned himself in to the authorities. Lastowka offers a policy argument for a legal recognition of virtual property: society is less violent when governments recognize and protect ownership rights to private property.

In addition to World of Warcraft and Legend of Mir, another kind of virtual world is the social world, where users do not compete to win games. In Second Life, for example, user "residents" socialize and participate in group activities and also create and trade virtual property and services. Under the Second Life terms of use agreements, users retain copyright for any content they create, and the server and clients provide simple digital-rights management functions. In the first real-world lawsuit involving virtual property, *Bragg v. Linden Research Inc.*, 487 F. Supp. 2d 593 (E.D. Penn. 2007), a dispute arose over a Second Life land purchase. Linden Lab, the company that maintains Second Life, encourages users to make money from land transactions. Linden Lab banned the user, Marc Bragg, from Second Life and canceled his account, claiming that

he had used a method, forbidden by their terms of use agreement, to purchase, at auction, thousands of dollars' worth of virtual property that was not officially listed for public sale. As a result, Bragg lost access to land he bought as well as his other virtual property, which was valued at thousands of real-world dollars. The case was ultimately settled, with the terms confidential; the judge found that the dispute was real and that the game's terms of use agreement provided no real method for dispute resolution.

In most virtual worlds, the terms of use agreements require that content generated by users is either the property of, or is subject to, the licensed use of the game owners. Unlike many other virtual worlds, content in Second Life is generated mostly by users. The owner, Linden Lab, contractually requires that users permit the game to upload content and prohibit users from posting content that infringes on the company's copyright. But, unlike most other virtual-world owners, Linden Lab does allow users to benefit financially (in both the virtual and real worlds) from their creativity within Second Life. Lastowka writes, "When virtual worlds empower users with a wide range of creative freedom and encourage them to take economic ownership in their productions, those worlds are more likely to attract lawsuits from all directions. Large scale financial stakes and uncertain rules are a dangerous mixture." In fact, a class action suit filed in 2009 by Second Life creators claims that Second Life failed to protect user-generated intellectual property after someone had duplicated a plaintiff's creations and sold them at a discounted price elsewhere.

In *Virtual Justice*, Greg Lastowka estimates that at least 100 million people interact in virtual worlds on a weekly basis. He reports that analysts predict that number will likely double or triple in the next five or 10 years. The appeal of virtual worlds, he suggests, may lie in "the inherent ambiguity present in the virtual realm, where things can be and not be all at once. If we could clearly see and weigh the risks and rewards present in virtual worlds, clarifying the legal

status of our interests in them, it might be that we would limit, for better or for worse, the sorts of pleasure they currently provide." This treasure of a book has a similar appeal in its forgoing to offer definite solutions to the legal questions raised by virtual worlds. Lastowka is not intractable in his theses, and he elicits the best in his readers by encouraging them to think critically. That the subject matter involves the terrain of the imagination is of great help as well. **TFL**

Heidi Boghosian is the executive director of the National Lawyers Guild.

Corporate Governance and the Business Life Cycle

Edited by Igor Filatotchev

Edward Elgar Publishing, Northampton, MA, 2010. 423 pages, \$210.00.

REVIEWED BY CHRISTOPHER FAILLE

Corporate governance is, by standard definition, the way in which a corporation protects the interests of its shareholders, bondholders, and other creditors. Corporate governance is both an economic and a legal issue, and is usually discussed as a matter of "agency theory." The question, in other words, is how can the managers of an enterprise best be kept loyal to their presumed task as the agents of investing principals?

"Life-cycle" theorists have a distinctive take on questions of corporate governance. They posit that a corporation develops through typical stages. In youth, it is the vehicle of an individual entrepreneur or his or her immediate family. Later, if it is successful, it acquires extensive resources and commitments, becoming too much for the founder and his kin to handle, and they are tempted to bring in professional managers, perhaps making a public offering of stock in order to cash in on their own equity in the process. Firms that have not yet gone public but that are of that scale and face the pressures that often lead to that move are referred to in the life-cycle literature as "threshold firms."

Once a corporation passes through

that threshold and becomes a public firm, the corporation may settle into a "mature" period. Over the course of this phase it will exhaust its opportunities for growth in the focal industry, perhaps diversifying or over-diversifying.

Eventually, a mature firm enters a period of decline, perhaps because of "managerial rent-seeking opportunities." This, in other words, is the time when there is the greatest likelihood that managers will prove less-than-faithful agents to their principals, and performance will suffer. A firm in this state of decline may re-invigorate itself in a limited number of ways. One of these is the public-to-private buyout—in effect, a sort of corporate rebirth, beginning the cycle anew.

The editor of this volume, Igor Filatotchev, a professor of corporate governance and strategy at Cass Business School, City University, London, is one of the leading exponents of this school of thought. Among his contributions was a seminal paper—first presented to an Academy of Management meeting in New Orleans in 2004—titled "The firm's strategic dynamics and corporate governance life-cycle." Filatotchev co-authored this article with Steve Toms, of the University of York, and Mike Wright, of Nottingham University Business School. A re-working of that paper is offered here as chapter two.

Managers and Border Guards

Those not familiar with corporate governance theory in general might here ask a perfectly apposite question: What are "rent-seeking opportunities"? The word "rent" in this context has no necessary connection with real estate. It refers to any extraction of compensation from an individual or group with control over a bottleneck in a production process, usually with the implication that the benefit extracted involves no reciprocal benefits. A corrupt border guard asking for a bribe seeks "rent" of a sort—he expects a personal advantage for allowing another individual to make a crossing that, for whatever reason, the corrupt guard is in a position to

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permit or deny.

Rent-seeking behavior by managers, then, is one aspect of the agency problem in corporate law and economics. Leaving blatantly illegal or corrupt situations aside, a manager may be swayed more by a chance to get the big corner office and other intra-organization perks than by any devotion to the interests of the investors, or the manager may be honestly incapable of distinguishing between those two motivations. For many scholars of corporate governance, the purpose of a board of directors is precisely to check the potential rent-seeking behavior of managers. This is why, as Catherine M. Daily of Ohio State University and Dan Dalton of Indiana University observe in their contribution to this volume, there is widespread agreement in the literature that the best boards are those with a high proportion of outside directors.

But is there empirical data to support that theoretical consensus? Looking at the matter as an investor, if I can find two corporations that are congruent in all other relevant respects—for example, that have similar products in the same industry, are comparable in scale of production or intellectual property, and so forth—does the fact that one of these companies has a larger percentage of outsiders on its board give me a compelling reason to invest in that company rather than in its near twin?

Unfortunately for those who like their theories both neat and corroborated, the answer is no. As Daily and Dalton write: “[T]here is little empirical evidence that a preponderance of outside board members is associated with improved corporate performance.”

Theory and Data

So what are the theorists missing? Perhaps they have been neglecting the life-cycle approach. Perhaps, specifically, the data have been skewed because corporations from distinct stages of the life cycle have been included in such empirical surveys.

One hypothesis, reconciling theory and data, might be that, during the mature phase of the life cycle of a

corporation, it is most important to have a board of directors as a check on rent-seekers, but that a corporation still in its youth, crossing the threshold, seeks out directors for quite other reasons. Perhaps, furthermore, investors in those younger corporations should be happy with more inside bias on the boards on the whole, because they benefit from those other reasons.

A corporation may seek equity participation during the entrepreneurial stage, while the chief executive officer is the founder and dominant figure within the firm. At this time, members of the board of directors serve several functions: They offer advice and counsel, they offer channels for communication between the CEO and other organizations, and they even offer legitimacy—the very creation of a board shows the business world that this firm is following what is called, in another of the papers included here, “prevailing institutionalized norms.”

Think of board members as channels of communication for a moment. When a manufacturer of aluminum widgets reaches the point where its aluminum purchases are sufficient to require that it look for bargains, it might want a board member with experience in the aluminum world. Further, investors should be happy about the fact that the widget manufacturer has an individual with industry contacts on its board. At this point, it is not necessarily of concern to investors that the new director is an “insider.” By our hypothesis, the firm is still in its entrepreneurial stage, so the aluminum industry guy almost certainly comes from the founder’s social network.

Why should investors not worry about rent-seeking at this stage? A superficial answer is that, according to the life-cycle theory, rent-seeking is the peculiar sin of professional managers—the folks who take over after the firm passes the threshold and gets into stage three. This isn’t a very good answer, though.

A better answer—one that life-cycle theorists seem to appropriate from other older theories—is that a

firm in its early stages doesn’t yet have the amount of free cash flow that makes rent-seeking an especially grievous problem. Even the corrupt border guard of the above example probably is more interested in shaking down wealthy migrants than impoverished ones.

This book is a valuable collection of much of the research inspired in recent years by the life-cycle theory. I’m certain it will find a place on many library shelves in universities with law schools or fine economics departments. **TFL**

Christopher Faille, a member of the Connecticut bar since 1982, writes on a variety of financial issues, and is the co-author, with David O’Connor, of a user-friendly guide to Basic Economic Principles (2000).

The New Jim Crow: Mass Incarceration in the Age of Colorblindness

By Michelle Alexander

The New Press, New York, NY, 2010. 304 pages, \$27.95.

BY HARVEY GEE

In *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, Michelle Alexander, a professor at the Ohio State University Moritz College of Law, offers a compelling thesis: a racial caste system exists in the United States because of harsh sentencing laws aimed at African-Americans, which lead to their mass incarceration. Although, unlike Jim Crow laws, these sentencing laws are not explicitly aimed at African-Americans, the mass incarceration of African-Americans, according to Alexander, is a systematic, racialized form of social control that is functionally similar to Jim Crow laws.

Alexander offers a frank discussion of the role of the criminal justice system in creating and perpetuating a hierarchical racial stratification scheme in the United States. Her

thesis flies in the face of the belief that African-American men are incarcerated largely because of poverty or poor choices. Alexander explains that, just as Jim Crow laws arose from the ashes of slavery, so our present criminal justice system has evolved from Jim Crow laws.

Much of *The New Jim Crow* is devoted to examples of how the criminal justice system has gone awry. Alexander reports that black men are imprisoned on drug charges at substantially higher rates than white men, despite their not using or selling illegal drugs at higher rates. This results in a significant percentage of young African-Americans in large cities having criminal records. Because of the stigma attached to these individuals, they are marginalized as a racial subcaste and become permanent second-class citizens.

Having felony records causes millions of African-Americans to face barriers in employment, housing, and education, and to be denied certain privileges of citizenship, such as voting and jury service. Alexander contends that, because of the mass incarceration of black people, the stigma of being a criminal that attaches to them is a racial stigma, whereas white criminals face a less onerous nonracial stigma. She argues that this conflation of blackness with crime, which is fostered by politicians and by propagandists for the war on drugs, perpetuates discrimination against blacks.

Moreover, the majority of people who are arrested are not serious criminals. Eighty percent of drug arrests between 1980 and 2000 were for minor nonviolent offenses.

Alexander concludes that the concept of colorblindness as public policy is flawed because it construes African-Americans and Hispanics as “raceless” people who are ill-equipped to function in society. She argues that “colorblindness prevents us from seeing the racial and structural divisions that persist in society.” Prison incarceration is still characterized in race-neutral terms, even though it is clear that racial minorities, and not whites, are being incarcerated en masse.

Unfortunately, *The New Jim Crow*, like most contemporary treatments

of criminal justice issues, treats race solely within the traditional black vs. white framework and does not study sentencing disparities among other groups. By contrast, in “Punishing the ‘Model Minority’: Asian-American Criminal Sentencing Outcomes in Federal District Courts” (published in 47 *Criminology* 1045 (2009)), Brian D. Johnson and Sara Betsinger present the first systematic investigation of disparities in the sentencing of Asian-Americans in federal courts. It shows that Asian-American offenders are punished similarly to white offenders for all offenses examined, with the exception of immigration offenses, for which Asian-Americans are punished more severely. In its 2008 Report to the Legislature, the California Administrative Office of the Courts states that Asian-Americans and whites had the lowest rates of arrest, and both groups were more likely than African-Americans and Hispanics to receive lighter sentences.

The New Jim Crow is a valuable addition to the continuing discussion of the need to reform the nation’s criminal justice system. The author supports the claim that we are not living in a “post-racial” era after the election of the first African-American President in U.S. history. Until citizens and legislatures are willing to have a serious discussion about these issues and to enact effective legislation to address the racial disparities discussed in the book, the problems, unfortunately, will persist. **TFL**

Harvey Gee is an attorney in the capital habeas unit at the Office of the Federal Public Defender for the Western District of Pennsylvania. He was formerly a deputy state public defender in Colorado. He is the author of “Asian Americans and Criminal Law and Criminal Procedure: A Missing Chapter From the Race Jurisprudence Anthology,” published in 2 Georgetown Journal of Law & Modern Critical Race Perspectives (2011).

Capital Punishment on Trial: Furman v. Georgia and the Death Penalty in Modern America

By David M. Oshinsky

University Press of Kansas, Lawrence, KS, 2010. 144 pages, \$29.95 (cloth), \$14.95 (paper).

BY HARVEY GEE

In *Capital Punishment on Trial*, history professor and Pulitzer Prize-winning author David M. Oshinsky offers a neutral treatment of the history of the death penalty in this country and the U.S. Supreme Court’s jurisprudence on capital punishment. Beginning with the first execution of a Colonist in the New World—that of Captain James Kendall of the Jamestown Colony of Virginia in 1608—Oshinsky takes the reader to the 21st century and is always sensitive to the role of race in the imposition of the death penalty, particularly in the South.

In the 1960s, the NAACP’s Legal Defense Fund hired veteran civil rights lawyer Jack Greenberg and University of Pennsylvania law professor Anthony Amsterdam to plan an anti-death penalty offensive. Oshinsky is insightful in his discussions of the behind-the-scenes litigation strategies crafted by these and other death penalty attorneys. The U.S. Supreme Court eventually addressed the constitutionality of capital punishment in two fractured opinions in *Furman v. Georgia*, 408 U.S. 238 (1972), and *Gregg v. v. Georgia*, 428 U.S. 153 (1976). In *Furman*, the Court ruled that Georgia’s and Texas’ capital punishment statutes violated the Eighth Amendment’s prohibition on cruel and unusual punishment. The decision resulted in a de facto moratorium on capital punishment throughout the nation.

States that used capital punishment objected strongly to *Furman*, and President Richard Nixon called on Congress to restore the federal death

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penalty. Oshinsky explains that, until the mid-1960s, Americans agreed for the most part with progressive notions of penology. But, after the race riots in Watts, Detroit, and Newark, public opinion swayed in support of tougher criminal laws, longer prison sentences, and a general crackdown on social disorder. Not surprisingly, Oshinsky says, 39 states enacted new death penalty laws in response to *Furman*.

Four years after *Furman*, the Court ruled in *Gregg* that state death penalty laws were constitutional if they provided for bifurcating trials between the guilt and sentencing phases, applying aggravating and mitigating factors to determine just punishment, and requiring consideration of “the particularized nature of the crime and the particularized characteristics of the individual defendant” as well as appellate review in which the court considers, among other things, whether the sentence was influenced by “passion, prejudice, or any other arbitrary factor.”

Capital Punishment on Trial concludes by examining more recent Supreme Court death-penalty cases involving minors and the mentally ill, as well as the impact of international opinion on capital punishment in the United States. Oshinsky gracefully uses the personal tales of attorneys, victims, and death row inmates to create a thoroughly researched and well-written book that will serve as a firm foundation for a clearer understanding of the development of capital punishment litigation in this country. **TFL**

Harvey Gee is an attorney in the capital habeas unit at the Office of the Federal Public Defender for the Western District of Pennsylvania. He was formerly a deputy state public defender in Colorado. He is the author of “Asian Americans and Criminal Law and Criminal Procedure: A Missing Chapter From the Race Jurisprudence Anthology,” published in 2 Georgetown Journal of Law & Modern Critical Race Perspectives (2011).

Bloodlands: Europe Between Hitler and Stalin

By Timothy Snyder

Basic Books, New York, NY, 2010. 524 pages, \$29.95.

REVIEWED BY GEORGE W. GOWEN

Although the Dachau and Bergen-Belsen concentration camps were located in Germany, the killing facilities of Auschwitz, Treblinka, and Belzec were in occupied Poland. The Europe of Timothy Snyder’s *Bloodlands* “extends from central Poland to western Russia, through Ukraine, Belarus, and the Baltic States.” Snyder writes of the millions of Jews, Poles, Ukrainians, and others whom Hitler and Stalin slaughtered in these “bloodlands.” This holocaust was of such magnitude and horror that the civilized mind can little grasp the savagery it involved.

In the preface, Snyder writes:

Mass killing in Europe is usually associated with the Holocaust, and the Holocaust with rapid industrial killing. The image is too simple and clean. ... Of the fourteen million civilians and prisoners of war killed in the bloodlands between 1933 and 1945, more than half died because they were denied food. ... The two largest mass killings after the Holocaust—Stalin’s directed famines of the early 1930s and Hitler’s starvation of Soviet prisoners of war in the early 1940s—involved this method of killing. ...

After starvation came shooting, and then gassing. In Stalin’s Great Terror of 1937–1938, nearly seven hundred thousand Soviet citizens were shot. The two hundred thousand or so Poles killed by the Germans and the Soviets during their joint occupation of Poland were shot. The more than three hundred thousand Belarusians and the comparable number of Poles

executed in German “reprisals” were shot. The Jews killed in the Holocaust were about as likely to be shot as to be gassed.

The sheer numbers of the victims can blunt our sense of the individuality of each one.

Later in the book, Snyder elaborates on this last point:

Each record of death suggests, but cannot supply, a unique life. We must be able not only to reckon the number of deaths but to reckon with each victim as an individual. The one very large number that withstands scrutiny is that of the Holocaust, with its 5.7 million Jewish dead, 5.4 million of whom were killed by the Germans. But this number, like of all the others, must be seen not as 5.7 million, which is an abstraction few of us can grasp, but as 5.7 million *times one*.

The Diary of Anne Frank and the scene in Steven Spielberg’s “Schindler’s List” of a little red-coated girl among a somber crowd shuffling toward a concentration camp brings home the individuality of each victim better than any death count can.

For some, *Bloodlands* may serve as a refresher course on the start of World War II, the beginning of the Cold War, and the pivotal role of Poland as the first and last victim of Soviet-Nazi collaboration. In August 1939, Hitler sent von Ribbentrop to Moscow to meet with Molotov. As a result, Nazi Germany and the Soviet Union signed a nonaggression pact and a secret protocol, designating their respective “spheres of influence” within Eastern Europe, including the independent states of Finland, Estonia, Latvia, Lithuania, Poland, and Romania. On Sept. 1, 1939, Germany invaded Poland from the west, and Russia invaded Poland from the east on Sept. 17. Snyder writes, “Thanks to Stalin, Hitler was able, in occupied

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Cheryl A. Krause
Tama B. Kudman
Tara A. LaClair
W. Thomas Lacy Jr.
Miriam J. Lebental
Timothy G. Lenahan
Cathleen Lockhart
Armstead M. Long
Ryan M. Lukiewski
Michael G. Mask
Jamie M. McCall
John G. McCarthy
Jonathan P. McCartney
Mark L. McConaghy
Larry S. McDevitt
Dana W. McKee
Sarah CS McLaren
Martin J. McManus
D. Douglas Metcalf
Kimberly R. Mettler
Lauren E. Moak
Armin J. Moeller Jr.
E. Scott Moise
Provino Mosca
John A. Murray
Walter Nash
Andrea Neuman
Molly A. Newburn
Hector Oliveras
Daniel M. O'Neil Jr.
Luis R. Ortiz Segura
Michael J. Palestina
Karen L. Pascale
Gregory G. Paul
Gerard G. Pecht
Jan M. Pederson
Karen A. Pelczarski
Lisa R. Petersen
Mary B. Pinkel
William H. Pohle Jr.
Cynthia L. Pollick
Anna P. Prakash
Elisabeth C. Quinn Prescott
Kevin A. Rames
Jose Ramos-Ortiz
Craig M. Rappel
William Ready

Joshua J. Rissman
Rafael A. Rivera-Rosa
Kenneth S. Robbins
Laurel L. Roberts
Antonio J. Rodriguez
Kevin D. Rooney
Meryl W. Roper
Richard L. Rosenbaum
Chrissi R. Ross-Nimmo
Rafael M. Santiago-Rosa
Alexander R. Saunders
Carl F. Schoeppel
Carl Schuster
Cathleen A. Scott
Heidi T. Sharp
Michael J. Sherwood
Ernest J. Simmons
Jacqueline Simms-Petredis
Andrew D. Sims
Woodrow B. Sneed
Joshua J. Stellmon
Bric P. Storts III
David F. Stover
Erik Strindberg
Leo J. Talikka
Lisa M. Tatum
William G. Thomas
Justin Tierney Jr.
Jon D. Uman
Kristina H. Vaquera
Valerie J. Velasco
Jordan P. Vick
Theodore Von Keller
Vanessa L. Waguespack
Barton Marshall Watson
John W. Wauson
William E. Wegner
Brian S. Westenberg
Joe D. Whitley
Lori A. Wirkus
David J. Worley
Rachel K. Zimmerman
Larry W. Zukerman
Robert J. Zutz

**Sustaining Members—November/
December**

Michael H. Abraham
Kimberly Abramson
Eric M. Acker
David P. Ackerman
Ellen N. Adler
Annette M. Ahlers
J. Robert Alexander
Neil K. Alexander
David M. Allen
Matthews P. Allen
Rand L. Allen
Sharon S. Almonrode
David H. Angeli
C. Tom Arkoosh
Thomas H. Armstrong
Susan A. Arnold
George C. Aucoin
Daryl A. Audilett
Jim D. Aycock
Barak J. Babcock
Charlotte M. Bahin
Shawn K. Baker
Kimberly A. Bald
Laura A. Balson
Henry C. Barnett Jr.
Lauren F. Bartlett
Thomas R. Barton
David W. Basham
Alex P. Basilevsky
Thomas C. Beach III
Patrick R. Beckett
Grace S. Bellomy

ROUNDUP continued on page 64

- Christopher H. Benbow
 Amanda K. Bennett
 Erik W. Berger
 Jason P. Bergeron
 Paul M. Bernhart
 Frederick S. Berretta
 Thomas H. Bienert Jr.
 William Arthur Birdwell
 F. Douglas Birdzell
 Ace J. Blackburn Jr.
 James L. Blair
 Ron T. Blewett
 Seth J. Bloom
 George F. Bloss III
 Thomas J. Bois II
 Craig J. Bolton
 Jason R. Bonnet
 Daniel I. Booker
 David W. Boone
 Jeffrey B. Bove
 Maria Wyckoff Boyce
 David D. Boyer
 Kevin C. Braley
 Shawn M. Brannagan
 Sean E. Brearcliffe
 Ralph G. Breaux
 Robert S. Brewer Jr.
 Valerie Briggs Bargas
 Michael C. Brink
 Larry A. Brisbee
 James O. Broccoletti
 Laura A. Brodeur-McGeorge
 Thomas A. Brodnik
 Michael A. Brodsky
 David L. Brown
 James A. Brown
 Larry W. Brown
 Shawn C. Brown
 Joseph M. Bruno
 Bjorn E. Brunvand
 Karen Buck
 Karen M. Buesing
 David L. Burgert
 Jody K. Burnett
 George B. Butts
 Lacrechia G. Cade
 John G. Cady
 Craig L. Caesar
 J. Philip Calabrese
 Christopher J. Campbell
 Richard P. Campbell
 Scott A. Cannon
 Robert L. Carey
 Arthur R. Carmody Jr.
 W. Pitts Carr
 John Carson
 William P. Cassidy Jr.
 Ann N. Cathcart Chaplin
 James M. Cavin
 Peter J. Cerilli
 Eric Ronald Chad
 Robert P. Charbonnet Jr.
 Charles L. Chassaingac IV
 Derlene Chavira Chavez
 Jack L. Chestnut
 Neil H. Chonin
 Peter H. Christensen
 Angelina Christina
 Andrew K. Clark
 Anthony W. Clark
 Jennie L. Clark
 Linda L. Clark
 Mark L. Clark
 Kathleen K. Clarke
 Kimberly R. Clayson
 Christopher Clifton
 Stephen G. Cochran
 Celeste R. Coco-Ewing
 Justin S. Cohen
 Mark Cohen
 Michael B. Colgan
 Brian J. Comarda
 John F. Connolly
- R. Johan Conrod Jr.
 Jarrett E. Cooper
 Catherine D. Copeland
 Douglas G. Cornwell
 John P. Corrado
 Laura A. Corsell
 Ramon Coto-Ojeda
 David A. Coulson
 Craig E. Countryman
 Emily Courteau
 Dale G. Cox
 Edward F. Cox
 David F. Crabtree
 James S. Crane
 David E. Cranston
 Frederick George Craw
 Theodore O. Creason
 Jeffrey B. Crockett
 Stephen D. Cronin
 Andree Matherne Cullens
 Mark E. Cullers
 Gaye Nell Currie
 Joanne H. Curry
 Larry N. Curtis
 William F. Dahill
 Melanie E. Damian
 Frank J. D'Amico Jr.
 Virginia D. Davidson
 Leonard A. Davis
 Ryan G. Davis
 Thomas J. Davis
 Bruce W. Day
 Randy L. Dean
 Robert J. DeBry
 John M. Degnan
 Russell A. Del Toro
 Jose L. Delgado-Cadilla
 David M. DeMaio
 Paul G. Dembling
 Zeke DeRose III
 Donna B. DeVaney
 Kevin M. Dills
 Timothy E. Dixon
 Alfred S. Donau III
 Thomas M. Dougherty
 Raymond J. Dowd
 Robert M. Duffy
 Keely E. Duke
 John A. Dunlap
 Stanwood R. Duval
 Ewell E. Eagan Jr.
 David Efron
 Robert F. Elgidely
 Michael J. Elia
 Mary Elizabeth Sherwin
 Jeffrey R. Elkin
 Ford Elsaesser
 Ruth S. Epstein
 William Estrella
 Hon. Cheryl D. Fairbanks
 Ken B. Felker
 Ryan S. Ferber
 Katherine C. Ferguson
 Ivan M. Fernandez
 Richard J. Fernandez
 Alfredo Fernandez-Marti
 H. Robert Field
 Hon. Anita Fineday
 Michael W. Fitzgerald
 Michael P. Flaherty
 Harold J. Flanagan
 Joseph Fleming
 Matthew L. Fornshell
 Darrin L. Forte
 Adam M. Foslid
 Nancy Frankel Pelletier
 Andrew Steven Friedman
 Charles G. Frohman
 W. Roger Fry
 Raymond J. Fuentes
 William A. Fuhrman
 Christopher S. Gage
 Carol A. Gart
- Molly M. Gattuso
 Derrick E. George
 Albin H. Gess
 Joseph I. Giarrusso III
 Ernest I. Gifford
 Brian Gilchrist
 Jack P. Gilchrist
 Charles C. Gill
 Marianne J. Gilmartin
 David M. Gilmore
 Ellen C. Ginsberg
 Joan K. F. Gluys
 Allison H. Goddard
 Lawrence L. Goldberg
 Martin B. Goldberg
 Michael A. Golemi
 John B. Golper
 Richard J. Gonzales
 Christopher T. Goodin
 John Gorman
 George W. Gossman
 Gaye Nell Currie
 Meghan H. Grabel
 John P. Graceffa
 Gary L. Granik
 Ryan M. Grant
 Melanie Gray
 Stephen M. Greecher Jr.
 Carl Green
 Justin C. Greene
 Thomas C. Greenholtz
 Aubrey J. Gregory Jr.
 Mark E. Griffin
 Rees Griffiths
 Nina G. Gross
 Christopher M. G'sell
 Anthony M. Guerino II
 Andres Guillemard-Nobl
 Rafael Guillemety Mat
 Kara M. Hadican Samuels
 Jeffrey B. Halbert
 Anthony L. Hall
 M. Kristeen Hand
 Max A. Hansen
 Randolph H. Hardock
 John P. Harlee III
 Stephen D. Hartman
 Col. Mark W. Harvey
 Benjamin J. Haskin
 Jarrett J. Haskovec
 Donald B. Haslett
 Cheri B. Hass
 Jennifer A. Hataway
 John R. Hawkins
 Jessica W. Hayes
 Sherrard L. Hayes II
 John C. Hayes IV
 David R. Hazelton
 Daniel K. Hedges
 Laura J. Hein
 Toby K. Henderson
 Peter G. Herman
 Sylvia I. Hernandez-Castrodad
 K. Erickson Herrin
 Donald Herrmann
 Katherine A. Hesse
 Kathryn N. Hibbard
 John F. Higgins
 Thomas B. High
 William J. Hill III
 M. Gabrielle Hils
 J. Forrest Hinton Jr.
 Steven A. Hirsch
 Jeffrey M. Hoffman
 Jonathan M. Hoffman
 Frank M. Holbrook
 James R. Holland II
 Daniel D. Holliday III
 Kiernan K. Holliday
 James L. Holt Jr.
 Michael S. Hooker
 John C. Hopewell III
 Edward D. Hughes
 R. Eric Hutz
- Rudolf E. Hutz
 Robin N. Hyman
 Phoebe A. Isaacs
 Hon. Lee M. Jackwig
 Daniel O. Jamison
 Julie C. Janofsky
 John A. Jeansonne Jr.
 Burton J. Johnson
 Howard G. Johnson
 Michael L. Johnson
 Zandra L. Johnson
 Timothy J. Jordan
 Jennifer Kampsula
 Phillip R. Kaplan
 Robert J. Kaufman
 Steven S. Kaufman
 Jennifer L. Keller
 Joshua G. Keller
 Marissa D. Kelley
 Christopher A. Kenney
 Jay W. Kiesewetter
 Carolee G. Kilduff
 J. Scott Kilpatrick
 Steven S. Kimball
 Edward J. Kinberg
 Erin C. Koerselman
 Paul D. Kouri
 Tara A. LaClair
 Daniel J. LaCombe
 Anne C. Lahren
 Matthew L. Lalli
 Amy C. Lambert
 Wayne T. Lamprey
 Paul A. Lange
 Philippe J. Langlois
 John A. Lapinski
 Prefix First Name Middle Name
 Last Name Suffix
 Vilda S. Laurin III
 Jami E. Leach
 Tamsen L. Leachman
 Miriam J. Lebental
 Kenneth A. Lechter
 Darryl J. Lee
 Joseph P. Lenahan
 Timothy G. Lenahan
 John D. Lenoir
 Russell L. Leonard
 David W. Levene
 Col. David M. Lewis Jr.
 Steve V. Lewis
 Daniel Lichtl
 Marketa Lindt
 Cathleen Lockhart
 Dean David A. Logan
 Thomas L. Long
 Wayne D. Lonstein
 Paul O. Lopez
 Scott P. Lopez
 Rafael J. Lopez Rivera
 Linda L. Lord
 Aaron M. Lorentz
 Matthew John Lund
 Ronald E. Lund
 John R. Maley
 Jeffery M. Mallamad
 Timothy F. Maloney
 Steven D. Manning
 Jamie S. Manuel
 Pedro J. Manzano-Yates
 Michael G. Marderrosian
 Michael C. Marsh
 William J. Marshall
 Richard H. Martin
 Abel Martinez
 Carlos Martinez-Texido
 Laura N. Maupin
 John G. McCarthy
 Deborah B. McCrocklin
 Paula J. McDermott
 Larry S. McDevitt
 Thomas McEachin
 John McElhaney
- Patrick S. McGoey
 Martin J. McManus
 Adam C. McNeil
 Robert A. McNew
 Joseph L. McReynolds
 W. Carleton Metcalf
 Ronald E. Michelman
 Brian P. Miller
 Paul M. Miller
 John E. Milner
 Gregory J. Miner
 Charles O. Monk II
 Dora L. Monserrate
 Arthur Mora
 Mack J. Morgan III
 Drue Morgan-Birch
 Alice M. Morical
 Ian H. Morrison
 Provino Mosca
 Cornelius Moynihan Jr.
 Patrick M. Muldowney
 Brian P. Murphy
 James B. Murphy Jr.
 Lawrence J. Murphy
 Ryan Murphy
 John A. Murray
 Kelli A. Murray
 Brian T. Must
 Mark D. Myers
 Michael J. Nardotti Jr.
 Eugene R. Naylor
 R. Christopher Naylor
 Irma L. Netting
 Eugene M. Nettles
 Hon. P. Scott Neville
 Kara S. Nickel
 Christina T. Novajosky
 C. Leonard O'Brien
 Hector Oliveras
 Rafael V. Olivieri-Geigel
 Luis R. Ortiz Segura
 Louis O. Oubre
 H. Douglas Owens
 A. Michael Palizzi
 Edward Scott Palmer
 Joshua M. Palmintier
 Alexander C. Papandreou
 Karen L. Pascale
 Dominique E. Pearlman
 Mandy Pecher
 Gerard G. Pecht
 Alejandro R. Perkins
 Robert E. Pershes
 Cory J. Person
 Dennis J. Peterson
 Linda Pethick
 Victoria D. Pierce
 Lt. Col. William R. Piper
 William H. Pohle Jr.
 Michelle R. Points
 Holly M. Polglase
 B. Warren Pope
 Vincent J. Poppiti
 Gary P. Price
 Gerrit M. Pronske
 John H. Pucheu
 Michael J. Quinan
 Elisabeth C. Quinn Prescott
 Margaret S. Raben
 Kevin A. Rames
 Alberto M. Ramon
 John B. Reaves
 Patricia A. Redmond
 Joe R. Reeder
 Kelly D. Reese
 Robert L. Reeves
 Steven M. Richard
 Andrew S. Richardson
 Gerald F. Richman
 Peter C. Richter
 Harley E. Riedel
 Eugene A. Ritti
 Ruth A. Rivard

Ramon H. Rivera Sanchez
Kenneth S. Robbins
Marc W. Roberts
Patricia K. Rocha
Martin Rodriguez
Thomas D. Roebig Jr.
Susan M. Rogge
C. Keith Rooker
Maria E. Rosa-Domenech
Francisco A. Rosa-Silva
Bruce Alan Rosenblum
Peter V. Rother
Timila S. Rother
Christina C. Rubalcava
Bruce A. Rubin
Kelly A. Rudd
Jonathan S. Ruskin
Joseph P. Russoniello
Jeffrey T. Sagalewicz
Rebecca L. Saitta
Dee-Dee Samet
Phillip C. Samouris
Mathias W. Samuel
Gregory J. Sanders
Cary Sandman
A. Joseph Sano
Rafael M. Santiago-Rosa
Mark D. Sassak
Alexander R. Saunders
Lynn H. Scaduto
Tammy J. Schemmel
Carl F. Schoeppl
Carl Schuster
Cathleen A. Scott
Ronald L. Scott
Stephanie A. Segalini
Marc D. Seitles
Collins J. Seitz
Capt. Robert B. Serino
Hy Shapiro
William D. Shapiro
Bryan C. Shartle
Ray M. Shepard
Michael J. Sherwood
Spencer C. Siebers
Simone R. Siex
Fred R. Silvester
Theodore A. Sinars
Matt Sjoberg
Nelson P. Skinner
Andrew Joseph Sloniewsky
Richard A. Sly
John E. Smith
Tommy D. Snyder Jr.
Christopher A. Somers
Carol E. Sorenson
Madison S. Spach Jr.
C. Gordon Starling Jr.
David Stein
Stefan V. Stein
Michael J. Steinlage
Joshua J. Stellman
Catherine A. Stevens
Paul S. Stevens
Brick P. Storts III
David F. Stover
James P. Strenski
Elise M. Stubbe
Chad A. Sullivan
Dana L. Sullivan
Daniel F. Sullivan
Jill S. Sullivan
Patricia A. Sullivan
Jennifer Sullivan Davis
Daniel J. Supalla
Margaret Swetman
Leo J. Talikka
Lisa M. Tatum
Stephen E. Taylor
Edna M. Tejada-Oyola
Kelly E. Theard
William G. Thomas
Larry D. Thompson
Walter C. Thompson Jr.
Dale O. Thornsjo
Barbara Timmer

Andrea V. Timpa
Brian E. Toland
Alex D. Tomaszczuk
Homero Torralba
Rex Travis
William T. Treas
Alison M. Turner
Jon D. Uman
R. Pope Van Cleef Jr.
Stacy L. Van Dyken
Thomas P. Vartanian
Joseph G. Viacava
michelle visiedo
Thomas Voekler
Justin H. Volmert
Joanne M. Vorpahl
Eric D. Wade
Julie M. Wade
Clarence M. Wagner Jr.
Vanessa L. Waguespack
Barbara S. Wahl
Donald M. Wakefield
Michael L. Walker
Leslie E. Wargo
James A. Watkins
Norman J. Watkins
Barton Marshall Watson
Joseph H. Watson
Richard A. Weigand
Douglas S. Weigle
Michael J. Weikert
Morris Weinberg Jr.
Robert Weisberg
M. David Weisman
Nathan A. Wheatley
Larry R. White
Hon. Laurie A. White
William O. Whitehurst Jr.
Joe D. Whitley
Edward Wicker Jr.
T. C. Wicker III
Mark D. Wilkerson
Jill S. Willhoft
Daniel E. Williams
Ralph E. Williamson
Charles B. Wilmore
David Anthony Wilson
Jason Wise
Anne D. Wittmann
Margaret W. Wong
Judith L. Wood
Mary Q. Wood
Sheryl G. Wood
Matthew A. Woolf
Donald A. Workman
James Wyda
Rodger D. Young
Julian C. Zebot
Stephanie M. Zimmerman
Robert J. Zutz

**New Members—November/
December**

Antony A. Abboud
Jason Rafael Aguilo
Lukman I. Ahmed
Ellen M. Ahrens
Andrew U. Aladi
Barry P. Allen
Lisa A. Amato
Lavon M. Ammori
Christopher D. Anchondo
Katelin B. Anderbery
John Anderson
Angelica Arenado
Rashi Arya-Blankenship
Stephanie L. Ash
Bryce William Ashby
David N. Asmar
Michele S. Assayag
Jesse A. Atkins
Panayotta Augustin-Birch
Ukeme Awakessien
Aaron J. Babb
Richard B. Bacal
Benjamin E. Baker

Maria E. Baker
Mary Baker
Adam Ballinger
Matthew C. Barneck
Robert E. Battle
Brett J. Bauer
Hermann D. Bauer
Bryan Becker
Jon C. Beckman
Ashlee Bekish
Carolyn Bell
Clifford P. Bendam
Christopher Bennett
Henry J. Bergmans
Birney B. Bervar
Corinne Noelle Bethune
Brian Paul Bialas
Jennell Bilek
Zubin F. Billimoria
Daniel Birnbaum
Kathryn A. Bjornstad
Jeffrey Blackman
Elisabeth Blattner-Thompson
Stephanie R. Blind
Samantha A. Borden
Mary Bourke
John E. Bouzane
Rachel M. Bowe
Kevin Bringuel
Kevin Brodar
Brennan Tyler Brooks
Aaron W. Broughman
Elizabeth Brown
Jeffrey Carl Brown
Nell Irene Brown
Herschel Bullen
Shannon M. Byrne
John C. Calabrese
Eric G. Calhoun
John C. Camp
Colin D. Campbell
Kathryn M. Carney-Cole
Col. Jeffrey B. Carra
Robert Frank Castaneda
Errlinda Castillo
Jason E. Caton
Eric Ronald Chad
Shaw-Jiun Chalitsios-Wang
Vincent T. Chang
Seth P. Chazin
Shelton A. Chambers
Natalie S. Cheung
F. J. Chu
Vivian S. Chu
Kodi Jean Church
Nanci L. Clarence
Joshua Clause
Thomas K. Coan
James Patrick Cody
Jeffrey V. Commisso
John Joseph Coomes
Gerald B. Cope
Sara M. Corradi
Elias Correa-Menendez
Matthew D. Cote
Emily M. Coyle
Heather F. Crow
Jason W. Crowell
Marcia K Cypen
Carolyn Daley Scott
Christopher R. Darneal
Clarence M. Dass
Alexandra V. Dattilo
Danny David
Craig Alan Davis
Sandra L. Davis
William K. Davis
James V. DeBergh
Audrey G. Decker
Jonathan D. Decker
Adam Deckinger
Maria A. Del Monaco
Patrick G. Dempsey
Jerry N. Dennard
William R. Denny
Kevin Wade DeVore

Chris J. Diehl
Matthew Anderson Dooley
Troy J. Doucet
Deborah A. Drossis
Jelka L. Duchesne
Tara Reese Duginske
Damien P. DuMouchel
Melinda Dawn Lee Dunmire
Ewell E. Eagan Jr.
Russell J. Edelstein
Meagan J. Edwartowski
Ryan D. Elliott
Sarah E. English
Daniel David Estrin
Blake Etheridge
Melanie C. Eyre
Rami Fakhouri
Susan G. Faller
Shaina R. Fardell
Brandon Faulkner
Ettie Feistmann
Matthew Ferguson
Jordan Ferguson
Fernando Luis Ferrer-Lopez
Kate F. Fetkenhier
Mark Finkelstein
James Fisher
Stephen Mark Fisher
Donna S. Fitzgerald
Danielle Wayve Fitzsimmons
William Knapp Fitzsimmons
Shayla A. Fletcher
Dana Michelle Foley
Taylor Ford
J. Taylor Fox
Maureen Terese Franco
Gary A. Frank
Joshua Friedman
Jennifer A. Frost
Melanie L. Fry
Kevin P. Fularczyk
David H. Fulcher
Joseph A. Galea
Garrick L. Gallagher
Darrel J. Gardner
Seth Gaudreau
Gavin C. Gaukroger
Michael Robert Gaimo
Lena D. Giangrosso
Stephen J. Giovinco
Barbara Giuliano Di Fabio
Jose Luis Gonzalez
Krishna C. Grandhi
Ryan M. Grant
Zachary A. Gray
Ronald D. Green
Meagan Griffin
Hon. David C. Guaderrama
Eva I. Guerra
Mark C. Guinto
Benjamin E. Gurstelle
Jeanne Habib
Michael J. Haddad
Derek L. Haggerty
Mary Hallerman
Dori Handy
Alan T. Hargrove Jr.
Nadine R. Hatten
Armando G. Hernandez
Rosina Maria Hernandez
Cristina Hernandez-Villar
Anita M. Hertell
Jennifer M. Hinsperger
Amanda M. Hoffman
Katie M. Hoffman
Patnels R. Hokes
M. Elizabeth Holt
Craig Alan Houghton
Richard Houlihan
Henry E. Hudson
Timothy Hudson
Kevin R. Huennekens
Hoy R. Hughes

Bonnie A. Hungerford
William B. Ingram
Jennifer V. Ives
Walter K. Jamison
Joseph Jardine
Paula Jimenez-Pino
Breeann M. Johnson
Ashleigh M. Jones
William S. Jordan
Benjamin C. Kaasa
Isaiah R. Kalinowski
P. Rebecca Kamitsuka
Kimberly N. Katka
Michael R. Keefe
Thomas P. Kelly
William Kendall
Michael Kennedy
Alan Kennedy-Shaffer
Sat Nam Khalsa
Jonathan R. Khouri
Max Hollister Kieley
David Kilgore
Jessica G. Kingston
David M. Kipley
Simon Klevansky
Chelsea A. Klingsmith
Michael Kluchin
Mark Samuel Kokanovich
Dominic Kouffman
Lt. Col. Gary M. Kramer
Christopher M. Kromer
Gregory W. Kugle
Tabatha D. Kuykendall
Barry M. Landy
H. Colby Lane
Beatrice N. Larkin
Jessica Marie Lashier
Sanjiv Prakash Laud
Gregory Lawrence
Lisa M. Ledbetter
Kwangwook Lee
Alexa L. Lewis
Joseph Libretti
Elisa J. Lintemuth
Ariel M. Lipsky
Gelise V. Littlejohn
Linda L. Lord
Hope Lu
Mona Ma
Adam Daniel Maarec
Scott M. Mackela
Ugochi C. Madubata
Jordan D. Maglich
Michael J. Malecek
Janna Manes
Neil Joseph Marchand
Alicia Kate Margolis
Jonathan C. Marquet
Matthew E. Marrone
Kelley M. Marsden
Stephanie L. Martin
Andrea T. Martinez
Sholonda N. Mason
Nicole A. Matisse
Lindsay N. McAneeley
Sandra R. McCandless
Jon-Paul McConnell
Erin M. McDonald
Kathryn Maxine McDonald
Mary S. McElroy
Elizabeth McGee
Michael L. McGlamry
John J. McGregor
Scott A. McLaren
Thomas Gerard McNeill
Carolyn F. McNiven
James C. McWhinnie
Peggie Nichole McWhorter
Kristina Melomed
Perssis Meshkat
Sam Meziani
Robyn A. Millenacker
Brian P. Miller

ROUNDUP *continued on page 66*

ROUNDUP *continued from page 65*

Helen E. Mills
Aaron M Minc
John R. Mitchell
Blake Xavier Mogabgab
Douglas T. Moore
Randel Hood Mullican
Mauricio O. Muñoz-Luciano
Mary B. Murphy
Lorraine M. Musthaler
Dr. Raquel Myers
Sohrab Najafabadi
David Nichoff
Josephine Noble
Gregory J. Noto
John Nussbaumer
Emmet J. O'Hanlon
Marcos D. Oliva
Shiobhan Olivero
Rafael V. Olivieri-Geigel
Dennis M. O'Toole
Michael Oyler
Edward Scott Palmer
Sandra D. Parker
William H. Payne
David A. Peabody
Donesha Peak
Anthony R. Pecora
Genesis A. Peduto

Amie Penny
Margaret G. Perl
Cayce Christian Peterson
Justin Carl Pfeiffer
Caitlin Starr Pierce
Kristen M. Polanski
Vincent J. Poppiti
Angel V Poynter
Mayanic Prasad
Heather R. Pruger
Katharine L. Quaglieri
Lucas Radney
Maria I. Ramos
Arun Gadahad Rao
Matthew L. Rea
Richard J. Reding
Michelle R. Reese
Jacquelynn J. Regan
Helen Rhynard
Bryon Allyn Rice
Raymond P. Richards
Heather L. Ries
Joshua J. Rissman
Doricia M. Rivas
Jose I. Rivas
William F. Robertson
Christopher J. Rogers
Jorge R. Roig

Richard Rose
Justin Michael Ross
Michaela K. Rossettie
Brynn Paulette Rovito
Isaac H. Ryan
May A. Saad
Gary C. Safir
Carlos J. Sagardia
Barrett Salmon
Lucy C. Sanders
Justin M. Schafer
Amanda K. Schlitz
Kristin Kay Schroeder
Keith J. Schutter
Bryan A. Schwartz
David J. Schwendiman
Stanley Serwatka
Daniel N Sharkey
Julia Sherwin
Colleen N. Shovlin
Matthew J. Shupe
Andrea Marielle Siebert
Caroline E. Siefert
Phil Siegel
Robert L. Siems
Carey L. Sienkiewicz
Mark F. Silvaggio
Eulis Simien Jr.

James C. Skillern
Edward M. Smith
Heather M. Sneddon
Samuel J. Sorensen
Carol E. Sorenson
James R. Spencer
Patrick A. Stallworth
Johanna M. Staral
Megan Leigh Starich
Ronald Matthew Stella
Elizabeth A. Stevenson
Adam Strachan
Susan E. Sullivan
Jeannette F. Sweat
Brooke C. Swenson
Robert B. Sykes
John A Tacker Esq
Matthew David Taggart
Mathew Taylor
Klodiana B. Tedesco
Matthew S. Teetor
Joshua M. Templett
Chase Tettleton
Natalie E. Thomas
Wayne L. Thomas
Robert Samuel Thompson
Mitchell Tobias
Jenny Torres

Prof. Jorge Torres-Vargas
Robert J. Tribeck
Mirela O. Turc
April M. Urban
Nathan S. Vasu
Rudy Glynn Vrba
Richard Watts
Jennifer M Webb
Robert Weisberg
Bryan A. Welp
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Ryan Zagare
Jay Christopher Zainey Jr
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REVIEWS *continued from page 62*

Poland, to undertake his policies of mass killings. In the twenty-one months that followed the joint German-Soviet invasion of Poland, the Germans and the Soviets would kill Polish civilians in comparable numbers for similar reasons, as each ally mastered its half of occupied Poland.”

Beyond the scope of *Bloodlands* is the heroic history of remnants of the Polish army who escaped the Germans and the Soviets, made their way to England, and thereafter fought in the Battle of Britain, as well as in France, North Africa, and Italy. After World War II, the survivors who returned to the Soviet satellite state of Poland met an uncertain fate.

Ironically, in late 1944 and early 1945—toward the end of the war—

with Germany in disarray and an uprising taking place in Warsaw, the invading Red Army hesitated just east of the Vistula River, betraying the Poles and allowing Warsaw again to be almost totally destroyed by the Germans and also bringing Stalin’s ruthlessness to the attention of the Americans and the British. Snyder writes, “The ashes of Warsaw were still warm when the Cold War began.” Although not mentioned by Snyder, it was the Poles, whose rebellion in the 1980s eventually led to the end of the Soviet Union’s domination of the bloodlands.

Bloodlands is an uncomfortable read because of its subject matter—the chapter titles include “The Soviet Famines,” “Class Terror,” “The Economics of Apocalypse,” “Final Solution,”

“Holocaust and Revenge,” “The Nazi Death Factories,” “Resistance and Incineration,” and “Ethnic Cleansings.” The book is well written and will be important to all who study the history of the middle third of the 20th century—years that were soaked in blood. **TFL**

George W. Gowen is a partner with the New York law firm of Dunnington, Bartholow & Miller LLP. His areas of practice are trust and estates, corporate law, and sports law. He was an adjunct professor at the New York University Graduate School of Business, has served on United Nations commissions as counsel to leading sports organizations, and has served as chair of environmental and humane organizations.

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