

The Magazine of the Federalist Society

The Federalist Paper

Summer 2014
www.fed-soc.org

SUMMER
• ISSUE •

INSIDE:

**Second Annual
Executive Branch
Review Conference**

**2014 National Student
Symposium**

**Faculty, Lawyers, &
State Courts Updates**

THE FEDERALIST No. 78



“The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.”

LETTER FROM THE EDITOR

Dear Friend of the Society,

We are pleased to bring you the summer issue of *The Federalist Paper*. Inside, as always, we review the many programs and publications the Federalist Society has sponsored through its various divisions and special projects over the past months.

The Student Division continued another great year of dynamic programming at nearly every law school in the country. The highlight of this was the Annual Student Symposium, held this year at the University of Florida School of Law.

The Practice Groups held the Second Annual Executive Branch Review Conference in May in Washington, DC. The Conference attracted significant media coverage, and culminated with an address by U.S. Senator Ted Cruz (TX) on the latest edition of his report on “The Obama Administration’s Abuse of Power,” which details the Administration’s losses at the Supreme Court.

Also included in this issue are full updates from our Lawyers Chapters, State Courts Project, International Law & Sovereignty Project, and Faculty Division.

Stay tuned on fed-soc.org and FedSocBlog.com to stay updated on our Teleforum Conference Calls, SCOTUScasts, Practice Group Podcasts, newest *Engage* articles, and white papers.

As always, we invite and encourage friends and members to send in comments and suggestions to Christian.Corrigan@fed-soc.org—and we look forward to hearing from you!

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Student Division Report

By *Caroline Moore*

Assistant Director, Student Division

The Student Division had a spring semester packed with 720 successful events on timely public policy issues. Student chapters held a total of 1,440 events during the last academic year. Our **Pepperdine, Harvard, and Columbia** chapters held events that exceeded 200 attendees.

The Student Division continues to be impressed with the outstanding leadership of our student chapters and their efforts on their respective campuses. **Ave Maria** was rewarded for their hard work and presented with the “Student Organization of the Year” award by their classmates at their Annual Barrister’s Ball. **Baltimore** was also the recipient of the “Student Group of the Year” award. **Campbell**

received an award for “Student Organization of the Year,” which was definitely deserved after a year of hard work and two events with over 150 attendees. The first was an event this fall that featured Rep. Paul Stam from

the North Carolina House of Representatives debating Rep. Nick Glazier of the North Carolina General Assembly. The successful event attracted 200 attendees and was titled “On Privacy & Safety and Abortion in North Carolina after Senate Bill 353.” Alan Gura of Gura & Possessky PLLC, former North Carolina State Senator Ellie Kinnaird, and Rep. Paul Luebke from the North Carolina General Assembly debated before an audience of 150 on “Liberty and Security: The Second Amendment.”

As student chapters were awaiting the ruling in the *Hobby Lobby* case, they held numerous events and even symposiums on the topic of religious liberty. **Penn** held a thought-provoking symposium on “Dictating

Conscience: Law as a Cultural Weapon,” which featured esteemed speakers such as: Prof. Robert George of Princeton University; Prof. Patrick Deneen from the University of Notre Dame; Jordan Lorence from Alliance Defending Freedom; Ed Whelan from the Ethics & Public Policy Center; Sherif Girgis from Princeton University; Trevor Burrus of Cato Institute; and John Corvino of The Gay Moralist. The day-long symposium covered religious liberty topics such as same-sex marriage and *Hobby Lobby*. The 100 attendees had the chance to mingle with speakers throughout the day and walk away from the event with a grasp on these important issues. Twelve of our other chapters also hosted events on topics

involving free exercise rights of corporations, the contraceptive mandate, and the history of the Religious Freedom Restoration Act. **Penn State** held an event grossing 100 attendees with Prof. Robin Fretwell Wilson of Illinois Law



Supreme Court Justice Antonin Scalia with the Yale Chapter.

and Pennsylvania State Rep. Gordon Denlinger on “Same-Sex Marriage.” **Notre Dame** hosted Hon. Ken Starr, President of Baylor University, for an event on “The *Hobby Lobby* Case: The Long Journey of the Religious Freedom Restoration Act.” They had 140 attendees. **Texas A&M** held a debate on “Same-Sex Marriage and Religious Liberty” with Prof. Robin Fretwell Wilson of Illinois Law debating Prof. Meg Penrose from Texas A&M Law in front of a crowd of 120 students and faculty members. **Elon, Columbia, Tennessee, New Mexico, and George Mason** also debated the topic of same-sex marriage.

Our spring programming continued with several events in our Robert H. Bork series, which cover

Originalism, the Constitution, the rule of law, and the role of a judge. One of the most notable Bork events this semester was an event that featured Judges Brett Kavanaugh and David Tatel of the U.S. Court of Appeals for the DC Circuit, and was moderated by Harvard Law Dean Martha Minow. This **Harvard** event on “The Second Highest Court in the land: Judging on the DC Circuit,” gave the 110 student attendees insight into working and clerking on the DC Circuit, which is something many hope to achieve. Prof. Lee Strang from Toledo debated Prof.



U.S. Supreme Court Justice Clarence Thomas with the UVA Chapter leadership after an event.

Allen Rostron of before a crowd of 115 at **Missouri-Kansas City** on “Originalism v. the Living Constitution: Suppose Both are Right?” **Notre Dame** hosted Judge Diane Sykes of the U.S. Court of Appeals for the Seventh Circuit for an event on “The Current Debate about Judicial Restraint.” There were 60 students and faculty in attendance for this enlightening presentation. The Yale Student Chapter continued its great year with a tremendous event that allowed them a front row seat inside the U.S. Supreme Court. This event, titled “A Conversation with Justice Scalia,” drew a crowd of 100. Judge Richard Sullivan from the Southern District of New York participated in an event with the **Columbia** chapter on “Battle Hymn of a Federal Trial Judge.” This event was very well attended with over 255 students and faculty members present. Judge Kathleen M. O’Malley participated in an event on the “The Federal Circuit and Separation of Powers” at **Ave Maria** this spring. The successful series continued this semester with events at: **Penn, Utah, Indiana, Denver, Creighton, Chicago, and Duke.**

National security is another topic our chapters continually hold events on. In April, **Texas Tech** and the Black Law Students Association co-sponsored an event on accountability and tolerance in the workplace as applied to the United States Government with former Defense Department Inspector General Hon. Joseph Schmitz. **Nebraska** held an event on “Law, War, Ethics, and Terror,” which featured Prof. Jack Beard of Nebraska Law. He reviewed America’s conflict with terrorism since the 9/11 attacks, while focusing on the legal, ethical, and practical framework governing U.S. actions. This event was

another successful event for our the chapter, with over 140 attendees. **Ave Maria** hosted Captain Sulmasy of the U.S. Coast Guard Academy and Prof. Kevin McGovern from

Ave Maria Law on the topic of “Drones, the President, and the Constitution.” The interesting discussion began when Captain Sulmasy posed the question: “Are we at war or are we just enforcing criminal law by the use of drones?” He talked about some of the problems with drones, the secrecy involved, and the government justification of this behavior post-9/11.

The event had 60 faculty members and students in attendance. Chapters at: **Charleston, South Carolina, New York Law, Missouri-Kansas City, Colorado, Penn, Hawaii, Penn State, Case Western, UMass, Dartmouth, Southern Methodist, Florida Coastal, and Washington** also held events on national security this spring.

The use of police force continues to be a topic that many of chapters find fascinating. The **SUNY Buffalo** chapter took on “Racial Profiling Considered: A Discussion About the Stop-and-Frisk Decision” after the controversial policing technique played a large role in New York City’s mayoral race. The event was co-sponsored by the Black Law Students Association, the Latin American Law Students Association, and the Asian Pacific American Law Students Association. Prof. Eli Silverman, co-author of *The Crime Numbers Game: Management by Manipulation*; H. McCarthy Gipson, former police commissioner of the City of Buffalo; Buffalo City Court Judge E. Jeannette Ogden ’83; and Prof.s Anthony O’Rourke and Anjana Malhotr were involved in this panel. **Kansas** held an event on “The Rise of the Warrior Cop” with Radley Balko of *Reason Magazine* and attorney Addie Heart with over 100 attendees. **St. Mary’s** held a debate on the Second Amendment with Dr. John Lott from the Crime Prevention Center and Prof. Geary Reamey of St. Mary’s Law which drew a crowd of 65 attendees. **Southern Illinois, Florida State, Hawaii, Florida, Florida Coastal, Missouri-Kansas City, George Mason, and Penn** also held events on law enforcement. Several of these events had over 75 attendees.

Student chapters hosted several other notable events

this semester. **Arizona** hosted a lively event on Earth Day that encouraged students to reconsider environmental regulation in light of the natural rights philosophy embodied in the Declaration of Independence and the Constitution. Kennerly Davis, former Deputy Attorney General of Virginia, described to an audience of approximately 40 the many ways in which the administrative state, including the current form of environmental regulation, is contrary to natural rights and the rule of law. He offered an alternative approach to environmental regulation more consistent with our founding principles. Law School Dean Kirsten Engel provided commentary for the event. U.S. Sen. Mike Lee (UT) presented on “Executive Overreach and Separation of Powers” at **Brigham Young** to a crowd of 125. **Colorado**

had in event with Prof. Richard Epstein, Laurence A. Tisch Professor of Law at NYU, this spring on “Should College Athletes Be Able to Unionize?” There were over 40 students and faculty in the audience and the event sparked a lot of questions. **Florida** had Dr. Tibor Machan of Chapman University and Prof. Steven Willis from Florida Law participate in a speech with commentary titled “The Principles of Libertarianism” and drew a crowd of 63 attendees. **Southwestern** hosted a debate about the FDA’s role in regulating off-label drug use featuring Prof. Richard Epstein of NYU and Prof. Ryan Abbott of Southwestern Law School. Before an audience of 180, Prof. Epstein argued that excessive regulation stunts innovation while Prof. Abbott argued that regulation improves drug safety.

Bitcoin, which is considered an alternate form of currency, has been in the news. **Florida State** hosted an event on Bitcoin and it was one of their most successful events of the year. The event was held in the evening and drew over 50 attendees. Derek Khanna, a Yale Visiting

Fellow, and Prof. Shawn Bayern of Florida State Law participated in this event. Many were unfamiliar with Bitcoin but left understanding what it is, whether it is a commodity or a currency, and possible ways to regulate it. **NYU** hosted a bitcoin symposium with Marwan Forzley from eBillme, Jerry Brito from the Mercatus Center, Reihan Salam from *National Review*, Reuben Grinberg of Davis Polk, John Collins from the Senate Homeland Security and Government Affairs Committee, Carter Dougherty from *Bloomberg News*, Steven Englander from Citigroup, Alex Waters from CoinApex, Antonis Polemitis of Ledra Capital, Marwan Forzley, and Sara Eisen of CNBC. The panels covered impending regulation of bitcoin and business and economics in relation to bitcoin. There were



(above) Jordan Lorence, Alliance Defending Freedom (center), speaks at Penn Law’s “Dictating Conscience: Law as a Cultural Weapon” symposium. (below) Ed Whelan, President of the Ethics & Public Policy Center, also speaking at the Penn Law symposium.”



over 60 attendees at the symposium.

Our Student Symposium was a tremendous success, with over 400 student attendees. The **Florida** did a wonderful job hosting the three day symposium of “Security vs. Freedom: Contemporary Issues and all of the panels sparked debate among attendees about the government’s role in keeping us safe and preserving privacy. The winners for our annual

Feddie awards are: **Yale** for Chapter of the Year, **South Carolina** for Most Improved Chapter, **Harvard** for Greatest Membership Growth, and **Barry** for Most Creative Publicity. Read more about the event on pages 9-12.

We also held our Annual Student Leadership Conference on July 18-20 in Washington, DC. We look forward to reviewing this exciting weekend in the Fall Issue of *The Federalist Paper*.

Faculty Division Update

By Anthony Deardurff

Deputy Director, Faculty Division

The Faculty Division enjoyed a full and productive spring semester. Among the programming that filled our spring schedule was our third annual Junior Scholars colloquium as well as the conclusion of our 2013-2014 Liberty Fund colloquium series. In conjunction with the Practice Groups, we also continued to post podcasts as the Supreme Court concluded its October 2013 term. Among the cases covered by our experts were some of the most highly anticipated cases involving affirmative action, the “contraceptives mandate,” the treaty power, the presidential recess appointments power, and legislative prayer.

This spring, we concluded our most recent “Law and Liberty” series of colloquia co-sponsored by the Liberty Fund. At each colloquium, a group of faculty members, practitioners, and aspiring academics spent a day and a half discussing and debating a set of pre-assigned readings that focus on important legal questions. On January 24th-25th in Dallas participants gathered to discuss two of our most foundational freedoms at our “Freedom of Assembly and Religious Liberty” colloquium. This colloquium assessed the arguments made in Professor John Inazu’s book *Liberty’s Refuge: The Forgotten Freedom of Assembly* and the response of his critics. Another group of participants met February 7th-8th in San Francisco to discuss behavioral economics, the role it plays in thinking about law, and the debate over “libertarian paternalism” at our “Behavioral Economics and the Free Society” colloquium. Last but not least, “The Federalists, Anti-Federalists, and the Constitution They Created” took place in Warrenton, Virginia on March 21st-22nd. During this colloquium, participants considered key exchanges between the Federalists and the Anti-Federalists about defects in the Articles of Confederation and efforts to resolve those defects in the Constitution of 1789.

This summer will see the beginning of new “Law and Liberty” series of colloquia, starting with “Constitutional Theory and Liberty: The Current State of Originalism,” in Minneapolis, Minnesota on July 25th - 26th. Participants will explore the widely varying justifications for and criticisms of originalism. On August 15th-16th, participants will convene in Chicago for the second Liberty Fund colloquium of the summer, “Liberty of Conscience

and the Law,” during which participants will address the legal status of “conscience” in light of our history and traditions as well as Court precedent, including the recent *Hobby Lobby* decision.

June 13th-15th marked our third annual Junior Scholars Colloquium, held in Warrenton, Virginia. It provided eight scholars, aspiring faculty, and junior faculty members who have been teaching for no more than seven years the opportunity to present competitively selected unpublished papers and receive comments from more senior faculty members in their field of expertise. Strong interest from junior faculty, the competitive nature of the selection process, and the high quality of submissions all contributed to the success of this event.

In July, the Division will launch its second colloquia series under a grant from the John Templeton Foundation, beginning with “Law and the Moral Sense.” Participants will gather in Denver on July 25th-26th to discuss the Enlightenment concept of the “moral sense” and the role that moral sentiments play with respect to social norms, the rule of law, and the structure of government. On Sept. 19th-20th, a group of participants will convene in Philadelphia for “The Classical Liberal Constitution,” where they will consider the extent to which classical liberal thought should inform our understanding of the Constitution. As a focal point for exploring this topic, we will use portions of Richard Epstein’s new book *The Classical Liberal Constitution*.

In addition, the Faculty Division continues to produce “SCOTUScasts” on Supreme Court cases that have been recently argued or decided. To date, our experts, who include experienced law professors and practitioners, have analyzed over 90 oral arguments and decisions from the October 2013 term—all available at fed-soc.org.

Finally, preparations are underway for our 17th Annual Faculty Conference, which will be held in Washington, D.C. on January 3rd-4th, 2015. We received many panel and debate topic suggestions from faculty members and are currently making selections and finalizing program details. The conference program will include works-in-progress paper presentations as well as presentations of competitively selected papers by junior faculty members.

Alumni Relations

By Caroline Moore
Director of Alumni Relations

The Federalist Society aims to bring our alumni at a number of law schools together to will allow our members to connect or re-connect throughout the year. In the past, we've used events such as the Annual Alumni Breakfasts at our National Lawyers Convention to fill the gaps in alumni relations. But we believe Annual Summer Receptions that feature alumni speakers will supplement our student and lawyer members' chances to build relations with one another. Many of our student members travel to larger cities to intern in the summer and this is something we need to use to set a foundation for our alumni to engage throughout the year. We hope by bringing these alumni together they will not only enjoy meeting with each other, but will also be able to help our chapters and their schools assure a vigorous discussion of ideas.

This spring, the University of Chicago Alumni Chapter hosted an in event in Washington, DC in conjunction with their law school reunion. The event began when Michael H. Schiff, the dean of University of Chicago Law, delivered introductory remarks for the reception. Jan Crawford who is a political correspondent and chief legal correspondent for CBS news was the guest speaker for the event. She discussed the 2013-2014 Supreme Court term to the large audience of alumni. This was an extremely successful event, and we look forward to co-sponsoring alumni events with the University of Chicago in future months.

In June, we held three alumni chapter events. The **University of Michigan** Alumni Chapter hosted an event with Michael Daugherty, the CEO & President of LabMD and author of *The Devil Inside the Beltway*. In Washington, DC Alumni had the chance to listen to Mr. Daugherty's experience with the FTC, after a cyber security company downloaded health information of thousands of LabMD patients. Mr. Daugherty, an alum of the University of Michigan, graciously gifted each attendee with a free copy of his recent book.

Also in June, the **University of Virginia** Alumni Chapter hosted an event with Professor John Harrison of UVA law in Washington, D.C. Over 40 students and alumni attended this events and listened to Professor Harrison's timely discussion of *NLRB v. Noel Canning*.

The decision on the case came down on the morning of the event, so many attended to hear the esteemed professor discuss the decision, as well as explain the implications for future cases. Prof. Harrison explained that, while this was a unanimous ruling, the interpretation of several Justices offers wiggle room when interpreting future cases. He explained the difference between inter and intra recess appointments and took questions from many attendees, delving into what the three day recess ruling means and what implications this decision will have on both the senate and the house. Lastly, the current **Yale** Alumni Chapter hosted a student and alumni reception in New York City in late June.

In July, the Harvard Alumni Chapter held a student and alumni reception in New York City. The Yale Alumni chapter held a student and alumni reception at the end of July in Washington, DC. The University of Chicago Alumni Chapter held a "Bourbon and Boggs" event, which was a student and alumni reception with Judge Danny Boggs in Washington, DC. Also in July, the Harvard Alumni Chapter held a student and alumni reception in Washington, DC.

If you are interested in being involved with an alumni mentioned chapter above please contact Caroline Moore at caroline.moore@fed-soc.org. You can also find any of the above alumni chapters' Facebook groups online: "Federalist Society UVA Alumni Chapter," "Federalist Society Michigan Alumni Chapter," "Federalist Society Harvard Alumni Chapter," "Federalist Society Yale Alumni Chapter," or "Federalist Society University of Chicago Alumni Chapter." We will post relevant alumni chapter information on Facebook about upcoming events and members of these groups will be able to post relevant content online. These are private groups that will be managed by the Federalist Society. We look forward to expanding the current alumni groups and using them to build a strong Federalist Society alumni network.

Annual Student Symposium

By *Shad White, President of the Harvard Federalist Society; Carol Szurkowski, Executive Vice President of the Harvard Federalist Society; Cory Liu, Editor-in-Chief of the Harvard Journal of Law and Public Policy; and Stephanie Freudenberg, Deputy Editor-in-Chief of the Harvard Journal of Law and Public Policy*

Nearly 500 students and distinguished speakers from around the country gathered on March 7-8, 2013, at the University of Florida for a symposium on “Security vs. Freedom: Contemporary Controversies.” In the words of the symposium organizers, “Americans have been embroiled in debate regarding the boundaries between the freedom that defines us and the safety measures necessary to achieve that freedom. The issue is so divisive that individuals who share a large majority of their core beliefs can be bitter rivals regarding the line drawing in this debate. Now, more than a decade following the 9/11 terrorist attacks, balancing national security and personal freedom seems more challenging than ever.”

We gathered to hear more on these controversies. After registration, hundreds of attendees gathered in the spacious J. Wayne Reitz Union Ballroom, which was cloaked in blue and orange, to begin a weekend of stimulating speeches and debates.

ROUNDTABLE: BALANCING PRIVACY AND SECURITY

Moderator: **Hon. William H. Pryor, Jr.**, U.S. Court of Appeals for the Eleventh Circuit.

Ted Ulyot is the former General Counsel of Facebook. Mr. Ulyot argued there are two themes that arise from debates about security and its tension with freedom. **Steven G. Bradbury** is an attorney at Dechert, LLP. Mr. Bradbury suggested that national security is necessary to secure the other freedoms guaranteed by the Constitution. **Prof. John Stinneford** teaches law at the University of Florida’s Levin College of Law. As the father of three small

children, Prof. Stinneford began by noting that privacy is impossible for some. He argued the Framers prioritized making illegal searches and seizures a violation of our rights because they fought in part to defend this right. The rise of technology has given the government the ability to see private material without physically intruding into our lives. **Julian Sanchez**, an American libertarian writer, is from the Cato Institute. Mr. Sanchez spoke on the long history of the abuse of intelligence-gathering powers by the federal

government, from J. Edgar Hoover to the Johnson administration to today. We know today that elaborate steps were taken to conceal and destroy the evidence of these past abuses. This history suggests we should think about the effect of incursions on privacy on our society as a whole. First Amendment doctrine, for instance, shows that we all benefit from a structure that allows a diversity of opinions, even if we disagree with a speaker. **Rachel Brand** is a

member of the Privacy and Civil Liberties Oversight Board (PCLOB). Ms. Brand said the 9/11 Commission Report recommended the creation of a board to oversee the national security agencies, and that is the role PCLOB plays.

DEBATE 1: SHOULD WE BETTER PROTECT GOVERNMENT SECRETS AND PUNISH LEAKS MORE SEVERELY?

Moderator: **Judge Jerry Smith**, U.S. Court of Appeals for the Fifth Circuit.

Dr. Roger Pilon is Director of Constitutional Studies at the Cato Institute. Dr. Pilon noted that, when developing an argument on privacy, it is best to start by identifying the central dilemmas. One of these dilemmas is the



(left to right) *Ted Ulyot, former Facebook General Counsel; Steven G. Bradbury, Dechert, LLP; Rachel Brand, Member of the Privacy and Civil Liberties Oversight Board; and Prof. John Stinneford, University of Florida, during the “Balancing Privacy and Security” Roundtable.*

need for government to have the means to defend our rights. Gathering intelligence often compromises our right to full privacy. We must have systems to disclose times when intelligence gathering goes too far. When a Manning or Snowden must be relied upon to blow the whistle on key intelligence programs, these systems have failed. This is not a new problem, though. The Cold War administrations were all criticized for failing to admit the excesses of intelligence gathering. When we try to regulate intelligence gathering by statute, though, the executive branch argues technology moves too fast and the writing is too vague to quickly respond to problems. Whether they are right is a political question. As for Snowden and Manning, their prosecution is also a political question – and one that must be decided in the light of the real world consequences of their actions on our safety.

Prof. Nadine Strossen teaches at New York Law School and works for the ACLU. She argued that the urgent need to protect whistleblowers extends directly from the libertarian tenets of the Federalist Society, like “the state exists to preserve freedom.” It is disheartening to see the whistleblowers who disclose information that is favorable to the executive branch go unpunished, while whistleblowers who expose information unfavorable to the executive branch are prosecuted. James Madison – and the principle that the “separation of powers is central to the Constitution” – would be offended. Excessive secrecy is an expensive waste of fiscal resources. It also undermines national security, since limiting public information and accountability guarantees intelligence failures. And yet government espionage prosecutions against whistleblowers are at an all-time high. More resources should instead be dedicated to prosecuting the lawbreakers exposed by the information released by the whistleblowers. Less information should be called “classified.” Finally, we would do well to have clearer procedures about when whistleblowers are allowed to disclose information.

PANEL 1: CYBERSECURITY AND THE NSA

Moderator: **Chief Justice Ricky Polston** of the Florida Supreme Court.

Stewart Baker, a partner at Steptoe & Johnson and former General Counsel of the NSA, argued that increases in privacy rights and civil liberties come at the cost of national security. **Prof. Randy Barnett** of Georgetown University Law Center argued that the NSA’s metadata collection program violates the Fourth

Amendment. He began by discussing the history of the Fourth Amendment, explaining that the Fourth Amendment was designed to prevent the British practice of using general warrants by imposing the requirements of probable cause and particularity. Prof. Barnett argued that the NSA’s metadata collection program is the modern day version of the general warrant. **Prof. Jeremy Rabkin** of George Mason University School of Law began by observing that the metadata collection program is set to expire and probably will not be renewed because both Democrats and Republicans oppose it. Prof. Rabkin argued that the metadata collection program violates the privacy interests of every person whose data are collected.

DEBATE 2: IS THE FISA COURT TOO SECRET?

Moderator: **Hon. Charles T. Canady** of the Florida Supreme Court.

Alex Abdo is an attorney with the American Civil Liberties Union. Mr. Abdo opened the debate by arguing that the FISA Court is too secret. It has shifted away from its original function of making individualized determinations about whether a particular identified target may be monitored to ruling on general questions about the constitutionality of entire intelligence programs. Such questions, Mr. Abdo argued, go to the fundamental nature of the relationship between the government and its citizens and should not be debated solely in secret. The secrecy of FISA Court decisions both reduces the quality and range of arguments that are brought before the FISA Court, and detracts from the quality of the opinions that the FISA Court produces. Mr. Abdo believes that adversarial presentations in front of the FISA Court, as well as public debate, is critical to getting all of the relevant arguments on the table so that the court can make an informed decision.

Gregory McNeal is a Prof. at Pepperdine University School of Law. Mr. McNeal agreed with Mr. Abdo that there should be more transparency in the FISA Courts, but he drew a distinction between operational transparency, which he did not think needed to be enhanced, and transparency of the actual decisions and legal interpretations reached by the court, which he did think should be enhanced. Despite Congressional oversight authority, Mr. McNeal argued, the FISA Court lacks democratic accountability because members of Congress cannot publicly campaign to overturn FISA Court decisions because he cannot reveal the content of those decisions to the public.

Mr. McNeal disagreed that a different FISA Court disclosure regime would have deterred Snowden from disseminating the classified documents that he did. He argued that most of the ideological defenses that Snowden has offered for his actions are in fact post hoc justifications. But Mr. McNeal did agree that the current system, in which the executive unilaterally decides which surveillance programs will be used, bypassing Congress entirely, is far from the ideal way that these programs should be put into place. At an appropriate level of abstraction, public debate over surveillance programs can be helpful, and may provide an escape valve through which people like Snowden can express their frustrations. Mr. McNeal believed that the harm Snowden's leaks caused was great, because it will cause important sources of intelligence to dry up now that targets know the details of the surveillance methods that the U.S. is using.

PANEL 2: DETAINED SUSPECTED TERRORISTS TRY IN MILITARY COURTS OR CIVILIAN COURTS?

Moderator:

Hon. A. Raymond Randolph, U.S. Court of Appeals for the D.C. Circuit.

Prof. Laura Donahue teaches at the Georgetown University Law Center. Prof. Donahue discussed the ordinary criminal justice system's capacity to handle terrorism trials. She laid out the principal objections to terrorism prosecutions in the ordinary criminal justice system. Those objections include: concerns about evidentiary standards and the exclusion of hearsay evidence; the problems of dealing with classified information; the right to call and confront witnesses and the potential access to detainees and overseas witnesses; trial by jury and concerns about juror intimidation and juror bias; the right to speedy trials; and the right to self-representation and concerns about access to sensitive information.

Prof. Christopher Jenks teaches at the Southern Methodist University Dedman School of Law and is Director of the Criminal Justice Clinic. Prof. Jenks discussed the uncertainty surrounding the President's scope of authority for indefinite detention,

and criticized ambiguous statutory provisions for only compounding the problem. **Prof. Peter S. Margulies** teaches at the Roger Williams University School of Law. Prof. Margulies admitted that military commissions are important tools, but asserted that they must be used correctly. He discussed the Framers, including Alexander Hamilton and James Madison, and their commitment to comply with international law. Prof. Margulies distinguished between war crimes and other crimes, and asserted that, consistent with international law, military commissions have jurisdiction only over war crimes. According to Prof. Margulies, war crimes include targeting and killing civilians, sabotage, and treason, but that material support of terrorism and conspiracy are not clearly against the law of war. Prof. Margulies asserted that the Framers would have looked to international sources of law to determine what constituted war crimes, and analyzed some recent cases and whether the charged offenses were war crimes under international law. **Prof. Deborah Pearlstein** teaches at Benjamin N. Cardozo School of Law. She discussed the legal complexity of military commission trials, and asserted that the legal complexity has not decreased, though it has changed. Prof. Pearlstein noted that military commission convictions have been challenged in federal court, with the D.C. Circuit recently reversing one conviction for material support of terrorism because the court determined that material support was not a war crime when the offense was committed, and that the ex post facto law applies.



Prof. Nadine Strossen, New York Law School & ACLU (left), debates Dr. Roger Pilon, Cato Institute (right), on "Should we better protect government secrets or punish leaks more severely?"

ing one conviction for material support of terrorism because the court determined that material support was not a war crime when the offense was committed, and that the ex post facto law applies.

PANEL 3: DRONES AND PRESIDENTIAL AUTHORITY

Moderator: **Hon. Eileen J. O'Connor**, partner at Pillsbury Winthrop Shaw Pittman LLP.

Gregory G. Katsas is a partner at Jones Day. He has served as Assistant Attorney General for the Civil Division and as Acting Associate Attorney General. Mr. Katsas wanted to reframe the question to: "When is it appropriate to use drones for targeted killings of suspected al Qaeda terrorists? He asserted that this is

an easy question—the United States is in armed conflict with al Qaeda. President George W. Bush made the basic decision to treat 9/11 as an act of war, and that decision was ratified by Congress when it passed the Authorization for the Use of Military Force (AUMF), by the Supreme Court in *Hamdan* when it applied a law of war framework, and by President Obama, who embraced the law of war paradigm wholesale. According to Mr. Katsas, because the United States is in armed conflict with al Qaeda, the President can order lethal force to be used against the enemy. He asserted that drones are simply a way of delivering lethal force, with less risk to United States forces. **Prof.**

Martin Flaherty teaches at Fordham University School of Law. He argued that there was a need for greater transparency in disclosing both the factual and legal bases for targeted killings. This has been a problem in both the Bush and Obama Administrations, and the lack of information and statistics has made it difficult to have a robust public debate about this issue. **Prof. Michael Stokes**

Paulsen teaches at the University of St. Thomas Law School. He argued that the President, as Commander in Chief, has the plenary power and discretion to target and kill people he identifies as enemy combatants who are engaged in lawful and unlawful war-waging activities against the United States, regardless of whether that person is a U.S. citizen, and regardless of where he is located at the time he is targeted. **Prof. Rosa Brooks** teaches at the Georgetown University Law Center. She argued that targeted killings ordered by the President in secret are deeply offensive to our constitutional separation of powers because the AUMF did not authorize them. In fact, Congress has rejected an application from the President for a more expansive AUMF. Prof. Brooks argued that over the last decade, we have seen AUMF

“mission creep” and are going after people increasingly unconnected to Al Qaeda, while Members of Congress from both parties have not reacted against this trend with the vigor that they should. Next, she argued that targeted killings deeply undermine core norms and rules of international law.

BANQUET

Hon. Michael B. Mukasey, the 81st Attorney General of the United States and former Chief Judge of the United States District Court for the Southern District of New York, delivered the keynote address at the banquet. He defended the NSA’s programmatic surveillance of the contents of communications and bulk collection of metadata, arguing that they are valuable, constitutional tools for protecting national security. Judge Mukasey also argued that the recent leaks of classified documents have damaged national security, and criticized the media for glorifying the leakers. He argued that the effectiveness of the NSA’s techniques depends on their opacity, and that disclosures of the techniques would render them useless.

Prof. Joshua D. Wright of George Mason University School of Law was presented with the Paul M. Bator Award. The award recognizes promising young faculty members under the age of 40 who have demonstrated excellence in legal scholarship, a commitment to teaching, and a concern for their students. Finally, the annual Freddie Awards were given to several student chapters in recognition of their leadership over the course of the last year (see the Student Division Chapters Update for more information on the nominees and winners of the Feggies).



(above) Prof. Joshua Wright, George Mason Law & Federal Trade Commission, speaks after receiving the Paul M. Bator Award. (below) Carol Szurkowski (left) and Dan Loveland (right) from the Harvard Chapter accepting the James Madison “Feddie” Award.



Practice Groups Update

By Will Courtney, Assistant Director of Practice Groups,

Juli Nix, Director of Conferences,

David C.F. Ray, Associate Director of Practice Groups

The Practice Groups have been extremely active over the last few months. We present an overview of these activities.

The Administrative Law & Regulation Practice Group hosted a Teleforum conference call on a case that may pose the most serious challenge to the Affordable Care act currently in the courts, *Halbig v. Sebelius*. Prof. Jonathan Adler and Prof. Nicholas Bagley had a lively discussion on the topic, and fielded questions from practice group members. The practice group also hosted a call with Daren Bakst and Stuart Paper on recent efforts by the Food and Drug Administration to effectively ban trans fats from processed foods.

The Civil Rights Practice Group hosted Teleforum conference calls on a number of fascinating circuit court cases. Profs. Jennifer McAward and Gail Heriot discussed *Hatch v. U.S.*, on the use of the Thirteenth Amendment in modern hate crime prevention efforts, and Prof. Ernest Young and Erin Blondel covered *Hernandez v. Stephens*, a case that held that the determination of intellectual disability—and thus death penalty eligibility—can depend on national origin.

The Corporations, Securities, & Antitrust Practice Group co-hosted two Courthouse Steps Teleforum conference calls with the **Litigation Practice Group** previewing and summarizing the oral arguments in *Haliburton v. Erica P. John Fund*, featuring Steven Bradbury, Michael Klausner, and Jeffrey Wall.

The Criminal Law & Procedure Practice Group has made a tremendous effort to keep members informed

of recent criminal law cases at the Supreme Court. Prof. Orin Kerr joined a Teleforum conference call to offer same-day coverage on oral arguments in the highly anticipated cell phone privacy cases, *Wurie* and *Riley*, and John Malcolm provided same-day coverage of the oral arguments in the free speech case *Susan B. Anthony List v. Driehaus* on another Teleforum call. John Malcolm was joined in a Teleforum discussion of the decision in the child pornography case *Paroline v. U.S.* by Prof. Paul Cassell, who argued the case at the Supreme Court.

The practice group also hosted a pair of Teleforum conference calls on criminal sentencing, a topic of continued focus. These calls featured Prof. Douglas Berman, Prof. Paul Cassell, John Malcolm, and Prof. William Otis.

Recent activity by the Environmental Protection Agency in the area of greenhouse gas regulation has driven much of the activity of the **Environmental Law & Property Rights Practice Group**. The practice group hosted Oklahoma Attorney General Scott Pruitt at the National Press Club in Washington, DC to discuss his state's Clean Air Act compliance plan in the face of new EPA regulation. His remarks were followed by a panel featuring Jeffrey Clark, William Brownell, Patrick McCormick III, and David Doniger. On June 2, 2014 the Obama Administration took action that would require a 30 percent cut in carbon emissions at fossil fuel-burning power plants by 2030—Mark DeLaquil and David Rivkin joined a Teleforum conference call to offer their analysis to members the following day. The EPA's recent efforts have resulted in a number



U.S. Sen. Ted Cruz (TX) delivers the closing address at the Second Annual Executive Branch Review Conference in May.

of noteworthy cases in the Supreme Court and the DC Circuit, and Darin Bartram, Roger Martella, and Robert Gasaway participated in several Teleforum calls to keep practice group members abreast of these developments.

The **Financial Services & E-Commerce Practice Group** continues to utilize Teleforum conference calls to provide valuable information to Federalist Society members on the implications of the Dodd-Frank Act. Peter Wallison and Wayne Abernathy discussed new authority granted by Dodd-Frank to the Financial Stability Oversight Council, and SEC Commissioner Daniel Gallagher and former Commissioner Paul Atkins treated members to an excellent conversation on Dodd-Frank's impact on United States capital markets.

In addition, Charles Cooper, Iain Murray, and Prof. Todd Zywicki joined a Teleforum conference call on an important developing issue Operation Chokepoint, a recent initiative of the Obama Administration led by the Department of Justice, the FDIC, and the CFPB. The operation aims to pressure certain industries, primarily payday lending and online lending, by increasing oversight requirements to such levels that it becomes unprofitable for the banks to work with the third-party payment processors who enable these targeted industries to process payments.

The **International & National Security Practice Group** hosted numerous Telefora throughout 2014. It

held a Teleforum where Roger Williams University School of Law Prof. Peter S. Margulies, Center for Strategic Research and National Defense University Director and Yale Law School Senior Research Scholar Dr. C. Nicholas Rostow, and Sullivan & Cromwell LLP Counsel Edwin D. Williamson conversed about what should the United States Government position be in regards to its interpretation that the International Covenant on Civil and Political Rights and other key treaties do not apply to its actions outside the United States. Specifically, they spoke about the United States process of explaining their interpretation to a United Nations monitoring panel.

The Supreme Court decided a complex but important case on June 16, 2014, *Republic of Argentina v. NML Capital, Ltd.* At issue were whether NML Capital could bring suit against Argentina under the Foreign Sovereign Immunities Act (FSIA) and the extent of discovery to which plaintiffs are entitled. The Supreme Court ruled, 7-1, that Argentina is subject to FSIA, and thus liable to suit pursuant to it, and that American banks can be ordered to disclose Argentina's assets in the U.S. as part of discovery in the default lawsuit. International law experts, University of San Diego School of Law Prof. Michael D. Ramsey and Fordham University School of Law Prof. Thomas H. Lee examined and spoke about the Supreme Court decision taken by the Supreme Court and the possible effects of the decision in the years to



(left to right) Brianne Gorod, Appellate Counsel at the Constitutional Accountability Center; Prof. Jonathan Turley, George Washington Law; Stuart Taylor, Brookings Institution; and Prof. Nicholas Quinn Rosenkranz, Georgetown University Law Center, during the "Suspension of Laws: What are the Limits of Executive Authority?" panel at the Second Annual Executive Branch Review

come.

The **Litigation Practice Group** has also been active hosting various Teleforums. In March, Sullivan & Cromwell Special Counsel Jeffrey B. Wall attended the oral arguments before the Supreme Court in the *Halliburton Co. v. Erica P. John Fund*, and in a Courthouse Steps Teleforum, Mr. Wall offered his analysis on the arguments and the likely outcome of the case. Also in March, the practice group held an insightful Teleforum conversation with Vanderbilt University Law School Prof. Brian T.

Fitzpatrick and Center for Class Action Fairness Founder and President Theodore H. Frank. This Teleforum examined what to do with sometimes significant amounts of settlements funds remaining after all identified plaintiff awards have been made.

The **Professional Responsibility & Legal Education Practice Group** hosted a book review Teleforum with Washington University in Saint Louis School of Law Prof. Brian Z. Tamanaha. In his book, *Failing Law Schools*, Prof. Tamanaha argues law schools are failing abjectly. Thus, he posits that widespread practices, including false reporting of LSAT and GPA scores, are misleading placement reports and demonstrate the fundamental failure to prepare graduates to enter the profession. James Haynes of the Federalist Society's Professional Responsibility & Legal Education Practice Group Executive Committee interviewed Prof. Tamanaha about his book.

The **Religious Liberties Practice Group** also held numerous interesting Teleforums. In March, the practice group held an informative Teleforum on *Sebelius v. Hobby Lobby Stores, Inc.* This Teleforum featured University of California at Los Angeles School of Law Prof. Stephen M. Bainbridge, University of Notre Dame Law School Prof. Gerard V. Bradley, Georgetown University Law Center Prof. Martin S. Lederman, and Brooklyn Law School Prof. Nelson Tebbe. Together, our law experts examined and gave their analysis on the Religious Freedom Restoration Act of 1993 (RFRA).

On May 5, 2014, the Supreme Court issued its

decision in *Town of Greece v. Galloway*, overturning a Second Circuit decision that held that a legislative prayer practice violates the Establishment Clause of the First Amendment. Our expert, Christian Legal Society Senior Counsel Kim Colby, offered her analysis of the implications of the decision for religious liberty jurisprudence.

In June, the Religious Liberties group hosted a special 90-minute panel discussion Teleforum on two important cases the U.S. Supreme Court decided this term. In *Hobby Lobby*, the U.S. Supreme Court ruled the federal

government cannot require private businesses that are closely held and religiously devout to pay for contraceptives they believe are life threatening. The panel of law experts consisted of University of Notre Dame Law School Prof. Richard W. Garnett, IV, sole appellate practitioner Erik S. Jaffe, Villanova University School of Law Vice Dean & Prof. of Law Michael P. Moreland, and University of Virginia School of Law Prof. Micah J. Schwartzman. The panelists responded to the cases, the outcomes, and the audience's questions.

The **Telecommunications & Electronic Media Practice Group** was also active in 2014. In March, the practice group hosted an informative Teleforum about the Communications Act of 1934. Our experts in this Teleforum were Energy and Commerce Committee Majority Counsel for Communications and Technology Policy Shawn H. Chang, Free State Foundation President Randolph J. May, and Committee on Energy and Commerce Committee Chief Counsel for Communications and Technology David Redl. This Teleforum addressed fundamental questions, such as: whether an update to the Communications Act is needed and why; if an update is desirable, what a new Communications Act should look like, including, more specifically, how the structure of the act should be changed along with the jurisdiction of the Federal Communications Commission.

In June, the **Federalism & Separation of Powers Practice Group** presented a Courthouse Steps Teleforum discussing the *NLRB v. Noel Canning* U.S. Supreme Court decision. In a unanimous decision authored by



Prof. Martin Lederman, Georgetown University Law Center (left), and Elizabeth Wydra, Constitutional Accountability Center (right), during the "Contraceptive Mandate" panel at the Second Annual Executive Branch Review Conference.

Justice Breyer, the Court held that recess appointments made in pro forma sessions are invalid. Our experts; Noel J. Francisco of Jones Day who argued the case, Prof. Kristin E. Hickman of University of Minnesota Law School and Prof. Michael B. Rappaport of the University of San Diego School of Law.

In June, the Federalism & Separation of Powers Practice Group held a Teleforum discussing the new book, *Obama's Enforcer: Eric Holder's Justice Department*. In the book and on the call the authors, John Fund of *National Review* and Hans A. von Spakovsky of The Heritage Foundation, presented an analysis of the Attorney General's role in advancing the administration's political agenda, as well as his responsibilities as a "heat shield," protecting the president on numerous fronts.

In June, the **Federalism & Separation of Powers Practice Group** held a Courthouse Steps Teleforum on the recently decided U.S. Supreme Court case, *Bond v. U.S.* The Court did not avail itself of the opportunity to decide an important issue: Do the Constitution's structural limits on federal authority impose any constraints on the scope of Congress' authority to enact legislation to implement a valid treaty, at least in circumstances where the federal statute, as applied, goes far beyond the scope

of the treaty, intrudes on traditional state prerogatives, and is concededly unnecessary to satisfy the government's treaty obligations? Instead, the Court resolved the case using statutory interpretation. Two experts who filed an amicus brief in the case, Dr. John C. Eastman of Chapman University School of Law and Prof. Nicholas Quinn Rosenkranz of Georgetown University Law Center discussed the outcome and its implications.

The **Free Speech & Election Law Practice Group** presented a Teleforum call in May with the plaintiff in an important First Amendment case decided this Term.

Shaun McCutcheon discussed his book, *Outsider Inside the Supreme Court: A Decisive First Amendment Battle*, describing his road to the nation's highest court, and his quest to bring needed change to Washington by giving more candidates an opportunity to compete in the political arena and offer expanded ideas in the public marketplace.

Prof. Bradley A. Smith of Capital University Law School and former Chairman of the Federal Election Commission discussed, "The First Amendment and Campaign Finance: Assessing the Recently-Decided *McCutcheon v. FEC Case*" for the Free Speech & Election Law Practice Group in April, shortly after the decision came down. Prof Smith discussed how significant the decision is and how important might it prove to be in coming elections.

The **Intellectual Property Practice Group** hosted a Courthouse Steps Teleforum in June discussing the U.S. Supreme Court's recently decided important

property rights cases, *Nautilus v. Biosig Instruments* and *Lighthouse Networks v. Akamai Technologies*. Our experts; Aaron M. Panner of Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C and Thomas G. Saunders of WilmerHale discussed the decisions and their implications.

Prof. Adam Mossoff of George Mason University School of Law discussed the U.S. Supreme Court's surprisingly short opinion in *Alice Corp. v. CLS Bank* for our Intellectual Property Practice Group Courthouse Steps Teleforum in June. In the decision the Supreme Court invalidated Alice Corporation's patent on a computer-implemented technology for managing risk in financial transactions as claiming an "abstract idea."

The Intellectual Property Practice Group hosted a special Teleforum "Who Rules Patents? A Discussion with Chief Judge Randall R. Rader" in April. Having



Kyle Duncan, Duncan PLLC (left), and Prof. John C. Eastman, Chapman University School of Law (right), during the "Contraceptive Mandate" panel at the Second Annual Executive Branch Review Conference.

completed work on the America Invents Act in 2011, Congress is now considering further patent revision legislation. While some observers argue that the patent system is broken, in dire need of repair, others assert that the patent system has fostered innovation in technology, communications and elsewhere, which has permitted remarkable advances and robust



Prof. Gail Heriot, University of San Diego Law & U.S. Commission on Civil Rights (left) and Peter Kirsanow, U.S. Commission on Civil Rights, during the “Use of Disparate Impact Analysis” panel at the Second Annual Executive Branch Review Conference in May.

economic expansion in those sectors in an otherwise tepid economy. Chief Judge Randall R. Rader of the United States Court of Appeals for the Federal Circuit discussed what parts of the current patent revision efforts are true reform and which are unwarranted government intrusions. Judge Rader also discussed the respective roles and expertise of the judiciary and the legislature when it comes to patents, patentability, fee-shifting, patent-licensing, and more.

SECOND ANNUAL EXECUTIVE BRANCH REVIEW CONFERENCE

A key element of the Practice Groups’ Executive Branch Review project is our annual conference. This year’s Executive Branch Review Conference took place on Wednesday, May 7th at the Mayflower Hotel in Washington, DC. The Second Annual Executive Branch Review Conference began with an opening address by Hon. Tom Cotton, U.S. House of Representatives, Arkansas. There were several breakout sessions:

Suspension of Laws: What are the Limits of Executive Authority?

From enforcing and defending the Defense of Marriage Act, implementing the Affordable Care Act, enforcing federal marijuana laws, to making changes to sentencing guidelines, the Executive Branch has chosen less than vigorous action. What are the limits on the Executive’s authority to defer? When may, and may not,

the Executive choose not to act, or to act less vigorously, and still meet the requirements of the Take Care Clause? The panel featured: Brianne Gorod, Appellate Counsel, Constitutional Accountability Center; Prof. Nicholas Quinn Rosen-

kranz, Georgetown University Law Center; and Prof. Jonathan Turley, J.B. and Maurice C. Shapiro Prof. of Public Interest Law; Director of the Environmental Law Advocacy Center; Executive Director, Project for Older Prisoners, The George Washington University Law School. The panel was moderated by Stuart S. Taylor, Jr., Nonresident Senior Fellow in Governance Studies, The Brookings Institution.

Policy without Process?

The Administrative Procedure Act (APA) defines the process by which federal regulatory agencies are to adopt and enforce federal regulations. Many commentators, however, argue that the federal government has for years engaged in the practice of implementing and enforcing policy while evading the notice and comment requirements of the APA. Critics site informal agency guidance, opinion letters, regional office actions, and other agency actions that purport to bind at least some stakeholders. What are the limits? How real are other commentators complaints about the “sue and settle” phenomenon, described as a less-than-adversarial suit brought against, for example, the Environmental Protection Agency (EPA). Such a suit, it is claimed, argues for an expansion or broader reading of the EPA’s regulatory authority which, after resolution of the suit via settlement, is agreed to by all parties. Finally, what are the limits of unilateral action by a President via executive order? The panel featured:

Prof. Jonathan Adler, Johan Verheij Memorial Prof. of Law; Director, Center for Business Law and Regulation, Case Western Reserve University School of Law; William L. Kovacs, Senior Vice President, Environment, Technology & Regulatory Affairs, U.S. Chamber of Commerce; and Prof. Stephen I. Vladeck, Prof. of Law, American University Washington College of Law. The panel was moderated by Hon. Susan E. Dudley, Research Prof. of Public Policy and Public Administration and Director, Regulatory Studies Center, The Trachtenberg School of Public Policy and Public Administration,

Disparate Impact Analysis

Under disparate impact analysis, certain practices might be considered discriminatory if they have a disproportionate adverse impact on a protected class of persons, even without discriminatory intent. A number of commentators have noted an expansion of the use of disparate impact analysis in the federal government to areas other than employment, now including education, housing, government contracting, and auto financing, to name a few. Our panel of experts discussed whether or not there has been such an increase, and, if so, what the ramifications might be. The panel featured: Hon. Gail Heriot, Prof. of Law, University of San Diego School of Law and Commissioner, U.S. Commission on Civil Rights; Hon. Peter N. Kirsanow, Benesch, Friedlander, Coplan & Aronoff LLP and Commissioner, U.S. Commission on Civil Rights and former Member, National Labor Relations Board; Prof. Theodore M. Shaw, Prof. of Professional Practice in Law, Columbia University School of Law; and was moderated by Adam Liptak, Supreme Court Correspondent, *The New York Times*

The Internal Revenue Service

The Internal Revenue Service (IRS) is in the headlines almost daily. This panel discussed the IRS's proposed revision to 501(c)(4) rules, the targeting of certain organizations in IRS review and approval processes, as well as the IRS's determination, currently the subject of litigation, that individuals who participate in federally-run as well as state-run health care exchanges established under the Affordable Care Act are entitled to subsidies. The panel featured: Michael A. Carvin, Partner, Jones Day; Dr. Craig Holman, Government Affairs Lobbyist, Public Citizen; Cleta Mitchell, Partner, Foley & Lardner LLP and Robert N. Weiner, Partner, Arnold & Porter LLP.

The Contraceptive Mandate

Religion has long had a special place in our society

and in the Constitution. Has that place been evolving? If so, how? What does the Constitution say about the role of the federal government, and the Executive Branch in particular, in the realm of religious liberties? This panel will take up such issues as the HHS contraceptive mandate, the U.S. Solicitor General's positions in religious freedom cases, and other statutory and regulatory matters that have come to the forefront in recent years. The panel featured: Kyle Duncan, Duncan PLLC; Dr. John C. Eastman, Henry Salvatori Prof. of Law & Community Service, Chapman University School of Law; Prof. Martin S. Lederman, Georgetown University Law Center; Elizabeth B. Wydra, Chief Counsel, Constitution Accountability Center; and was moderated by **Mr. Robert Barnes**, Supreme Court Correspondent, *The Washington Post*.

Executive Power and the Role of the Coordinate Branches

What are the duties and responsibilities of the Legislative and Judicial Branch in policing Executive Branch activities? Has the administrative state grown to an extent that the very balance of power between the three branches has changed, and have the coordinate branches taken a step back? When it comes to the separation of powers, and ensuring one branch does not encroach on the proper authority of another, Federalist 51 advises that, "Ambition must be made to counteract ambition." Should Congress provide more robust oversight, or use its power of the purse more readily to rein in the Executive? Has the judiciary, through the non-delegation doctrine, Chevron deference, and its recent City of Arlington decision, struck the right balance? These and other questions were addressed by our panelists. The panel featured: Hon. Charles J. Cooper, Partner, Cooper & Kirk, PLLC; Prof. William N. Eskridge, Jr., John A. Garver Prof. of Jurisprudence, Yale Law School and Prof. Neomi Rao, Associate Prof. of Law, George Mason University School of Law.

The Conference ended with a Keynote Address by Hon. Ted Cruz, U.S. Senator, Texas where he released his latest report, "The Legal Limit Report No. 4: The Obama Administration's Abuse of Power".

The Second Annual Executive Branch Conference was very well attended and all sessions were live-streamed to audience members across the country. The videos of each of the speeches and panels are available at www.fed-soc.org.

Second Executive Branch Review Conference



Lawyers Chapters Update

By Jennifer Derleth

Deputy Director, Lawyers Chapters

The Federalist Society's Lawyers Chapters sponsored a busy schedule of Spring programs, focusing on religious liberty and conscience rights issues, the debate between privacy and security, school choice, and campaign finance reform. We present an overview of these programs.

Religious liberty and conscience rights issues continued to be hot topics for many chapters this Spring, particularly as the Supreme Court considered the HHS contraception mandate. Cameron Smith of the Alabama Policy Institute addressed the **Birmingham** Lawyers Chapter on *Hobby Lobby* and the limits of corporate conscience. The **Memphis** Lawyers Chapter held a discussion on religious liberty between Prof. Scott Gaylor of Elon University School of Law and Prof. Lisa Shaw Roy of the University of Mississippi School of Law, moderated by Magistrate Judge Charmiane Claxton of the U.S. District Court for the Western District of Tennessee. The **St. Louis** Lawyers Chapter hosted a panel discussion on religious liberty and the effects of *Hobby Lobby* and other healthcare mandate cases. The panel included Profs. Carl Esbeck and Josh Hawley of the University of Missouri School of Law, Prof. Frederick Gedicks of BYU Law School, Prof. Kevin Walsh of the University of Richmond School of

Law, and Prof. Andrew Koppelman of Northwestern University School of Law. Over 40 lawyers and judges attended the program. Kyle Duncan, Special Counsel for the State of Louisiana and formerly of the Becket

Fund, spoke to the **Dallas, Montgomery, and Baton Rouge** Lawyers Chapters on religious liberty and conscience rights in relation to the HHS Mandate and *Hobby Lobby*. These events drew about 40 attendees each. The **Tulsa** Lawyers Chapter hosted a luncheon with Oklahoma Attorney General Scott Pruitt who discussed *Hobby Lobby* and related religious liberty issues. General Pruitt also addressed sue-and-settle and the state's pending Obamacare challenge. The **Orange County** Lawyers Chapter co-hosted the annual "Religion and the Law Symposium," featuring Profs. John Eastman and Lawrence Rosenthal of Chapman University School of Law. They discussed rights of conscience vs. same-sex rights in a post-Prop 8 environment.

Many chapters tackled the controversy involving privacy concerns and constitutional liberties in light of the NSA's data surveillance program. The **Atlanta** Lawyers Chapter hosted former United States Attorney General Michael Mukasey who spoke to a crowd of 115 lawyers on the myths and reality of national security, privacy, and



(above) U.S. Sen. Kelly Ayotte (third from right) with DC Young Lawyers Chapter Board Members (left to right) Chris Grieco, Ashley Carter, Alyssa DaCunha, Will Levi, and Will Haun after Sen. Ayotte's event with the chapter. (below) Former Secretary of Defense Donald Rumsfeld speaks at a breakfast event in June for the DC Young Lawyers Chapter.



the Constitution. The **New Hampshire** Lawyers Chapter held a debate with Charles Douglas, a former New Hampshire Supreme Court Associate Justice and U.S. Congressman; Paul Rosenzweig of Red Branch Consulting PLLC; and moderator Prof. Calvin Massey of the University of New Hampshire Law School. They examined whether the NSA monitoring of domestic communications can be reconciled with individual constitutional liberty interests. Douglas maintained the NSA surveillance program is an unconstitutional violation of the Fourth Amendment. Rosenzweig cautioned that the metadata program does not involve actually listening to phone calls, and Americans must accept that some level of government surveillance is needed for national security. The event drew 60 lawyers. The **Tampa** Lawyers Chapter hosted Prof. Randy Barnett of Georgetown University Law Center, who contended the NSA data seizures are unconstitutional. Prof. Nathan Sales of George Mason University discussed the NSA's surveillance programs and the current controversy about the balance of security and civil liberties at a luncheon with the **Houston** Lawyers Chapter. Prof. Luke Milligan of the University of Louisville gave an address, "Government Surveillance and the Original Meaning of the Fourth Amendment," to 45 members of the **Louisville** Lawyers Chapter. The **Columbus** Lawyers Chapter hosted a debate on whether the NSA's metadata collection program comports with the Fourth Amendment. Prof. Ric Simmons of Ohio State University College of Law defended the program's constitutionality, and Gary Daniels of the ACLU of Ohio argued that the program violates the Fourth Amendment.

Several chapters addressed the topic of school choice. The **Louisville** and **Indianapolis** Lawyers Chapters hosted Clint Bolick of the Center for Constitutional Litigation at the Goldwater Institute who discussed the current state of the school choice debate. Each of those programs drew about 35 attendees. The **Charlotte** Lawyers Chapter also hosted Clint Bolick along with Rep. Rob Bryan of the North Carolina House of Representa-

tatives who spoke to over 45 lawyers. They provided a national and local perspective on school choice and an update on voucher program legislation in North Carolina. The **Milwaukee** Lawyers Chapter hosted a lively debate, "Resolved: School Choice Strengthens Both Public and Private Education Through a Competitive Marketplace." The participants included Anneliese Dickman, an independent policy researcher; Jamie Luehring of HOPE Christian Schools; and Richard Esenberg of the Wisconsin Institute for Law & Liberty.

With the Supreme Court's decision in *McCutcheon v. Federal Election Commission*, campaign finance continued to be a hot button issue. Ilya Shapiro of the Cato Institute addressed the **Minnesota** and **New Jersey** Lawyers Chapters on how the Court reached its decision to strike down aggregate donation limits, what the legal and political consequences might be, and how this case relates to *Citizens United*. The **Atlanta** and **Cincinnati** Lawyers Chapters hosted Prof. Bradley Smith of West Virginia University School of Law. In **Atlanta**, he delivered an address, "*Citizens United*, *McCutcheon*, and the Supreme Court's Campaign Finance Jurisprudence" to a crowd of 80 lawyers. In **Cincinnati**, he examined what the decision reveals about where the Supreme Court may be heading with regard to the treatment of campaign donations as speech and what the dissent tells us about the dissenters' view of First Amendment rights. *Washington Post* columnist George Will spoke about campaign finance reform to 210 attendees at the **Washington, DC** Lawyers Chapter's monthly luncheon. The **Memphis** Lawyers Chapter hosted a debate, "Campaign Finance Regulation after *McCutcheon*," with John Ryder of the Republican National Committee, Michael Morley of Harvard Law School, and J. Gerard Stranch of Branstetter, Stranch & Jennings, PLLC. The event was moderated by Judge Samuel Mays of the U.S. District Court for the Western District of Tennessee.

Many chapters hosted book events this spring. The **Los Angeles** Lawyers Chapter hosted Prof. John Yoo of Berkeley Law and author of *Point of Attack: Preventive*



Oklahoma Attorney General Scott Pruitt (center) with Tulsa Lawyers Chapter President Adam Doverspike and other board members at a May luncheon. General Pruitt wore orange and blue in honor of the Oklahoma City Thunder's playoff game that night.

War, International Law, and Global Warfare. Prof. Yoo debated Prof. Angelo Codevilla of Boston University and the author of *To Make and Keep Peace Among Ourselves and All Nations*. They discussed how and when the United States should take military action, when the U.S. should have intervened in Syria, and whether international law should constrain or facilitate military action abroad. Fifty lawyers attended the program. The **New York City** Lawyers Chapter also hosted Prof. Yoo along with Prof. Michael Lewis of Ohio Northern University Law School. Addressing 75 guests, they discussed the law and policy of wars in Crimea, Syria, and Libya as well as the looming threats in Iran and North Korea. The **Mobile, Minnesota**, and **Madison** Lawyers Chapters hosted Clark Neily of the Institute for Justice to discuss his book *Terms of Engagement: How Our Courts Should Enforce the Constitution's Promise of Limited Government*. The **Phoenix** Lawyers Chapter also hosted Mr. Neily along with Greg Patterson, blogger and former Arizona State Legislator, who offered a brief rebuttal. The **Los Angeles** Lawyers Chapter hosted Andrew McCarthy, a *National Review* contributor and the author of *Faithless Execution*, who addressed the controversy surrounding the Obama Administration's decision to trade five Taliban militants detained at Guantanamo Bay for the return of Army Sgt. Bowe Bergdahl. Stephen Rohde, former president of the ACLU Foundation of Southern California, offered commentary on Mr. McCarthy's remarks. The **Long Island** Lawyers Chapter also hosted Mr. McCarthy who discussed his book and President Obama's use of executive power.

Several chapters hosted programs with prominent judges and public officials. The **Indianapolis** Lawyers Chapter hosted a luncheon with U.S. Senator Dan Coats. Senator Coats touched on the controversy surrounding the filibuster rule changes and commented

on how partisan the Senate has become, saying that everything today has to do with politics and not policy. The **Indianapolis** Lawyers Chapter also hosted Indiana Governor Mike Pence for a luncheon event with 65 attendees. Governor Pence emphasized the importance of federalism and maintained that Republican leadership must permanently reduce the size of the federal government by returning resources and responsibilities to the states. The governor recounted a conversation he had with former Attorney General Edwin Meese, who recalled that one of President Ronald Reagan's chief policy priorities concerned federalism, which he particularly appreciated as a former governor. Governor Pence

also highlighted some of Indiana's conservative achievements, including implementing permanent tax reforms and his creation of the Healthy Indiana Plan that uses personal healthcare savings accounts instead of an Obamacare insurance exchange. Judge Bill Pryor of the U.S. Court of Appeals for the Eleventh Circuit gave a luncheon address to the **New Orleans** Lawyers Chapter on "The Unbearable Rightness of *Marbury v. Madison*: Its Real Lesson and Irrepressible Myths."

The **San Diego** Lawyers Chapter hosted its 21st Anniversary Celebration with the keynote speech delivered by Congressman Darrell Issa who also received the chapter's 2014 Bernie Siegan Award. The **Michigan** Lawyers chapter hosted its Annual Dinner and Grano Award Presentation with over 150 lawyers and judges in attendance. Baylor University President Kenneth Starr delivered the keynote speech, and Judge Gerald Rosen of the U.S. District Court for the Eastern District of Michigan was honored with the Chapter's Grano Award. Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit spoke on emerging privacy issues in our technological age and took Q&A from the audience at the **Columbus** Lawyers Chapter's breakfast event.

The **DC Young** Lawyers Chapter continues to host



(left to right) Prof. Carl Esbeck, Prof. Frederick Gedicks, Prof. Kevin Walsh, Prof. Andrew Koppelman, & Prof. Joshua Hawley being introduced by St. Louis Lawyers Chapter President Steve Clark.

sold-out events with some of the most prominent legal and policy figures. It hosted two networking dinners, the first with former SEC Commissioners Paul Atkins and Kathleen Casey and the second with Miguel Estrada of Gibson Dunn. The chapter held a panel discussion, “Careers on Capitol Hill,” with participants Gregg Nunziata, Senator Marco Rubio’s general counsel; Scott Keller, Senator Ted Cruz’s chief counsel; Ted Lehman, counsel in the Office of the Ranking Member at the Senate Judiciary Committee; and Prof. Neomi Rao of George Mason University School of Law, who moderated. They discussed their career trajectories and offered job advice to an overflowing room of 75 lawyers and law students. Federal Election Commission Chairman Lee Goodman addressed the chapter at a breakfast, and former White House Counsel C. Boyden Gray gave an update on Dodd-Frank at an evening reception of 50 attendees. The chapter hosted former Secretary of Defense Donald Rumsfeld for a breakfast with an at-capacity crowd of 80 guests. Secretary Rumsfeld offered advice to the young lawyers from his book, *Rumsfeld’s Rules*, and he offered reflections on the current situation in Iraq in the Q&A. For the chapter’s signature summer event, U.S. Senator Kelly Ayotte spoke to over 90 lawyers and law students. She reflected upon her early career as a prosecutor and her work as New Hampshire’s first female Attorney General. Senator Ayotte expressed her concerns about executive overreach and questioned the Obama Administration’s use of executive power in several instances, including Obamacare, recess appointments, immigration law, and the controversy surrounding the release of Guantanamo Bay detainees without the consent of Congress.

The **New York City Young** Lawyers Chapter held an intimate networking dinner with Logan Beirne, author of *Blood of Tyrants: George Washington & the Forging of the Presidency*. The chapter also hosted a well-attended evening reception with entrepreneur Mark Gerson, chairman of Gerson Lehrman Group. Mr. Gerson spoke to the young lawyers and law students about how they can use their law degrees to pursue business ventures or other career paths besides practicing law or working in politics.

There were many other notable events this spring. The

Birmingham Lawyers Chapter hosted a Q&A forum with the candidates for Alabama’s Sixth Congressional District. Participants included Democratic candidate Avery Vise and Republican candidates Will Brooke, Paul DeMarco, Gary Palmer, and Tom Vignuelle. The **Austin** Lawyers Chapter hosted a Texas Supreme Court Roundup with Justice Don Willett of the Texas Supreme Court and Don Cruse with SCOTX Blog. The **Los Angeles** Lawyers Chapter also hosted its annual California Supreme Court Roundup with Rex Heinke of Akin Gump, Lisa Jaskol of Public Counsel, Julian Poon of Gibson Dunn, and Jeremy Rosen of Horvitz & Levy. Both programs attracted 60 lawyers. The **Miami** Lawyers Chapter hosted Cleta Mitchell, who addressed the controversy concerning the IRS’s alleged targeting of conservative groups. The **Little Rock** Lawyers Chapter relaunched with a debate about the conservative case for tort reform. Brian Brooks, Counsel for the Arkansas Trial Lawyers Association, debated James R. Copland of the Manhattan Institute’s Center for Legal Policy. Brooks maintained that tort reform limits local control by constraining juries and degrades the lives of those seeking damages. Copland maintained that small businesses are hurt by not reforming the civil justice system because they are captive to the local tort climate. Tort reform could also result in a tax cut for Arkansans, because

it limits the amount of money spent in the civil justice system. He contended, “It’s really a tax cut and it’s really a regulatory cut if you’re doing a tort reform that reduces the cost and increases the fairness of the liability system. Organized trial lawyers like to act as if this is a free market system, when in fact it is the use of government force to redistribute wealth from one party to another.”

The Lawyers Chapters have planned a full schedule for the summer. Many more chapters will host annual Supreme Court reviews, including **Triangle, Philadelphia, Iowa, Dallas, Austin, Tulsa, Oklahoma City, and Fort Worth**. Several chapters also have summer associate receptions scheduled to connect with students working in their cities. For details on these events and all lawyers chapter programming, please visit www.fed-soc.org.



Former U.S. Attorney General Michael B. Mukasey (center) with Atlanta Lawyers Chapter President Adam Biegel (left) and Board Chairman Frank Strickland (right).

Federalist Society Advances Liberty and Rule of Law in Europe

By Paul Zimmerman

Deputy Director, International Affairs

In the first half of 2014, the Federalist Society's International Affairs project has broken through on several fronts in generating a critical discussion of rule-of-law and related issues in Western Europe, Central and Eastern Europe, and in the international realm with its Global Governance Watch® project.

From February to May in Britain, the Federalist Society capitalized on its expanding network of U.K. civil society groups by organizing a set of four roundtable meetings, called the Law and Liberty Circle, in **London** to discuss the U.K.'s relationship with the European Union and the European Court of Human Rights. The goal of these coalition meetings has been to use the Society's expertise in bringing together groups to engage in a conversation on the best strategy to promote a measured, thoughtful exchange in the country on British sovereignty.

The first meeting, in March, focused on the U.K.'s relationship with the European Court of Human Rights; the second, also in March, on the growing authority of the European Union institutions over the U.K. justice system; the third, in April, on a potential British Bill of Rights in place of the country's current Human Rights Act; and the fourth, in May, on European Union regulatory rules and the landscape of law and justice in Britain following the elections.

The Law and Liberty Circle meetings attracted a total of nearly fifty attendees, including eminent mem-

bers of the bar, representatives of respected think tanks and other organizations, and a Member of Parliament.

One of the gains from these meetings has been the enthusiastic response by civil society organizations seeking the Federalist Society's organizational support and sponsorship in planning events on Britain's relationship with European institutions. In May, the Society sponsored an event in London organized by the British think tank Politeia featuring Martin Howe QC, who discussed "The U.K. and the EU: The Constitutional Framework for Renegotiation." Following a lecture, a group of respected attorneys, Members of Parliament, journalists, and others gathered for a dinner to discuss how Britain could best proceed with

negotiating its relationship with the EU, and attendees recognized the Federalist Society for its continued interest in developing such an exchange in the U.K. The International Affairs Division has agreed to sponsor two more lectures and dinners with Politeia later in 2014: an event in July on the EU and financial services regulation, and an event in October on a potential U.K. Bill of Rights.

In France, the Federalist Society's work with the civil society network Institut de Formation Politique ("IFP") has culminated in the formation of a law student organization at Pantheon-Assas University Paris II called the Law and Liberty Circle. The leaders of this organization will seek to engage students in debates and other high-level events relating to individual freedom,



In July, the Federalist Society sponsored a retreat with alumni from the Hungarian organization the Common Sense Society's annual Summer Leadership Academy in Szirak, Hungary.

civil society initiatives, and the need for limited government. The group is planning a slate of events for the fall of 2014 and attended the Federalist Society's Student Leadership Conference in July to observe how students involved with our organization form successful student chapters in the U.S.

The Society has continued its support of the "Agenda Europe" network, a wide-ranging group of civil society group leaders, academics, journalists, and people who work in European institutions and international organizations on issues relating to individual freedom and national sovereignty, by sponsoring a lunch gathering of the members of this group in **Rome** in April.

In May, the Federalist Society's Deputy Director of International Affairs Paul Zimmerman attended an event co-hosted by the Common Sense Society, a partner organization in **Budapest**, on "The Power of Social Innovation," afterwards meeting with a number of young conservatives and libertarians from Hungary who are interested in the Federalist Society's continuing work with groups in the country. Also in May, as part of the Society's research and on-the-ground reporting for its website Global Governance Watch®, Paul attended a panel discussion at the Notre Dame London Law Centre, in which human rights activists and academics from the U.K., U.S., and other countries discussed the proposal of a legally binding treaty requiring states to monitor and regulate transnational corporations on human rights issues and to provide remedies to alleged victims of human rights violations by businesses.

In June, the Federalist Society, with the generous support of the John Templeton Foundation, sponsored the visit of Prof. Peter "Bo" Rutledge from the University of Georgia School of Law to speak at a conference on problems associated with civil procedure delays hosted at the Institute for Legal Studies at the Hungarian Academy of Sciences in Budapest.

The Federalist Society once again, at the end of June, co-sponsored the European Advocacy Academy, a conference organized by the organization European Dignity Watch, which promotes the freedom of the individual and the importance of national sovereignty in Europe. As in past years, the Academy serves as a high-level international training that discusses how to respond to the fundamental challenges Europe faces today in all countries and at the supranational level, bringing together civil society leaders, policy experts, journalists, and academics to discuss how to push back against the orthodoxy of the left on current issues. The Federalist

Society's Director of International Affairs Jim Kelly led a session at the Academy educating participants on "The Matrix of Human Rights Governance Networks," and participated in a panel discussion on recent developments at UN institutions.

Also in June, the Federalist Society furthered its crucial commitment to the maintenance and expansion of its European Judicial Network, a group of judges from national constitutional courts—mainly in Central and Eastern Europe—the European Court of Human Rights, and the Court of Justice of the European Union, by hosting its second European Judicial Network Conference in **Vienna**.

Ten European judges from six different countries, including a newly appointed judge from the Constitutional Court of Ukraine, attended the conference to engage in discussion on issues of common interest, including legal principles that Constitutional Courts should apply in reviewing fiscal, regulatory, or tax policies that may be a threat to free markets, the balance of powers between the national courts and European supranational courts, measures to protect the independence of the judiciary, and ways in which to promote a democratic and transparent process for constitutional reforms and amendments. In addition to the European judges, three judges from U.S. courts of appeal attended the proceedings to lend their expertise on the issues: Judge Edith Jones of the Fifth Circuit, Judge Douglas Ginsburg of the DC Circuit, and Judge A. Raymond Randolph of the DC Circuit.

The three-day conference was invaluable in giving the judges an opportunity to learn from each other's experiences on the bench in their home countries, and also to receive friendship and support from fellow jurists who often encounter withering criticism in their countries for their adherence to rule-of-law principles and the ideals of limited government.

The goal of the work described above, as always, is to advance the message of partner organizations and individuals in other countries who seek to promote a reasoned conversation on the necessary foundations of a free society, as we believe this conversation contributes to a more robust recognition of the principles of freedom at home. In the months ahead, the Federalist Society will continue to consolidate and expand its networks in Europe and to further this crucial discussion using its support for programs, research, and reporting on the universal importance of the rule of law, limited government, and individual liberty.

State Courts Report

By Peter Bisbee

Assistant Director, External Relations

The State Courts Project monitors activities relating to the role of state courts, judicial selection, judicial philosophy, and the rule of law generally, consistently seeking to spark debate and increase the quality of the discussion surrounding important legal policy issues. The developments described below have drawn considerable attention in local legal communities and in some cases nationally.

FLORIDA

Changes to the judicial selection system are being considered in Florida. With three supreme court justices set to reach the mandatory retirement age before their terms expire in 2019, the appointment power of the next governor could change the ideological balance of the seven-member court. Under current law, these three justices will be forced to retire on the same day the gubernatorial term ends, January 8, 2019. In March, a constitutional amendment that would allow departing governors to make prospective appointments, even if a vacancy occurs on their last day in office, for judicial vacancies was introduced in the Florida Senate. Senate Joint Resolution 1188 passed both the House and Senate in April and has been filed with the Secretary of State. If voters approve the amendment in the November general election, Governor Rick Scott, if re-elected, or his successor will have the power to appoint a majority of the seven-member court, a legacy which could last for decades.

LOUISIANA

In April a constitutional amendment was proposed in the Louisiana Senate which provided for the potential elimination of judgeships as vacancies occur in the state. Senate Bill 216 would change the procedures used when a judicial vacancy occurs in the state. Currently, the governor is required to call a special election to fill such a vacancy. Under the proposed change, the issue of whether the election is called is left up to the Louisiana Supreme Court. The court could recommend that the vacancy be filled and the governor call an election; the abolition of the judgeship; or its moving to another

location where a judicial shortage may exist. The bill passed the Senate 38-0 and made it through the House Committee on Civil Law and Procedure without opposition, however, it did not achieve the two-thirds vote in needed to pass the House.

MICHIGAN

In our last issue we detailed the Michigan Supreme Court's decision to create a task force to explore whether attorneys should be required to join the Michigan Bar. The court requested the report in response to a Senate bill introduced in January that would make bar membership voluntary, which came in response to criticism of mandatory membership because of the politicization of the bar regarding issue advocacy.

The task force, which was led by former Michigan Bar president Alfred Butzbaugh, issued a report on June 3rd recommending that membership in the State Bar of Michigan remain mandatory for all attorneys but with tighter rules governing issue advocacy. The task force recommendations call for stricter guidelines regarding public advocacy by the bar, specifically prohibiting advocacy on election law, judicial selection, issues that are perceived to be associated with one party or candidate, matters that are primarily intended to personally benefit lawyers or law firms, and "issues that are perceived to be divisive within the bar membership." Following a period of public comment on the recommendations, which ended in early August, the Supreme Court is expected to issue new rules regarding issue advocacy for the bar.

A few weeks after the report was released in June, the Michigan Supreme Court ordered that annual lawyer dues to the State Bar of Michigan be cut by \$20, removing a portion of dues earmarked for the attorney discipline fund because of the fund's surplus, which is estimated at over \$5 million. All lawyers pay a fee for the discipline system, even if they're not active members of the state bar.

MINNESOTA

For years the Minnesota group Coalition

for Impartial Justice has been campaigning for a constitutional amendment in Minnesota that would end nonpartisan contested judicial elections in the state. The group aims to replace these elections with a Missouri Plan style system of judicial selection, by means of legislation which the group dubs the “Impartial Justice Act”. If the proposed Impartial Justice Act became law, all judicial vacancies would be filled by gubernatorial appointment, in which the governor would choose from a list of nominees given by the Minnesota Commission on Judicial Selection. Furthermore, under the proposed system sitting judges would face an independent review and yes-or-no retention elections after each term.

In 2013 legislation promoting these ideas was introduced in both the Minnesota House and Senate, with both bills failing to make it to a vote. In March of this year another piece of legislation, House Bill 1083, was introduced promoting the Impartial Justice Act, however, the bill has yet to make it to a vote in the House. Over the last few months the Coalition for Impartial Justice has been trying to build support for the legislation so that voters could potentially vote on the amendment in November.

TENNESSEE

In August, Tennessee voters had the opportunity to change the composition of Tennessee Supreme Court with the retention elections of Justices Gary Wade, Sharon Lee, and Cornelia Clark. All three justices were appointed by Governor Phil Bredesen, a Democrat. Lieutenant Governor Ron Ramsey led the Republican push to persuade voters to oust the three justices. The campaign to remove the justices was the first serious challenge to sitting Tennessee Supreme Court justices in nearly two decades. The retention election was heated, as ethics complaints and outspoken ad campaigns were levied against all three justices, which led to an equally fierce campaign to retain the justices. On August 7th the voters of Tennessee went to the polls and elected to retain the three justices by a margin of around 57 percent to 43 percent. The justices will now serve new eight-year terms on the court, leaving the current majority in place for the foreseeable future.

Tennessee voters will decide in November whether to amend the state constitution to say whether the state’s method of selecting appellate judges should be changed for the first time since 1971. Amendment #2 would allow governors to appoint appellate judges, who then stand for yes-or-no retention elections every eight years. To succeed, the proposed amendment will need

more than just a simple majority of the vote. It will need support from more than 50 percent of the number of people who vote in the gubernatorial election on the same day. Proponents of the amendment, including former Republican U.S. Senator Fred Thompson and former Democrat Governor Phil Bredesen, argue the amendment will add new accountability and a stronger voice for Tennessee voters in the selection process.

OF INTEREST

In May, we published a white paper titled “History and Recent Developments in Same-Sex Marriage Litigation.” The first half of the paper describes the history of same-sex marriage litigation with a focus on the three landmark cases: *Romer v. Evans*, *Lawrence v. Texas*, and *United States v. Windsor*. The second half of the paper focuses on the legal landscape in a post-*Windsor* era. Since *Windsor*, federal challenges are primarily threefold: substantive due process, equal protection, and full faith and credit, while state challenges (in large part) demand a right to marry as well as divorce. The paper also includes an extensive appendix of all litigation related to the rights of same-sex couples in states that do not recognize same sex marriage. All State Courts Project white papers and Docket Watch are available to view online at www.StateCourtsGuide.com, along with many other resources.