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Engage : The Journal of the Federalist Society's Practice Groups

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Engage

The Journal of the Federalist Society's Practice Groups

A Project of the E.L. Wiegand Practice Groups

Johnson v. California: *When Does "All"*
Mean "All?" by Tom Gede

The Supreme Court's Property Rights Cases
by Steven J. Eagle

*Ten Reasons Why the Ninth Circuit Should
Be Split* by Diarmuid F. O'Scannlain

*How Intellectual Property Became
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*The DREAM Act: Tapping An Overlooked Pool
of Home-Grown Talent to Meet Military
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*Letters to Senator Arlen Specter, Chairman,
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Rotunda, Thomas D. Morgan and Stephen Gillers, David Luban
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James Madison by Chester Harding, National Portrait Gallery, Smithsonian Institution

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are those of the contributors and are not necessarily those of the Federalist Society
or its members. While publication standards are high, we are always happy to consider
publishing responses to articles contained in *E n g a g e*.

Letter from the Editor...

Engage, the journal of the Federalist Society for Law and Public Policy Studies, is a collaborative effort involving each of the Society's fifteen Practice Groups. The Federalist Society's Practice Groups spark a level of debate and discussion on important topics that is all too often lacking in today's legal community. Through their programs, conferences and publications, the Practice Groups contribute to the marketplace of ideas in a way that is collegial, measured, and open to all.

Volume 6, Issue 2 is dedicated almost exclusively to original articles produced by Society members and friends. The U.S. Supreme Court, recently the subject of extensive media attention, is featured prominently in a number of articles, including an analysis of the decisions handed down in the controversial Ten Commandments cases and a look at the impact Judge Robert Bork would have had on the Court had he been ultimately confirmed as a Justice. In addition, we have reprinted letters written by Professors Ronald D. Rotunda, Thomas D. Morgan, Stephen Gillers, David Luban and Steven Lubet to Senator Arlen Specter regarding then-Judge John J. Roberts' role in the case of *Hamdan v. Rumsfeld*. This issue also features the first installment of a series entitled "Ninth Circuit Split: Point/Counterpoint." Ninth Circuit Judge Diarmuid F. O'Scannlain's "Ten Reasons Why the Ninth Circuit Should Be Split" will be followed in the next issue by a rebuttal from Judge Alex Kozinski, also on the Ninth Circuit.

Upcoming issues of *Engage* will feature other original articles, essays, book reviews, practice updates and transcripts of programs that are of interest to Federalist Society members. We hope you find this and future issues thought-provoking and informative.

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Editor
Kenneth R. Wiltberger

ADMINISTRATIVE LAW AND REGULATION

WHAT WILL THE GOVERNMENT DO WITH YOUR CONFIDENTIAL PRICING INFORMATION ONCE YOU ENTER INTO A FEDERAL CONTRACT?

By PATRICIA H. BECKER*

It comes as no surprise that doing business with the federal government raises many unique business and legal considerations. For instance, although a company and its employees can be fined and/or prosecuted for disclosing any of the government's "secrets," the government may not be equally protective of contractors' trade secrets. In fact, the government may consider itself obligated to disclose companies' secrets, even to competitors.

I. Overview of FOIA

The Freedom of Information Act (FOIA) was enacted in 1966 to provide transparency regarding the actions of the federal government.¹ FOIA thus was one of the early federal government "sunshine" provisions. Under FOIA, any person may obtain information from the federal government by submitting a written request if the information is: (1) kept in a system of records; (2) retrievable; and (3) not legally exempt from release. If information does not fall within any exemption, it will be provided to the requester. One such exemption is Exemption 4 of FOIA.² Exemption 4 was established to protect "trade secrets and commercial or financial information [that is] obtained from a person and [is] privileged or confidential."³ Unfortunately, over the years, courts have eroded some of this protection through decisions in various FOIA request and "Reverse-FOIA" cases.

II. The "Reverse FOIA" Process

Litigation involving FOIA Exemption 4 has arisen (1) in response to objections by a requester to the government's refusal to provide certain requested records and (2) where the entity that initially submitted the requested information to the government objects to its release to a third party in response to a FOIA request.

Since third parties may request information under FOIA that can include a company's proprietary information, the government has established a process by which it will solicit and consider the original submitter's position regarding disclosure.⁴ Specifically, when a FOIA request is filed for information that is potentially exempt from release under Exemption 4, the government must notify the original submitter that its information has been requested and identify the particular information at issue, e.g., unit prices in a contract. The government then must invite the submitter to provide its views as to whether the information sought should be released.

If the government decides to release the information over the objection of the submitter, the submitter may file suit against the government under the Administrative Procedure Act (APA) to enjoin the release. Such an action is known as a "Reverse-FOIA" suit. The term "Reverse-FOIA" is used to

distinguish these FOIA cases from actions filed by parties contesting government decisions to withhold records that have been requested under FOIA. The term "Reverse-FOIA" was defined by the D.C. Circuit Court of Appeals in *CNA Fin. Corp. v. Donovan*.⁵ The court stated that:

"Reverse-FOIA" actions are now a common species of FOIA litigation. Jurisdiction over these cases is conferred by 28 U.S.C. § 1331(a) (1982), while § 10(a) of the Administration Procedure Act (APA), 5 U.S.C. § 702 (1982), supplies the cause of action. *Chrysler Corp. v. Brown*, 441 U.S. 281, 317 & n.47, 99 S. Ct. 1705, 1725 & n.47, 60 L. Ed. 2d 208, 234 & n.47 (1979). Typically, a submitter of information—usually a corporation or other business entity required to report various and sundry data on its policies, operations, or products—seeks to prevent the [government] agency that collected the information from revealing it to a third party in response to the latter's FOIA request. The agency's decision to release the data normally will be grounded either in its view that none of the FOIA exemptions applies, and thus that disclosure is mandatory, or in its belief that release is justified in the exercise of its discretion, even though the data fall within one or more of the statutory exemptions.⁶

III. Framework for this Article

The simple objective of transparency regarding government actions has grown to potentially endanger private entities and their trade secrets because of the approach taken by agencies and the development of FOIA case law. This article examines how the courts in "Reverse-FOIA" cases reviewed agency efforts to release contract information and, at times, have contorted the basic concept of transparency to the detriment of private parties and their trade secrets. This discussion provides guidance as to what safeguards (if any) a submitter can rely upon to protect its trade secrets and proprietary commercial or financial information, if it provides such data to the federal government. Furthermore, we will examine how government policies have or have not reflected the law in this area.

In order to understand the current state of law and policy regarding the release of confidential commercial information, it may be helpful to review the evolution of both the judicial interpretation and the Department of Justice (DOJ) interpretation of FOIA Exemption 4. The latter is reflected in guidance to agencies. Accordingly, we first will review the

historical interpretations of FOIA Exemption 4. We then will assess the current state of FOIA case law from the perspective of the District of Columbia Circuit, which has developed the majority of the “Reverse-FOIA” case law.

FOIA Exemption 4 applies to two distinct types of information: (1) trade secrets and (2) commercial or financial information that is privileged and confidential. Both types of information are routinely requested, expected, and even required by the federal government in many circumstances. For example, contractors may be required to provide this type of information in the course of competition, performance, and related administration (e.g., Defense Contract Audit Agency audits) of their government contracts. All government contracts include contractor pricing information in some form. Even if detailed cost information is not included, there will always be some price information in the contract, such as the unit price for an item, weapon system, hourly rate for services, or at least the total contract price. Depending on the circumstances, such as other competitions in the private or public marketplace where the prices would be relevant, a company may fear that disclosure of its price information to its competitors will compromise important proprietary information and result in competitive harm. Contractors often fear that their competitors will obtain significant proprietary and competitively sensitive information simply by submitting a FOIA request to the government.

Exemption 4 appears intended to allay business fears that FOIA would permit or even encourage the government to disclose proprietary information to the public.⁷ Furthermore, as discussed above, there is a process by which the government normally notifies contractors of requests for their information and enables them to provide their opposition, if any, to release of sensitive information. If that is the case, why then are many contractors nonetheless concerned that their sensitive information will not be protected? These concerns stem from the fact that information intended to be protected from mandatory public disclosure by Exemption 4 has been released by the federal government pursuant to FOIA requests during the past two decades. Our review will show how this occurred, and address what the case law signifies in regard to the current balance between transparency and the protection of sensitive contractor information under FOIA, particularly because the government has pressed for release of such information.

IV. Background

Prior to addressing the case law, it is worth noting some policy issues underlying the application of FOIA and Exemption 4 to information that pertains to contractual relationships between the government and private parties. Before FOIA, and even for the first few decades after FOIA was enacted, the federal government generally took the position that if a contractor gave the government proprietary information (particularly contract prices), the company ceded control of such information as a “cost of doing business” with the government.⁸ Although the government might be

said to act in a commercial capacity when it enters the marketplace via government contracting, the view that contractors are deemed to cede rights simply by virtue of entering a contractual relationship runs counter to the government’s commercial persona and harkens back to its regulatory or sovereign role.

Accordingly, for many years when a FOIA request was received, the government policy was that the information was releasable. Courts supported the release of unit prices. Typically, the courts supported release because they did not believe that the submitters of the information could show that unit prices disclosed specific cost or profit information that could be used by competitors to the competitive harm of the submitter. *See, e.g.* TRIFID Corp. v. Nat’l Imagery & Mapping Agency, 10 F. Supp. 2d 1087 (E.D. Mo. 1998); Martin Marietta Corp. v. Dalton, 974 F. Supp. 37 (D.D.C. 1997); McDonnell Douglas Corp. v. NASA, 895 F. Supp. 319 (D.D.C. 1995), *vacated as moot*, 88 F.3d 1278 (D.C. Cir. 1996); Comdisco, Inc. v. GSA, 864 F. Supp. 510 (E.D. Va. 1994); Pac. Architects & Eng’rs v. United States Dep’t of State, 906 F.2d 1345 (9th Cir. 1990); Acumenics Research & Tech., Inc. v. United States Dep’t of Justice, 832 F.2d 800 (4th Cir. 1988).

In cases such as those cited above, both courts and the government viewed the prospect of disclosure as a cost of doing business with the federal government, as if there was some type of implied consent on the contractor’s part by virtue of entering the contract relationship. It sometimes has been stated that the government is subject to the same general rights and obligations when it contracts as any other party. This concept was discussed by the Supreme Court in detail in *United States v. Winstar Corp. et al.*,⁹ although that case did not involve government handling of contractor information. One might argue, therefore, that if the government obtained information in its commercial capacity as a contracting party, it should analyze release from that role as well—with a greater eye toward its status as a party to the contract relationship (in which it may have obtained information in confidence, such as in proposals that were submitted with restrictive legends) rather than as the sovereign.

V. Balance of Competing Interests

Even apart from its commercial capacity, the government has an interest in protecting contract information. FOIA and its Exemptions establish a balance of competing interests. On the one hand, the Act promotes transparency in government operations. On the other, the exemptions recognize that legitimate governmental and other interests may mitigate against the disclosure of particular categories of records.

Exemption 4 safeguards trade secrets and confidential commercial or financial information. To the extent the information is commercially sensitive, the private entity that submitted such information obviously has a substantial interest in protecting the information from public disclosure. At the same time, the government may have a separate,

discrete interest in protecting the information from disclosure. For example, where disclosure may impair the government's ability to obtain similar information in the future, disclosure could result in harm to the government in a broader, programmatic context. The government thus could suffer harm in ways that are independent of any commercial harm that the submitter of the information might suffer. Exemption 4 thus encompasses a variety of interests that mitigate against disclosure. We will review the historical analysis of each element of Exemption 4 separately.

A. First Element of Exemption 4 of the FOIA—Trade Secrets

Of the two types of information protected by Exemption 4 of FOIA (trade secrets and privileged or confidential commercial or financial information), one might anticipate that trade secrets would be the portion that would be more easily understood because that term is used in other statutes, the common law, and in private transactions. Although FOIA uses the term “trade secrets,” the Act does not define it. Court decisions reflect significant efforts to interpret the scope of this element of Exemption 4.

The Restatement of Torts contained a broad definition that was used for many years to define this element of Exemption 4.¹⁰ In 1983, the District of Columbia Circuit took a more narrow view of what the term “trade secrets” encompassed. Specifically, in the pivotal case of *Public Citizen Health Research Group v. FDA*,¹¹ the D.C. Circuit rejected the more encompassing Restatement definition in favor of a narrower definition of “trade secrets” for purposes of FOIA Exemption 4.¹² This case involved a FOIA request by Public Citizen for clinical studies of intra-ocular lenses that various manufacturers had submitted to the FDA. The FDA withheld some of the requested studies on the basis that they constituted trade secrets. Public Citizen filed suit to compel release.¹³ The district court granted summary judgment against Public Citizen, which then appealed.

Upholding the district court's decision, the court of appeals defined a “trade secret” as “a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.”¹⁴ Rather than rely on other definitions in statutes that used the term, the D.C. Circuit tailored the definition specifically for purposes of Exemption 4 of FOIA. In doing so, the court opened up the second type of protected information under Exemption 4, the commercial and financial information element, to separate legal interpretation. The court reasoned that if the two elements did not have distinct meanings, it would have been difficult (as it was for government counsel at oral argument)¹⁵ to identify any commercial or financial information from the second element of Exemption 4 that would not also be considered a trade secret under the old, broad definition of the first element, thereby rendering superfluous the separate reference to “commercial or financial” information. The court reasoned that its newly tailored definition was more true to congressional intent. In order to make sense of a statute that

specifically referenced both trade secrets and a separate category of “commercial or financial information,” the court thus read trade secrets more narrowly than it had prior to this decision.

The development of the interpretation of this first element of Exemption 4 also grew to involve the Trade Secrets Act.¹⁶ This criminal statute expressly prohibits government employees from disclosing trade secrets. Once information is found to be a trade secret, not only is it exempt from mandatory release under FOIA, but its release is prohibited by the Trade Secrets Act, which makes disclosure a criminal offense.¹⁷ However, since the courts had interpreted a distinction between the two elements (i.e., trade secrets and commercial or financial information), their application theoretically could be quite different. Unlike trade secrets, if commercial or financial information was found to be exempt from mandatory disclosure under FOIA, there was some prospect that the government nonetheless had discretion to release it because release was not prohibited.¹⁸

This prospect was short-lived. Exemption 3 authorizes withholding of information when its release is specifically exempted from disclosure by statute. The court in *CNA Financial Corp. v. Donovan*, 830 F.2d 1132 (D.C. Cir. 1987) found that the Trade Secrets Act did not fulfill the role of a withholding statute under Exemption 3 of FOIA. However, the court also determined that the Trade Secrets Act was at least coextensive with Exemption 4 of FOIA. Within three years, therefore, the court closed off the option for any discretionary release by an agency where Exemption 4 applies. Later, in *McDonnell Douglas Corp. v. Widnall*, 57 F.3d 1162, 1164 (D.C. Cir. 1995), the court found that “whenever a party succeeds in demonstrating that its materials fall within Exemption 4, the government is precluded from releasing the information by virtue of the Trade Secrets Act.” Thus, the bulk of Reverse-FOIA case law centers on interpretation of the second element of Exemption 4, the privileged or confidential commercial or financial information.

B. Second Element of Exemption 4 of the FOIA—Commercial or Financial Information Obtained from a Person [that is] Privileged or Confidential

1. National Parks & Conservation Ass'n v. Morton

The seminal case interpreting the second element of Exemption 4 is *Nat'l Parks & Conservation Ass'n v. Morton*.¹⁹ In this FOIA case, the Conservation Association sought to compel the Department of the Interior to release information regarding its park concession contracts. The district court granted summary judgment for the government on the basis that the information was exempt from release under Exemption 4. Because the parties agreed that the information at issue was financial information that was not privileged, the only issue on appeal was whether the information was “confidential.”²⁰ The appellate court determined that for the commercial and financial information element of Exemption 4 to apply, the concessionaires would have to show that disclosure would impair the government's ability to obtain the information in the future and/or would cause substantial harm to the competitive position of the

submitter. The court did not see how the record in the case justified withholding the information. Therefore, the court reversed and instructed the lower court to further develop the record. This gave the agency an opportunity to develop the record to show how the concession contractors would be harmed by disclosure. The court saw evidence of such potential harm as necessary to support exempting the information from FOIA release.

In *National Parks*, the D.C. Circuit established a two-prong test for determining when commercial or financial information received from a person is “confidential” within the context of Exemption 4. The court took into account the dual purpose nature of Exemption 4—to balance the interests of both the government and the requester.²¹ Typically, this balance weighs the interest in disclosure against the harms likely to be caused by such disclosure. As established by *National Parks*, to be considered confidential under Exemption 4, the agency or a reviewing court must find that disclosure of the commercial or financial information is likely to have either of the following effects: (1) impair the government’s ability to obtain necessary information in the future or (2) cause substantial harm to the competitive position of the person from whom the information was obtained.²²

The court in *National Parks*, almost as an aside, stated that because the concessionaires at the parks were required to provide the government the financial information at issue, there was “presumably no danger that public disclosure w[ould] impair the ability of the government to obtain this information in the future.”²³ As discussed below, this prospect of impairment was used by later courts to raise an important distinction.

2. Public Citizen Health Research Group v. FDA

In the 1983 *Public Citizen* decision, the D.C. Circuit refined the *National Parks* test.²⁴ The court stated that it had consistently held that the terms “commercial” and “financial” should both be given their ordinary meanings.²⁵ Then, in addition to narrowing the definition of trade secrets in the first element (as discussed above), the court described the level of “competitive harm” evidence needed to establish that information qualifies as commercial or financial information within the scope of Exemption 4.²⁶ The court stated that to oppose disclosure, a party did not have to show “actual competitive harm.”²⁷ To the contrary, the court concluded that evidence showing “actual competition and the likelihood of substantial competitive injury” was sufficient to establish that the information was confidential.²⁸

The D.C. Circuit went on to emphasize that the important point for competitive harm in the FOIA context. . . . that it be limited to harm flowing from the affirmative use of proprietary information by competitors. Competitive harm should not be taken to mean simply any injury to competitive position, as might flow from customer or employee disgruntlement or from the

embarrassing publicity attendant upon public revelations concerning, for example, illegal or unethical payments to government officials or violations of civil rights, environmental or safety laws.²⁹

The harm has to be commercial and competitive in nature. The next significant development in the interpretation of Exemption 4 by the D.C. Circuit was an affirmation of the *National Parks* test coupled with a significant clarification of its scope and application. *Critical Mass*³⁰ gave more life to a consideration referenced in the *National Parks* case but not really developed earlier—the impact of the nature of the original submission on the impairment analysis.

C. Critical Mass Energy Project v. Nuclear Regulatory Commission

In the early 1990s, the D.C. Circuit began to focus on the circumstances under which the information at issue was provided to the government. In *Critical Mass*, the court developed the distinction (alluded to in the above discussion regarding the *National Parks* test) based on whether information was submitted to the government on a voluntary basis or in response to a requirement.³¹ The court concluded that if commercial information was voluntarily provided to the government, but was normally not made public, it would be considered confidential. There would be no need for any further assessment of the harm to the submitter that likely would result from disclosure. Exemption 4 protection from mandatory disclosure would apply since disclosure would impair the government’s ability to obtain such information in the future because submitters who were not required to submit it might decline to do so. If the information at issue, however, had been submitted to the government in response to a requirement (*i.e.*, on a mandatory basis), submitters could not decline to submit it and the assessment of its confidential nature thus would involve application of the *National Parks* test. In this circumstance, the prospect of competitive harm would have to be assessed.

Evaluating the confidentiality piece of the commercial element, therefore, courts now apply the voluntary versus mandatory distinction from *Critical Mass*. Based on *Critical Mass*, to find commercial or financial information confidential when the submitter was required to submit it to the government, disclosure of the information would have to be likely to either: (1) impair the government’s ability to get the information in the future (government interest) or (2) cause substantial harm to the competitive position of the person from whom the information was obtained (private interest). This is the *National Parks* test.

Prior to *Critical Mass*, courts in various cases had commented about how difficult it might be for the government to obtain certain commercial information from other contractors in the future if they knew it would be released. In fact, there already had been a presumption that if submission of the information was required then, even if it were released, companies would continue to provide the information. Following *Critical Mass*, however, courts began to examine

the issue more intently, particularly when the information had been voluntarily submitted to the government. Courts realized that in assessing the public and private interests, the type of submission could influence the ultimate finding of confidentiality.³² As discussed below, however, just like the basis for submission, the type of information provided (such as price information) can impact the protection afforded by Exemption 4.

VI. Protection of Contract Price Information

The D.C. Circuit clarified the standard to protect price information in its 1999 decision in *McDonnell Douglas Corp. v. NASA*.³³ In this case, NASA had decided to release certain contract line-item prices pursuant to a FOIA request. The district court upheld the agency's decision. McDonnell Douglas filed a Reverse-FOIA suit to prevent release of its contract prices. The D.C. Circuit, rejecting various government arguments supporting release, held that the price information at issue was protected by Exemption 4 of FOIA and reversed the district court. The government had argued that the price information at issue could be considered unit prices, which the government for years had presumed was releasable and, in fact, had adopted release of unit prices as its established policy.³⁴

The D.C. Circuit strongly rejected that policy as contrary to the law: "NASA's response to appellant's concern that its customers' bargaining leverage will be enhanced is rather mystifying. The agency said that publication of line item prices is the 'price of doing business' with the government, which either assumes the conclusion, or else assumes a legal duty or authority on the government to publicize these prices, which, as we have noted, the government does not assert."³⁵

The court of appeals also dismissed other arguments advanced by the government:

- If commercial or financial information is likely to cause substantial competitive harm to the person who supplied it, that is the end of the matter, for the disclosure would violate the Trade Secrets Act. The court did not limit this conclusion to the McDonnell Douglas unit prices, but used far broader language (e.g., "commercial or financial information," "the person who supplied it").
- [T]he agency "reasoned" that underbidding due to the disclosure would not occur because price is only one of the many factors used by the government in awarding contracts. That response seems too silly to do other than to state it, and pass on.³⁶

The DOJ summary of the case describes the sweeping nature of the *McDonnell Douglas v. NASA* decision, stating that it "reject[ed] a longstanding federal agency disclosure practice ..."³⁷

Although courts previously had held that unit prices could be released where they did not reveal elements of a contractor's costs or profit,³⁸ the D.C. Circuit rejected that position and instead analyzed the extent to which disclosure of the prices themselves were likely to result in competitive harm to the submitter (*McDonnell Douglas* in that case). The D.C. Circuit found that these unit prices were confidential because the contractor established that release would allow competitors to underbid the prices and also enable the contractor's customers to "ratchet down" the prices they were charged.³⁹ The court found that "[b]oth of the reasons McDonnell Douglas advanced for claiming its line item prices were confidential information or financial information [were] indisputable" and that under present law a submitter has "every right to insist" that confidential information be withheld from disclosure.⁴⁰ To the extent there was any doubt, the court also reiterated that there was no longer any prospect of discretionary release by an agency where Exemption 4 applies.

VII. A Balancing Act

In 2001, the D.C. Circuit further clarified the distinction between voluntary and mandatory submissions. At issue was how to determine whether a submission was mandatory. The court in *Center for Auto Safety v. NHTSA* held that "actual legal authority, rather than parties' beliefs or intentions, governs judicial assessments of the character of submissions."⁴¹ The court went on to state that "linking enforceability and mandatory submissions creates an objective test; regardless of what the parties thought or intended, if an agency has no authority to enforce an information request, submissions are not mandatory."⁴² Information submitted voluntarily would be exempt from disclosure if the submitter could establish that it was the kind of information that was not customarily released to the public. To determine what was "customary," the D.C. Circuit reasoned that a court needed to look at the submitter's customary treatment of the type of information, rather than how the industry as a whole treated such information.⁴³ In addressing the issue of whether disclosure was customary, the D.C. Circuit held that the district court had misstated the appropriate legal standard. "The trial court appeared to indicate that the [requestor] Center for Auto Safety was required to prove that intervenor-defendants have previously released *identical* information."⁴⁴

In a 2002 FOIA case, where the sole issue was whether the commercial information in dispute was "confidential" under the *National Parks* test, the district court summarized its job well: "The court is therefore charged with balancing the public interest in disclosure against the private interest in withholding the information."⁴⁵ This case was interesting in that it more clearly viewed the government acting in its role as a commercial entity; the case involved release of information regarding royalties on inventions stemming from Cooperative Research and Development Agreements (CRADAs), i.e., joint development efforts by government and industry.

With FOIA's presumption of release, this balancing test represents the most protection a contractor could hope for in a general scheme. The next real challenge to private interests was the handling of specific scenarios, particularly involving price data. This would prove to be the next tug-of-war between public and private interests in Exemption 4 case law.

VIII. Recent Status of Law Regarding Pricing Information

Soon after the 1999 *McDonnell Douglas* decision, the government FOIA authorities took a new approach in order to continue their longstanding policy of release of unit pricing. Prior to that decision, unit prices routinely had been released. The government realized that release of prices can result—at least in the short run—in lower prices. The only real dilemma is that at some point entities might become deterred from providing the information in the first case or from contracting with the government if it always releases prices.

Instead of relying only on FOIA interpretation, government officials turned to the Federal Acquisition Regulation (FAR) as new support for the long espoused policy that unit prices should be released on the basis that it required (or at least authorized) release of such prices. Relying on a rewrite of FAR Part 15 (which had occurred almost two years earlier), DOJ led the way in interpreting the FAR to mandate release of awarded contract prices in the notifications and debriefings provided to unsuccessful offerors.⁴⁶ This was disturbing since, even after the revision of Part 15, the FAR continued to limit its instructions regarding disclosure with the caveat that disclosure could not violate FOIA or the Trade Secrets Act.⁴⁷

By releasing information in these non-FOIA request situations (such as in debriefings), the government purported to circumvent the protections otherwise accorded to private interests in the context of FOIA requests. Specifically, Executive Order No. 12,600⁴⁸ provides certain safeguards to a submitter of information. It requires the government to notify the submitter that it has received a request for the information and provide the submitter an opportunity to respond. However, this process is only triggered by submission of a FOIA request. To the extent the government intended to, and did, release information during a debriefing, prior to submission of any FOIA request, the safeguards of the Executive Order were not even triggered.

Furthermore, the government began to assert this purported FAR requirement for disclosure as a basis for release under FOIA on the basis that the information was already “public” in some sense. Specifically, to the extent the FAR required or at least authorized release and the government released the information, there was no point or purpose served by subsequently notifying the submitter in response to a later FOIA request because the information already was deemed to be in the public domain.

This conflict took center stage in *MCI Worldcom Inc. v. GSA*.⁴⁹ In an opinion just before *MCI*, the district court in the District of Columbia had opined that the government's

reliance on the FAR Part 15 provisions was misplaced.⁵⁰ In *Mallinckrodt Inc. v. West*, the court analyzed whether the *National Parks* test applied—first determining whether the information was provided voluntarily or not. Then it found that the rebate and incentive information in an existing blanket purchase agreement was not “unit pricing data” as the government alleged, and thus was not covered by the cited FAR provisions. *Mallinckrodt* was decided based on the harm or impairment caused by release, not the FAR Part 15 alleged mandate—but judicial sights had been set on the government's new policy to release prices.

A. *MCI Worldcom Inc. v. GSA*

In *MCI*, a court had the opportunity to evaluate the merits of the government's new policy that FAR Part 15 mandated release of “unit prices.” The court held it did not set such a mandate. First, the *MCI* court disagreed with the government's contention that the information at issue constituted unit prices. Judge Gladys Kessler determined that the relevant information, (B-Tables)—which are “complex matrices in computer data base format that contained detailed line item pricing information,”⁵¹—are more akin to cost breakdowns, which the FAR expressly stated should not be released to any other offeror.⁵² If the information did not constitute “unit prices,” it could not be within the scope of the FAR Part 15 provision. GSA's stated basis for releasing the information apart from the FOIA, therefore, would fail of its own accord.

Judge Kessler continued, however, noting that even if the information at issue constituted unit prices, the government's assertion that FAR Part 15 required the information be released was wrong. Judge Kessler stated:

Contrary to GSA's reading, the revised regulations do not permit GSA to disclose ‘unit price’ information regardless of its confidential nature . . . any such reading is contrary to the express language of the FAR and its authorizing statute, [Federal Acquisition Streamlining Act] FASA, which explicitly prohibits disclosure of confidential information.⁵³

The court then conducted a detailed analysis of the information at issue pursuant to Reverse-FOIA law developed to this point *i.e.*, an assessment of the likelihood that competitive harm would result from release.

The court found that the contractor was required to include the information in its proposal for the contract, but the information nonetheless was protected from disclosure under Exemption 4 because it was confidential commercial or financial information per the *National Parks* test. The court conducted a thorough assessment of whether there was a likelihood of substantial competitive harm if the information was released.

Judge Kessler found that the telecommunications companies had presented evidence of “precisely the injuries

that led this Circuit to declare that line item pricing was confidential information and not disclosable.”⁵⁴ Based on the facts, the court granted summary judgment for the telecommunications companies—thereby protecting the price information from release on the basis that disclosure likely would result in harm.

B. *McDonnell Douglas Corp. v. USAF*

The next significant case in the Reverse-FOIA realm is *McDonnell Douglas Corp. v. USAF*.⁵⁵ The Air Force issued a request for proposals in 1997 for repair and maintenance work on the KC-10 line of aircraft in its fleet. McDonnell Douglas submitted detailed pricing data as part of its proposal. McDonnell Douglas was awarded the contract, consisting of a base year and eight option years. The contract incorporated the pricing information that McDonnell Douglas had submitted in its proposal.

After the award, a competitor filed a FOIA request for a copy of the contract. The Air Force notified McDonnell Douglas that it had received the request. McDonnell Douglas promptly objected to release of some of the pricing information, pointing to at least the option year prices and prices for certain contract line items (CLINs) as confidential. More specifically, the court ended up reviewing whether the Vendor Pricing CLINs and the Over and Above Work CLINs, in addition to the option year prices, were exempt from disclosure under FOIA per Exemption 4.

The court’s analysis cleanly stepped through the above-described *National Parks* standard test as it had evolved over the years. The *McDonnell Douglas* appeal was a review of the lower court’s grant of summary judgment in support of the USAF’s release of the information. The D.C. Circuit determined that because disclosure of the Vendor Pricing CLINs and the option year pricing likely would cause substantial competitive harm to McDonnell Douglas, the information should be protected as confidential commercial information.

However, the D.C. Circuit rejected the company’s arguments regarding the Over and Above Work CLINs. Contrary to McDonnell Douglas’ claim, the court was not convinced that competitors would be able to calculate McDonnell Douglas’ Labor Pricing Factor from a combination of the information for Over and Above pricing and the recent public media disclosures about what an “average blue collar worker” was earning in that locale. The majority in this 2-1 decision was deliberate in its balancing of the public and private interests as the case law, particularly for the second element of Exemption 4, had developed.

Responding to a partial dissent by Judge Garland,⁵⁶ the majority wrote that the core purpose of FOIA is not disclosure of vendor prices, but simply to provide the public insight into the operation and activities of its government, so the public can better understand its operation.⁵⁷ In the case at issue, the total contract price already had been properly released. As a result, the vendor pricing did not contribute in any significant way to the public’s understanding of how its

government operates. To the contrary, disclosure would only provide insight into the contractor’s workings at that private party’s expense.⁵⁸

After *McDonnell Douglas* was decided in 2004, DOJ sought rehearing *en banc*. Explaining its decision to petition for rehearing, DOJ cited what is characterized as the “extraordinary split decision on an issue of great importance to the adjudication of ‘reverse FOIA’ cases under the APA.”⁵⁹ Further, DOJ pointed to the fact that other circuits, such as the 4th (coincidentally citing a DOJ case involving release under FOIA) and 9th Circuits, when faced with this issue, had upheld agency decisions to disclose contractors’ price information. These other Circuits had held that the unit price information was not protected by Exemption 4. DOJ argued that various Circuits having differing holdings on this issue presented “practical difficulties and uncertainties” that it sought to alleviate by requesting rehearing. On December 16, 2004, the D.C. Circuit denied DOJ’s requests for rehearing and rehearing *en banc*.

C. *MTB Group, Inc., v. United States*

Interestingly, one of the most recent cases to utilize the FOIA Exemption 4 analysis was not even a FOIA case. The United States Court of Federal Claims issued a decision on June 7, 2005 which relied on Exemption 4 analysis to determine if the release of contractors’ price information in a competitive auction scenario was improper.⁶⁰ In that decision, Judge Christine Miller recognized that Exemption 4 case law provided comparable reasoning that she could use to evaluate the release of information being complained of in the case before her. This case involved a protest to enjoin HUD’s Reverse Auction Program (RAP). According to the protester, RAP disclosed too much confidential pricing information. The protestor filed suit because it believed the disclosure of the prices would allow competitors to figure out protected contractor bid and proposal information.

Because her case involved an auction scenario, the contractor was clearly required to provide the pricing information.⁶¹ Thus, Judge Miller stepped through the test balancing of the competing public and private interests in disclosure that has been used in FOIA Exemption 4 cases. Ultimately, Judge Miller was not convinced based on the facts that the information to be released was confidential commercial information. Judge Miller stated that “the standards for determining whether Exemption 4 applies in a particular [FOIA] matter offer a legitimate tool to establish whether HUD or another agency has violated the FAR through a reverse auction procedure.”⁶² It thus appears that FOIA Exemption 4 analysis may find its way into other areas of government contracting law.

IX. Contractors and Their Price Information Today

DOJ’s current guidance to government FOIA officers shows that DOJ still takes the position that the D.C. Circuit was incorrect in the latest *McDonnell Douglas* case in regard to the appropriate analysis of the releasability of unit prices under FOIA. DOJ’s policy guidance states that, as in “comparable circumstances when government policy is under

judicial review,” agencies should continue existing administrative practices. In fact, DOJ cites its 2002 “Treatment of Unit Prices Under Exemption 4” as still being the current guidance on which to rely.⁶³ This guidance was issued when DOJ was still petitioning for a rehearing of *McDonnell Douglas*. However, as of more than six months after its rehearing petitions were denied, the DOJ Office of Information and Privacy has not modified or removed this guidance from its website.

The 2004 *McDonnell Douglas* case, however, set the controlling standard in the D.C. Circuit with regard to disclosure of price information in response to a FOIA request. This is an important development for companies seeking to protect their price information from public release. The D.C. Circuit has rejected the argument that FAR Part 15 mandates release and instead has continued to apply the *National Parks* test.⁶⁴ In fact, the D.C. Circuit has not made any distinction about the type of information sought to be released; the analysis applies to all information on a case-by-case basis.

Contract pricing information typically is considered information that has been submitted on a mandatory basis within the meaning of *Critical Mass*, but often is considered “confidential” within the scope of *National Parks*. The current state of the law in the D.C. Circuit thus is favorable to protecting contractors’ price information. Yet the government’s policy guidance has not been comparably updated. Accordingly, there is a significant risk that a company may still have to resort to the court system to protect its unit prices from release. There is, then, a risk that a court might not be convinced that a company’s substantial competitive harm outweighs the benefits of disclosure.

Contractors should not have to continue turning to the courts to apply the *National Parks* balancing test to prevent disclosure of their price information. It is in a contractor’s best interest to convince the government agency itself not to release its price information. While case law is supportive, the challenge is that government policy has not been brought in line with the state of the law. So, to make the information less likely to be released, it has to be greatly detailed, thereby exacerbating the potential harm from release. However, if a company tries to compile the information in a manner such that competitors are less likely to decipher the more competitively sensitive elements, the risk of an agency releasing the information under DOJ’s outdated policy guidance grows.⁶⁵

X. Going Forward: A New Policy?

The best solution is politically the most difficult one. Like FOIA policies issued post-9/11 protecting information for homeland security reasons, the government should adopt a clear FOIA policy—modeled on the D.C. Circuit’s view. Apart from the overall contract price—which could be disclosed in most cases to foster the interests of transparency to which FOIA is directed, this guidance should acknowledge a presumption of confidentiality when the information sought involves underlying cost or pricing information under a federal

government contract, such as unit prices and CLIN and sub-CLIN structure. Such a policy would set a bright line test that (1) would be consistent with the state of the law with regard to contractors’ pricing information and (2) reduce uncertainty on the part of contractors and the government with regard to the protections that may and will be accorded to pricing. Such a policy would also be consistent with the precept that government, in its commercial capacity, should act in a way that befits a contractual relationship, rather than one that imposes the sovereign demands as a “cost of doing business.” To the extent information was submitted with a reasonable expectation of confidentiality, the government should take all permissible steps to protect it from release. And at least in the D.C. Circuit, there would be a good chance that such a policy could withstand judicial scrutiny.

The government’s policy should be updated to provide these protections without a company having to file suit for a court determination on an already settled judicial issue. Companies should not have to rely on costly court battles against the agency with which they do business, to protect their price information, especially since the law seems relatively settled.

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Footnotes

¹ See 5 U.S.C. § 552, which was substantially amended in 1974 and 1986.

² 5 U.S.C. § 552(b) includes a total of 9 such exemptions.

³ 5 U.S.C. § 552(b)(4).

⁴ See Exec. Order No. 12,600, 3 C.F.R. 235 (1988), *reprinted in* 5 U.S.C. § 552 note (2000). This Executive Order requires agencies to notify the original submitters of information and solicit their input regarding release of information when a request for information is received from a third party.

⁵ 830 F.2d 1132 (D.C. Cir. 1987).

⁶ *Id.* at 1134 n.1.

⁷ See *generally* S.1160 (Before the Subcommittee. on Administrative Practice and Procedure of the Senate Committee on the Judiciary) 89th Cong. §§ 6-8 (1965); H.R. Rep. No. 89-1497 at 10 (1966).

⁸ See *Racal-Milgo Gov’t Sys. v. SBA*, 559 F. Supp. 4, 6 (D.D.C. 1981).

⁹ See 518 U.S. 839 (1996)(citing *Horowitz v. United States*, 267 U. S. 458 (1925)).

¹⁰ Until 1983, a part of the Restatement of Torts definition of trade secrets had been widely accepted for FOIA purposes. This broad definition stated that a “trade secret may consist of any formula, pattern, device, or compilation of information which is used in one’s business and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.” RESTATEMENT OF TORTS §757 cmt. b (1939).

¹¹ 704 F.2d 1280 (D.C. Cir. 1983).

¹² *Id.* at 1288.

¹³ *Id.* at 1283.

¹⁴ *Id.*

¹⁵ *Id.* at 1289.

¹⁶ 18 U.S.C. § 1905. In relevant part, the Act states:

Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than \$1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.

¹⁷ *Id.*

¹⁸ The prospect that the government might have discretion to release, notwithstanding applicability of Exemption 4, was raised by *Nat'l Org. for Women, Washington D.C. Chapter v. Social Sec. Admin. of Dep't of Health & Human Services*, 736 F.2d 727 (D.C. Cir. 1984), but the D.C. Circuit did not decide this issue due to the procedural posture of the case. The case went to the Court of Appeals based on an appeal of a preliminary injunction against disclosure while the merits were still before the District Court. As noted in the text, *CNA* later completely closed off this possibility to agencies.

¹⁹ 498 F.2d 765 (D.C. Cir. 1974).

²⁰ *Id.* at 766. Typically, FOIA and Reverse-FOIA cases have not involved disputes regarding the definition of “a person outside the government.” See 5 U.S.C. 552(b)(4). Scrutiny instead has focused on what constitutes “commercial or financial information” which is “privileged” or (more typically) “confidential” within the meaning of Exemption 4.

²¹ *Id.* at 767.

²² *Id.* at 770. As noted in *CNA*, *supra* n.4 at 1153 n.147 in 1976, Congress expressed its approval of this test for Exemption 4 of FOIA.

²³ *Id.*

²⁴ See *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280 (D.C. Cir. 1983).

²⁵ *Id.* at 1289.

²⁶ *Id.* at 1291.

²⁷ *Id.* (quoting *Gulf & Western Indus., Inc. v. United States*, 615 F.2d 527, 530 (D.C. Cir. 1979)).

²⁸ *Id.*

²⁹ *Id.* at n.30 (quoting Connelly, *Secrets and Smokescreens: A Legal and Economic Analysis of Government Disclosures of Business Data*, 1981 WIS. L. REV. 207, 235-36).

³⁰ *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871 (D.C. Cir. 1992). The public interest group, Critical Mass Energy Project, requested various safety reports that had been

voluntarily provided by industry to the Nuclear Regulatory Commission (“NRC”). The NRC withheld the reports under FOIA. The District Court upheld the NRC decision not to disclose the information, but the Court of Appeals reversed. Before the information was released, the NRC and an industry group petitioned for rehearing *en banc*. The case discussed here is the *en banc* decision of the court.

³¹ *Id.*

³² As the D.C. Circuit stated in *Critical Mass*:

Thus, when information is obtained under duress, the government’s interest is in ensuring its continued reliability; when that information is volunteered the government’s interest is in ensuring its continued availability. A distinction between voluntary and compelled information must also be made when applying the “competitive injury” prong. In the latter case, there is a presumption that the government’s interest is not threatened by disclosure because it secures the information by mandate; and as the harm to the private interest (commercial disadvantage) is the only factor weighing against FOIA’s presumption of disclosure, that interest must be significant. Where, however, the information is provided to the government voluntarily, the presumption is that its interest will be threatened by disclosure as the persons whose confidences have been betrayed will, in all likelihood, refuse further cooperation. In those cases, the private interest served by Exemption 4 is the protection of information that, for whatever reason, ‘would customarily not be released to the public by the person from whom it was obtained’—to use the formation adopted by this court in *Sterling Drug*, 450 F.2d at 709 (quoting Senate Report at 9). *Critical Mass* at 878.

³³ 180 F.3d 303 (D.C. Cir 1999).

³⁴ See *supra* pp. 5-6.

³⁵ *McDonnell Douglas Corp. v. NASA*, 180 F.3d 303, 306.

³⁶ *Id.*

³⁷ U.S. DEPT. OF JUSTICE, SIGNIFICANT NEW DECISIONS, FOIA UPDATE, VOL. XX, NO. 1, *available at* http://www.usdoj.gov/oip/foia_updates/Vol_XX_1/page2.htm.

³⁸ See *supra* pp 5-6.

³⁹ *McDonnell*, 180 F.3d 303, 305 (D.C. Cir 1999).

⁴⁰ *Id.* at 307.

⁴¹ *Center for Auto Safety v. NHTSA*, 244 F.3d 144, 149 (D.C. Cir 2001).

⁴² *Id.*

⁴³ *Id.* at 147-148.(emphasis added).

⁴⁴ *Id.* at 146.(emphasis in original).

⁴⁵ *Pub. Citizen Health Res. Group v. NIH*, 209 F. Supp. 2d 37, 46 (D.D.C. 2002).

⁴⁶ See U.S. DEPT. OF JUSTICE, OFFICE OF INFORMATION AND PRIVACY, MEMORANDUM FOR THE UNIT PRICE OFFICERS CONFERENCE (February 24, 2000). Various federal agencies followed DOJ, interpreting FAR Part 15 to mandate releases of this type. As noted later, GSA was one such agency.

⁴⁷ See *generally* FAR 15.503 and FAR 15.506.

⁴⁸ *Supra* note 4.

⁴⁹ *MCI Worldcom Inc. v. GSA*, 163 F. Supp. 2d 28 (D.D.C. 2001). (This case was a consolidation of two reverse-FOIA actions. Telecommunications companies filed suit against GSA to enjoin disclosure of the pricing data in connection with contracts that were still active and had option years still ahead. Both the MCI and Sprint cases were consolidated in this opinion. Hereafter, we refer only to MCI as representing both cases.).

⁵⁰ *See Mallinckrodt Inc. v. West*, 140 F. Supp. 2d 1 (D.D.C. 2000).

⁵¹ *MCI* at 30.

⁵² *Id.* at 34.

⁵³ *Id.* at 35-36.

⁵⁴ *Id.* at 36 (citing *McDonnell*, 180 F.3d at 306).

⁵⁵ *McDonnell Douglas Corp. v. USAF*, 375 F.3d 1182 (D.C. Cir. 2004).

⁵⁶ Judge Garland was concerned that the court's majority opinion came "perilously close to a per se rule that line-item prices.... may never be revealed to the public through a FOIA request." *Id.* at 1194. He thought that barring release of prices should be the exception, not the rule.

⁵⁷ *Id.* at 1193.

⁵⁸ *Id.* (quoting *Dep't. of Defense v. FLRA*, 510 U.S. 487, 495 (1994)).

⁵⁹ OFFICE OF INFORMATION AND PRIVACY, U.S. DEPT. OF JUSTICE, FULL COURT REVIEW SOUGHT IN McDONNELL DOUGLAS UNIT PRICE CASE (October 7, 2004) *available at* <http://www.usdoj.gov/oip/foiapist/2004foiapist31.htm>.

⁶⁰ *MTB Group, Inc. v. United. States*, 65 Fed. Cl. 516, (2005).

⁶¹ *Id.* at 17.

⁶² *Id.* at 22.

⁶³ *See supra* note 37.

⁶⁴ The test applies if the commercial or financial information was required to be provided to the government and is not the type of information customarily made public by the submitter.

⁶⁵ To the extent that the contractor provides information to the government which is more detailed or extensive than what the government required, that information can still be treated as voluntarily submitted. *See Critical Mass* at 878. However, the information at issue cannot merely be subsumed within the concept of the total price. *See generally Cortez III Service Corp. v. NASA*, 921 F. Supp 8 (D.D.C. 1996) making a distinction between required G&A rates and voluntarily included G&A rate caps.

CIVIL RIGHTS

COLWELL V. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES: FEDS ORDER PHYSICIANS AND HEALTH CARE PROVIDERS TO PROVIDE FREE LANGUAGE TRANSLATION SERVICES TO LIMITED ENGLISH PROFICIENT PATIENTS

BY SHARON L. BROWNE*

"I will follow that system of regimen which, according to my ability and judgment, I consider for the benefit of my patients, and abstain from whatever is deleterious and mischievous."

*The Oath and Law of Hippocrates.*¹

For 2,400 years, society has been confident that properly trained, competent, and compassionate physicians will not abuse such power. Not so, says the federal government. The patient-physician relationship came under attack by the United States Department of Health and Human Services (HHS) when it adopted a language policy controlling the manner in which physicians must communicate with their limited English proficient (LEP) patients.² Physicians are fighting back.

On August 30, 2004, three physicians, ProEnglish,³ and The Association of American Physicians & Surgeons⁴ filed a complaint for declaratory and injunctive relief in the United States District Court for the Southern District of California.⁵ *Colwell v. United States Department of Health and Human Services* is a facial challenge to HHS's unprecedented expansion of Title VI of the Civil Rights Act of 1964,⁶ (Title VI) when the Department adopted its *Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons* (Policy Guidance Rule).⁷ Title VI prohibits "discrimination under any program or activity receiving Federal financial assistance" against any person in the United States "on the ground of race, color, or national origin." Although neither language nor LEP status are protected classifications under Title VI,⁸ the Policy Guidance Rule requires physicians who receive funding from HHS to provide free oral and written translation services to LEP patients, without reimbursement, to avoid possible prosecution for national origin discrimination under Title VI.

I. Background of the Policy Guidance Rule

People from all over the world immigrate to the United States. They come with different cultures, ways of thinking, languages, and social and economic backgrounds.⁹ The United States has an increasingly diverse population of which "47 million people over the age of 5-years old, out of a total of 262.4 million, speak a primary language other than English."¹⁰ Besides English, there were almost "500 different languages spoken in the United States in 2000, up from 400 in 1990."¹¹ Approximately 14 million people lack English proficiency and are designated LEP persons.¹²

Shortly before President Clinton left office on August 11, 2000, he signed Executive Order 13,166, *Improving Access to Services for Persons with Limited English Proficiency*.¹³ It directs all federal agencies to adopt a plan to "improve access" to federally funded programs for persons who do not speak English.¹⁴ The order states that each Federal agency must develop plans and

implement systems consistent with the "general guidance document" issued by the Department of Justice.¹⁵ This document was to set forth "the compliance standards that recipients must follow to ensure that the programs and activities they normally provide in English are accessible to LEP persons and thus do not discriminate on the basis of national origin in violation of Title VI of the Civil Rights Act of 1964, as amended, and its implementing regulations."¹⁶ As this passage indicates, the executive order almost casually blurs the important distinction between language and national origin.¹⁷ In doing so, it ignores three decades of judicial rejection of the notion of equating language with national origin under Titles VI and VII of the Civil Rights Act.¹⁸

II. The Policy Guidance Rule

On August 8, 2003, HHS published its third version of the Policy Guidance Rule.¹⁹ Despite constituting a significant change in policy to the detriment of physicians nationwide, this rule took effect without complying with the notice and comment rulemaking requirements of the Administrative Procedures Act (APA).²⁰ Like the earlier versions, HHS announced that the Policy Guidance Rule was effective immediately.²¹ It is a sweeping new policy that requires all physicians who receive any federal funding from HHS, including Medicare or Medicaid, to provide free oral and written translations for any patient who has limited English speaking skills and to ensure the quality and accuracy of the translation—or face possible prosecution for national origin discrimination.²²

The rule covers all HHS funded recipients, including those that receive federal funds directly or indirectly from HHS, as well as public or private organizations operating health and social service programs.²³ It expressly identifies hospitals, physicians in private practice, nursing homes, welfare agencies, contractors, subcontractors, vendors, and other health care providers.²⁴ This means physicians who receive financial reimbursement or payments under the Medicaid and/or Medicare programs, or work in hospitals that receive federal funds, must comply with the rule's new standards to provide free language assistance in the form of interpreters and translated documents to all LEP patients.²⁵

According to the Policy Guidance Rule, physicians must notify LEP patients of their right to free language assistance services.²⁶ Physicians have a responsibility to ensure that their policies and procedures do not deny LEP patients access to health care services because of a language barrier.²⁷ The rule requires physicians to ensure the competency and effectiveness of the free language assistance services provided to their LEP patients.²⁸ "[R]ecipients are required" to perform "an individualized assessment" of four factors to determine the extent of the free translation services to LEP patients.²⁹ The more important the service—such as serious or life-threatening implications that affect a LEP patient's health—the more likely that translation services are required.³⁰ The rule

encourages physicians to selectively provide language assistance to certain groups and not others based on the size of the LEP population served.³¹ The rule eliminates the use of family members or friends as interpreters unless the physician has notified the LEP patient of the free language assistance and the patient has refused.³²

Failure to follow these requirements may result in prosecution for illegal national origin discrimination.³³ If an LEP patient is dissatisfied with the level of language assistance, he or she may file a complaint, report, or other information with HHS' Office of Civil Rights (OCR).³⁴ OCR is required to investigate all complaints.³⁵ OCR may terminate a physician's funding or refer the matter to the DOJ to seek injunctive relief or pursue other enforcement proceedings against the physician.³⁶

The Policy Guidance Rule places the burden on the physicians being investigated to prove that they are not intentionally discriminating on the basis of national origin.³⁷ To provide evidence of compliance, the rule encourages physicians to adopt an effective LEP Plan.³⁸ A physician under investigation can also provide "strong evidence" of compliance by meeting the "safe harbor" provision for written translations.³⁹

III. The Lawsuit

In *Cohwell v. USHHS*, plaintiffs make three claims that the Policy Guidance Rule is invalid and unconstitutional. First, although the Policy Guidance Rule is a legislative rule creating new obligations for physicians, HHS gave no prior notice of the policy change in violation of the notice and comment rulemaking requirements set forth in section 553 of the APA.⁴⁰ Second, the rule is ultra vires and is in violation of section 706 of the APA⁴¹ because nothing in Title VI or its legislative history supports HHS' claim equating language with national origin. Third, the rule is overbroad and is unconstitutionally vague in violation of the First Amendment. While Plaintiffs' motion for preliminary injunction was pending, HHS filed a motion to dismiss for lack of subject matter jurisdiction and failure to state a claim. On March 7, 2005, the district court issued an order granting HHS' motion and denied the physicians' motion as moot. The case is now on appeal on the issues of standing and ripeness.⁴² Because the issues in this lawsuit require no further factual development, the plaintiffs are asking the Ninth Circuit to decide the merits as well.

A. HHS' Policy Guidance Rule was Issued in Violation of the APA

The APA requires agencies to advise the public through a notice in the Federal Register of the terms or substance of a proposed substantive rule, allowing the public a period to comment.⁴³ The "notice and comment" requirement is "designed to give interested persons, through written submissions and oral presentations, an opportunity to participate in the rulemaking process."⁴⁴ Generally, "[t]he procedural safeguards of the APA help ensure that government agencies are accountable and their decisions are reasoned."⁴⁵

The notice and comment requirement can be waived only for "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice."⁴⁶ In contrast, the Policy Guidance Rule should be deemed *legislative*.⁴⁷ As explained above, it creates and imposes new substantive rights and obligations

without any independent legislative basis, thereby triggering the APA's notice and comment requirements.⁴⁸

HHS maintains that the rule is merely an interpretive measure setting out compliance standards for Title VI.⁴⁹ But, regardless of HHS' claim, "if there is no legislative basis for enforcement action on third parties without the rule, then the rule necessarily creates new rights and imposes new obligations. This makes it legislative."⁵⁰ The Ninth Circuit Court of Appeals also recognizes that "when an agency does not hold out a rule as having the force of law, it may still be legislative if it is inconsistent with a prior rule having the force of law."⁵¹

In this case, prior to implementation of the Policy Guidance Rule, physicians were able to manage their LEP patients based upon their best professional judgment. Now, physicians are required to provide free oral and written translation services to LEP patients or face the threat of prosecution for national origin discrimination. The rule adds substantive requirements to Title VI based on lack of proficiency in the English language.

HHS contends that the Policy Guidance Rule is exempt from the notice and comment procedures of the APA because it does not establish a binding norm that is used to determine the rights of physicians. Yet, the express requirements of the rule show the binding effect on physicians receiving federal funds. For example, the rule requires physicians, without exception, to perform the four-factor analysis described above.⁵² Then HHS uses this analysis to determine compliance with Title VI and Title VI regulations.⁵³ The binding effect of the rule is further established by its "safe harbor" provision for written translations.⁵⁴ Physicians can use the "safe harbor" as "strong evidence of compliance with the recipient's written-translation obligations."⁵⁵ Similarly, the rule strongly encourages physicians to develop and maintain an LEP plan because the existence of an LEP Plan can be used as a "means of documenting compliance with Title VI."⁵⁶

The express language of the Policy Guidance Rule shows that it is a substantive rule and alters an existing regulatory scheme. It establishes a fixed standard for compliance. It binds the regulated community of physicians to a new standard of conduct. This is the kind of rule that must be issued legislatively, following the notice and comment procedures set out in section 553 of the APA. Because HHS did not follow the notice and comment procedures but declared the Policy Guidance Rule to take effect immediately, the Ninth Circuit should find HHS' action "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observance of procedure required by law."⁵⁷

B. HHS' Policy Guidance Rule Exceeds HHS' Authority under Title VI

The appellate court should determine, as a matter of law, that HHS exceeded its authority under Title VI when it adopted the Policy Guidance Rule. In promulgating the rule, HHS adopted a new interpretation of Title VI equating language with national origin. No congressional policy under Title VI has ever supported such an equation of language with national origin.⁵⁸

1. The Policy Guidance Rule Creates New Law Not Authorized by Title VI

Title VI prohibits “discrimination under any program or activity receiving Federal financial assistance” against any person in the United States “on the ground of race, color, or national origin.”⁵⁹ On its face, Title VI prohibits national origin discrimination. However, neither language nor LEP status are mentioned. The legislative history of Title VI is silent as to these classifications.⁶⁰ Similarly, HHS’ regulation adopted pursuant to Title VI prohibits national origin discrimination and is silent on the question of language.⁶¹

HHS maintains that the Policy Guidance Rule is consistent with its Title VI regulation and turns to *Lau v. Nichols*⁶² to support its claim.⁶³ Yet, *Lau* cannot bear the weight HHS puts on it. In *Lau*, the Supreme Court held that students of Chinese ancestry who did not speak English were entitled to equal education opportunities but the Court made it clear that “[n]o specific remedy is urged upon us. Teaching English to the students of Chinese ancestry who do not speak the language is one choice. Giving instructions to this group in Chinese is another.”⁶⁴ In *Lau*, there was no discussion of any regulation’s validity and *Lau* was decided before the United States Supreme Court’s determination that Title VI bans only disparate treatment, not disparate effects on a particular group.

In *Alexander v. Sandoval*, the Supreme Court reaffirmed that “Title VI proscribe[s] only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.”⁶⁵ Language is not an included classification. In discussing *Lau*, the Court said that “we have since rejected *Lau*’s interpretation of § 601 as reaching beyond intentional discrimination.”⁶⁶ In this case, the Policy Guidance Rule does not seek to prohibit intentional discrimination against LEP patients on the basis of race, color, or national origin. Instead, it provides an administrative remedy to LEP patients based on language.⁶⁷

If Congress had intended Title VI to include language as a protected classification, it had the ability to amend Title VI. By its inaction, Congress has not considered language discrimination to be encompassed in Title VI.⁶⁸ There is no doubt HHS exceeded its congressionally delegated authority under Title VI when it adopted the Policy Guidance Rule commanding physicians to provide language assistance to non-English speakers or face the threat of prosecution for national origin discrimination under Title VI.

2. Language Is Not a Proxy for National Origin Under Title VI

In adopting the Policy Guidance Rule, HHS makes the unfounded assumption that language can be used as a proxy for national origin under Title VI. There simply is no congressional policy under Title VI that equates language with national origin. The ability to speak English and national origin are distinct qualities.

Courts have held that governmental bodies are allowed to communicate in English to the public. In *Toure v. United States*, for example, the Second Circuit rejected the contention that the federal government was obligated to furnish notices of seizure in French to a native of Togo. *Toure* argued that furnishing the notices in English violated his right to procedural due process because his native language was French and his ability to speak English was limited. The Second Circuit disagreed, explaining: “A requirement that the

government ascertain, and provide notice in, the ‘preferred’ language of prison inmates or detainees would impose a patently unreasonable burden upon the government.”⁶⁹

Soberal-Perez v. Heckler, on which the *Toure* court relied, is to the same effect.⁷⁰ There, the Second Circuit rejected the claims that the failure of HHS to provide notices and instructions in Spanish discriminated against Hispanics on the basis of their national origin in violation of Title VI, due process and the Equal Protection Clause. The court explained: “the Secretary’s failure to provide forms and services in the Spanish language does not on its face make any classification with respect to Hispanics as an ethnic group. A classification is implicitly made, but it is on the basis of language, i.e., English-speaking versus non-English-speaking individuals, and not on the basis of race, religion or national origin. *Language, by itself, does not identify members of a suspect class.*”⁷¹

HHS in adopting the Policy Guidance Rule conflates national origin and language. Such a position has no legal or scientific support and the Ninth Circuit should find that HHS exceeded its authority under Title VI in violation of section 706 of the APA.

C. The Policy Guidance Rule Forces Physicians to Speak in Violation of the First Amendment

The Policy Guidance Rule directly impinges on the physician-patient relationship. It controls the manner in which physicians communicate with their LEP patients, i.e. physicians must speak to LEP patients through foreign language interpreters or face the threat of prosecution for national origin discrimination. HHS maintains that control over physicians’ speech by requiring the physician to communicate in a foreign language as a condition of the receipt of federal funds is necessary to avoid national origin discrimination and is not overbroad. However, the Policy Guidance Rule controls far too much speech to be constitutional. As described above, it covers the entire physician-patient relationship.

The Policy Guidance Rule is also invalid because it is facially vague. Vague laws are unconstitutional not only because they “may trap the innocent by not providing fair warning” but also because they pose a heightened risk of “arbitrary and discriminatory enforcement.”⁷² This risk is uniquely great under the Policy Guidance Rule. Physicians are required to use the four-factor assessment to determine the extent of their compliance obligation in order to avoid charges of national origin discrimination. The four-factor assessment is supposed to inform physicians “what reasonable steps, if any, they should take to ensure meaningful access for LEP persons.”⁷³ Yet, the assessment fails at this task. Instead, it sets forth a series of standardless mandates, that only serve to confuse instead of clarify.

For example, “eligible service population” is not defined beyond saying that the “greater the number or proportion of these LEP persons, the more likely language services are needed.”⁷⁴ Physicians are told to examine everything from “their previous experiences with LEP encounters” to “census data” but are never told how HHS defines “eligible service population.”

Similarly indefinite is the requirement for physicians to examine the “frequency with which LEP individuals come in contact with the recipient’s program, activity of service.”⁷⁵ As an explanation, the rule only provides this broad statement: “The more frequent the

contact with a particular language group, the more likely that enhanced language services in that language are needed.”⁷⁶ No standard is provided by which to judge what degree of contact triggers a given requirement of language assistance, other than the general statement “[t]he steps that are reasonable for a recipient that serves an LEP person on a one-time basis will be very different than those expected from a recipient that serves LEP persons daily.”⁷⁷ Physicians who encounter LEP patients daily have “greater duties” than those servicing LEP patients on an infrequent basis, but the Policy Guidance Rule does not say how much greater, nor indicate what level or type of service HHS will consider sufficient to avoid prosecution for national origin discrimination. There are many other examples of vague standards throughout the Policy Guidance Rule. The bottom line is that the rule lacks clear and understandable guidelines. Physicians cannot establish with reasonable certainty that they have met some entirely subjective standard of compliance in an area such as language that is in constant flux. The rule places physicians in a no-win situation by forcing them to guess at its meaning at the risk of sanction whichever way they turn.

Conclusion

HHS’s Policy Guidance Rule is poorly conceived and illegal. It rests on an interpretation of federal civil rights laws that has no basis in fact or law, attempts to impose new nationwide obligations without notice or opportunity for comment, and requires physicians to interpret impossibly vague standards at the risk of prosecution or loss of their livelihood.

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Footnotes

¹ Hippocrates, *The Oath and Law of Hippocrates. Vol. XXXVIII, Part I. THE HARVARD CLASSICS* (New York: P.F. Collier & Son, 1909–14)(Mar. 15, 2005), available at www.bartleby.com/38/1/.

² LEP persons are defined as “[i]ndividuals who do not speak English as their primary language and who have a limited ability to read, write, speak or understand English.” 68 Fed. Reg. at 47,313.

³ ProEnglish is a nonprofit advocacy organization that promotes English as a common language in American political and governmental life. Information on ProEnglish is available at www.proenglish.org.

⁴ The American Association of American Physicians and Surgeons is a national, nonprofit organization dedicated to preserving freedom in the practice of ethical medicine and opposes government interference in the one-on-one patient-physician relationship. Additional information on the association is available at www.aapsonline.org.

⁵ See Appellants’ Opening Brief, *Colwell v. United States Dep’t of Health and Human Servs.*, (9th Cir. 2005) (No. 05-55450), on appeal from the United States District Court for the Southern District of California, Case No. 04 CV174SBTM.

⁶ 42 U.S.C. § 2000d.

⁷ 68 Fed. Reg. at 47,311.

⁸ As stated in *Alexander v. Sandoval*, 532 U.S. 275, 280-81 (2001), Title VI “proscribe[s] only those racial classifications that would violate the Equal Protection Clause.” (quoting *Regents of University of California v. Bakke*, 438 U.S. 276 (1978)(opinion of Powell, J.).

⁹ Secretary Roderick R. Paige, Remarks at the American Council on the Teaching of Foreign Languages” (Nov. 21, 2003), (“A language is...a culture, a way of thinking, and a perspective on the world....The study of language is the study of life, literature, history, and thought. It is nothing less than the study of our world and ourselves.”), available at <http://www.ed.gov/news/speeches/2003/11/11212003.html> (last visited July 15, 2005). Cited in OFFICE OF CIVIL RIGHTS EVALUATION, U.S. COMMISSION ON CIVIL RIGHTS, DRAFT REPORT FOR COMMISSIONERS’ REVIEW, TOWARD EQUAL ACCESS: ELIMINATING LANGUAGE BARRIERS FROM FEDERAL PROGRAMS (2004). This draft report addressed government efforts to reduce language obstacles to programs and services. At its September 17, 2004, meeting, the U.S. Civil Rights Commission declined to pass this report.

¹⁰ U.S. CENSUS BUREAU, LANGUAGE USE, ENGLISH ABILITY, AND LINGUISTIC ISOLATION FOR THE POPULATION 5 YEARS AND OVER BY STATE (2000) available at http://www.census.gov/population/www/socdemo/lang_use.html. (Last visited July 14, 2005). See also U.S. CIVIL RIGHTS COMMISSION, TOWARDS EQUAL ACCESS: ELIMINATING LANGUAGE BARRIERS FROM FEDERAL PROGRAMS (2004)(Draft Report).

¹¹ U.S. CIVIL RIGHTS COMMISSION, TOWARDS EQUAL ACCESS: ELIMINATING LANGUAGE BARRIERS FROM FEDERAL PROGRAMS (2004) (Draft Report) at 22.

¹² Mona T. Peterson, *The Unauthorized Protection of Language Under Title VI*, 85 MINN. LAW. REV. 1437 (2001).

¹³ 65 Fed. Reg. 50121 (August 16, 2000).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See *supra* note 9. As pointed out by Roger Clegg, General Counsel for Center for Equal Opportunity: “Ability to speak English and ethnicity are obviously distinct qualities. Some people of a particular national origin will not be able to speak English well, but others will. Conversely, some people not of that particular national origin will not be able to speak English well.” (Letter from Roger Clegg, General Counsel for Center for Equal Opportunity, to Merrily Friedlander, Dep’t of Justice, Civil Rights Division, February 14, 2002), available at <http://www.ceousa.org/vi.html> (last reviewed July 13, 2005).

¹⁸ The phrase “national origin” is identical in Titles VI and VII and some courts use the jurisprudence under each title interchangeably. *Elston v. Talladega County Board of Education*, 997 F.2d 1394, 1407 (11th Cir. 1993). These cases are collected and discussed in Barnaby Zall, *English in the Workplace* (CENTER FOR EQUAL OPPORTUNITY, 2000). A partial list includes: *Long v. First Union Corp.*, 894 F.Supp. 933, 941 (E.D. Virginia, 1995)(“There is nothing in Title VII which protects or provides that an employee has a right to speak his or her native tongue while on the job”), *affirmed*, 86 F.3d 1151 (4th Cir. 1996); *Castaneda v. Pickard*, 648 F.2d 989, 1007 (5th Cir. 1981)(“[W]e do not think it can seriously be asserted that [a] program [of allegedly inadequate bilingual education] was intended or designed to discriminate against Mexican-American students’ in violation of Title VI.”); *Vasquez v. McAllen Bag & Supply Co.*, 660 F.2d 686 (5th Cir. 1981) (Title VII

permits English-on-the-job rule for non-English-speaking truck drivers); *Frontera v. Sindell*, 522 F.2d 1215 (6th Cir. 1975)(Fourteenth Amendment allows English civil service exam for carpenters); *Garcia v. Rush Presbyterian St. Luke's Medical Center*, 660 F.2d 1217 (7th Cir. 1981)(upholding hiring practices requiring English proficiency); *An v. General Am. Life Ins. Co.*, 872 F.2d 426 (9th Cir. 1989)(table) (Section 1981 requires proof of intentional discrimination; "A policy involving an English requirement, without more, does not establish discrimination based on race or national origin."); *Velasquez v. Goldwater Mem. Hosp.*, 88 F. Supp.2d 257, 261-62 (S.D.N.Y. 2000) ("Neither the statute nor common understanding equates national origin with the language that one chooses to speak.).

¹⁹ 68 Fed. Reg. 47,311. On August 30, 2000, HHS published its first "Notice of Policy Guidance." 65 Fed. Reg. 52762 (August 30, 2000). The rule was republished on February 1, 2002, and similarly went into immediate effect. 67 Fed. Reg. 4,968 (Feb. 1, 2002). Prior to the rule, HHS attempted but failed to develop and adopt regulations equating language with national origin. Peterson, 85 MINN. L. REV. at 1455; Allison Keers-Sanchez, *Mandatory Provision of Foreign Language Interpreters in Health Care Services*, 24 J. LEGAL MED. 557, 562 (2003)("To date, no legislative enactments contain specific protection against language discrimination.").

²⁰ 5 U.S.C. § 553(b)-(d).

²¹ 68 Fed. Reg. at 47,311.

²² 68 Fed. Reg. at 47,313. The rule states that failure to take the steps prescribed "may violate the prohibition under Title VI. . . and the Title VI regulations against national origin discrimination."

²³ 68 Fed. Reg. at 47,313. The rule covers the recipient's entire operation as well as "subrecipients" when "funds are passed through from one recipient to a subrecipients." *Id.*

²⁴ *Id.*

²⁵ *Id.* at 47,315.

²⁶ *Id.* at 47,320.

²⁷ *Id.* at 47,318.

²⁸ *Id.* at 47,316.

²⁹ *Id.* at 47,314 (emphasis added). The four factors are: (1) the number or proportion of LEP patients to be served or likely to be served, (2) the frequency the LEP patient comes in contact with the physician's services, (3) the nature and importance of the physician's services, and (4) physician's resources and costs. *Ibid.*

³⁰ *Id.* at 47,315.

³¹ *Id.* at 47,314; 47,319.

³² *Id.* at 47,323.

³³ *Id.* at 47,311.

³⁴ *Id.* at 47,321.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 47,319. An effective plan requires the recipient to identify: (1) how to determine the language of communication with an LEP person, (2) the way translations services will be provided; (3) the process for training staff; (4) the process to provide notice of free translation services to LEP persons; (5) the methods to monitor and update the LEP Plan. Also, the plan is to set clear goals and establish management accountability. *Id.* at 47,320-21.

³⁹ *Id.* at 47,319. See also 67 Fed. Reg. 41,456, where the DOJ recognizes that certain languages that are only oral such as Hmong have only recently been converted to a written form.

⁴⁰ 5 U.S.C. § 553.

⁴¹ 5 U.S.C. § 706.

⁴² *Colwell v. United States Department of Health and Human Services*, (9th Cir.) Case No. 05-55450. Plaintiffs filed their opening brief on July 11, 2005.

⁴³ See 5 U.S.C. § 553(b) and (c).

⁴⁴ *Chief Probation Officers of California v. Shalala*, 118 F.3d 1327, 1329 (9th Cir. 1997).

⁴⁵ *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752, 758 (9th Cir. 1992).

⁴⁶ 5 U.S.C. § 553(b)(3)(A).

⁴⁷ *Hemp Industries Ass'n v. Drug Enforcement Admin.*, 333 F.3d 1082, 1087 (9th Cir. 2003), explains "that legislative rules, unlike interpretative rules, have the 'force of law.'" *Hemp* identified three circumstances in which a rule has the "force of law:" "(1) when, in the absence of the rule, there would not be an adequate legislative basis for enforcement action; (2) when the agency has explicitly invoked its general legislative authority; or (3) when the rule effectively amends a prior legislative rule." *Id.* at 1087.

⁴⁸ See *Hemp Indus.*, 333 F.3d at 1087 (citation omitted). (Interpretive rules "merely explain, but do not add to, the substantive law that already exists in the form of a statute or legislative rule. Legislative rules, on the other hand, create rights, impose obligations, or effect a change in existing law pursuant to authority delegated by Congress.").

⁴⁹ The Policy Guidance Rule states: "It has been determined that this revised HHS LEP Guidance does not constitute a regulation subject to the rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. § 553." 68 Fed. Reg. at 47,311. HHS insists that "[t]he policy guidance is not a regulation but rather a guide. Title VI and its implementing regulations require that recipients take reasonable steps to ensure meaningful access by LEP persons. This guidance provides an analytical framework that recipients may use to determine how best to comply with statutory and regulatory obligations." *Id.* at 47,313 n.2.

⁵⁰ 333 F. 3d at 1088.

⁵¹ *Id.* (citations omitted).

⁵² 68 Fed. Reg. at 47,314.

⁵³ 68 Fed. Reg. at 47,313.

⁵⁴ It is well established that “safe harbor” provisions for purposes of enforcement create norms that have a practical binding effect. Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, And The Like—Should Federal Agencies Use Them To Bind The Public?*, 41 DUKE L.J. 1311, 1339 (1992) (“Sometimes the agency is stating a safe-harbor policy, such that private persons may know that if they observe the policy they will not be deemed in violation, and will not be prosecuted. But they will not necessarily be deemed in violation, or be prosecuted, if they do not observe the policy. Such a document can create binding norms.”).

⁵⁵ 68 Fed. Reg. at 47,319.

⁵⁶ *Id.* Further indications of the binding effect of the Policy Guidance Rule includes: requiring a specific level and type of oral translation, *ibid.* at 47,317, prohibiting the physicians from using family members or friends unless insisted upon by the LEP patient, *ibid.* at 47,317-18, requiring physicians to be responsible for determining the competence and effectiveness of the language translation being provided, *ibid.* at 47,316, and commanding physicians to provide translation services in a timely manner, *ibid.*

⁵⁷ 5 U.S.C. § 706(2)(A) and (D).

⁵⁸ An agency that imposes a standard of conduct to expand a statute is creating a new law and is invalid. 5 U.S.C. § 706(2)(A) and (C).

⁵⁹ 42 U.S.C. § 2000d.

⁶⁰ See 1964 U.S.C.C.A.N. 2391, H. Rep. No. 914, 88th Cong., 2nd Sess.; and S. Rep. No. 872, 88th Cong., 2nd Sess. See also Raphael Metzger, *Hispanics, Health Care, and Title VI of the Civil Rights Act of 1964*, 3 KAN. J.L. & PUB. POL’Y 31 n.84 (1994) (neither the House or Senate legislative histories on the Civil Rights Act of 1964 references language in the context of national origin.).

⁶¹ The regulation states that recipients of federal funding may not “utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.” 45 C.F.R. § 80.3(b)(2).

⁶² *Lau v. Nichols*, 414 U.S. 563 (1974).

⁶³ 68 Fed. Reg. at 47,312.

⁶⁴ *Lau*, 414 U.S. at 564-65.

⁶⁵ 532 U.S. 275, 280-81 (citation omitted).

⁶⁶ *Id.* at 285. *Almendares v. Palmer*, 284 F. Supp. 2d 799, 804 n.4 (N.D. Ohio 2003) (recognized that because of *Alexander*, *Lau* is no longer good law).

⁶⁷ See also Roger Clegg, *Speak Now (In English) . . . Or Forever Hold Your Peace*, NATIONAL REVIEW ONLINE (1 February 2002), available at www.nationalreview.com/clegg/clegg020102.asp. (Retrieved July 15, 2005).

⁶⁸ Contrast Congress’ treatment in Title VI with statutes requiring translation services in the Rehabilitation Act of 1973 (29 U.S.C. §§ 701, 772), and the Americans with Disabilities Act (42 U.S.C. §§ 12101, 12102, 12111).

⁶⁹ 24 F.3d 444, 446 (2d Cir. 1994).

⁷⁰ 717 F.2d 36 (2d Cir. 1983).

⁷¹ *Id.* at 41(emphasis added).

⁷² *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. at 498 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972)).

⁷³ 68 Fed. Reg. at 47,314.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

CORPORATIONS

WHAT IF JUDGE BORK HAD BECOME JUSTICE BORK?

By DAVID BALTO*

Maybe it's that I am a Boston Red Sox fan: I always ask "what if?" What if Babe Ruth had not been traded in 1918, what if in 1975 Bucky Dent had awoken with a toothache, if Bill Buckner could have fielded that simple grounder in 1986, what if. . .

With the recent Supreme Court confirmation battles we were once again reminded of the contentious nomination of Judge Robert Bork in 1987. Soon after Justice Roberts' nomination was announced, some commentators and politicians opined how much worse off the legal system would have been if Bork had been confirmed. They posited that civil liberties, the right to choose and other fundamental liberties would have been severely restricted by Bork's presence on the Court.

But many people forget that Judge Bork's nomination raised a uniquely adversarial debate in the antitrust arena, where Judge Bork was known as one of the most visible critics of antitrust jurisprudence. What would have happened to antitrust jurisprudence if Judge Bork had become Justice Bork?

Beginning with his dissent from the 1968 White House Antitrust Task Force Report on Antitrust in which he strongly criticized proposed legislation aimed at "deconcentrating" markets, then-Professor Bork wrote frequently on how antitrust jurisprudence was out of date for the demands of the later-20th-Century economy. Judge Bork's 1978 book, *The Antitrust Paradox*, articulated his comprehensive views about the inadequacies of antitrust law and the fashion in which it had harmed the ultimate goal of protecting consumer welfare. By the time of his nomination nine years later *The Antitrust Paradox*¹ had had an extraordinary influence in the refinement of antitrust law. It had been cited by six of the nine Justices then sitting on the Court and had been cited by over by 70 lower court opinions.

We are all familiar with the contentious debates in the Bork hearings on constitutional rights, civil liberties and certain unenumerated rights. Antitrust, however, was also an important area of the debate on his nomination, although it was left until the last two days of the hearings. The adversaries in the Bork antitrust debate were luminaries of the antitrust world.

Supporting Judge Bork were Philip Areeda, the leading antitrust scholar, Thomas Kauper, another leading antitrust scholar, Former Assistant Attorney General for the Antitrust Division Donald Baker, then a preeminent antitrust practitioner, and James Halverson, speaking on behalf of the ABA Antitrust Section. On the other side of the ring were an equally prominent group of scholars and officials led by two state attorneys general, Robert Abrams of New York and Charles Brown of West Virginia. The antitrust scholars' role was played by Robert Pitofsky, then-Dean of the Georgetown Law School and soon to be Chairman of the Federal Trade Commission, and representing the interests of private plaintiffs was Max Blecher.

The proponents of Judge Bork's nomination emphasized three factors: First, Judge Bork's beliefs, although inconsistent with some old Supreme Court precedents, were within the mainstream of antitrust law. Second, Judge Bork's scholarship had provided important guidance in helping to modernize the approach to antitrust law. Third, Bork's scholarship emphasized the critical paradox in the values that lay beneath the surface of the antitrust laws: between what Justice Powell (whom Bork would have replaced) called "competition based on efficiency" and what Justice Peckham a century ago called the protection of "small dealers and worthy men." In this debate the former values were preeminent.

Bork had been a judge on the D.C. Circuit for about three years. During that time, he had authored three notable antitrust opinions: *Neumann v. Reinforced Earth*, 786 F.2d 424 (DC Cir. 1986), a monopolization case based on allegations of sham litigation; *FTC v. PPG Industries*, 628 F. Supp. 881 (DDC) in which the court supported an FTC request for a full-stop injunction on a proposed acquisition (the panel ordered a complete injunction); and *Rothery v. Atlas Van Lines*, 792 F.2d. 210 (DC Cir. 1986), in which he upheld joint venture marketing restraints under the ancillary restraints doctrine.

The proponents even suggested that Judge Bork had an activist antitrust agenda. First, based on his writings and the decision in *Rothery*, Bork would provide important guidance on joint-venture antitrust law. Second, his scholarship focused on how sham litigation could be used to impose barriers to competition and violate the antitrust laws. Finally, the proponents suggested that he would attack governmental restraints such as those imposed under the state action doctrine.

Not surprisingly, the opponents of the Bork nomination had a diametrically opposite perspective. They dissected *The Antitrust Paradox* line-by-line. *The Antitrust Paradox* called for significant reform of the antitrust laws, and the critics suggested that as a Supreme Court justice he would use the Court to make radical reforms regardless of Congress' intent.

At a philosophical level the debate was about the purposes of the antitrust laws: were the concerns strictly economic or did they include other political and social concerns? One of the main targets of criticism was Bork's view that economic efficiency was the sole concern of the antitrust laws.

Bork said in *The Antitrust Paradox*, "the only goal that should guide the interpretation of the antitrust laws is the welfare of consumers. Departure from that standard destroys the consistency and predictability of the law; run counter to legislative intent, as that intent is conventionally derived; and damage the integrity of the judicial process by involving the courts in grossly political choices for which neither the statutes nor any other acceptable source provide guidance." For an insightful criticism of Bork's

perspective see Robert Lande, “Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged,” 34 *HASTINGS L.J.* 65 (1982).

The critics emphasized that according to Judge Bork, antitrust enforcement should be limited to “the suppression of competition by horizontal agreement, . . . horizontal mergers creating very large market shares, . . . and deliberate predation.” They suggested that Bork’s focus on “consumer welfare” actually was a very narrow concept of “business efficiency.” In Judge Bork’s world, to paraphrase the critics, there would be no enforcement against such beneficial practices as small horizontal mergers, all vertical and conglomerate mergers, vertical price maintenance and market division, tying arrangements, exclusive dealing and requirements contracts and price discrimination. Dean Pitofsky suggested in a Bork antitrust world even the merger of Exxon and Texaco would be permitted.

According to the critics, Bork would clearly support reversing numerous major Supreme Court antitrust opinions, and Bork had expressed a profound skepticism about Congress’ ability to legislate in the area of antitrust. Specifically, the critics suggested that under Bork’s legal regime there would be no resale price maintenance enforcement and mergers would be permitted to the level of reducing the number of firms to three or four in any market.

The *Rothery* decision received specific criticism (although, as an interesting sidenote, Bork’s opinion was joined by then-Judge Ruth Bader Ginsberg). *Rothery* involved a straightforward marketing restraint imposed by a joint venture. Bork reversed the district court, which had granted summary judgement on *Copperweld*² grounds, perhaps to reach the more interesting joint venture questions. He argued that any restraints imposed by a joint venture with such a small market share could not have had an anticompetitive effect.

What was troubling to the critics was Judge Bork’s observation that after the Supreme Court’s decisions in *GTE Sylvania* and *BMI*, the Supreme Court’s 1967 decision in *United States v. Sealy* and 1972 decision in *United States v. Topco* had been effectively overruled. Such “guidance” seemed unnecessary to the resolution of the case and seemed to reflect relatively narrow recognition of antitrust precedent and a willingness to rewrite the law.

The Committee rejected Bork’s nomination and cited his antitrust views as a reason why he would be inappropriate for the bench. It noted that “despite his reputation as a practitioner of judicial restraint . . . he was an activist of the right” in the antitrust field, “ready and willing to substitute his views for legislative history and precedent in order to achieve his ideological goals; and even when examined by comparison to other conservative critics of antitrust enforcement his views are extreme.” Some critics had said that Bork’s appointment to the Court would result in “antitrust changes of truly tidal proportions.” The committee report noted that Bork criticized most of the landmark Supreme Court antitrust decisions, including *Brown Shoe v. United States* (1962) (horizontal and vertical mergers); *FTC v. Proctor and Gamble* (1967) (conglomerate mergers); *Dr. Miles Medical Co. v. John D. Park & Sons Co.* (1911) (per-se illegality of resale price maintenance); and *Standard Oil Co. of California v. United States* (1949) (exclusive-

dealing arrangements). In fact he had called the entire body of Supreme Court precedent in the antitrust field “mindless law.”

The Committee noted that Bork recognized in *The Antitrust Paradox* the incredible power that the Supreme Court has in molding the antitrust laws: “the antitrust laws are so open textured leaving so much to be filled by the judiciary, that the court plays in antitrust almost as unconstrained a role as it does constitutional law.” The Committee found it difficult to reconcile his professed philosophy of judicial deference to the will of Congress with this “undisguised distrust and disregard for Congressional enactments” in the area of antitrust.

Bork’s nomination went down to defeat by 58-42. He resigned from the D.C. Circuit soon thereafter.

So what would the difference in antitrust jurisprudence have been if Bork had been elevated to the Supreme Court? Ultimately President Reagan was able to appoint Anthony Kennedy to Justice Powell’s seat. Kennedy certainly has been less prolific than Bork probably would have been, authoring only four antitrust opinions, *Kansas v. Utilicorp*, *FTC v. Ticor*, *Brooke Group v. Brown & Williamson*, and *United States Postal Services v. Flamingo Industries*. Moreover, antitrust is not an area in which there are particularly important swing votes. In fact, of the 24 antitrust cases decided in the 18 years since Bork’s failed nomination, only four involved five-four decisions: *Summit v. Pinhas*, *Kansas v. Utilicorp*, *Hartford Fire v. California*, and *California Dental Association v. FTC*. Kennedy was on the losing side in all of those cases except *Kansas v. Utilicorp*. Having a different judge in Justice Kennedy’s chair would not have made a significant difference in these cases.

Counting votes, however, severely understates the potential influence of an antitrust luminary such as Judge Bork. Bork, with his expertise, boundless energy and clear vision would have had substantially greater influence than his single vote. In the past two decades antitrust has been a back-bench subject with typically only one case a year decided. One would have expected a far greater attention to antitrust with Bork on the bench.

So what are some of the potential differences we might have seen had he been a member of the Court?

Here are six “what if” suggestions:

1.) *City of Columbia v. Omni*³ —This case upheld an alleged fraud in securing a franchise. The Court rejected an antitrust claim under the state action doctrine, holding that a conspiracy or fraud exception did not exist. With Bork’s strong views about the anticompetitive uses of governmental action one might have expected him to have taken an aggressive posture on the conduct at issue in this case and the Supreme Court may indeed have found a violation.

2.) *Kodak v. Image Technical Services*⁴ —This case reversed summary judgment for the defendant in a controversial tying arrangement. One might imagine that Bork, with his strong criticism of antitrust law involving tying, would have framed the debate in a very different fashion than the case was ultimately decided. Bork

would have given very little deference to the older tying cases that Justice Brennan extensively relied upon.

3.) *Professional Real Estate Investors v. Columbia Pictures Industries*.⁵—This case articulated a rather strict rule for antitrust cases attacking sham litigation. One might imagine that Bork, with his strident criticism of the use of sham litigation as a form of predation, would have argued for a broader rule of law that would have enabled private plaintiffs and the government to attack sham litigation more broadly. Moreover, his views may have led to a decision in finding an antitrust violation.

4.) *California Dental v. FTC*.⁶—This case reversed an FTC decision finding certain advertising restraints by the California Dental Association illegal under the antitrust laws. It resulted in a 5-4 decision which has proven to be uniquely difficult to interpret for the courts and regulators. Bork, with his clear vision of the potential problems of horizontal restraints, might have brought together a consensus with a clearer rule of law on why these restraints were illegal.

5.) *Federal Trade Commission v. Superior Court Trial Lawyers*.⁷—In this decision the Supreme Court reversed a decision of the D.C. Circuit decision upholding a “boycott” by publicly funded defense attorneys, in part, on First Amendment grounds. Judge Bork, with his strong opinions on First Amendment rights, may well have convinced his fellow Justices that the boycott seeking higher reimbursement for representatives of indigent defendants should not be condemned as *per se* illegal.

6.) *Chroma Lighting v. GTE Prods.*.⁸—Of course Bork would have been able to exercise his influence on decisions of whether to grant *certiorari* in certain cases. The Supreme Court accepted very few antitrust decisions for review in the 1990s. One might imagine that the number would have been significantly greater with such a notable antitrust expert on the bench. One area in which Bork’s scholarship suggested there was significant mischief was in the area of Robinson-Patman enforcement. *Chroma Lighting* offered the opportunity for the Supreme Court to reverse the *Morton Salt*.⁹ presumption of anticompetitive harm from the existence of price discrimination. One might imagine that Bork would have worked hard to have *certiorari* granted in such a case to narrow the potentially harmful effects of Robinson-Patman litigation.

Eighteen years after the debate one wonders whether Bork’s nomination to the bench would today receive such strident opposition. Thanks to the effective leadership of Republicans like the late Janet Steiger, Jim Rill and Tim Muris, and Democrats like Bob Pitofsky and Joel Klien, antitrust has clearly become a bipartisan endeavor where consensus rules over controversy. One can search in vain to find either Democrat or Republican antitrust enforcers citing *Brown Shoe*, *Procter & Gamble*, *Standard Oil*, *Topco*, or *Sealy*. On the other hand, one can find studious citation to Bork’s opinion in *Neumann* and Bork’s writings in the DOJ briefs in *Microsoft*. Even Judge Bork’s call for limited enforcement in the areas of resale price maintenance, vertical mergers, conglomerate mergers and price discrimination has come about regardless of which political party is in charge.

Ultimately, though he did not ascend to the Court, Judge Bork appears to have prevailed in the debate posed in *The Antitrust Paradox*. But Supreme Court antitrust jurisprudence is probably far less vibrant because of his absence.

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Footnotes

¹ ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (Basic Books, Inc. 1978).

² *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

³ *City of Columbia and Columbia Outdoor Advertising v. Omni Outdoor Advertising*, 499 U.S. 365 (1991).

⁴ *Eastman Kodak Co. v. Image Technical Services*, 504 U.S. 451 (1992).

⁵ *Prof’l Real Estate Investors v. Columbia Pictures Indus., Inc.*, 508 U.S. 49 (1993).

⁶ *Cal. Dental Ass’n v. Federal Trade Comm’n.*, 526 U.S. 756 (1999).

⁷ *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411 (1990).

⁸ *Chroma Lighting v. GTE Prods. Corp.*, 127 F.3d 1136 (9th Cir. 1997).

⁹ *Fed Trade Comm’n v. Morton Salt Co.*, 334 U.S. 37 (1948).

UNITED STATES V. DENTSPLY INTERNATIONAL: PUTTING TEETH INTO EXCLUSIVE-DEALING CLAIMS?

BY JOHN K. BUSH*

Introduction

In many courts, an antitrust challenge to an exclusive contract can be called a “Rodney Dangerfield”: it gets no respect. As the First Circuit observed, “[d]espite some initial confusion, today exclusive dealing contracts are not disfavored by the antitrust laws.”¹ They are not *per se* illegal in vertical relationships but rather are judged under the rule of reason.² And, as the Second Circuit noted, they are “presumptively legal.”³

It is understandable why courts uphold many exclusive-dealing contracts. As the D.C. Circuit explained, “exclusive contracts are commonplace—particularly in the field of distribution—in our competitive, market economy, and imposing upon a firm with market power the risk of an antitrust suit every time it enters into such a contract, no matter how small the effect, would create an unacceptable and unjustified burden upon any such firm.”⁴ In the right circumstances exclusive dealing can promote inter-brand competition and “enable a manufacturer to prevent dealers from taking a free ride”⁵ on efforts such as national advertising.⁶ Exclusivity also can sometimes be applauded for “assuring steady supply, affording protection against price fluctuations, reducing selling expenses, and promoting stable, long-term business relationships.”⁷

In the last several years, however, conventional wisdom has been challenged by a string of high-profile federal appellate decisions. These opinions have affirmed jaw-dropping judgments on antitrust claims challenging certain exclusive-dealing arrangements or have held that such claims had to go to trial. The most recent example is the Third Circuit’s decision in *United States v. Dentsply International, Inc.*, which is the subject of a pending *certiorari* petition.⁸ In *Dentsply*, the appellate court reversed summary judgment for Dentsply International, a manufacturer of prefabricated artificial teeth, and held that the Department of Justice had sufficient evidence to proceed on an illegal monopolization claim under § 2 of the Sherman Act⁹ allegedly arising from exclusive contracts entered into between Dentsply and its dealers.

Dentsply comes on the heels of *LePage’s Incorporated v. 3M*,¹⁰ where the Third Circuit, sitting *en banc*, affirmed a \$68 million judgment against 3M on a Sherman Act § 2 claim based on its exclusive dealing and other alleged exclusionary conduct in the transparent tape market. Last year, in *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories Inc.*,¹¹ the Second Circuit reversed summary judgment for a drug manufacturer and the supplier of a key chemical ingredient for a generic drug on a claim that their exclusive supply arrangement was an illegal restraint of trade under § 1 of the Sherman Act.¹²

Exclusive-dealing contracts were also successfully challenged in *United States v. Microsoft Corp.*, in which the D.C. Circuit affirmed the district court’s holding that Microsoft’s exclusive contracts with internet-access providers were “exclusionary devices, in violation of § 2 of the Sherman Act,”¹³ and in *Conwood Company, L.P. v. United States Tobacco Company*, in which the Sixth Circuit affirmed the largest antitrust judgment in U.S. history—\$1.05 billion—against a manufacturer of moist snuff tobacco on a Sherman Act § 2 claim based upon alleged exclusionary conduct that included contracts with retailers for “exclusive racks” for product display.¹⁴

Dentsply and these other cases since 2000 stand in contrast to the almost universal judicial skepticism during the 1980s and 1990s of antitrust attacks on exclusive dealing. The Seventh Circuit, in particular, was an outspoken critic, in cases such as *Roland Machinery Company v. Dresser Industries, Inc.*,¹⁵ and *Paddock Publications, Inc. v. Chicago Tribune Company*,¹⁶ which rejected Sherman Act § 1 claims against exclusive agreements relating to construction equipment dealers and news service licensees, respectively.

The Seventh Circuit was not alone. Significant cases in the Second, Eighth and Ninth Circuits—for example, *CDC Technologies, Inc. v. IDEXX Laboratories, Inc.*,¹⁷ *Omega Environmental, Inc. v. Gilbarco, Inc.*,¹⁸ *Balaklaw v. Lovell*,¹⁹ *Ryko Manufacturing v. Eden Services*²⁰ and *General Business Systems v. North American Philips Corporation*²¹—all upheld various exclusive contracts, and in *Barry Wright Corp. v. ITT Grinnell Corp.*, then-Judge Stephen Breyer wrote the First Circuit opinion that affirmed judgment for the defendant on a Sherman Act § 2 claim arising from a requirements contract.²²

In *Jefferson Parish Hospital District No. 2 v. Hyde*, the Supreme Court enumerated some potential evils of exclusives: they “in some circumstances, create or extend market power of a supplier or the purchaser party to the exclusive-dealing arrangement, and may thus restrain horizontal competition,” and “[e]xclusive dealing can have adverse economic consequences by allowing one supplier of goods or services unreasonably to deprive other suppliers of a market for their goods, or by allowing one buyer of goods unreasonably to deprive other buyers of a needed source of supply.”²³ Nevertheless, while paying lip service to these concerns, lower courts in the 1980s and 1990s usually upheld such arrangements, whether challenged under § 1 or § 2 of the Sherman Act or under § 3 of the Clayton Act.²⁴

Courts evaluate the legality of exclusive contracts based on business justifications for the arrangement and on the level of market “foreclosure” caused by the exclusive contract, but, as Judge Breyer observed, “virtually every contract to buy ‘forecloses’ or ‘excludes’ alternative sellers

from *some* portion of the market, namely the portion consisting of what was bought.”²⁵ In this sense foreclosure of competitors who did not get the sale is a logical and justified result of the competitive process, and courts have been reluctant to disrupt this natural consequence. In recent exclusive-dealing cases, however, many courts seem to have given foreclosure a closer look and have approached with greater skepticism the reasons proffered for exclusivity.

Given the historically dismal record of plaintiffs in exclusive-dealing litigation, what explains their success of late in cases like *Dentsply*? Are the ostensibly divergent outcomes in recent cases versus prior decisions caused by conflicting legal standards? Are the different results explained simply by the defendant’s market share—with a higher number invalidating the exclusive contract even if other factors support its legal validity? Is Supreme Court intervention required in this area? *Dentsply* is a helpful case on point to consider these questions.

Dentsply’s Market Share and Exclusive Contracts

Dentsply makes artificial teeth that it sells to dealers, which, “in turn, supply the teeth and other products to dental laboratories, which fabricate dentures for sale to dentists.”²⁶ The relevant market defined by the district court and accepted by the Third Circuit was “the sale of prefabricated artificial teeth in the United States.”²⁷ This market—“marked by a low or no growth potential” as a result of “advances in dental medicine”²⁸—includes “total sales of artificial teeth to the laboratories and the dealers combined.”²⁹

The Third Circuit left undisturbed the district court’s findings that Dentsply “enjoys a 75%-80% market share on a revenue basis, 67% on a unit basis, and is about 15 times larger than its next closest competitor.”³⁰ According to those findings, “Dentsply has long dominated the industry consisting of 12-13 manufacturers.”³¹ Each of the seven “significant manufacturers” against which it competes has a market share of 5% or less.³²

For over fifteen years, Dentsply has “discouraged its dealers from adding competitors’ teeth to their lines of products.”³³ In 1993, Dentsply formalized its position in a policy known as “Dealer Criterion 6,” which states that Dentsply will not sell its teeth to any distributors who carry a competitor’s products, except for competing products already carried by its dealers before 1993.³⁴ Other than with respect to these “grandfathered” competing products, Dentsply has enforced its exclusivity policy against all dealers and “rebuffed attempts . . . to expand . . . lines of competing products beyond the grandfathered ones.”³⁵ The exclusive contracts, however, do not on their face lock up the dealers for long; indeed, they are “essentially terminable at will” because “Dentsply operates on a purchase order basis.”³⁶

The District Court’s Ruling

The district court granted Dentsply’s motion for summary judgment on all of the DOJ’s claims brought under §§ 1 and 2 of the Sherman Act and § 3 of the Clayton Act.

The only part of the district court’s ruling before the Third Circuit was the Sherman Act § 2 claim for illegal monopolization, as the government decided not to appeal its other claims.

Dentsply successfully persuaded the district court that despite its predominant market share, its “tactics did not preclude competition from marketing their products directly to the dental laboratories.”³⁷ As the district court found, “direct sales to laboratories was a viable method” for competitors to do business, in addition to sales through dealers not under contract with Dentsply.³⁸ Because the exclusive dealer agreements did not preclude such alternative distribution, the district court found that “‘Dentsply does not have the power to exclude competitors from the ultimate consumer.’”³⁹

The district court found that the failure of Dentsply’s “two main rivals” to obtain greater market shares resulted not from any illegal activity on Dentsply’s part, but rather from “their own business decisions to concentrate on other products lines, rather than implement active sales efforts for teeth.”⁴⁰ By contrast, Dentsply had “implemented aggressive sales campaigns, including efforts to promote its teeth in dental schools, providing rebates for laboratories’ increased usage, and deploying a sales force dedicated to teeth, rather than the entire product mix.”⁴¹

In addition, the district court considered it significant that the terminable-at-will nature of the exclusivity created a condition in which “dealers were free to leave the network at any time.”⁴² Moreover, the district court determined “that Dentsply had not created a market with supra competitive pricing.”⁴³ All of these findings led the district court to hold that “the Government failed to prove that Dentsply’s actions have been or could be successful in preventing new or potential competitors from gaining a foothold in the market.”⁴⁴

The Third Circuit’s Reasoning

Contrary to the district court, the Third Circuit panel found that Dentsply had market power. Not only was “Dentsply’s share of the market . . . more than adequate to establish a prima facie case of power,” but Dentsply had “held its dominant share for more than ten years and . . . fought aggressively to maintain that imbalance.”⁴⁵

The Third Circuit heavily discounted the factors that had led the district court to conclude that Dentsply’s dominant market share resulted from greater competitive efforts rather than illegal activity. According to the appellate court, “[t]he reality is that over a period of years, because of Dentsply’s domination of dealers, direct sales have not been a practical alternative for most manufacturers.”⁴⁶ In the Third Circuit’s view, “[i]t has not been so much the competitors’ less than enthusiastic efforts at competition that produced paltry results, as it is the blocking of access to key dealers.”⁴⁷ The court of appeals explained “[t]he apparent lack of aggressiveness by competitors” as “not a matter of apathy,

but a reflection of the effectiveness of Dentsply's exclusionary policy."⁴⁸

The appellate court also cited testimony of two former managerial employees of Dentsply. Statements by these witnesses such as "[d]o not allow competition to achieve footholds in dealers; tie up dealers; do not 'free up' key players," and "[y]ou don't want your competition with your distributors, you don't want to give the distributors an opportunity to sell a competitive product"—which might have been dismissed as simply aggressive sales talk—were deemed instead by the Third Circuit to be "clear expressions of a plan to maintain monopolistic power."⁴⁹

Also significant to the appellate court's finding of market power were "some ten separate incidents in which Dentsply required agreement by new as well as longstanding dealers not to handle competitors' teeth," and the termination of at least one dealer that refused to follow Dentsply's exclusivity requirements.⁵⁰

The Third Circuit dismissed the district court's holding that Dentsply's contracts with dealers did not preclude direct sales to laboratories because "[a]lthough some sales were made by manufacturers to the laboratories, overwhelming numbers were made to dealers."⁵¹ Thus, according to the court of appeals, Dentsply's exclusivity arrangements were analogous to 3M's "lock[] up [of] high volume distribution channels" in *LePage's* and the foreclosure of "a substantial percentage of the available opportunities for product distribution" in *Microsoft*.⁵²

The Third Circuit further noted Dentsply's "reputation for aggressive price increases in the market," expert testimony for both parties "that were Dealer Criterion 6 abolished, prices would fall," the testimony of a former sales manager for Dentsply "that the company's share of the market would diminish should Dealer Criterion 6 no longer be in effect," evidence that "[l]arge scale distributors observed that Dentsply's policy created a high price umbrella," and proof that "Dentsply did not reduce its prices when competitors elected not to follow its increases."⁵³

This record was enough to persuade the appellate court that the government had made a showing of market power, the first element of its monopolization claim, even though the Third Circuit noted that Dentsply's prices fell "between those of" the "premium tooth lines" of its chief competitors, and even though the panel implicitly acknowledged the absence of evidence that Dentsply had charged a monopoly price.⁵⁴

The Third Circuit also found sufficient evidence for the case to proceed on the second element of a Sherman Act § 2 claim: "that the power was used 'to foreclose competition.'"⁵⁵ This standard was described as not requiring "total foreclosure" but rather simply proof that "the challenged practices bar a substantial number of rivals or severely restrict the market's ambit."⁵⁶

The government had sufficient evidence to make this showing, the appellate court found, because "[b]y ensuring that the key dealers offer Dentsply teeth either as the only or dominant choice, Dealer Criterion 6 has a significant effect in preserving Dentsply's monopoly."⁵⁷ In this regard, the Third Circuit noted that "Dentsply has always sold its teeth through dealers" and "[f]or a great number of dental laboratories, the dealer is the preferred source for artificial teeth" because of, among other advantages, "the benefit of 'one stop-shopping' and extensive credit services" and discounts.⁵⁸

These facts led the Third Circuit to call the dealers "the 'gateways' . . . to the artificial teeth market."⁵⁹ This was confirmed by the "miniscule" market shares achieved by competitors who directly sold to laboratories.⁶⁰ In addition, although the appellate court acknowledged "the legal ease with which the relationship can be terminated, the dealers have a strong economic incentive to continue carrying Dentsply's teeth," which in the Third Circuit's view created circumstances analogous to "3M's aggressive rebate program" and "discounts" in *LePage's*.⁶¹ The panel was convinced that, notwithstanding that alternative means of access to the customer theoretically existed for Dentsply's competitors, those were not really viable options: "The paltry penetration in the market by competitors over the years has been a refutation of theory by tangible and measurable results in the real world."⁶²

Is There Any Inconsistency Here?

Most of the arguments raised by Dentsply and accepted by the district court, but rejected by the Third Circuit, were keys to the reasoning of earlier cases that upheld exclusivity arrangements. This raises the question of why the difference, which is not entirely explained by the *Dentsply* appellate opinion.

For example, as the Third Circuit acknowledged, in many earlier cases, "courts . . . indicated that exclusive-dealing contracts of short duration are not violations of the antitrust laws."⁶³ In fact, the Second Circuit in a 1994 decision opined that exclusivity arrangements of a relatively short duration "may actually encourage, rather than discourage competition."⁶⁴ That is because, among other reasons, the limited term allows competitors the opportunity to approach dealers with better offers to break the exclusivity without fear of interfering with a long-term contractual relationship.

Dentsply's exclusive contracts are as short as they can be: they are terminable-at-will purchase orders. Yet, the Third Circuit summarily dismissed as "distinguishable" prior case law upholding short-term exclusive contracts, but provided no explanation for this conclusion.⁶⁵

Similarly, the Third Circuit gave short shrift to the fact that there were alternatives to Dentsply's exclusive distributors for making sales—another argument that was a winner in prior exclusive-dealing cases. In *Omega Environmental*, for example, the Ninth Circuit upheld exclusive-dealer contracts based, in part, on the rationale

that “[c]ompetitors are free to sell directly, to develop alternative distributors, or to compete for the services of existing distributors.”⁶⁶ Similarly, in *Ryko Manufacturing*, the Eighth Circuit upheld exclusive-dealing provisions because, among other reasons, the plaintiff failed to produce evidence suggesting that the provisions “generally prevented . . . competitors from finding effective distributors for (or other means of promoting and selling) their products.”⁶⁷ Dentsply’s competitors distribute teeth either “directly to dental labs” or “through dental dealers” not under contract with Dentsply, or through both sales methods.⁶⁸ In the past, these alternative avenues would seem to have swayed other Circuits against a finding of market foreclosure, but they did nothing to alter the conclusion of the court of appeals in *Dentsply*.

The Third Circuit attempted to justify its skepticism of sales alternatives by pointing to evidence of the supposed superiority of dealers because of the breadth of their product and service offerings.⁶⁹ Yet the *Omega Environmental* court rejected a similar “dealers as gateways to the market” argument. In that case, the Ninth Circuit concluded that the “proven finances, abilities and customer relationships” of dealers did make them indispensable for sales.⁷⁰ The fact that the defendant in *Omega Environmental* had exclusives with “almost all” of the distributors in the market did not matter because competitors could still sell directly to customers or develop new distributor relationships.⁷¹

According to the Ninth Circuit, the defendant, “having succeeded in legitimately controlling the best, most efficient and cheapest source of supply, ‘. . . [did] not have to share the fruits of its superior acumen and industry.’”⁷² This sentiment is consistent with the Supreme Court’s recent observation that the antitrust laws contain “no duty to aid competitors.”⁷³

Another key to decisions upholding exclusivity arrangements is the absence of proof of monopoly profits.⁷⁴ Although the *Dentsply* appellate opinion cited evidence of price increases and a “high price umbrella,” Dentsply’s prices were lower in fact than those of at least one competitor and there was no proof of monopoly profits or supra-competitive pricing. The Third Circuit was nonetheless convinced there was sufficient proof of market power, where other Circuits in the past might have found it lacking.

In *Roland Machinery*, the Seventh Circuit held that, in order to show that an exclusive-dealing contract is unreasonable, the plaintiff must prove (1) “that it is likely to keep at least one significant competitor of the defendant from doing business in the relevant market,” and (2) “that the probable (not certain) effect of the exclusion will be to raise prices above (and therefore reduce output below) the competitive level, or otherwise injure competition.”⁷⁵ Though *Roland Machinery* involved a Sherman Act § 1 claim, while the *Dentsply* appellate opinion focused exclusively on § 2 of the Sherman Act, courts look at market foreclosure as a relevant consideration under each provision. Query whether,

had the *Roland Machinery* standard of foreclosure been used by the Third Circuit, the outcome in *Dentsply* would have been different.

An obvious factor that could distinguish *Dentsply* from cases where exclusive dealing has been upheld is Dentsply’s predominant market share. Whereas the defendants in many of the earlier pro-exclusivity cases generally had market shares well below 50%, Dentsply’s was substantially more than half of the relevant market. The same was the case in many other recent decisions in which courts have taken a hard look at exclusive contracts, but not all. For example, the D.C. Circuit in *Microsoft* stated “that a monopolist’s use of exclusive contracts, in certain circumstances, may give rise to a [Sherman Act] § 2 violation even though the contracts foreclose less than the roughly 40% or 50% share usually required in order to establish a § 1 violation.”⁷⁶

Many recent decisions cannot seem to get past the market-share numbers in evaluating the legality of exclusive contracts under either § 1 or § 2 of the Sherman Act. Their emphasis on “quantitative” rather than “qualitative” analysis harkens back to early case law under which exclusive arrangements were presumed invalid if the defendant had the requisite market share, which sometimes was deemed to be well less than 50%.

In addition, many appellate courts take an ad hoc, fact-intensive approach to evaluating the legality of exclusive contracts under the antitrust laws, with few clear governing legal standards. An exclusive contract can be deemed good or bad simply by the company it keeps. As Chief Judge Beckwith of the Southern District of Ohio recently observed, the Sixth Circuit in *Conwood* upheld the jury’s \$1.05 billion verdict because the “exclusive selling agreements with retailers” at issue—though “entirely legal” standing alone—were part of a package of wrongful activities by the defendant, United States Tobacco Company (“USTC”), which included “intentionally remov[ing]” the plaintiff’s “package racks from retail stores without permission of store managers,” “destroy[ing] or discard[ing] the racks,” and “then put[ting]” the plaintiff’s “product cans into USTC’s own racks in an attempt to ‘bury’” the plaintiff’s “products”; “train[ing] its sales representatives to trick store representatives and clerks so that” the plaintiff’s “racks and products could be moved or destroyed”; “provid[ing] misleading and incorrect information about sales date[s] for USTC and competitors’ products”; and “encourag[ing] the retailers to stock more of USTC’s products and less of the competitors products.”⁷⁷

Chief Judge Beckwith acknowledged that the range of recent appellate decisions in this area present “somewhat imprecise and certainly conflicting standards by which to judge . . . allegations of . . . monopolistic behavior” predicated on the alleged monopolist’s exclusive contracts.⁷⁸ He refused to follow *LePage* and sought to distinguish *Dentsply* in granting summary judgment on a Sherman Act § 2 claim challenging “rebate and ‘access’ contracts” between the drug manufacturer Wyeth and pharmacy benefit managers that,

according to the plaintiff, gave Wyeth's Premarin a favorable formulary placement and effectively excluded rival drugs from the market.⁷⁹

Conclusion

It has been almost 45 years since the Supreme Court addressed exclusive dealing in any significant fashion, in *Tampa Electric Co. v. Nashville Coal Co.*⁸⁰ *Tampa Electric* was a requirements-contract case in which the Court held that the exclusivity at issue would be valid unless its probable effect was to "foreclose competition in a substantial share of the line of commerce affected."⁸¹ Justice O'Connor rephrased the standard in her concurring opinion in *Jefferson Parish Hospital*, as "when a significant fraction of buyers or sellers are frozen out of a market by the exclusive deal."⁸² The Court, however, provided little guidance in *Jefferson Parish Hospital* as to factors for determining what constitutes "substantial foreclosure" or a "significant fraction," and as explained, the lower courts appear to have reached differing conclusions as to the relevant considerations (or non-considerations), and the weight to give them.

Dentsply is indicative of recent appellate cases that appear to undertake more rigorous review of exclusive dealing than did earlier case law, albeit under standards that can vary significantly from Circuit to Circuit and even from case to case within the same Circuit. *Dentsply* may be the right opportunity for the Supreme Court once again to take a bite at the antitrust law governing exclusivity arrangements.

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Footnotes

¹ *Eastern Food Servs., Inc. v. Pontifical Catholic Univ. Servs. Ass'n, Inc.*, 357 F.3d 1, 8 (1st Cir. 2004).

² *See, e.g., Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961).

³ *Electronics Communications Corp. v. Toshiba America Consumer Prods., Inc.*, 129 F.3d 240, 245 (2d Cir. 1997).

⁴ *United States v. Microsoft*, 253 F.3d 34, 70 (D.C. Cir.), *cert. denied*, 534 U.S. 952 (2001).

⁵ *Roland Machinery Co. v. Dresser Indus.*, 749 F.2d 380, 395 (7th Cir. 1984).

⁶ *See, e.g., id.*

⁷ *Geneva Pharmaceuticals Technology Corp. v. Barr Labs., Inc.*, 386 F.3d 485, 508 (2d Cir. 2004).

⁸ 399 F.3d 181 (3d Cir. 2005), *petition for certiorari filed* (Sept. 14, 2005) (No. 05-337).

⁹ 15 U.S.C. § 2.

¹⁰ 324 F.3d 141 (3d Cir. 2003), *cert. denied*, 124 S. Ct. 2932 (2004).

¹¹ 386 F.3d 485.

¹² 15 U.S.C. § 1.

¹³ 253 F.3d at 71.

¹⁴ 290 F.3d 768 (6th Cir. 2002), *cert. denied*, 537 U.S. 1148 (2003).

¹⁵ 749 F.2d 380.

¹⁶ 103 F.3d 42 (7th Cir. 1996).

¹⁷ 186 F.3d 74 (2d Cir. 1999).

¹⁸ 127 F.3d 1157 (9th Cir. 1997).

¹⁹ 14 F.3d 793 (2d Cir. 1994).

²⁰ 823 F.2d 1215 (7th Cir. 1987).

²¹ 699 F.2d 965 (9th Cir. 1983).

²² 724 F.2d 227 (1st Cir. 1983).

²³ 266 U.S. 2, 45 (1984).

²⁴ 15 U.S.C. § 14.

²⁵ *Barry Wright*, 724 F.2d at 236 (emphasis in original).

²⁶ *Dentsply*, 399 F.3d at 184.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 188.

³⁰ *Id.*

³¹ *Id.* at 184.

³² *Id.*

³³ *Id.* at 185.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 189.

³⁸ *Id.* at 185-86.

³⁹ *Id.* (quoting *United States v. Dentsply Int'l, Inc.*, 277 F. Supp. 2d 387, 452 (D. Del. 2003)).

⁴⁰ *Id.* at 189.

⁴¹ *Id.* at 185.

⁴² *Id.* at 186.

⁴³ *Id.*

⁴⁴ *Id.* (quoting *Dentsply*, 277 F. Supp. 2d at 453 (quoting *LePage's*, 324 F.3d at 159)) (quotation marks omitted).

⁴⁵ *Id.* at 188.

⁴⁶ *Id.* at 189.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *See id.* at 189-90 (quotation marks omitted).

⁵⁰ *Id.* at 190.

⁵¹ *Id.*

⁵² *Id.* (citing *LePage's*, 342 F.3d at 144, 160-62; *Microsoft*, 253 F.3d at 70-71).

⁵³ *Id.* at 190-91.

⁵⁴ *Id.* at 191.

⁵⁵ *Id.* (quoting *United States v. Griffith*, 334 U.S. 100, 107 (1948)).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *See id.* at 191-92.

⁵⁹ *Id.* at 193.

⁶⁰ *Id.*

⁶¹ *See id.* at 193-94.

⁶² *Id.* at 194.

⁶³ *Id.* at 194 n.2.

⁶⁴ *Balaklaw v. Lovell*, 14 F.3d 793, 799 (2d Cir. 1994).

⁶⁵ *See Dentsply*, 399 F.3d at 194 n.2.

⁶⁶ 127 F.3d at 1163.

⁶⁷ 823 F.2d at 1234.

⁶⁸ *Dentsply*, 399 F.3d at 188.

⁶⁹ *Id.* at 192-93.

⁷⁰ *Omega Environmental*, 127 F.3d at 1163.

⁷¹ *Id.*

⁷² *Id.* (quoting *General Business Systems*, 699 F.2d at 979).

⁷³ *Verizon Communications, Inc. v. Law Offices of Curtis v. Trinko, LLP*, 540 U.S. 398, 411 (2004).

⁷⁴ *See, e.g., CDC Technologies*, 186 F.3d at 81; *Roland Machinery*, 749 F.2d at 394.

⁷⁵ *Id.* at 394.

⁷⁶ 253 F.3d at 70.

⁷⁷ *J.B.D.L. Corp. v. Wyeth-Ayerst Labs., Inc.*, No. 1:01-CV-704, 1:03-CV-781, 2005 WL 1396940, at *16 (S.D. Ohio June 13, 2005).

⁷⁸ *Id.*, 2005 WL 1396940, at *15.

⁷⁹ *Id.*, 2005 WL 1396940, at *12-*15.

⁸⁰ 365 U.S. 320.

⁸¹ *Id.* at 327.

⁸² *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 45 (1984) (O'Connor, J., concurring).

CRIMINAL LAW AND PROCEDURE

JOHNSON V. CALIFORNIA: WHEN DOES “ALL” MEAN “ALL?”

BY TOM GEDE*

In February 2005 the U.S. Supreme Court, in a 5-3 decision, refused to craft a prison exception to its now firmly-anchored command that “[a]ll racial classifications [imposed by government] . . . must be analyzed . . . under strict scrutiny.” *Johnson v. California*.^{1, 2} Will this decision point to similar outcomes in other civil rights cases involving race on the grounds that “all” racial classifications will be subject to strict scrutiny? Quite probably that is the case, but only for divergent reasons. All in all, there were only two votes in *Johnson* embracing the notion that the higher standard properly applies “to any and *all* racial classifications”³ without exception.

Indeed, while the five-member majority in *Johnson v. California* requires strict scrutiny for the prison rights at issue, a majority of justices appear not to embrace wholeheartedly the above command for *all* cases involving racial classifications. The two-member dissent of Justices Thomas and Scalia argue strict scrutiny should not automatically apply in prison administration cases involving racial classifications. The three-member concurrence of Justices Ginsburg, Souter and Breyer opines that, while appropriate here, strict scrutiny ought not be applied “to any and all racial classifications,”⁴ citing Justice Ginsburg’s reservations in her concurrence in the 2003 law school admissions case of *Grutter v. Bollinger*.⁵ Justice Stevens dissented on the ground the record did not justify the prison’s segregation practices, no matter which standard is applied. At minimum, then, it seems at least four justices, and possibly five, do not fully subscribe to the command to subject “all” racial classifications to strict scrutiny. That leaves only Justices O’Connor, the author of *Johnson*, and Justice Kennedy arguably as the strongest defenders of the standard for all cases involving racial classifications.

The dissent in *Johnson* has its own italicized “all” to remark upon, in noting that the Court previously had adhered to a standard of deference to prison administrators under *Turner v. Safley*⁶ in all cases involving constitutional claims by prisoners.⁷ Indeed, Justice Thomas starts his dissent by witnessing the Court’s conflicting categorical statements. “On the one hand, . . . this Court has said that ‘[a]ll racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized.’” *Gratz v. Bollinger*, 539 U. S. 244, 270 (2003) (emphasis added) (quoting *Adarand Constructors, Inc. v. PeZa*, 515 U. S. 200, 224 (1995)). On the other, this Court has no less categorically said that ‘the [relaxed] standard of review we adopted in *Turner* [. . .] applies to all circumstances in which the needs of prison administration implicate constitutional rights.’”⁸

As Justice Thomas observes, the majority resolves this

conflict in favor of strict scrutiny. Disagreeing, he says the Constitution has always demanded less within the prison walls. “Even when faced with constitutional rights no less ‘fundamental’ than the right to be free from state-sponsored racial discrimination,” he writes, “we have deferred to the reasonable judgments of officials experienced in running this Nation’s prisons.”⁹ Justice Thomas uses the dissenting opinion to provide an exacting analysis of the court’s prison standards jurisprudence, highly recommended for the student of prison rights. Clearly, however, it did not carry the day.

I. CDC’s double-celling practice

At issue in *Johnson* was California’s practice of segregating on the basis of race new and transferring male prisoners at “reception centers” in double cells for up to 60 days each time they enter a new correctional facility. The California Department of Corrections (CDC) houses all new male inmates and all male inmates transferred from other state facilities in reception centers for up to 60 days upon their arrival.¹⁰ During that time, prison officials evaluate the inmates to determine their ultimate placement. The temporary double-cell assignments in the reception centers are based on a number of factors, including race, according to the CDC.¹¹ However, invariably, inmates of the same racial and ethnic background are housed together during this evaluation period. Racial classifications are not an issue in other aspects of the state prison system, as all other facilities, including dining areas, yards and cells are fully integrated.

The emphatic concern of CDC officials has been the prevention of violence related to prison and street gang affiliations, most often organized along racial and ethnic lines.¹² Indeed, as Justice Thomas notes, the Aryan Brotherhood, the Black Guerrilla Family, the Mexican Mafia, the Nazi Low Riders, and La Nuestra Familia are organized along racial lines.¹³ As Justice Thomas further notes, these gangs perpetuate hate and violence, and interracial murders and assaults among inmates perpetrated by these gangs are common.¹⁴

CDC relies on its own classification process for each new inmate, starting from a rough profile from county records, during which it completes an evaluation of the inmate’s physical, mental and emotional health.¹⁵ To determine the inmate’s security needs, CDC evaluates the prisoner’s criminal history, history in jail, previous prison or jail commitments, and whether he has enemies elsewhere in prison, including people who may have testified against him in the past or in his criminal case, or inmates with whom he may have had disputes during previous jail or prison placements.¹⁶

Because of a shortage of space, single-celling at reception centers is reserved for inmates who present special

security problems. CDC includes those convicted of very notorious crimes; those in need of protective custody because of their effeminate appearance, extreme youth or old age, or small stature; former law enforcement officers; known informants; and known gang leaders.¹⁷

In arguing that race is only one of many considerations prison officials take into account, CDC informed the Court that prison officials look at the relative ages of the potential cellmates, avoiding the placement of an older inmate with a much younger inmate; the relative size of the potential cellmates, avoiding the placement of a large inmate with an inmate of a much slighter build; and various “case factors” and “custody concerns,” including, among other things, the inmate’s need for psychiatric or specialized medical care, criminal and escape history, the need for protective or confidential placement, and prison gang or street gang affiliation. CDC officials work to discern gang affiliation from a number of visual cues, including race, tattoos, haircut, or displays of gang colors on items of clothing or items carried on the person.¹⁸

II. The Court’s response

The case arose out of years of litigation by plaintiff inmate Johnson seeking damages for the double-celling practices as an infringement of his constitutional rights. The district court granted summary judgment to CDC officials on grounds that they were entitled to qualified immunity because their conduct was not clearly unconstitutional. The Court of Appeals for the Ninth Circuit affirmed,¹⁹ holding the constitutionality of the CDC’s policy should be reviewed under the deferential standard the Supreme Court articulated in *Turner v. Safley*,²⁰ not strict scrutiny. The Supreme Court granted review to decide which standard of review applies.²¹

On review in the Supreme Court, the five-member majority made short work of CDC’s justification of double-celling by race and its argument for the *Turner* standard for its procedures. Without hesitation, the Court sprang to its standard articulated in *Adarand Constructors, Inc. v. Peña*,²² when it said: “all racial classifications [imposed by government] . . . must be analyzed by a reviewing court under strict scrutiny.”²³ To emphasize the standard’s universality, the Court noted it has insisted on strict scrutiny “in every context,” and then cited its holdings on “benign” racial classifications, such as race-conscious university admissions policies,²⁴ race-based preferences in government contracts,²⁵ and race-based districting intended to improve minority representation.²⁶ Concluding the CDC’s policy is “immediately suspect” as an express racial classification, it now requires the CDC to demonstrate that the policy is narrowly tailored to serve a compelling state interest. The Court declined to decide whether the CDC policy violates equal protection, and remanded the case to the lower courts to apply strict scrutiny in the first instance.²⁷

Just as quickly the Court dispatched the CDC’s claim that its policy should be exempt from the strict scrutiny standard and its concomitant burden because it is “neutral,”

meaning that all prisoners are “equally” segregated. Citing *Shaw v. Reno*,²⁸ the Court reiterated that “racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally,” and even relied on *Brown v. Board of Education*²⁹ for the Court’s rejection of the notion that separate can ever be equal—or “neutral.”³⁰

The Court majority also rests on the 1968 decision in *Lee v. Washington*,³¹ where it upheld a three-judge panel’s order directing desegregation in Alabama’s prisons. It is the case that in *Lee*, three Justices concurred to express the view that prison authorities have the right, “acting in good faith and in *particularized circumstances*, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails.”³² But the three justices make clear that this right is limited and its recognition does not “dilute” the Court’s commitment to the Fourteenth Amendment.³³

The interesting play of conflicting categorical commands is found in the Court’s—and the dissent’s—treatment of *Turner v. Safley*, *supra*. In *Turner*, the Court adopted a reasonableness standard that asks whether a regulation that burdens prisoners’ fundamental rights is “reasonably related” to “legitimate penological interests.”³⁴ *Turner*, it should be noted, took into account the Court’s previous regard for *Lee v. Washington*, when it recited the set of principles that necessarily frame an analysis of prisoners’ constitutional claims.³⁵ Federal courts, it noted, must take cognizance of the valid constitutional claims of prison inmates.³⁶ Among those to which the *Turner* Court pointed were: prisoners retain the constitutional right to petition the government for the redress of grievances;³⁷ they are protected against invidious racial discrimination by the Equal Protection Clause of the Fourteenth Amendment,³⁸ and they enjoy the protections of due process.³⁹

Brushing aside CDC’s argument that the *Turner* standard is rigorous and searching enough to root out any invidious discrimination against prisoners,⁴⁰ the *Johnson* majority simply stated it has never applied the *Turner* standard to racial classifications.⁴¹ *Turner* itself did not involve such a classification, the Court observed, “and it cast no doubt on *Lee*.”⁴² The Court stated it applies *Turner* only to rights that are “inconsistent with proper incarceration.”⁴³ Compliance with the Fourteenth Amendment’s ban on racial discrimination is, according to the *Johnson* majority, “consistent with proper prison administration,” adding further that “[r]ace discrimination is ‘especially pernicious in the administration of justice.’”⁴⁴ In short, the Court in *Johnson* equates CDC’s double-celling, which invariably occurs along racial lines, with the invidious racial discrimination barred by *Lee v. Washington*. As Justice O’Connor pens:

The right not to be discriminated against based on one’s race is not susceptible to the logic of *Turner*. It is not a right that need necessarily be compromised for the sake of proper prison administration.⁴⁵

Justice O'Connor writes further that the "necessities of prison security and discipline,"⁴⁶ are a "compelling government interest justifying only those uses of race that are narrowly tailored to address those necessities, *see, e.g., Grutter v. Bollinger*, 539 U. S. 306." It is in *Grutter*, of course, that Justice O'Connor wrote that the use of race in the law school admissions policies at the University of Michigan were in fact subject to strict scrutiny, but nonetheless met the heightened test of being narrowly tailored to meet compelling governmental interests. Consistent with her words in this *Johnson* case - and the remand for further analysis - her language in *Grutter* reflects her embracing of the categorical involved:

Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it. As we have explained, "whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection."⁴⁷

III. The dissenting opinion

The dissent in *Johnson* tackles the conflict of categorical commands in part by noting "just how limited the policy at issue is."⁴⁸ Putting the matter in context, Justice Thomas, joined by Justice Scalia, notes that "California racially segregates a portion of its inmates, in a part of its prisons, for brief periods of up to 60 days, until the State can arrange permanent housing."⁴⁹ California's prisons, housing some 160,000 prisoners, have been a breeding ground for some of the most violent prison gangs in America—"all of them organized along racial lines."⁵⁰ While the majority is concerned with "sparing inmates the indignity and stigma of racial discrimination," he writes, "California is concerned with their safety and saving their lives."⁵¹

While the majority accepts the notion advanced by certain amici and the U.S. Solicitor General that racial integration of prisoners actually leads to less violence,⁵² the dissent accepts the CDC's contention that housing inmates in tightly-confined double cells without regard to race threatens not only prison discipline, but also the physical safety of inmates and staff.⁵³ The dissent takes issue with the amount of actual segregation that occurs, citing figures such as "10.3% of all wardens at maximum security facilities in the United States report that their inmates are assigned to racially segregated cells—apparently on a permanent basis."⁵⁴ Apparently, such policies are the result of discretionary decisions by wardens rather than of official state directives.⁵⁵

Ultimately, Justice Thomas takes the dissent to the question of *Turner* and *Adarand* and *Grutter*. He writes that none of the categorical statements in the latter two cases overruled, *sub silentio*, *Turner* and its progeny, "especially since the Court has repeatedly held that constitutional demands are diminished in the unique context of prisons."⁵⁶ *Adarand*, he notes, only addressed the contention that racial

classifications favoring rather than disfavoring blacks are exempt from strict scrutiny.⁵⁷ For most of the Nation's history, Justice Thomas writes, "only law-abiding citizens could claim the cover of the Constitution: Upon conviction and incarceration, defendants forfeited their constitutional rights and possessed instead only those rights that the State chose to extend them."⁵⁸ In writing for the majority in *Overton v. Bazzetta*,⁵⁹ a visitation rights case, Justice Kennedy noted:

The very object of imprisonment is confinement. Many of the liberties and privileges enjoyed by other citizens must be surrendered by the prisoner. An inmate does not retain rights inconsistent with proper incarceration.⁶⁰

Clearly, the Court has moved in the direction of finding that incarceration does not divest prisoners of all constitutional protections.⁶¹ However, as for *Lee v. Washington*, *supra*,⁶² Justice Thomas confirms that *Lee* did not address an applicable standard of review—no less a "heightened" one.⁶³ There, in a *per curiam*, one-paragraph opinion the Court affirmed an order to Alabama to desegregate its prisons under *Brown v. Board of Education*, *supra*. At issue there, of course, was the complete and permanent racial segregation in all the state's penal facilities. Where the District Court, affirmed by the *per curiam* opinion, allowed for segregation by race for limited periods where needed for prison security and discipline, the Court expressed no standard for evaluating such actions.⁶⁴

Ultimately, it was *Turner* that set forth the Court's recognition that there must be an accommodation between constitutional rights of prisoners and the needs of prison administration. In *Turner*, there was a two-step analysis reflecting (1) that prisoners retain certain constitutional rights, including the right to be "protected against invidious racial discrimination;"⁶⁵ and (2) prison administrators rather than courts should "make the difficult judgments concerning institutional operations."⁶⁶ Thus, the reasoning goes, the *Turner* Court necessarily recognized that the deferential standard—upholding prison regulations if they reasonably relate to legitimate penological interests—would apply to the infringement of constitutional rights. Justice Thomas writes:

Nowhere did the Court suggest that *Lee*'s right to be free from racial discrimination was immune from *Turner*'s deferential standard of review. To the contrary, "[w]e made quite clear that the standard of review we adopted in *Turner* applies to *all* circumstances in which the needs of prison administration implicate constitutional rights."⁶⁷

In urging *Turner* to be applied uniformly to a prisoner's challenge to his condition of confinement, Justice Thomas recited those cases to date where the Court refused to adopt a different standard of review for such claims.⁶⁸ Even fully recognizing that inmates retain rights not inconsistent with proper incarceration, it has been *Turner* that has provided

the standard by which to judge prison administration actions infringing upon those rights. As Justice Thomas puts it:

[T]his Court recognized that experienced prison administrators, and not judges, are in the best position to supervise the daily operations of prisons across this country. [...] *Turner* made clear that a deferential standard of review would apply across-the-board to inmates' constitutional challenges to prison policies.

Finally, the dissent adopts the view that, under the *Turner* standard, the CDC's practice of double-celling by race for the 60-day evaluation period passes constitutional muster. Following the four-part test of *Turner*, as urged upon the Court by the CDC, Justice Thomas concludes (1) the CDC's policy is reasonably related to a legitimate penological interest (reducing violence to inmates and staff arising from racially-aligned gang-related activity); (2) alternative means of exercising the restricted right remain open to inmates; (3) racially integrating double cells might negatively impact prison inmates, staff, and administrators; and (4) there are no obvious, easy alternatives to the CDC's policy.⁶⁹ Forcing an integration of new and transferring inmates based solely on non-race factors would purposefully overlook the clear race-related aspects of ethnically- and racially-aligned gang activity. As Justice Thomas writes, the CDC's policy "does not appear to arise from laziness or neglect; California is a leader in institutional intelligence-gathering."⁷⁰ It would seem it is precisely in such conditions that courts should defer to the judgment of prison administrators under a rational relationship test. But, again, the argument did not persuade a majority of the Court.

IV. Conclusion

Johnson v. California puts in sharp focus a conflict in the categorical commands of the Court—all cases involving racial classifications are subject to strict scrutiny—and all cases involving challenges of prison regulations are subject to the *Turner* deferential standard of review. Here, the Court majority resolved the conflict in favor of the former formulation. Seen beyond the context of a prison case, *Johnson* demonstrates the more agonizing struggle of the Court when racial classifications are at issue. From questions on law school admission preferences to questions about institutions solely for persons of Hawaiian ancestry, the categorical commands are subject to expressed reservations, concurring opinions and vigorous dissents. Justices O'Connor and Kennedy appear to have been the most consistent in uniformly applying the higher standards, even if it results in upholding a law, regulation or practice under the higher standard.

It is not clear whether the dissent in *Johnson* believes that the CDC practice will survive strict scrutiny. The Court majority repeats the adage that strict scrutiny is not "strict in theory, but fatal in fact."⁷¹ "Strict scrutiny does not preclude the ability of prison officials to address the compelling interest in prison safety," the majority says.⁷² While the University of Michigan Law School may have met the higher standard, it

is difficult to know whether prison officials in California or elsewhere facing the possibility of racially-motivated gang-related violence can persuade federal courts of their compelling interests.

Justice Thomas, in his dissent, reflects on how the inmate plaintiff Johnson acknowledges the presence of racially-motivated gang violence in prison and fears that racial violence could be directed at himself.⁷³ In his final comment, Justice Thomas muses that "[p]erhaps on remand the CDC's policy will survive strict scrutiny, but in the event that it does not, Johnson may well have won a Pyrrhic victory."⁷⁴

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Footnotes

¹ 543 U.S. ___, 125 S. Ct. 1141, 160 L. Ed.2d 949 (2005), slip opn. at 4-5 (quoting *Adarand Constructors, Inc. v. PeZa*, 515 U.S. 200, 227 (1995) (emphasis added)). Chief Justice Rehnquist took no part in the decision. While the 5-member majority decided that the strict scrutiny standard applied, it remanded the case without determining whether the challenged CDC practice was unconstitutional as a violation of the Equal Protection Clause. In dissenting, Justice Stevens would have had the Court find the CDC's practice unconstitutional outright. (Thomas, J. and Scalia, J., dissenting, on the basis that the strict scrutiny standard should not apply to the CDC's practice).

² This *Johnson v. California*, No. 03-636, should not be confused with *Johnson v. California*, No. 04-6964, decided June 13, 2005, concerning purposeful discrimination in jury selection. The latter may be found at 125 S. Ct. 2410, 73 USLW 4460.

³ *Johnson, supra*, slip opn. at 3 (Ginsburg, J., concurring)(italics added).

⁴ See n.3.

⁵ 539 U.S. 306, 344-346 (Ginsburg, J., concurring).

⁶ 482 U.S. 78 (1987).

⁷ *Johnson v. California*, 543 U.S. ___ (2005) (Thomas, J., dissenting) (slip opn. at 1; also at 7-8) ("[W]e made quite clear that the standard of review we adopted in *Turner* applies to all circumstances in which the needs of prison administration implicate constitutional rights." *Washington v. Harper*, 494 U.S. 210, 224 (1990) (emphasis added).").

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ Respondents' Brief at 6. According to the CDC, the double-celling practice takes place at seven of California's thirty-two prisons. They are used for first-time inmates as well as to inmates transferring within the state correctional system. In 2003, the seven reception centers for male inmates processed more than 40,000 newly admitted inmates

and almost 72,000 inmates who were returned from parole, in addition to a portion of the 254,000 already admitted male inmates who were moved from one facility to another.

¹¹ Respondents' Brief at 6.

¹² *Johnson*, slip opn. at 2, at 9-10 (Thomas, J., dissenting).

¹³ *Johnson*, at 10-11 (Thomas, J., dissenting).

¹⁴ *Ibid.*

¹⁵ *Id.* at 7.

¹⁶ *Ibid.*

¹⁷ *Id.* at 7-8.

¹⁸ *Id.* at 8.

¹⁹ 321 F. 3d 791 (2003).

²⁰ 482 U.S. 78 (1987).

²¹ 540 U.S. 1217 (2004).

²² 515 U.S. 200, 227 (1995). *See also* *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493 (1989).

²³ *Johnson*, slip opn., at 4-5.

²⁴ *Id.* (citing *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003)).

²⁵ *Id.* (citing *Adarand*, *supra*, at 226).

²⁶ *Id.* (citing *Shaw v. Reno*, 509 U.S. 630, 650 (1993)).

²⁷ *Id.*, slip opn., at 15.

²⁸ 509 U.S. 630, 650 (1993).

²⁹ 347 U.S. 483 (1954).

³⁰ *Johnson*, slip opn. at 6.

³¹ 390 U.S. 333 (1968) (per curiam).

³² *Johnson*, slip opn. at 6, (quoting *Lee v. Washington*, *supra*, at 334 (emphasis added)).

³³ *Ibid.*, citing *Lee*, *supra*, (Black J., Harlan J., and Stewart J., concurring).

³⁴ 482 U.S. 78, 89.

³⁵ *Id.* at 84; Respondents' Brief at 20. The Brief characterizes a four-part test under *Turner*: "whether the [challenged] practice has a valid, rational connection to a legitimate governmental interest; whether alternative means are open to inmates to exercise the asserted right; what impact an accommodation of the right would have on guards and inmates and prison resources; and whether there are "ready alternatives" to the practice."

³⁶ *Id.* at 84. (citing *Procunier v. Martinez*, 416 U.S. 396, 413-414 (1974)).

³⁷ *Ibid.* (citing *Johnson v. Avery*, 393 U.S. 483 (1969)).

³⁸ *Ibid.* (citing *Lee v. Washington*, *supra*).

³⁹ *Ibid.*, (citing *Wolff v. McDonnell*, 418 U.S. 539 (1974) and *Haines v. Kerner*, 404 U.S. 519 (1972)).

⁴⁰ Respondents Brief, at 16.

⁴¹ *Johnson*, slip opn. at 9.

⁴² *Ibid.*

⁴³ *Ibid.* (quoting *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003); *Pell v. Procunier*, 417 U.S. 817, 822 (1974)).

⁴⁴ *Johnson*, slip opn. at 10 (quoting *Rose v. Mitchell*, 443 U.S. 545, 555 (1979)).

⁴⁵ *Ibid.*

⁴⁶ *Ibid.* (quoting *Lee v. Washington*, *supra*, at 334).

⁴⁷ *Grutter v. Bollinger*, *supra*, at 326-27 (quoting *Adarand Constructors, Inc. v. PeZa*, *supra*, 515 U.S. at 229-230).

⁴⁸ *Johnson*, slip opn. at 2 (Thomas, J., dissenting).

⁴⁹ *Ibid.*

⁵⁰ *Id.* at 1-2.

⁵¹ *Id.* at 2.

⁵² *Johnson*, slip opn. at 8. (majority opinion).

⁵³ *Johnson*, slip opn. at 4 (Thomas, J., dissenting).

⁵⁴ *Id.* at 23.

⁵⁵ *Ibid.*; there was some dispute as to whether other states or the federal government permitted similar temporary racial segregation in prisons, but the dispute was not dispositive of the question of the legal standard before the Court. Justice Thomas points to the argument of several States with less severe problems which nonetheless maintained that policies like California's are necessary to deal with race-related prison violence, citing the Brief of the States of Utah, Alabama, Alaska, Delaware, Idaho, Nevada, New Hampshire and North Dakota as *Amici Curiae*.

⁵⁶ *Ibid.* (citing *Harper*, *supra*, 494 U. S., at 224; *Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989); *Turner*, *supra*, 482 U.S., at 85; *Webster v. Fall*, 266 U.S. 507, 511 (1925)).

⁵⁷ *Id.* at 19 (citing *Adarand*, 515 U.S. at 226-227; accord, *Grutter v. Bollinger*, 539 U.S. 306, 353 (2003))(Thomas, J., concurring in part and dissenting in part).

⁵⁸ *Id.* at 5 (citing *Shaw v. Murphy*, 532 U.S. 223, 228 (2001); *Ruffin v.*

Commonwealth, 62 Va. 790, 796 (1871)).

⁵⁹ 539 U.S. 126 (2003).

⁶⁰ *Id.* at 131-132 (citing *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 125 (1977); *Shaw v. Murphy*, *supra*, 532 U.S. at 229).

⁶¹ *Ibid.* (citing *Wolff v. McDonnell*, *supra*, 418 U.S. at 555-556 (the right to due process) and *Cruz v. Beto*, 405 U.S. 319, 322 (1972) (per curiam)(the right to free exercise of religion)).

⁶² 390 U.S. 333 (1968) (per curiam).

⁶³ *Johnson*, slip opn. at 16-17; and at 27 (Thomas, J., dissenting) (“The Court of Appeals, like *Johnson*, did not equate Lee’s test with strict scrutiny, and . . . [e]ven *Johnson* did not make the leap equating Lee with strict scrutiny when he requested that the Court of Appeals rehear his case. [. . .] That leap was first made by the judges who dissented from the Court of Appeals’ denial of rehearing *en banc*. 336 F.3d, at 1118 (Ferguson, J., joined by Pregerson, Nelson, and Reinhardt, JJ., dissenting from denial of rehearing *en banc*).”).

⁶⁴ *Ibid.*

⁶⁵ *Turner*, *supra*, 482 U.S. at 84 (citing *Lee v. Washington*, *supra*, 390 U.S. 333).

⁶⁶ *Id.* at 89, quoting *Jones*, *supra*, 433 U.S. at 128.

⁶⁷ *Johnson*, slip opn. at 7-8. (Thomas, J., dissenting).

⁶⁸ *Id.*, at 8 (citing *Harper*, *supra*, 494 U.S. at 224) (Turner’s standard of review “appl[ies] in all cases in which a prisoner asserts that a prison regulation violates the Constitution, *not just those in which the prisoner invokes the First Amendment*” (emphasis added)); *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 353 (1987) (“We take this opportunity to reaffirm our refusal, *even where claims are made under the First Amendment*, to substitute our judgment on . . . difficult and sensitive matters of institutional administration for the determinations of those charged with the formidable task of running a prison.” (internal quotation marks and citation omitted; emphasis added)).

⁶⁹ *Id.* at 12-16.

⁷⁰ *Id.* at 16.

⁷¹ *Johnson*, slip opn. at 14 (majority opinion)(quoting *Adarand*, *supra*, 515 U.S., at 237 (internal quotation marks omitted)) *See also Grutter*, 539 U.S., at 326-327 (“Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it.”).

⁷² *Ibid.*

⁷³ *Johnson*, slip opn. at 28 (Thomas, J., dissenting).

⁷⁴ *Ibid.*

ENVIRONMENTAL LAW AND PROPERTY RIGHTS

THE SUPREME COURT'S PROPERTY RIGHTS CASES

BY STEVEN J. EAGLE*

I. Introduction

The U.S. Supreme Court handed down three major decisions affecting private property rights during its 2004-05 term. *Lingle v. Chevron U.S.A., Inc.*¹ held that substantive due process plays no explicit role in Takings Clause² adjudications. *San Remo Hotel, L.P. v. City and County of San Francisco*³ confirmed that, at least under the Court's current jurisprudence, it is almost impossible to have an as-applied regulatory takings claim heard in federal court. Finally, *Kelo v. City of New London*⁴ essentially drained the Fifth Amendment's Public Use Clause of any remaining significance, holding that it does not bar the taking of private property for retransfer to other private owners for purposes of economic development.

The Court also used *Lingle* to summarize the elements of its regulatory takings law. It characterized these strands as sharing "a common touchstone."⁵ Nevertheless, Justice O'Connor's opinion for a unanimous Court⁶ conceded that its "regulatory takings jurisprudence cannot be characterized as unified."⁷ In fact, beneath a façade of tidiness, the Court did nothing to eliminate the basic incoherence of its takings doctrine. As my law school mentor, the late Myres McDougal, once put it: "to make a superb inventory of Augean stables is not to cleanse them!"⁸

It would be a mistake, however, to think that the Court's takings cases are uniformly negative in their promise. The Court's longstanding antipathy to explicit use of substantive due process in Takings Clause analysis might have preordained the outcome in *Lingle*, but, as Justice Kennedy noted in his separate concurrence, does not rule out due process in other contexts.⁹ *Lingle* also makes it clear that a due process challenge to an asserted property deprivation "probes the regulation's underlying validity," is thus "logically prior to and distinct from" the Takings Clause, and hence cannot be subsumed under it.¹⁰ *San Remo* closes a narrow door to federal judicial review of takings cases, but four justices suggested that future litigants press upon a broader one.¹¹

While *Kelo* rejected a bright-line test for demarcating the Public Use clause generally, five justices indicated that it would be appropriate to do so, at least in some situations. Even Justice Stevens, together with Justices Souter, Ginsburg, and Breyer, who joined in his opinion for the Court without qualification, seem to have sloughed the starry-eyed faith in the ability of eminent domain to improve the human condition that had marked the Court's landmark cases of half a century earlier.¹²

II. Takings and Substantive Due Process—*Lingle v. Chevron U.S.A.*

In *Lingle v. Chevron U.S.A. Inc.*,¹³ the Supreme Court revisited and rejected a test for facial regulatory takings claims that it had enunciated 25 years earlier, in *Agins v. City of Tiburon*.¹⁴

A. The *Agins* "Substantially Advances" Test

Agins stated that the enactment of a zoning ordinance constituted a taking when that ordinance "does not substantially advance legitimate state interests."¹⁵ Justice O'Connor commenced the Court's *Lingle* opinion with the observation that the *Agins* "substantially advances" formula was an example of the "doctrinal rule or test that finds its way into our case law through simple repetition of a phrase."¹⁶ On close examination, she concluded, the "substantially advances" test relates to the validity of a regulation, an inquiry "logically prior to and distinct from the question whether a regulation effects a taking."¹⁷

During the "substantially advances" formulation's 25-year life, it had been criticized as a Takings Clause test by some commentators¹⁸ and defended by others.¹⁹ When the U.S. Solicitor General filed an unusual amicus brief imploring the Court to repudiate the "substantially advances" prong of *Agins* in a case not raising it squarely, *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,²⁰ the Court responded with a curt rebuff.²¹ It added that, while the Court had not provided "a thorough explanation of the nature or applicability of the requirement that a regulation substantially advance legitimate public interests outside the context of required dedications or exactions," the trial court's instructions employing the test were "consistent with our previous general discussions of regulatory takings liability."²² The Court then cited a litany of cases in which "substantially advances" language was employed.²³

B. The Facts were Unfavorable to Petitioner

Before delving deeper into *Lingle*'s theoretical aspects, it is worth noting that the case again confirms the truism that the presence or absence of compelling facts goes a long way in Supreme Court takings cases. In *Del Monte Dunes*,²⁴ one factor that led to the award of takings damages was the palpable feeling of the justices, voiced from the bench by Justice Scalia, that the developer might feel it was being "jerked around" and that after a while one might begin to "smell a rat."²⁵ On the other hand, in this past Term's *Kelo* case, Justice Stevens stressed with approval the "thorough deliberation that preceded [the redevelopment plan's] adoption."²⁶

The facts in *Lingle* were unfavorable to the petitioner. The Court was being asked to ratify a robust doctrine that

some regarded as a judicial usurpation of legislative power through substantive due process.²⁷ Yet neither malice nor actual injury appeared to be present and the trial court's fact finding process arguably was insufficient. The statute, even if counterproductive from an economic perspective, did not approach the level of "egregious government misconduct"²⁸ or conduct that "shocks the conscience"²⁹ that U.S. Courts of Appeals have required to establish a due process violation generally, and in land use cases.³⁰

The petitioner, Chevron, was the larger of the two gasoline refiners in Hawaii and the largest marketer of gasoline as well.³¹ Chevron sold most of its gas through independent lessee-dealers. Typically, Chevron charged these dealers a monthly rent, defined as a percentage of the dealer's margin on retail sales. Chevron also required that the dealers buy gasoline at a rate it unilaterally set. In an effort to limit retail gasoline prices in Hawaii, the Legislature enacted a law in 1997 limiting the rent that oil companies could charge lessee-dealers to 15 percent of gross profits.³²

Chevron immediately sought to enjoin enforcement of the statute, on the ground, pertinent to the Supreme Court's review, that the rent cap constituted a facial taking. Both Chevron and the state sought summary judgment. They stipulated that Chevron's return on its lessee-dealer stations under the statute would satisfy any constitutional standard.³³ Thus, the lack of even asserted direct harm probably undercut any thought that the petitioner had been treated unfairly. Were the Court to find unfairness, then, it would have to be solely by dint of the intrinsically arbitrary nature of the state's regulation.

The U.S. District Court accepted Hawaii's argument that the cap was intended to prevent concentration of the gasoline market, and the resulting high price to consumers, by maintaining the viability of independent lessee-dealers. However, it granted Chevron summary judgment on the grounds that the statute would not substantially advance the State's asserted and legitimate interest, since it did not preclude oil companies from charging the transferees of incumbent dealers a premium that would offset the advantage of the mandated percentage rent deduction.³⁴

The U.S. Court of Appeals for the Ninth Circuit upheld the district court's use of the "substantially advances" standard, but vacated the judgment and remanded for a determination of whether the rent cap would, in fact, substantially advance the state's goal.³⁵ On remand, the trial court held a one-day bench trial, heard one expert from each side, and concluded that Chevron's expert was "more persuasive" as to whether the Hawaii statute would achieve its objective.³⁶ "Along the way," as the Supreme Court put it, the district court "determined that the state was not entitled to enact a prophylactic rent cap without actual evidence that oil companies had charged, or would charge, excessive rents."³⁷

The Ninth Circuit affirmed the remand decision, holding that its prior opinion barred the state from challenging use of the "substantially advances" test, and also rejecting the state's challenge to the application of this standard to the facts of the case.³⁸ As the Supreme Court noted, "the lower courts in this case struck down Hawaii's rent control statute as an 'unconstitutional regulatory taking,' based solely upon a finding that it does not substantially advance the state's asserted interest in controlling retail gasoline prices."³⁹ The Supreme Court reversed.⁴⁰

Whatever the merits of the litigants' claims,⁴¹ the Court hinted that it took into account the apparently casual nature of the trial court's fact finding process in its dismissive summary of that court's conclusions: "We find the proceedings below remarkable, to say the least, given that we have long eschewed such heightened scrutiny when addressing substantive due process challenges to government regulation."⁴²

C. The Court Criticized "Substantially Advances" as a Due Process Test

The gravamen of the Supreme Court's *Lingle* holding is that the "substantially advances" test is a due process test and, as such, has no rule in regulatory takings analysis. Early in its opinion, the Court stated:

The Takings Clause of the Fifth Amendment, made applicable to the States through the Fourteenth, provides that private property shall not "be taken for public use, without just compensation." As its text makes plain, the Takings Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power." In other words, it "is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." While scholars have offered various justifications for this regime, we have emphasized its role in "bar[ring] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."⁴³

The "substantially advances" formula, the Court adds, anomalously would distinguish between burdens that are equally onerous, requiring compensation only where the regulation is not efficacious, a distinction of no bearing to the individual owner.⁴⁴

The owner of a property subject to a regulation that *effectively* serves a legitimate state interest may be just as singled out and just as burdened as the owner of a property subject to an *ineffective* regulation. It would make little sense to say that the second owner has suffered a taking while the first has not. Likewise, an ineffective regulation

may not significantly burden property rights at all, and it may distribute any burden broadly and evenly among property owners. The notion that such a regulation nevertheless “takes” private property for public use merely by virtue of its ineffectiveness or foolishness is untenable.⁴⁵

The Court concluded that the lower courts in *Lingle* took the “substantially advance” statement “to its logical conclusion, and in so doing, revealed its imprecision. Today we correct course.”⁴⁶

D. The Court’s “Takings” Tests are Largely Based on Due Process

Were the Supreme Court to have developed a robust doctrine of reviewing government *deprivations* of private property under the Due Process clause, and government *takings* of private property under a property rights-based Takings Clause, *Lingle*’s holding would be doctrinally consistent. Instead, for the last 30 years the Court has conflated the two approaches, defining takings of property not in terms of property rights, but in terms of ends-means analysis and, above all, “fairness.”

1. A True Property Rights Approach to Takings

It is black letter law that “property” consists not of “things,” but rather of the right to use, exclude others from, and alienate things.⁴⁷ A property rights-based Takings Clause jurisprudence would ask, first, whether property rights have been appropriated by government and, second, whether the affected owners received implicit compensation in the form of “reciprocity of advantage.”⁴⁸ Appropriation without reciprocal advantage would constitute a compensable taking.

Such a straightforward approach would involve the application of judgment, but the contours of decisionmaking seem clear. Reciprocity, for instance, would include instances where each owner benefits from restrictions imposed on all other owners, such as the merchants in the French Quarter of New Orleans whose historic structures would be devalued if neighbors were allowed to convert to modern fast food restaurants.⁴⁹ Reciprocity would not include the situation in *Penn Central Transportation Co. v. City of New York*,⁵⁰ where, as then-Justice Rehnquist noted in dissent, 400 buildings were singled out for designation as official landmarks out of over one million buildings and structures in New York City. The “landmark designation imposes upon [affected owners] a substantial cost, with little or no offsetting benefit.”⁵¹

Another articulated concern about a property rights approach to takings is that owners will define the interest they allege to be taken to correspond exactly with the scope of the government action. This has been referred to as “entitlement chopping”⁵² and “conceptual severance.”⁵³ However, at least two objective tests have been proposed to deal with this problem. Professor John Fee has suggested an “independent economic viability” standard.⁵⁴ I have advocated accepting the landowner’s delineation of the

relevant parcel only if it corresponds with a “commercial unit” of property in fact traded in the relevant market.⁵⁵

2. The Court’s Crypto-Due Process Approach to Takings

In her *Lingle* opinion, Justice O’Connor observed that there was “no question that the ‘substantially advances’ formula was derived from due process, not takings, precedents.”⁵⁶ She noted that *Agins* cited *Nectow v. City of Cambridge*,⁵⁷ where the plaintiff claimed to be deprived of his property “without due process of law,”⁵⁸ and *Village of Euclid v. Ambler Realty Co.*,⁵⁹ “a historic decision holding that a municipal zoning ordinance would survive a substantive due process challenge so long as it was not ‘clearly arbitrary and unreasonable, having no *substantial relation to the public health, safety, morals, or general welfare.*’”⁶⁰ While the Court has tried to recharacterize its property deprivation precedents as firmly rooted in the Takings Clause,⁶¹ due process always has played a leading role.⁶²

Yet since the beginning of the Supreme Court’s contemporary interest in takings law, marked here as its 1978 decision in *Penn Central Transportation Co. v. City of New York*,⁶³ the Court has conflated takings and substantive due process concepts.

The essential difference between “property” and the command over resources evinced by contract is that the latter is bilateral. Contract rights normally are binding only upon those in privity to the agreement. On the other hand, property rights are in rem—they are binding upon everyone in the world.⁶⁴ Likewise, “due process” is an inherently relational concept. The Due Process Clauses of the Fifth⁶⁵ and Fourteenth Amendments⁶⁶ are not directed towards defining “property” or when government conduct constitutes its appropriation. Instead, their object is ensure that individual receive the benefit of procedures designed to produce fair outcomes and government conduct that is not arbitrary.

E. The Court’s Revealing Summary of Its Takings Jurisprudence

In her *Lingle* summary of contemporary takings law, Justice O’Connor noted the landmark cases enunciating some of its strands; *Loretto v. Teleprompter Manhattan CATV Corp.*,⁶⁷ involving permanent physical invasions; *Lucas v. South Carolina Coastal Council*,⁶⁸ involving deprivations of all economically beneficial use; and *Penn Central Transportation Co. v. City of New York*,⁶⁹ involving an ad hoc multifactor test stressing the economic impact of the regulation on the claimant particularly, the extent to which the regulation has interfered with distinct investment-backed expectations, and the character of the regulation.”⁷⁰ She continued:

Although our regulatory takings jurisprudence cannot be characterized as unified, these three inquiries (reflected in *Loretto*, *Lucas*, and *Penn Central*) share a common touchstone. Each aims to identify regulatory actions that are functionally

equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights. The Court has held that physical takings require compensation because of the unique burden they impose: A permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner's right to exclude others from entering and using her property—perhaps the most fundamental of all property interests. In the *Lucas* context, of course, the complete elimination of a property's value is the determinative factor. And the *Penn Central* inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests.⁷¹

Only in a metaphorical sense could Justice O'Connor have been speaking about "the severity of the burden that government imposes upon private property rights." Property rights, as such, have no burdens. Only owners have burdens. Economic impacts do not impinge upon property rights—they impinge only on property owners, for whom a loss of a given absolute magnitude might or might now be meaningful or tolerable, depending on their overall wealth or poverty. The inquiry is subtly shifted from whether there is a taking property to whether a burden has been imposed that is meaningful, given the circumstances of the particular owner.

Finally, the "degree to which it interferes with legitimate property interests" formulation is highly revealing. Given that interests deemed by law to be "illegitimate" are not property, and given Justice O'Connor's particular affinity towards *Penn Central*,⁷² her more precise reference would be to "reasonable investment-backed expectations."⁷³ But, why "expectations" is a test of property is not discernable. As Professor Richard Epstein noted, none of the justices has offered "any telling explanation of why this tantalizing notion of expectations is preferable to the words 'private property' (which are, after all, not mere gloss, but actual constitutional text)."⁷⁴

F. Lingle Legitimizes Separate Due Process Clause Judicial Review

At the same time that it rejected the "substantially advances" formula as a Takings Clause test, the Supreme Court affirmed its role for it in connection with the Due Process Clause.

[T]he "substantially advances" inquiry probes the regulation's underlying validity. But such an inquiry is logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose. . . . Conversely, if a government action

is found to be impermissible—for instance because it fails to meet the "public use" requirement or is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action.⁷⁵

This part of the *Lingle* opinion is important, since U.S. Circuit Courts of Appeals have split on whether claims that state or local deprivations of property could constitute violations of owners' due process rights are actionable under Section 1983⁷⁶ without first fulfilling the exceedingly onerous requirements for federal review of takings claims under the Supreme Court's *Williamson County* doctrine.⁷⁷

In *Albright v. Oliver*,⁷⁸ the Supreme Court reiterated the general rule established by its earlier holding in *Graham v. Connor*⁷⁹ that "[w]here a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.'"⁸⁰ Based on *Graham*, the Ninth Circuit, in *Penman v. Armendariz*,⁸¹ held that "that the scope of substantive due process, however ill-defined, does not extend to circumstances already addressed by other constitutional provisions."⁸² *Lingle* now makes it clear that due process review is not "already addressed" by the Takings Clause.

Still, the flowering of meaningful substantive due process review for property deprivation claims awaits the enunciation of a reasonable standard for review of such claims. The Supreme Court has stated that "[t]he guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the objective sought to be obtained."⁸³

In practice, the bar is a high one. In *County of Sacramento v. Lewis*,⁸⁴ the Supreme Court added that "the core of the concept" of due process is "protection against arbitrary action" and that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'"⁸⁵ The U.S. Courts of Appeals have echoed that view.⁸⁶

Justice Kennedy's concurring opinion in *Lingle* reminded his colleagues that, although *Chevron* had voluntarily dismissed its due process claim, the Court's decision "does not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate due process."⁸⁷ In his concurring opinion in *Kelo v. City of New London*,⁸⁸ also decided this term, Justice Kennedy wrote that, under some circumstances, courts applying rational-basis review under the Public Use Clause should scrutinized the facts in the manner used by courts under the Equal Protection Clause. Kennedy reinforced this significant signal by citing to *Cleburne v. Cleburne Living Center, Inc.*,⁸⁹ a case associated with "covert heightened scrutiny."⁹⁰

III. Federal Court Review of State and Local Regulatory Takings—*San Remo*

In *San Remo Hotel, L.P. v. City and County of San Francisco*,⁹¹ the Supreme Court held that the full faith and credit statute precluded the relitigation of regulatory takings issues adjudicated by the California courts. The petitioners had no desire to have their case heard in the California courts at all, but sued there only because that was required by the “state litigation” prong of the U.S. Supreme Court’s decision in *Williamson County Regional Planning Commission v. Hamilton Bank*.⁹²

All nine justices in *San Remo* deemed the general rules of issue preclusion applicable. The result was that substantive federal review, held out to be “premature” pending state review in *Williamson County*,⁹³ never would take place at all. The Court had granted cert because the Second Circuit recently had found such a result intolerable in *Santini v. Connecticut Hazardous Waste Management Service*,⁹⁴ a result that conflicted with the Ninth Circuit’s holding in *San Remo*.⁹⁵ In *Santini*, the Second Circuit declared:

It would be both ironic and unfair if the very procedure that the Supreme Court required Santini to follow before bringing a Fifth Amendment takings claim—a state-court inverse condemnation action—also precluded Santini from ever bringing a Fifth Amendment takings claim. We do not believe that the Supreme Court intended in *Williamson County* to deprive all property owners in states whose takings jurisprudence generally follows federal law (*i.e.*, those to whom collateral estoppel would apply) of the opportunity to bring Fifth Amendment takings claims in federal court.⁹⁶

Justice O’Connor’s comment about how a “doctrinal rule or test finds its way into our case law through simple repetition of a phrase,” although made in *Lingle*,⁹⁷ would have been at least as appropriate in *San Remo*. As Chief Justice Rehnquist noted in his concurrence in the judgment, joined by Justices O’Connor, Kennedy and Thomas, “the affirmative case for the state-litigation requirement has yet to be made.”⁹⁸ He concluded:

I joined the opinion of the Court in *Williamson County*. But further reflection and experience lead me to think that the justifications for its state-litigation requirement are suspect, while its impact on takings plaintiffs is dramatic. . . . In an appropriate case, I believe the Court should reconsider whether plaintiffs asserting a Fifth Amendment takings claim based on the final decision of a state or local government entity must first seek compensation in state courts.⁹⁹

A. The Facts in *San Remo*

In *San Remo*, a city ordinance, based on a “severe shortage” of affordable housing, barred the petitioners from

converting their 62-unit hotel in the Fisherman’s Wharf neighborhood from residential to tourist use unless they provided replacement residential units or paid a \$567,000 “in lieu” fee. The petitioners litigated their takings claims based on California law in the California courts, and asserted that they would reserve their federal takings claims for adjudication in federal court, if necessary.¹⁰⁰ The state court of appeal held the “in lieu” fee to constitute an exaction and that it failed to pass muster under the intermediate scrutiny standard.¹⁰¹ The California Supreme Court reversed, noting, however, that the petitioners had reserved their federal causes of action.¹⁰² Nevertheless, according to the U.S. Supreme Court, the state court did not confine its analysis to California jurisprudence:

In the portion of its opinion discussing the Takings Clause of the California Constitution, however, the court noted that “we appear to have construed the clauses congruently.” Accordingly, despite the fact that petitioners sought relief only under California law, the state court decided to “analyze their takings claim under the relevant decisions of both this court and the United States Supreme Court.”¹⁰³

Justice Stevens stated the question before the Court as “whether we should create an exception to the full faith and credit statute, and the ancient rule on which it is based, in order to provide a federal forum for litigants who seek to advance federal takings claims that are not ripe until the entry of a final state judgment denying just compensation.”¹⁰⁴ He asserted that the case supporting the right of litigants to reserve their federal claims while litigating others in state court, *England v. Louisiana State Board of Medical Examiners*,¹⁰⁵ applies only when the antecedent state issue “was distinct from the reserved federal issue.”¹⁰⁶

Although petitioners were certainly entitled to reserve some of their federal claims . . . *England* does not support their erroneous expectation that their reservation would fully negate the preclusive effect of the state-court judgment with respect to any and all federal issues that might arise in the future federal litigation. Federal courts, moreover, are not free to disregard 28 U.S.C. § 1738 [the full faith and credit statute] simply to guarantee that all takings plaintiffs can have their day in federal court.¹⁰⁷

B. *Williamson County and Its Progeny*

The hotel owners in *San Remo* had attempted to avoid the *Williamson County* doctrine, “a special ripeness doctrine applicable only to constitutional property rights claims”¹⁰⁸ that places exceedingly onerous and expensive burdens on litigants.¹⁰⁹

In *Williamson County Regional Planning Commission v. Hamilton Bank*,¹¹⁰ the bank sued in federal court immediately after the commission denied approval for its

planned expansion of a subdivision. The bank did not pursue alternative forms of relief, including requesting a variance, appealing to the County Council, requesting that the county's general plan be amended, or suing in inverse condemnation in state court.¹¹¹ The Supreme Court ruled that it could not determine whether there had been a taking, because there had been no "final decision" by the planning commission. Furthermore, the "respondent did not seek compensation through the procedures the State has provided for doing so."¹¹² For these two reasons, the Supreme Court ordered the claim to be dismissed from the federal courts as unripe.¹¹³

The "final decision" prong of *Williamson County* asserts that an as-applied takings claim "is not ripe until the government entity charged with implementing the regulation has reached a final decision regarding the application of the regulations to *the property* at issue."¹¹⁴ Since this prong was not relevant in *San Remo*, it suffices to note that it's assumption that planners decide how much development is permissible in a complex project simply misapprehends their professional role,¹¹⁵ and that the apparently simple requirement for a decision has embroiled landowners in a plethora of sub-prongs.¹¹⁶

The "state litigation" prong of *Williamson County* was the basis for *San Remo*. As *Williamson* declared: "The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation."¹¹⁷ Thus, it added "because the Fifth Amendment proscribes takings *without just compensation*, no constitutional violation occurs until just compensation has been denied."¹¹⁸ The Court noted soon after *Williamson*, in *MacDonald, Sommer & Frates v. Yolo County*, that "a court cannot determine whether a municipality has failed to provide 'just compensation' until it knows what, if any, compensation the responsible administrative body intends to provide."¹¹⁹ Thus, an owner asserting that a government action constitutes a taking must make a formal demand upon the responsible agency for compensation and that claim must be rejected before the owner has a constitutional takings claim. If the *Williamson County* doctrine had stopped there, the Constitutional anomaly exacerbated by *San Remo* would not exist.

C. The Williamson County "State Litigation" Prong has No Logical Basis

At oral argument in *San Remo*, while the petitioners' attorney was explaining the case's complex history, Justice O'Connor interjected: "And you haven't asked us to revisit that *Williamson County* case, have you?" When the attorney responded in the negative, O'Connor retorted: "Maybe you should have."¹²⁰

Williamson County stated:

The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation. Nor does the Fifth Amendment require that just compensation be

paid in advance of, or contemporaneously with, the taking; all that is required is that a "reasonable, certain and adequate provision for obtaining compensation" exist at the time of the taking. If the government has provided an adequate process for obtaining compensation, and if resort to that process "yield[s] just compensation," then the property owner "has no claim against the Government" for a taking. Thus, we have held that taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act. Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.¹²¹

Subsequently, in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,¹²² the Court vacated a judgment by the California Supreme Court striking the church's claim for regulatory takings damages on the ground that appropriate remedy would have been invalidation of a regulation determined to constitute a taking. The U.S. Supreme Court held that a landowner would be entitled to money damages for the time that an invalidated regulation was in effect, and remanded for further proceedings.¹²³ There had been no determination on the merits. Under prior California doctrine, there was no need to establish a mechanism for paying just compensation, since invalidation was deemed sufficient. It was in this context—that California had not yet devised a compensation mechanism—that the U.S. Supreme Court quoted *Williamson County*: "Our cases have also required that one seeking compensation must 'seek compensation through the procedures the State has provided for doing so' before the claim is ripe for review."¹²⁴

There are two significant problems with this analysis. First, it lacks appreciation of the gradual evolution in the mechanism for seeking compensation from the Federal Government. Prior to 1855, the only recourse of those with monetary claims against the United States was in persuading members to introduce private bills in Congress. In that year, the U.S. Court of Claims was created, but had the power only to advise Congress regarding payment. Congress subsequently gave the Court of Claims the power to make binding judgments in 1863. The Tucker Act, enacted in 1887, gave the Court of Claims the power to hear suits based on the Constitution. The court has been reorganized, most recently as the U.S. Court of Federal Claims, under Article I of the Constitution, with appeals to an Article III tribunal, the U.S. Court of Appeals for the Federal Circuit.¹²⁵ Under the Tucker Act, the U.S. Court of Federal Claims has exclusive jurisdiction over takings claims against the Federal Government in excess of \$10,000.¹²⁶ As this brief history indicates, the evolution from making demands for compensation directly to Congress to making them through an independent tribunal established at the pleasure of Congress has been gradual.

With respect to takings claims against local governments, there is no logical connection between the requirement that the purported inverse condemnee demand compensation from the condemnor, say, a city, and the requirement that it file suit in state court in order to obtain it.

Williamson County noted that “[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation.”¹²⁷ Thus, “because the Fifth Amendment proscribes takings *without just compensation*, no constitutional violation occurs until just compensation has been denied.”¹²⁸ But just compensation accrues from the time that the city engages in the act that constitutes the taking,¹²⁹ and the Constitutional claim logically is perfected when the city explicitly refuses to compensate.

The structure of the Takings Clause, which makes takings lawful, but conditions them on payment, does not make that provision unique so as to justify the “state litigation” requirement. Cities engage in conditionally permissible actions all the time. For instance, they have a right to prevent free speech, conditioned on their exercise of reasonable time, place, and manner restrictions. Hewing more closely to the Constitutional text, government searches and seizures are lawful, although conditioned on the showing of probable cause and the issuance, where necessary, of a warrant.¹³⁰

There is no more logical reason why a person claiming a regulatory taking should have to sue in state court to establish the proposition of lack of compensation than a person denied the right to speak in a public park should have to sue in state court to establish that the narrow grounds on which a city might legitimately suppress speech do not exist.

The general rule, as Chief Justice Rehnquist noted in his *San Remo* concurrence in the judgment, is that, as in *Patsy v. Board of Regents of Florida*,¹³¹ plaintiffs suing under § 1983 are not required to have exhausted state administrative remedies.¹³² Just as *San Remo* applied the general rule of issue preclusion to state court procedures required to ripen takings claims, the rule enunciated in *Patsy* should apply to *Williamson County* itself. Furthermore, in *Suitum v. Tahoe Regional Planning Agency*,¹³³ the Court described *Williamson* as a “prudential” ripeness test,¹³⁴ thus indicating that the Court could eliminate it, *sua sponte*.

Another aspect of the unfairness of the state litigation prong is its disparate treatment of property owners and government defendants. In *City of Chicago v. International College of Surgeons*,¹³⁵ the Supreme Court held that a municipal defendant can remove a regulatory takings case to federal court, even though it could not have been heard there, in the first instance, at the plaintiff’s behest. After *International College of Surgeons*, the U.S. Court of Appeals concluded that the *Williamson County* doctrine “may be anomalous,” but, with a broad hint, added that announcing its repudiation “is for the Supreme Court to say, not us.”¹³⁶

The Court denied *certiorari*,¹³⁷ but four justices seem primed to act now.

Just as the Court rejected an exception to the general rule of issue preclusion in *San Remo*, it should repudiate the exception to the general rule that the plaintiff selects from among appropriate fora that was a basis of *Patsy*. There is no need for a regulatory takings plaintiff to have two bites at the apple. Issue preclusion, among other doctrines, will prevent this.¹³⁸ But the plaintiff should select its bite.

IV. Takings for Economic Development and the “Public Use” Requirement—*Kelo*

Kelo v. City of New London,¹³⁹ in which the Supreme Court explicated the Public Use Clause,¹⁴⁰ has generated an immense amount of professional¹⁴¹ and public interest.¹⁴² “To call it a backlash would hardly do it justice. Calling it an unprecedented uprising to nullify a decision by the highest court in the land would be more accurate.”¹⁴³

Kelo considered whether the condemnation of private homes in a non-blighted neighborhood, with subsequent transfer to private developers for the purpose of economic revitalization, constituted a public use. The affected homeowners included longtime residents,¹⁴⁴ and their resistance to the condemnation of their working class neighborhood for upscale redevelopment resonated with the public.

A. The *Kelo* Facts Resonate with the Public and Legal Scholars

One reason for the intense public interest is surprise. People associate eminent domain with traditional public uses and generally have been unaware of the increasing use of condemnation to acquire private property for transfer to other private entities. The growth of public awareness of condemnations for retransfer largely came about through a series of articles by *Wall Street Journal* reporter Dean Starkman. In 1998, he wrote:

Local and state governments are now using their awesome powers of condemnation, or eminent domain, in a kind of corporate triage: grabbing property from one private business to give to another. A device used for centuries to smooth the way for public works such as roads, and later to ease urban blight, has become a marketing tool for governments seeking to lure bigger business.”¹⁴⁵

Follow-up articles in 2001 noted that state courts were starting to reign in eminent domain abuse.¹⁴⁶ Nevertheless, by late 2004 it seemed that localities valued eminent domain for retransfer more than ever:

Desperate for tax revenue, cities and towns across the country now routinely take property from unwilling sellers to make way for big-box retailers. Condemnation cases aren’t tracked nationally,

but even retailers themselves acknowledge that the explosive growth of the format in the 1990s and torrid competition for land has increasingly pushed them into increasingly problematic areas—including sites owned by other people.¹⁴⁷

The most comprehensive study of eminent domain for retransfer to private interests was prepared by the Institute for Justice, a libertarian public interest organization that also represented the *Kelo* petitioners.¹⁴⁸ This analysis, which reviewed condemnation activity in 41 states during the years 1998-2002, indicated that a total of 10,282 takings were threatened or filed in which the real property involved would be retransferred to a private entity.¹⁴⁹

The city of New London is located in southeastern Connecticut, where the Thames enters Long Island Sound. Largely because of the loss of manufacturing and naval jobs, the economy and population of New London have undergone a significant and prolonged economic decline. The State of Connecticut has designated it a “distressed municipality.”¹⁵⁰

In January 1998, Connecticut approved a \$5.35 million bond issue for redevelopment planning in the Fort Trumbull area, and a separate \$10 million bond issue for a state park there.¹⁵¹ In February 1998, the pharmaceutical manufacturer Pfizer Inc. announced that it would construct a \$300 million research facility adjoining Fort Trumbull.¹⁵² Local planners hoped that the Pfizer project would draw in new business and serve as a “catalyst to the area’s rejuvenation.”¹⁵³ After extensive hearings and in coordination with the state, the city formulated an economic revitalization plan for the Fort Trumbull area, to be effectuated through its non-profit entity, the New London Development Corporation.¹⁵⁴ The plan included a waterfront conference hotel, restaurants, shopping and new residences and support facilities.¹⁵⁵ According to the Supreme Court of Connecticut, the plan “was ‘projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas.’”¹⁵⁶

B. Four Opinions, Four Perspectives

There were four opinions in *Kelo*. Justice Stevens, writing for a 5-4 majority, asserted that “public purpose” has morphed to subsume “public use,” and that the Fort Trumbull project served a public purpose.¹⁵⁷ Justice Kennedy signed on to the Stevens opinion, but, in a separate concurring opinion, made it clear that, under certain unspecified circumstances, heightened judicial scrutiny of condemnations for retransfer is required.¹⁵⁸ Justice O’Connor wrote the principal dissent, in what apparently was her swansong takings opinion.¹⁵⁹ In line with her penchant for pragmatism, she stressed the possibilities of abuse in the Court’s prior public use language.¹⁶⁰ Finally, Justice Thomas, who also joined the O’Connor dissent, asserted that the Court’s error had been fundamental—it had stripped the “Public Use Clause” out of the Constitution.¹⁶¹

1. Justice Stevens and the “Living Constitution”

The “living constitution,” a jurisprudential approach often associated with Justice Brennan and the Warren Court, asserts that the Constitution as a living document subject to “contemporary ratification,” and must be interpreted in light of society’s “current problems and current needs.”¹⁶² Justice Stevens, writing for the Court in *Kelo* in that idiom,¹⁶³ declared that the question was “whether the City’s development plan serves a ‘public purpose.’” Without exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field.”¹⁶⁴ From a popular perspective, the issue posed by *Kelo* is whether the right to keep one’s own home yields to condemnation for private redevelopment, countenanced for purposes of economic development? The Court ruled 5-4 that it does.

Justice Stevens attempted to demonstrate that even the Court’s older cases equated “public use” with “public purpose.” He thus cited *Fallbrook Irrigation District v. Bradley*¹⁶⁵ as standing for the proposition that “when this Court began applying the Fifth Amendment to the States at the close of the 19th century, it embraced the broader and more natural interpretation of public use as ‘public purpose.’”¹⁶⁶ *Strickley v. Highland Boy Gold Mining Co.*,¹⁶⁷ he added, upheld a mining company’s use of an aerial bucket line to transport ore over property it did not own, and that the Court’s opinion by Justice Holmes “stressed ‘the inadequacy of use by the general public as a universal test.’”¹⁶⁸

Stevens also took full advantage of expansive language in the Court’s cases upholding takings for retransfer for private development that were decided in an era of considerable optimism about large-scale urban renewal. These were *Berman v. Parker*,¹⁶⁹ upholding the condemnation of a sound department structure so that the blighted area in which it was located could be comprehensively revitalized, and *Hawaii Housing Authority v. Midkiff*,¹⁷⁰ upholding the condemnation of underlying fee interests concentrated in a few eleemosynary trusts and retransferring the titles to the individual residential parcels to the homeowners who had long-term ground leases. These were justified as a means of ending feudalism in Hawaii.

In *Berman*, Justice Douglas rhapsodized at length about the power of government to ennoble individuals and communities:

We deal . . . with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. . . . Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. . . . The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.

Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it. Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. . . .

We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. . . . It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. . . .

Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end. Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established. . . .¹⁷¹

Notably, public use, public purpose, transfers to other private parties, and the police power all were fused together.

In *Midkiff*, Justice O'Connor built upon *Berman*, declaring: "The 'public use' requirement is thus coterminous with the scope of a sovereign's police powers."¹⁷² As consumer advocate Ralph Nader recently observed, the effect of Justice O'Connor's broad language is to make the definition of public use "[w]hatever the government says it is."¹⁷³

Summing up in *Kelo*, Justice Stevens concluded that "[f]or more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power."

He noted cases, like *99 Cents Only Stores v. Lancaster Redevelopment Agency*,¹⁷⁴ which troubled Justice O'Connor,¹⁷⁵ but wrote that abuses "can be confronted if and when they arise."¹⁷⁶

2. Justice Kennedy Remains Enamored with the Potential of Due Process

Justice Kennedy, whose vote was needed for Stevens' majority, warned in a concurring opinion that "[t]here may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted."¹⁷⁷ In his *Lingle* concurrence, Kennedy had cited *Eastern Enterprises v. Apfel*.¹⁷⁸ There, Kennedy was the only justice to conclude that a severely retroactive, large, and unexpected demand for payment to replenish a retirement and medical benefits fund made upon a former employer was invalid under the Due Process Clause. Kennedy's *Kelo* concurrence established a marker for future cases:

A court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits, just as a court applying rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications. . . .

A court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit, though with the presumption that the government's actions were reasonable and intended to serve a public purpose. . . .¹⁷⁹

It is particularly notable that in the course of this discussion Justice Kennedy cited *Department of Agriculture v. Moreno*¹⁸⁰ and *City of Cleburne v. Cleburne Living Center, Inc.*,¹⁸¹ both cases associated with the surreptitious higher standard of review termed rational basis "with bite,"¹⁸² or "covert heightened scrutiny,"¹⁸³ in order to establish whether government conduct is arbitrary.

3. Justice O'Connor's Distress with the Pragmatism She Wrought

Justice O'Connor, the author of the principal dissent, declared that, under the majority's view, "the words 'for public use' do not realistically exclude any takings, and thus do not exert any constraint on the eminent domain power."¹⁸⁴

Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public—in the process. To reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings "for public use" is to wash

out any distinction between private and public use of property—and thereby effectively to delete the words “for public use” from the Takings Clause of the Fifth Amendment.¹⁸⁵

Justice O’Connor set out to distinguish Justice Douglas’s *Berman* opinion,¹⁸⁶ and her own *Midkiff* opinion.¹⁸⁷

[F]or all the emphasis on deference, *Berman* and *Midkiff* hewed to a bedrock principle without which our public use jurisprudence would collapse: “A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void.” . . .

The Court’s holdings in *Berman* and *Midkiff* were true to the principle underlying the Public Use Clause. In both those cases, the extraordinary, precondemnation use of the targeted property inflicted affirmative harm on society—in *Berman* through blight resulting from extreme poverty and in *Midkiff* through oligopoly resulting from extreme wealth. And in both cases, the relevant legislative body had found that eliminating the existing property use was necessary to remedy the harm. . . . Because each taking *directly* achieved a public benefit, it did not matter that the property was turned over to private use. Here, in contrast, New London does not claim that Susette Kelo’s and Wilhelmina Dery’s well-maintained homes are the source of any social harm. Indeed, it could not so claim without adopting the absurd argument that any single-family home that might be razed to make way for an apartment building, or any church that might be replaced with a retail store, or any small business that might be more lucrative if it were instead part of a national franchise, is inherently harmful to society and thus within the government’s power to condemn.¹⁸⁸

Referring to “errant language in *Berman* and *Midkiff*,” Justice O’Connor conceded that her *Midkiff* equation of “public use” as “coterminous” with the police power “was unnecessary to the specific holding[.]”¹⁸⁹ She also warned that Justice Kennedy’s “as-yet-undisclosed test” was apt not to work: “The trouble with economic development takings is that private benefit and incidental public benefit are, by definition, merged and mutually reinforcing.”¹⁹⁰

4. Justice Thomas and the Need for First Principles

Finally, Justice Thomas dissented tartly, noting that the Framers had embodied in the Fifth Amendment’s Public Use Clause Blackstone’s view that “the law of the land. . . postpone[s] even public necessity to the sacred and inviolable rights of private property.”¹⁹¹ “Defying this understanding, the Court replaces the Public Use Clause with

a “[P]ublic [P]urpose” Clause (or perhaps the “Diverse and Always Evolving Needs of Society” Clause).¹⁹²

Justice Thomas also criticized Justice Stevens’ explanation that the older case law supported the Court’s equation of public use with public purpose. In his analysis of *Fallbrook Irrigation Dist. v. Bradley*,¹⁹³ for instance, the condemnation for purposes of constructing an irrigation ditch did serve a public purpose, since all landowners affected by the ditch had a right to use it.¹⁹⁴ Likewise *Strickley v. Highland Boy Gold Mining Co.*¹⁹⁵ “could have been disposed of on the narrower ground that ‘the plaintiff [was] a carrier for itself and others,’ and therefore that the bucket line was legally open to the public.”¹⁹⁶

C. Who is benefited by condemnation for retransfer and why does it matter?

Justice Stevens started his analysis by asserting that it was “perfectly clear” that “the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation.”¹⁹⁷ Likewise impermissible would be a taking “under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit.”¹⁹⁸ On that score, Justice Stevens reassured that the “takings before us, however, would be executed pursuant to a ‘carefully considered’ development plan.”¹⁹⁹ A “one-to-one transfer of property, executed outside the confines of an integrated development plan . . . would certainly raise a suspicion that a private purpose was afoot,” such cases could “be confronted when and if they arise.”²⁰⁰ “Courts have viewed such aberrations with a skeptical eye.”²⁰¹

One of the examples that Stevens cited for this proposition was *99 Cents Only Stores v. Lancaster Redevelopment Agency*.²⁰² There, a leading “big box” retail chain, Costco, had threatened to leave the city unless its smaller competitor’s adjacent land was condemned and transferred to it. The agency instituted eminent domain proceedings, on the pretextual grounds of blight. The court found that “by Lancaster’s own admissions, it is was willing to go to any lengths . . . simply to keep Costco within the city’s boundaries. In short, the *very reason* that Lancaster decided to condemn 99 Cents’ leasehold interest was to appease Costco. Such conduct amounts to an unconstitutional taking for purely private purposes.”²⁰³

But nothing in *99 Cents Only Stores* suggests that redevelopment agency or city officials were bribed, or otherwise acted out of any motive other than the city’s welfare. They were aware of the importance of retaining Costco, a principal tenant in the agency’s most successful project and the only shopping center in Lancaster with a regional draw for customers. The court noted that these officials “[v]iew[ed] Costco as a so-called ‘anchor tenant’ and [were] fearful of Costco’s relocation to another city.”²⁰⁴ As the Lancaster city attorney candidly said, “99 Cents produces less than \$40,000 [a year] in sales taxes, and Costco was producing more than \$400,000. You tell me which was more important.”²⁰⁵

It is true, of course, that Costco would gain from displacing 99 Cents Only Stores, and that it was motivated by its own prospects of gain. But that does not distinguish Costco from any other commercial developer or retailer.

Going on the premise that condemnation for economic development has no lesser legal status than condemnation for alleviation of physical blight, it is hard to distinguish the agency that condemns an unblighted “big box” store at the behest of its larger competitor, in order to derive the benefits that inure from the continued cooperation and presence of the larger firm, from condemning the unblighted small department store that stood in the way of a complete neighborhood make-over in *Berman v. Parker*.²⁰⁶ Indeed, Justice Stevens took pains to point out, in *Kelo*, that it would be a “misreading” to term *Berman* a removal of blight case, since it involved comprehensive revitalization. “Had the public use in *Berman* been defined more narrowly, it would have been difficult to justify the taking of the plaintiff’s nonblighted department store.”²⁰⁷

Justice Stevens’ emphasis on the comprehensiveness of the plan in *Kelo* also is important:

Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us, as it was in *Berman*, to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan.²⁰⁸

It is difficult to know what to make of this pronouncement. It might relate to the fact that large-scale actions are more inherently “legislative” and scrutinized by the public, so as to make them more worthy of deference.²⁰⁹ The “legislative” versus “adjudicative” distinction drawn by the Supreme Court in *Dolan v. City of Tigard*,²¹⁰ where the Court imposed heightened scrutiny on administrative agency decisions but not legislative ones, comes to mind as well. In any event, allowing a party to litigation to designate the scale of the inquiry has some of the same drawbacks as allowing that party to designate the “relevant parcel” in the conventional regulatory takings case.²¹¹ In both situations, the fairness of the result depends in large measure at how far the court looks. The fact that a city might be interested in “comprehensive” redevelopment of a wide area might imbue the entire scheme with a public purpose, but does not mean that the taking of an individual small parcel necessarily is for a public use.

Justice Stevens defended the condemnation in *Kelo* on the grounds that all of the state judges involved in the case “agreed that there was no evidence of an illegitimate purpose” and that “the city’s development plan was not adopted ‘to benefit a particular class of identifiable individuals.’”²¹² Likewise, “the development plan was not intended to serve the interests of Pfizer.”²¹³

However, as Justice O’Connor noted in her dissent, in economic development takings, “private benefit and incidental public benefit are, by definition, merged and mutually reinforcing. In this case, for example, any boon for Pfizer or the plan’s developer is difficult to disaggregate from the promised public gains in taxes and jobs.”²¹⁴ Justice Thomas noted that the project, which stated a “vague promise of new jobs and increased tax revenue,” also was “suspiciously agreeable to the Pfizer Corporation.”²¹⁵

The record certainly indicates that the needs of Pfizer were not far from the minds of redevelopment officials. The city’s development consultant noted that Pfizer was “the ‘10,000 pound gorilla’ and ‘a big driving point’ behind the development project.”²¹⁶ A letter from the president of the city’s development corporation to the president of Pfizer’s research division noted that Pfizer’s “requirements” had been met and that the corporation “was ‘pleased to make the commitments outlined below to enable you to decide to construct a Pfizer Central Research Facility in New London.’”²¹⁷

Perhaps, as the state supreme court found, the underlying purpose was benefit to the city.²¹⁸ But, ultimately, the quest for the definitive quid pro quo between the city and Pfizer not only is illusive, it is irrelevant. The prime interest of New London, and also of the State of Connecticut, which very actively participated in the Fort Trumbull project, was not contractual liability, but rather reputation as a redevelopment partner. If major companies like Pfizer are pleased with the upscale hotels, executive housing, attractive shops, and other amenities adjoining the sites they have redeveloped, other corporations that might be significant redevelopment partners in the government entity’s future projects will learn of it. Correspondingly, if companies like Pfizer are unhappy, future redevelopment efforts would become more difficult.

In *Lingle v. Chevron U.S.A., Inc.*²¹⁹ the Court asserted that there was a fundamental dissonance in basing the landowner’s entitlement to compensation on whether the city acted to further a legitimate purpose—the owner was, or was not, deprived of property regardless of the city’s reason.²²⁰ Yet in *Kelo*, the question of whether the city is acting primarily for public benefit raises the same sort of questions. If a condemnation for retransfer results in a large increment in amenities, jobs, and tax revenues, should it nevertheless be invalidated because the redeveloper obtained a larger benefit, or because the local official was acting to benefit the redeveloper instead of his or her employer? Likewise, if the city obtains a poor deal, either in terms of the absolute amount of benefit that it receives, in relation to better deals that were available, or compared with the condemnee’s subjective (and therefore noncompensable) losses, should the city officials’ fidelity to the goal of primary public benefit obviate the other factors?

C. County of Wayne v. Hathcock—An Alternative Approach

An important recent case that presents a comprehensive alternative to the *Kelo* approach to “public use” is the Michigan Supreme Court’s sweeping repudiation of its very well known *Poletown* doctrine,²²¹ in *County of Wayne v. Hathcock*.²²² In *Poletown*, the state high court had upheld the condemnation of an entire ethnic neighborhood of some 1,400 homes, schools, 16 churches, and 144 local businesses for retransfer to General Motors Corporation, which intended to build a Cadillac assembly plant. Alleviation of Detroit’s severe unemployment was the articulated and accepted justification. In 2004, in *Hathcock*, the Michigan court rejected condemnation for development of a large business and technology park, with a conference center, hotel accommodations, and a recreational facility, to be located near the Detroit airport.

Hathcock held *Poletown* to have been a “radical departure from fundamental constitutional principles.”²²³ The state supreme court reviewed the history of the term “public use” under the Michigan constitutions, and concluded that “the transfer of condemned property is a ‘pubic use’ when it possesses one of the three characteristics in our pre-1963 case law identified by Justice Ryan” in his *Poletown* dissent:

First, condemnations in which private land was constitutionally transferred by the condemning authority to a private entity involved “public necessity of the extreme sort otherwise impracticable.”

Second, this Court has found that the transfer of condemned property to a private entity is consistent with the constitution’s “public use” requirement when the private entity remains accountable to the public in its use of that property.

Finally, condemned land may be transferred to a private entity when the selection of the land to be condemned is itself based on public concern. In Justice Ryan’s words, the property must be selected on the basis of “facts of independent public significance,” meaning that the underlying purposes for resorting to condemnation, rather than the subsequent use of condemned land, must satisfy the Constitution’s public use requirement.²²⁴

D. The Transmutation of Private Ownership from Preventing Public Harm to Furthering Public Good

In its reaction to the *Kelo* case, perhaps the public found most vivid the following observation in Justice O’Connor’s dissent:

The Court rightfully admits, however, that the judiciary cannot get bogged down in predictive judgments about whether the public will actually

be better off after a property transfer. In any event, this constraint has no realistic import. For who among us can say she already makes the most productive or attractive possible use of her property? The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.²²⁵

These sentences point to a seismic shift in the basis for the Supreme Court’s view of land use regulation. In the seminal case upholding the concept of zoning, *Village of Euclid v. Ambler Realty Co.*, the Court found that its police power justification was intimately related to the law of nuisance.²²⁶ This is but an application of the Court’s broader observation, in *Mugler v. Kansas*, that “all property in this country is held under the implied obligation that the owner’s use of it shall not be injurious to the community.”²²⁷

Yet *Kelo* implicitly suggests that the touchstone has changed from the owner’s *right* to use property, subject to the obligation to do no harm, to the owner’s affirmative *obligation* to use property in ways that benefit the community—lest that property be taken away and vested in others.

E. Coda

Given the practical impossibility of cabining condemnation for retransfer for economic revitalization, the Supreme Court has two choices. The first, which four justices selected, is to transmute the Public Use Clause into an *ad hoc* analysis of public purpose and fairness. The second, which four other justices selected, is to hold fast to the traditional limitations on public use, as was done by the Michigan Supreme Court in *Hathcock*.²²⁸

It may be, however, that, when all is said and done, the U.S. Supreme Court will attempt to split the difference with a relaxed definition of “public use,” enforced through a higher level of judicial scrutiny, as suggested by the swing Justice, Anthony Kennedy.

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Footnotes

¹ 125 S.Ct. 2074 (2005).

² U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

³ 125 S.Ct. 2491 (2005).

⁴ 125 S.Ct. 2655 (2005).

⁵ *Lingle*, 125 S.Ct. at 2081.

⁶ Justice Kennedy also filed a separate concurring opinion.

- ⁷ 125 S.Ct. at 2082.
- ⁸ Myres S. McDougal, *Future Interests Restated: Traditions Versus Clarification and Reform*, 55 HARV. L. REV. 1077, 1115 (1942).
- ⁹ *Lingle*, 125 S.Ct. at 2087. See *supra* text accompanying note 87.
- ¹⁰ *Id.* at 2084. See *supra* text accompanying notes 75-82.
- ¹¹ See *infra* text accompanying notes 97-99, 120-138.
- ¹² See *infra* text accompanying note 171.
- ¹³ 125 S.Ct. 2074 (2005).
- ¹⁴ 447 U.S. 255 (1980).
- ¹⁵ *Id.* at 260.
- ¹⁶ 125 S.Ct. at 2077.
- ¹⁷ *Id.* at 2084.
- ¹⁸ See, e.g., Edward J. Sullivan, *Emperors and Clothes: The Genealogy and Operation of the Agins Tests*, 33 URB. LAW. 343 (2001).
- ¹⁹ See R. S. Radford, *Of Course a Land Use Regulation that Fails to Substantially Advance Legitimate State Interests Results in a Regulatory Taking*, 15 FORDHAM ENVTL L.J. 353 (2004).
- ²⁰ 526 U.S. 687 (1999).
- ²¹ 526 U.S. at 704.
- ²² *Id.* at 704.
- ²³ *Id.* at 704 (citing *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992); *Yee v. Escondido*, 503 U.S. 519, 534 (1992); *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 485 (1987); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)).
- ²⁴ *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999).
- ²⁵ *Id.*, oral argument, 1998 WL 721087, at 17 (1998).
- ²⁶ *Kelo v. City of New London*, 125 S.Ct. 2655, 2665 (2005).
- ²⁷ See *infra* text accompanying notes 84-86.
- ²⁸ *George Washington University v. District of Columbia*, 318 F.3d 203, 209 (D.C. Cir. 2003).
- ²⁹ *Creative Environments, Inc. v. Estabrook*, 680 F.2d 882, 883 (1st Cir. 1982).
- ³⁰ See also, *infra* note 86.
- ³¹ *Lingle*, 125 S.Ct. at 2078.
- ³² *Id.*
- ³³ *Id.* at 2078-79.
- ³⁴ *Id.* at 2079 (citing *Chevron U.S. A. Inc. v. Cayetano*, 57 F.Supp.2d 1003, 1014 (D. Hawaii 1998)).
- ³⁵ *Id.* at 2079-80 (citing *Chevron U.S. A. Inc. v. Cayetano*, 224 F.3d 1030, 1033-37 (9th Cir. 2000). Judge William Fletcher concurred only in the judgment, asserting that the “reasonableness” standard applicable to “ordinary price and rent control laws” should govern the court’s disposition. *Id.* at 1048).
- ³⁶ *Id.* at 2085 (citing *Chevron*, 198 F.Supp.2d 1182 (D. Hawaii 2002)).
- ³⁷ *Id.* (citing *Chevron* 198 F.Supp.2d at 1191).
- ³⁸ *Id.* (citing *Chevron*, 363 F.3d 846, 849-855 (9th Cir. 2004))(Once again, Judge Fletcher dissented the grounds that the “reasonableness” test was applicable. 363 F.3d at 359-361).
- ³⁹ *Id.* at 2082 (citing *Chevron*, 198 F.Supp.2d at 1193).
- ⁴⁰ *Id.* at 2080.
- ⁴¹ For an earlier discussion of *Lingle* in this journal, delving more closely into its factual basis and economic reasoning, see Louis K. Fisher and Esther Slater McDonald, *Supreme Court Preview: Regulatory Takings*, 6 ENGAGE 1: 4 (2002).
- ⁴² *Lingle*, 125 S.Ct. at 2085.
- ⁴³ *Id.* (citations omitted) (emphasis and brackets in original).
- ⁴⁴ 125 S.Ct. at 2084.
- ⁴⁵ *Id.* (emphasis in original).
- ⁴⁶ *Lingle* at 2087.
- ⁴⁷ See *PruneYard Shopping Ctr. v. Robbins*, 447 U.S. 74, 83 n.6 (1980) (“The term ‘property’ as used in the Taking Clause includes the entire ‘group of rights inhering in the citizen’s [ownership].’ It is not used in the ‘vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. [Instead, it] denote[s] the group of rights inhering in the citizen’s relation to the physical thing, as the right to possess, use and dispose of it.’ . . . The constitutional provision is addressed to every sort of interest the citizen may possess.” *Id.* (quoting *United States v. General Motors Corp.*, 323 U.S. 373, 377-78 (1945))) .
- ⁴⁸ The phrase was first used by Justice Holmes in *Jackson v. Rosenbaum*, 260 U.S. 22, 30 (1922). Holmes repeated the phrase, more famously and in the takings context, in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).
- ⁴⁹ See *City of New Orleans v. Dukes*, 427 U.S. 297 (1976) (upholding *Vieux Carre* ordinance).
- ⁵⁰ 438 U.S. 104 (1978).
- ⁵¹ *Id.* at 138-139 (Rehnquist, J., dissenting).
- ⁵² Frank Michelman, *Takings*, 1987, 88 COLUM. L. REV. 1600, 1601 (1988).
- ⁵³ Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1676 (1988).
- ⁵⁴ John E. Fee, Comment, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. CHI. L. REV. 1535, 1557-62 (1994). Under this standard, a taking has occurred when “any horizontally definable parcel, containing at least one economically viable use independent of the immediately surrounding land segments, loses all economic use due to government regulation.” *Id.* at 1538.
- ⁵⁵ STEVEN J. EAGLE, *REGULATORY TAKINGS* § 7-7(e)(5) (3d ed. 2005).
- ⁵⁶ *Lingle*, 125 S.Ct. at 2083.
- ⁵⁷ 277 U.S. 183 (1928).

- ⁵⁸ *Id.* at 185.
- ⁵⁹ 272 U.S. 365 (1926).
- ⁶⁰ *Lingle*, 125 S.Ct. at 2083 (quoting *Euclid*, 272 U.S. at 395) (emphasis supplied by *Lingle*).
- ⁶¹ See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374, 384 n.5 (1994) (dismissing as incorrect the view that regulatory takings jurisprudence is based upon due process concepts).
- ⁶² For elaboration, see Steven J. Eagle, *Substantive Due Process and Regulatory Takings: A Reappraisal*, 51 ALA. L. REV. 977, 998-1005 (2000).
- ⁶³ 438 U.S. 104 (1978).
- ⁶⁴ For an explication of this concept, see generally Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000); Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773 (2001).
- ⁶⁵ U.S. CONST., amend. V (1791) (“[N]or shall any person . . . be deprived of life, liberty or property, without due process of law.”).
- ⁶⁶ U.S. CONST., amend. XIV (1868) (“[N]or shall any State deprive any person of life, liberty, or property without due process of law.”).
- ⁶⁷ 458 U.S. 419 (1982).
- ⁶⁸ 505 U.S. 1003 (1992).
- ⁶⁹ 438 U.S. 104 (1978).
- ⁷⁰ *Lingle*, 125 S.Ct. at 2081-82 (discussing *Penn Central*, 438 U.S. at 124).
- ⁷¹ *Id.* at 2082 (internal citations omitted).
- ⁷² See, e.g., *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O’Connor, J., concurring) (avowing that *Penn Central* remains the “polestar” of the Court’s regulatory takings jurisprudence).
- ⁷³ The concept apparently originated in Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1233 (1967) (assigning preference to actions predicated upon “distinctly perceived, sharply crystallized, investment-backed expectation”). It was adopted by Justice Brennan in *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (“distinct investment-backed expectations,”) and restated without explanation in *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979), as “reasonable investment-backed expectations.” See Steven J. Eagle, *The Rise and Rise of “Investment-Backed Expectations,”* 32 URB. LAW. 437 (2000).
- ⁷⁴ Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369, 1370 (1993) (criticizing Justice Scalia’s *Lucas* opinion).
- ⁷⁵ *Lingle*, 125 S.Ct. at 2084.
- ⁷⁶ 42 U.S.C. § 1983, Civil Action for Deprivation of Rights. “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution . . . shall be liable to the party injured . . .”
- ⁷⁷ See *infra* text accompanying notes 108-118.
- ⁷⁸ 510 U.S. 266 (1994) (plurality).
- ⁷⁹ 490 U.S. 386 (1989).
- ⁸⁰ 510 U.S. at 273 (quoting *Graham*, 490 U.S. at 395).
- ⁸¹ 75 F.3d 1311 (9th Cir. 1996).
- ⁸² *Id.* at 1325.
- ⁸³ *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 84-85 (1980).
- ⁸⁴ 523 U.S. 833 (1998).
- ⁸⁵ *Id.* at 845-46.
- ⁸⁶ See, e.g., *Crider v. Board of County Commissioners*, 246 F.3d 1285, 1289 (10th Cir. 2001) (holding arbitrary and capricious “does not mean simply erroneous;” *Tri County Industries, Inc. v. District of Columbia*, 104 F.3d 455, 459 (D.C. Cir. 1997) (noting “grave unfairness” as a result of “substantial infringement of state law prompted by personal or group animus, or a deliberate flouting of the law that tramples significant personal or property rights . . .”; *Stern v. Halligan*, 158 F.3d 729, 731 (3d Cir. 1998) (declaring “. . . simple unfairness will not suffice to invalidate a law.”)).
- ⁸⁷ *Lingle*, 125 S.Ct. at 2087 (citing *Eastern Enterprises v. Apfel*, 524 U.S. 498, 539 (1998) (Kennedy, J., concurring in judgment and dissenting in part)).
- ⁸⁸ 125 S.Ct. 2655 (2005).
- ⁸⁹ 473 U.S. 432, 446-447, 450 (1985).
- ⁹⁰ LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1612 (2d ed. 1988).
- ⁹¹ 125 S.Ct. 2491 (2005).
- ⁹² 473 U.S. 172 (1985).
- ⁹³ *Id.* at 185.
- ⁹⁴ 342 F.3d 118 (2nd Cir. 2003).
- ⁹⁵ *San Remo*, 364 F.3d 1088 (9th Cir. 2004).
- ⁹⁶ *Santini*, 342 F.3d at 130.
- ⁹⁷ *Lingle v. Chevron U.S.A., Inc.*, 125 S.Ct. 2074, 2077 (2005).
- ⁹⁸ *Id.* at 2509 (Rehnquist, C.J., concurring in the judgment).
- ⁹⁹ *Id.* at 2509-10 (Rehnquist, C.J., concurring in the judgment).
- ¹⁰⁰ *Id.* at 2497-98. The Supreme Court noted that, in state court, petitioners “phrased their state claims in language that sounded in the rules and standards established and refined by this Court’s takings jurisprudence. *Id.*”
- ¹⁰¹ *Id.* at 2498 (citing the California Supreme Court summary, 41 P.3d 87, 96-97 (Cal. 2002)). The intermediate standard of review for exactions of property was discussed by the Supreme Court in *Lingle*. See *supra* QQ.
- ¹⁰² *Id.* (citing 41 P.3d at 91).
- ¹⁰³ *Id.* (citing 41 P.3d, at 100-101 (citing cases)).
- ¹⁰⁴ *Id.* at 2501 (citing *Williamson County*).
- ¹⁰⁵ 375 U.S. 411 (1964) (federal court abstained from adjudicating constitutionality of state refusal to deem graduates of chiropractic school compliant with Medical Practice Act so that state courts could determine whether Act applied to chiropractors at all).
- ¹⁰⁶ *San Remo*, 125 S.Ct. at 2502 (emphasis in original).
- ¹⁰⁷ *Id.* at 2501-02.

¹⁰⁸ Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 CAL. W. L. REV. 1, 2 (1992).

¹⁰⁹ See generally, John J. Delaney & Duane J. Desiderio, *Who Will Clean Up the "Ripeness Mess"? A Call for Reform so Takings Plaintiffs Can Enter the Federal Courthouse*, 31 URB. LAW. 195 (1999).

¹¹⁰ 473 U.S. 172 (1985).

¹¹¹ *Id.* at 196-97.

¹¹² *Id.* at 194.

¹¹³ *Id.* at 185.

¹¹⁴ *Id.* at 186 (emphasis added).

¹¹⁵ See Michael M. Berger, *The "Ripeness" Mess in the Federal Courts*, C872 ALI-ABA 41 (1993). "The planner's job is to draw an abstract plan and then determine whether a specific proposal meets all the requirements. Anyone who thinks that he can get a planning agency to tell him what he *can* do on his land has probably been abusing some controlled substance—or doesn't understand the planning process." *Id.* at 45 (emphasis in original).

¹¹⁶ See, e.g., MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 353 n.9 (1986) (holding submitted plan must not be "exceedingly grandiose"); Gil v. Inland Wetlands and Watercourses Agency, 593 A.2d 1368, 1374-75 (Conn. 1991) (holding multiple applications expected and four insufficient here); Eide v. Sarasota County, 908 F.2d 716 (11th Cir. 1990) (holding number dependent upon nature of project and challenge); Landmark Land Co. v. Buchanan, 874 F.2d 717 (10th Cir. 1989) (requiring one application plus some effort to pursue compromise with city).

¹¹⁷ Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194 (1985) (citing Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 297, n.40 (1981)).

¹¹⁸ *Id.* at 195, n.13 (emphasis in original).

¹¹⁹ 477 U.S. 340, 350 (1986).

¹²⁰ Oral Argument Transcript, San Remo Hotel, L.P. v. City and County of San Francisco, 125 S.Ct. 685 (2005) (No. 04-340), 2005 WL 757887 at *6.

¹²¹ *Williamson County*, 473 U.S. at 194-95 (internal citations omitted).

¹²² 482 U.S. 304 (1987).

¹²³ *Id.* at 322.

¹²⁴ *Id.* at 312 n.6 (quoting *Williamson*, 473 U.S. at 194).

¹²⁵ See generally, Gregory C. Sisk, *The Tapestry Unravels: Statutory Waivers of Sovereign Immunity and Money Claims Against the United States*, 71 GEO. WASH. L. REV. 602, 606-611 (2003).

¹²⁶ 28 U.S.C. § 1491(a)(1). The Act, originally passed in 1887, also provides for the adjudication of government contract, tax, government salary, and other disputes.

¹²⁷ Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194 (1985) (citing Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 297, n.40 (1981)).

¹²⁸ *Id.* at 195, n.13 (emphasis in original).

¹²⁹ See *First English*, 482 U.S. at 320 n.10 ("Though, as a matter of law, an illegitimate taking might not occur until the government refuses to pay, the interference that effects a taking might begin much earlier, and compensation is measured from that time.") *Id.* (citing Kirby Forest Industries, Inc. v. United States, 467 U.S. 1, 5 (1984)) ("Where Government physically occupies land without condemnation proceedings, 'the owner has a right to bring an 'inverse condemnation' suit to recover the value of the land on the date of the intrusion by the Government'"). *Id.* (quoting Kirby, 467 U.S. at 4 (emphasis added in *First English*)).

¹³⁰ U.S. CONST., amend. IV (1791).

¹³¹ 457 U.S. 496, 516 (1982).

¹³² *San Remo*, 125 S.Ct. at 2508 (Rehnquist, C.J., concurring in judgment) (citing *Patsy*, 457 U.S. at 516).

¹³³ 520 U.S. 725 (1997)

¹³⁴ *Id.* at 733-34.

¹³⁵ 522 U.S. 156 (1997).

¹³⁶ Kottschade v. City of Rochester, 319 F.3d 1038, 1040 (8th Cir. 2003).

¹³⁷ 540 U.S. 825 (2003).

¹³⁸ See, e.g., the *Rooker-Feldman* doctrine. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) (holding that inferior federal courts generally do not have the power to exercise appellate review over state court decisions).

¹³⁹ 125 S.Ct. 2655 (June 23, 2005). Justice Stevens' opinion for the Court was joined by Kennedy, Souter, Ginsburg, and Breyer, JJ. Justice Kennedy filed a concurring opinion as well. Justice O'Connor wrote a dissent, joined by Rehnquist, C.J., and Scalia and Thomas, JJ. Justice Thomas wrote a separate dissent, as well.

¹⁴⁰ U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

¹⁴¹ No fewer than 29 amicus brief were filed on behalf of the petitioners and 10 on behalf of the respondents.

¹⁴² According to a July 8-11, 2005, *Wall Street Journal/NBC News* poll "In the wake of court's eminent domain decision, Americans overall cite 'private-property rights' as the current legal issue they care most about, topping parental notification for minors' abortions or state right-to-die laws." John Harwood, *Washington Wire*, WALL ST. J., July 15, 2005, at A4.

¹⁴³ Kenneth R. Harney, *Eminent Domain Ruling Has Strong Repercussions*, WASH. POST, July 23, 2005, at F1.

¹⁴⁴ *Kelo*, 125 S.Ct. at 2660 (noting that one petitioner, Wilhelmina Dery, was born in her house in 1918 and has lived there ever since, and that another petitioner, Susette Kelo, has lived in the area since 1997, works as a nurse, and is much attached to her house and its water view).

¹⁴⁵ Dean Starkman, *Take and Give: Condemnation Is Used To Hand One Business Property of Another*, WALL ST. J., Dec. 2, 1998, at A1.

¹⁴⁶ Dean Starkman, *More Courts Rule Cities Misapply Eminent Domain*, WALL ST. J., July 23, 2001, at B1; Dean Starkman, *State Courts Side with Property Owner in Another Eminent Domain Contest*, WALL ST. J., Feb. 15, 2001, at B14.

¹⁴⁷ Dean Starkman, *Cities Use Eminent Domain to Clear Lots for Big-Box Stores*, WALL ST. J., Dec. 8, 2004, at B1.

¹⁴⁸ See Dana Berliner, *Public Power, Private Gain*, CASTLE COALITION (2003), available at http://www.castlecoalition.org/report/pdf/ED_report.pdf.

¹⁴⁹ *Id.* at 2.

¹⁵⁰ *Kelo*, 125 S.Ct. 2655, 2658 (2005).

¹⁵¹ *Id.* at 2659.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 2658-59.

¹⁵⁵ *Id.* at 2659.

¹⁵⁶ *Id.* at 2658 (quoting *Kelo v. City of New London*, 843 A.2d 500, 507 (Conn. 2004)).

¹⁵⁷ See *infra* text accompanying notes 162-176.

¹⁵⁸ See *infra* text accompanying notes 177-183.

¹⁵⁹ As of this writing, Justice O'Connor had submitted her resignation, effective with the conformation of a successor. Judge John G. Roberts of the U.S. Court of Appeals for the District of Columbia Circuit has been nominated to succeed her, but not yet confirmed.

¹⁶⁰ See *infra* text accompanying notes 184-190.

¹⁶¹ See *infra* text accompanying notes 191-196.

¹⁶² William J. Brennan, Jr., *Presentation to the American Bar Association* (July 9, 1985), in AMERICAN CONSTITUTIONAL LAW 607, 610 (Mason & Stephenson eds., 8th ed. 1987). See Arlin M. Adams, *Justice Brennan and the Religion Clauses: The Concept of a "Living Constitution"*, 139 U. PA. L. REV. 1319 (1991) ("This view of the Constitution as a living and evolving document whose interpretations should not be cabined by too literal a quest for the Framers' intent is a position that Justice Brennan consistently defended and thoughtfully espoused . . .") *Id.* at 1319. Brennan wrote the Court's opinion in *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

¹⁶³ See *infra* text accompanying note 192.

¹⁶⁴ *Kelo*, 125 S.Ct. at 2663.

¹⁶⁵ 164 U.S. 112 (1896).

¹⁶⁶ *Id.* at 2662 (citing *Bradley*, 164 U.S. at 158-164).

¹⁶⁷ 200 U.S. 527 (1906).

¹⁶⁸ 125 S.Ct. at 2662 (quoting *Bradley*, 200 U.S. at 531).

¹⁶⁹ 348 U.S. 26 (1954).

¹⁷⁰ 467 U.S. 229 (1984).

¹⁷¹ *Id.* at 31-34.

¹⁷² *Id.* at 240.

¹⁷³ Ralph Nader and Alan Hirsch, *Making Eminent Domain Humane*, 49 VILL. L. REV. 207, 211 (2004) ("Rather than emphasizing the justification of the public use in question, or the relatively small harm, the Court swept aside virtually any objection to any exercise of eminent domain. The Court gave away the game at the outset when it grappled with the definition of 'public use.' The Court's definition? Whatever the government says it is.") *Id.* at 210-211 (citations omitted).

¹⁷⁴ 237 F.Supp.2d 1123 (C.D. Cal. 2001).

¹⁷⁵ QQ Xref.

¹⁷⁶ 125 S.Ct. at 2667.

¹⁷⁷ *Id.* at 2670 (Kennedy, J. concurring).

¹⁷⁸ *Lingle*, 125 S.Ct. at 2087 (citing *Eastern Enterprises v. Apfel*, 524 U.S. 498, 539 (1998) (Kennedy, J., concurring in judgment and dissenting in part)).

¹⁷⁹ *Kelo*, 125 S.Ct. at 2669 (Kennedy, J. concurring) (internal citations omitted).

¹⁸⁰ 413 U.S. 528, 533-536 (1973) (striking down statute excluding from federal food stamp program households containing an individual unrelated to any other member of the household as irrational classification).

¹⁸¹ 473 U.S. 432, 446-447, 450 (1985) (finding no rational basis in record for believing that group home would pose any special threat to city's legitimate interests).

¹⁸² Gerald Gunther, *Forward, In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

¹⁸³ LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1612 (2d ed. 1988).

¹⁸⁴ 125 S.Ct. at 2675 (O'Connor, J., dissenting).

¹⁸⁵ *Id.* at 2671 (O'Connor, J., dissenting).

¹⁸⁶ *Berman v. Parker*, 348 U.S. 26 (1954).

¹⁸⁷ *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

¹⁸⁸ *Id.* at 2674-75 (Connor, J., dissenting) (quoting *Midkiff*, 467 U.S. at 245).

¹⁸⁹ *Id.* at 2675 (Connor, J., dissenting) (quoting *Midkiff*, 467 U.S. at 240).

¹⁹⁰ *Id.* at 2675 (Connor, J., dissenting).

¹⁹¹ *Id.* at 2677 (Thomas, J., dissenting).

¹⁹² *Id.* (quoting from Justice Stevens' opinion, *id.* at 2662-63 and adding capitalization).

- ¹⁹³ 164 U.S. 112, 161-162 (1896).
- ¹⁹⁴ *Kelo*, 125 S.Ct. at 2683 (Thomas, J., dissenting).
- ¹⁹⁵ 200 U.S. 527 (1906).
- ¹⁹⁶ *Kelo*, 125 S.Ct. at 2683-84 (Thomas, J., dissenting) (quoting *Strickley*, 200 U.S. at 531-32).
- ¹⁹⁷ *Id.* at 2661 & n.5 (paraphrasing and citing *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1789)).
- ¹⁹⁸ *Id.* at 2661.
- ¹⁹⁹ *Id.* (citing *Kelo*, 843 A.2d at 536).
- ²⁰⁰ *Id.* at 2667.
- ²⁰¹ *Id.* at 2667 n.17.
- ²⁰² *Id.* (citing 237 F.Supp.2d 1123 (C.D. Cal. 2001)).
- ²⁰³ 237 F. Supp. 2d at 1129 (emphasis in original).
- ²⁰⁴ *99 Cents Only Stores*, 237 F.Supp.2d at 1127.
- ²⁰⁵ Dean Starkman, *More Courts Rule Cities Misapply Eminent Domain*, WALL ST. J., July 23, 2001, B1 (quoting David McEwan).
- ²⁰⁶ 348 U.S. 26 (1954).
- ²⁰⁷ 125 S.Ct. at 2265 n.13.
- ²⁰⁸ *Id.* at 2665.
- ²⁰⁹ See *Fasano v. Board of Commissioners of Washington County*, 507 P.2d 23, (Or. 1973) *overruled on other grounds*, *Neuberger v. City of Portland*, 607 P.2d 722, 725 (Or. 1980) (deeming small-scale rezoning quasi-judicial in nature). Compare, *Arnel Dev. Co. v. City of Costa Mesa*, 620 P.2d 565 (Cal. 1980) (holding zoning ordinances legislative acts regardless of size of parcel affected).
- ²¹⁰ 512 U.S. 374, 385 (1994).
- ²¹¹ See, e.g. *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 497 (1987) (noting “our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, [and] one of the critical questions is determining how to define the unit of property “whose value is to furnish the denominator of the fraction.””(citation omitted).
- ²¹² *Kelo*, 125 S.Ct. at 2661-2662 (quoting *Midkiff*, 467 U.S. at 245).
- ²¹³ *Id.* at 2662 n.6 (quoting *Kelo*, 843 A.2d at 595 (Zarella, J., concurring in part and dissenting in part).
- ²¹⁴ 125 S.Ct. at 2675-76.
- ²¹⁵ *Id.* at 2677-78.
- ²¹⁶ *Kelo v. City of New London*, 843 A.2d 500, 537 (Conn. 2004).
- ²¹⁷ *Id.* at 538 n.51.
- ²¹⁸ *Id.* at 538.
- ²¹⁹ 125 S.Ct. 2074 (2005).
- ²²⁰ See *supra* text accompanying note 45.
- ²²¹ *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981).
- ²²² 684 N.W.2d 765 (Mich. 2004).
- ²²³ *Id.* at 788.
- ²²⁴ *Id.* at 781-783 (quoting *Poletown*, 304 N.W.2d at 478-480 (Ryan, J. dissenting).
- ²²⁵ *Kelo*, 125 S.Ct. at 2676 (O’Connor, J., dissenting).
- ²²⁶ 272 U.S. 365, 387-89 (1926).
- ²²⁷ 123 U.S. 623, 665 (1887).
- ²²⁸ See text associated with notes 221-224, *supra*.

CALIFORNIA GEOTHERMAL LAW AND ITS IMPACTS ON THERMOPHILE BIODIVERSITY

By TIFFANY GRANT*

I. Introduction

The growing need for efficient renewable energy in California has led to research into 'green' energy sources including geothermal energy production.¹ Federal and California state regulations have been designed to promote geothermal energy development. Although considered a 'green' resource, development of geothermal resources for energy production has not been without environmental opposition. "Plants . . . are facing the kind of obstacle environmentalists used to reserve for oil drilling."² Many environmental concerns stem from geothermal resource development;³ this article focuses on the loss of thermophile biodiversity from utilization of geothermal resources.

Thermophiles are microbial organisms that have adapted over millions of years to the extreme temperature and chemical compositions of each specific geothermal resource. Their ability to withstand high temperatures makes them invaluable to scientific and medical research. The economic potential of thermophiles in scientific and medical research is well known, with the discovery and research of a species in Yellowstone resulting in a scientific process which reportedly generates approximately \$100 million per year.⁴ However, thermophiles and their environments remain largely unstudied.⁵

Although federal and state regulations applicable to California have some basic environmental protections⁶ for geothermal resources, California lacks any regulations for the protection of thermophile biodiversity. In fact, current California law promotes the over utilization of geothermal resources thereby potentially promoting a significant loss of thermophile biodiversity.

II. Geothermal Resources & Energy Production

Through various technologies, the earth's heat, transferred through water, can be harnessed for energy production.⁷ The higher temperature resources are utilized primarily for energy production, while the lower temperature resources are used for various domestic applications including mineral spas.⁸

The growing need for efficient renewable energy in California has led to research into what are considered 'green' energy sources such as wind, solar and geothermal energy production.⁹ In 1999 alone, the Department of Energy spent a reported \$28.5 million dollars on geothermal research and development.¹⁰ The Geothermal Energy Association has reported, "In the next decade seventeen percent of the world's population could receive their electricity from a geothermal source."¹¹ Due to the demand for new energy sources, the development of geothermal resources has been promoted by the Department of Energy through research funding and Congress through the Geothermal Steam Act of 1970.¹²

III. Thermophiles & Environmental Concerns

The term 'green' to define geothermal energy production may be misleading. Although apparently less environmentally damaging than fossil fuel and nuclear energy production, geothermal energy, like any other energy resource, has adverse environmental impacts.¹³ This article will focus only on the potential for loss of thermophile biodiversity.¹⁴

Geothermal resources contain extreme temperatures and mineral compositions making them toxic for most prokaryotic species, but certain species have adapted to live in these toxic ecosystems. These species are referred to as thermophiles, hyperthermophiles, and extremophiles. Norman Pace, a molecular biologist at the University of Colorado, has noted:

It has become clear over the past few decades that substantial microbial diversity occurs at very high temperatures. Hyperthermophilic organisms promise a wealth of unknown biochemistry and biotechnological potential and challenge our comprehension of biomolecular structure. Nonetheless, relatively little is known about the diversity of life at high temperatures because of a traditional problem in microbial ecology: the inability to cultivate naturally occurring organisms.¹⁵

Cultures of some species are able to survive autoclaving,¹⁶ making them significant to scientific research. The potential for scientific development of pharmaceutical and industrial products and applications¹⁷ from bioprospecting is exemplified by the discovery and development of the "enzyme *Taq polymerase* . . . [which] was discovered through research on a thermally adapted microbe known as *Thermus aquaticus*" discovered during sampling of a hot spring in Yellowstone.¹⁸ The enzyme and a resulting technique called the PCR process was subsequently sold for \$300 million in 1991 and reportedly generates annual revenues around \$100 million per year.¹⁹ Acknowledging the importance of thermophiles, the National Park Service (NPS) has initiated a "Yellowstone Thermophiles Conservation Project."²⁰

Due to thermophiles' temperature adaptation, a change in temperature of the geothermal resource through extraction, injection, or re-injection of non-heated water could cause species die-offs if the temperature change was great enough to cause the surrounding geothermal fluid to cool, even briefly, to a temperature below acceptable thermophile living conditions.²¹ Many unknown conditions affect the sustainability and potential environmental impacts of geothermal resources. Research of replenishment rate and aquifer definition is primarily conducted in association with a proposed or currently utilized geothermal use. Although

research is being conducted into replenishment rates, aquifers and microbiological species of geothermal resources, the results are likely to be site/aquifer specific. The lack of scientific research and understanding into geothermal ecosystems is a key problem in the potential devastation of thermophile biodiversity.

IV. Current California Law

Geothermal Law in California can be broken down into the following steps: acquisition of the right to develop a geothermal resource, compliance with environmental requirements, and compliance with development and extraction requirements. Acquisition of rights to develop a geothermal resource is dependent upon whether the geothermal resource is federal, state, or private property.²²

A. Federal Geothermal Acquisition and Siting Rights

The majority of geothermal resources are located on federal land²³ in the western United States. Prior to 1970, geothermal resource development had been limited to primarily private lands because the Department of the Interior (DOI) was reluctant to dispose of geothermal resources on lands within its jurisdiction without federal direction.²⁴ To reduce this restriction on geothermal resource development, President Nixon approved the Geothermal Steam Act.²⁵

The Geothermal Steam Act (Act) of 1970 is the basis of all federal geothermal jurisprudence.²⁶ With two exceptions, the Act is the only means of acquiring rights to develop geothermal resources on U.S. public lands.²⁷ According to legislative history, the purpose of the Act was to “permit exploration and development of geothermal stream and associated geothermal resources. . . .”²⁸ The Act gave the Secretary of the Interior the ability to issue leases for geothermal steam development²⁹ and utilization in public lands, national forest, and lands conveyed subject to a reservation to the United States of the geothermal steam and associated resources.³⁰ The Act sets forth guidelines for leasing and royalties³¹ and exempts certain federal lands, including national recreational land and wildlife refuges, and tribally or individually owned Indian trust or restricted lands from the Act.³² The Act also contains an exclusion for the development of geothermal resources within National Parks when a significant thermal feature will be significantly adversely affected.³³

The primary question arising from the Geothermal Steam Act was: what are considered “lands conveyed by the United States subject to a [mineral] reservation to the United States of the geothermal steam and associated resources.”³⁴ The leading Ninth Circuit case on point is *United States v. Union Oil Co.*,³⁵ which held that geothermal resources were minerals reserved to the United States under the Stock-Raising Homestead Act of 1916 (SRHA). In an effort to civilize the west, the federal government enacted the SRHA to transfer public lands to private ownership under patents subject to a reservation to the United States “of all the coal and other minerals.”³⁶ The SRHA did not directly address the reservation

of geothermal resources or have an intent to reserve them because congress “was not aware of geothermal power”³⁷ when it enacted the SRHA.

Union Oil, as owners of lands in the Geysers Field of California, argued that the term ‘minerals’ should be given the “meaning it had in the mining industry at the time the [SRHA] was adopted”³⁸ and that geothermal resources should not be considered a “mineral” under the SRHA. The court instead looked at whether it “would further Congress’s purpose to interpret” geothermal resources as minerals³⁹ and held that the mineral reservation to the United States under the SRHA included geothermal resources.

It should be noted that “nothing prevents a contrary result in a case involving private rights arising in another state”⁴⁰ or under a statute other than the SRHA. In *Bedroc Limited, LLC v. United States*,⁴¹ the Supreme Court distinguished a mineral reservation under the Pittman Act in *Bedroc Limited* from a previous holding in *Watt v. Western Nuclear* regarding a mineral reservation under the SRHA. In *Watt v. Western Nuclear*, the Supreme Court construed the SRHA to include a mineral reservation of gravel where the SRHA reserved to the United States “all the coal and other minerals.”⁴² In *Bedroc Limited*, however, the Pittman Act reserved to the United States “all the coal and other valuable minerals.”⁴³ The Supreme Court in *Bedroc Limited* noted that at the time the Pittman Act was enacted, gravel was not a valuable mineral and therefore was not reserved to the United States. Such a different classification of geothermal resources could be found in a different state for private resources or under a different land grant act.

After rights to develop the resource are acquired, rights to construct a geothermal energy plant must be obtained. The Geothermal Steam Act provides that a geothermal lessee “shall be entitled to use so much of the surface of the land as may be found by the Secretary [of the Interior] for the production and conservation of geothermal resources.”⁴⁴

The primary California case on point is *Occidental v. Simmons*⁴⁵ decided in 1982 by the Northern District Court of California. Occidental, as the holder of a Department of Interior geothermal resources lease under the Geothermal Steam Act, filed suit against two owners of surface rights of land with mineral reservations to the United States patented under the SRHA. Occidental sought, “among other forms of relief,” a declaration of its right to build and operate a geothermal plant without the consent of the surface owners.⁴⁶ The court held that power plant siting rights in lands under the SRHA were reserved to the United States and that the Geothermal Steam Act authorized such leases. The court noted that removal of geothermal resources is inextricably connected to their utilization⁴⁷ and to hold that geothermal lessees own the rights to geothermal resources and “yet do not have the right to exploit those resources without the consent of the owners of surface interests would reduce the holding of *Union Oil* to an empty theoretical exercise.”⁴⁸

B. Federal Environmental and Developmental Regulations

After acquiring a federal lease for rights to develop geothermal resources and siting rights, geothermal energy developers begin the actual development of the geothermal resource. According to the Department of the Interior, the “development and production of geothermal resources involves six phases: exploration, test drilling, production testing, field development, power plant and power line construction, and full-scale operations.”⁴⁹

Since the lease of federal geothermal resources requires the discretionary approval of a federal agency, geothermal resource development on federal land is subject to the National Environmental Policy Act (NEPA). NEPA was enacted to “ensure that all federal agencies consider the environmental impact of their actions” through the development of environmental impact statements (EIS). A question arises as to which stage of geothermal resource development triggers NEPA compliance and the drafting of an Environmental Impact Report (EIR).⁵⁰

In 1974, Congress supplemented the 1970 Geothermal Steam Act with the Geothermal Energy Research, Development and Demonstration Act, which directed the federal government to “encourage and assist private industry through Federal assistance for the development and demonstration of practicable means to produce useful energy from geothermal resources with environmentally acceptable processes.”⁵¹ In 1973, the Department of the Interior (DOI) issued a programmatic EIS for the geothermal leasing program,⁵² which noted that initial exploration operations involve only casual activities and “practices which do not ordinarily lead to any appreciable disturbance or damage to lands, resources, and improvements.”⁵³

The *Sierra Club* Court recognized that to undertake exploration other than casual use, the lessee must submit a detailed plan of operations to the United States Geologic Survey (USGS) which includes proposed measures for “protection of the environment.”⁵⁴ Thus, geothermal energy developers are able to postpone the EIR NEPA process until a development plan is prepared. It should be noted that although NEPA requires an Environmental Impact Statement, it does not require that even significant environmental impacts be mitigated or avoided. In addition, it is difficult to measure the potential impacts on thermophile biodiversity because the majority of these species have not been identified, much less studied.

C. California State and Private Geothermal Acquisition

While Ninth Circuit case law has found that geothermal resources on federal land is a mineral, states differ on the classification and regulation of geothermal resources as a mineral, water, or sui generis, neither a water nor a mineral, resource.^{55&56} In California, two cases hold that geothermal resources are minerals on state and private lands, analogous with *Union Oil*. *Pariani v. California*⁵⁷ addressed whether a

state patent included rights to geothermal resources while *Geothermal Kinetics v. Union Oil*⁵⁸ addressed whether a geothermal resource is part of a mineral estate in a deed to private lands. Both cases regard rights to geothermal resources within The Geysers Field of Napa County, California.

In 1980, the California Court of Appeals decided *Pariani v. State of California*,⁵⁹ the state-law equivalent of the *Union Oil* case.⁶⁰ The plaintiffs were owners of land over geothermal resources in the Geysers Field area of Napa County. The lands had been granted by patent of the State of California between 1946 and 1956, with the reservation to the state of “all . . . mineral deposits.”⁶¹ As in *Union Oil*, the court noted “the fact that the presence of geothermal resources may not have been known to one or both parties to the . . . conveyance is of no consequence.”⁶² The court identified the interpretation as “[grants] for the sovereign should receive a strict construction—a construction which will support the claim of the government rather than that of the individual” and that “a grant is to be interpreted in favor of the grantee, except that a reservation in any grant, and every grant by a public officers or body, as such, to a private party is to be interpreted in favor of the grantor.”⁶³

Having stated the interpretation in favor of the state, the court then discussed the classification of a geothermal resource as a mineral. The court dismissed the idea that geothermal resources were heat or water, noting that the states’ definition of geothermal resources does not limit geothermal resources to heat. The court also dismissed the claim that geothermal resources are water, noting that the toxic⁶⁴ condensate of the steam at the Geysers field is not the “life-sustaining water which the courts have felt impelled to exclude from mineral grants and reservations.”⁶⁵ The court concluded that “either under a constructional approach of the general intent reservation . . . or the classification approach . . . geothermal resources are reserved to the patenting government.”⁶⁶

In *Geothermal Kinetics v. Union Oil*,⁶⁷ decided by the California Court of Appeals in 1977, the court considered whether a grant of minerals included geothermal resources. In agreement with *Union Oil* and *Pariani*, the court held that a geothermal resource is part of mineral estate in a deed to private lands. *Geothermal Kinetics* claimed title from a 1951 deed of conveyance for “all minerals in, on or under”⁶⁸ the land. *Union Oil*, holder of an assigned lease to the geothermal resources from the surface owners, claimed that the geothermal resources were not minerals, but heat. The court noted that a functional approach to interpreting the mineral grant was warranted instead of a mechanical approach. In addition, like *Union Oil* and *Pariani*, the court noted that the mineral does not need to be known to exist at the time of conveyance of a grant or reservation.⁶⁹

The court recognized that the State of California placed the Geothermal Resources Act under the section for Oil and Gas in the Public Resources Code inferring that the legislature

view geothermal resources as minerals.⁷⁰ The court went on to distinguish the geothermal resources from water stating that unlike groundwater, the “origin of geothermal waters is not rainfall, but water present at the time of the formation of the geological structure. Because rainfall does not replenish geothermal water, it is a depletable deposit.”⁷¹ As in *Pariani*, the court also recognized that geothermal water was not a necessity of the surface estate and that the geysers’ water was toxic and unusable for drinking or agricultural purposes. The court concluded that from examining both the broad purpose of the mineral conveyance and the expectations of the property interested, the rights to the geothermal resources are part of the mineral grant.⁷²

Defining geothermal resources as water, mineral or a *sui generis* (unique and separate) resource, has resulting impacts on the ownership and regulatory oversight of geothermal resources. The Federal and California case law classifying geothermal resources as minerals provides for the best understanding of geothermal resources. Although most geothermal resources require water to function, classifying geothermal resources as minerals instead of water accurately portray the nature of geothermal resources as finite, where water is usually considered a replenishable resource.

D. California Environmental & Development Regulation

The Division of Oil and Gas (DOG) permitting process ensures developer compliance with applicable California Geothermal Laws. California enacted laws for geothermal resources conservation in the Public Resources Code⁷³ and regulations for the drilling and operations of geothermal resources are recorded in the California Code of Regulations Title 14.⁷⁴ The purpose of the Division of Oil and Gas permitting for development of geothermal wells is to: “prevent, as far as possible, damage to life, health, property, and natural resources; prevent damage and waste of underground geothermal deposits; prevent loss of geothermal reservoir energy; prevent damage to underground and surface waters suitable for irrigation or domestic use; prevent other surface environmental damage, including subsidence; and encourage the wise development of geothermal resources through good conservation and engineering practices.”⁷⁵ Although the code specifically states its purpose is to prevent damage and waste of geothermal deposits, loss of geothermal energy, and damage to waters, the Public Resources Code does not however, make any mention of geothermal biodiversity or thermophile ecosystems.

The Division of Oil and Gas (DOG) oversees the drilling of wells and injection, including collecting monthly geothermal production and injection reports. The DOG ensures compliance with state casing, blow out prevention, plugging and abandonment, and production standards. In addition, the DOG collects well fees and is responsible for subsidence detection and abatement in geothermal areas in the State of California.⁷⁶ Development for low temperature geothermal resources require the same CEQA and DOG

permitting procedures as high temperature wells, but differ in the amount of bond, fees, and drilling requirements.⁷⁷

In addition to the NEPA and CEQA requirements discussed thus far, there is a vast number of other permitting agencies that may have jurisdiction over geothermal resource development within California.⁷⁸

V. Conclusion

Science has only recently begun to understand the importance of thermophiles and other microorganisms in the ecosystem. However, their financial addition to biomedical and scientific research for industrial process has already been documented.⁷⁹ Currently, geothermal resources are being exploited and depleted at significant rates solely for energy production, low temperature heating, and health spas. In many cases, such as the Geysers Field in California, the user of the geothermal resources is aware that the resource is finite and will soon be exhausted and destroyed.

With the little scientific knowledge surrounding geothermal resources, California law should provide for the protection of thermal biodiversity in geothermal resources to ensure that valuable resources are not destroyed before they are understood and their economic potential recognized.

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Footnotes

¹ Kabeh Badiei, *Geothermal Energy: Is It Attractive Enough to Draw Investors for Construction of Geothermal Electric Plants?*, 7 HASTINGS W.-N.W.J. ENV. L. & POL’Y 109, 109 (2001).

² Jake Wakeland, *Environmentalism’s Big Lie: Renewable Energy*, THE INTELLECTUAL ACTIVIST (October 2001), available at <http://www.intellectualactivist.com/aboutEnvironmentalism.html>.

³ Some of the environmental concerns include the setting of energy plants in remote, natural areas and noise and air pollution, thermal and mineral stream pollution from plant discharge, subsidence, the seismic effects of injection and re-injection of water into the geothermal resource, and loss of geologic record and thermophilic biodiversity.

⁴ Nancy S. Bryson, *The Integral Relationship Between the Federal Technology Transfer Act and Natural Resources*, 22 ENERGY & MIN. L. INST. 175, 182.

⁵ Norman R. Pace, *Phylogenetic Analysis of Hyperthermophilic Natural Populations Using Ribosomal RNA Sequences*, DOE MICROBIAL GENOME PROGRAM REPORT ABSTRACTS.

⁶ Including stream pollution, subsidence, and tectonic effects of injection.

⁷ It should be noted that many different geologic and tectonic processes cause heat production from within the earth, the detail of which is out of the scope and time constraints of this paper. For a more detailed discussion see MICHAEL K. LINDSEY & PAUL SUPTON, *GEOTHERMAL ENERGY: LEGAL PROBLEMS OF RESOURCE DEVELOPMENT* 3 (1975).

⁸ The four energy producing applications are dry steam systems, hot water systems, hybrid geothermal brine systems, and hot dry rock systems. Low temperature resources are also utilized for direct heating into buildings, homes, and greenhouses.

⁹ Badiei, *supra*, note 2.

¹⁰ Badiei, *supra*, note 2.

¹¹ Badiei, *supra*, note 2.

¹² Badiei, *supra*, note 2.

¹³ Badiei, *supra*, note 2.

¹⁴ Some of the environmental impacts of geothermal resource use including noise and air pollution associated with the construction of geothermal plants in endangered species habitat, subsequent thermal and mineral stream pollution from plant discharge, loss of thermophile biodiversity and geologic record, unknown groundwater depletion and potential subsequent subsidence, and possible tectonic effects of injection and re-injection of water into geothermal reservoirs. In addition, it should be noted that plant construction may conflict with the Endangered Species Act due to plant construction proposal in endangered species habitat. Thus, ecological degradation concerns and environmental opposition is perhaps greater due to required construction in remote and natural areas.

¹⁵ Pace, *supra*, note 6.

¹⁶ R. Hueber, H. Hueber and K.O. Setter, *Towards the ecology of Hyperthermophiles: biotopes, new isolation strategies and novel metabolic properties*, 24 *FEDERATION OF EUROPEAN MICROBIOLOGICAL SOCIETIES MICROBIOLOGY REVIEWS* ISSUE 5, 615 (2000) (“*Pyrolobus* and *Pyrodictium*”).

¹⁷ *Edmonds v. Babbit*, 93 F.Supp.2d 63, 64 n.1 (D.D.C. 2000).

¹⁸ Bryson, *supra*, note 5.

¹⁹ Bryson, *supra*, note 5.

²⁰ Yellowstone National Park Official Website, *Thermophiles*, available at <http://www.nps.gov/yell/nature/thermophiles/biopro.html>.

²¹ Due to the isolation of each geothermal resource from another, each geothermal resource and even each hot spring has evolved its own thermophile species. Thermophile species are at a great risk for species die off due to geothermal resource utilization because they may only exist in one location. If that one location or geothermal resource is significantly altered or depleted, the species will become extinct.

²² It should be noted that there are two parts to acquisition where the surface and mineral estates have been split: rights to the geothermal resource itself and ‘siting’ rights to construct a geothermal energy plant on land above the resource. Siting rights are particularly important on federal leases for geothermal resources where the United States has reserved mineral rights to land granted under land grants.

²³ Wakeland, *supra*, note 3.

²⁴ MICHAEL K. LINDSEY & PAUL SUPTON, *GEOTHERMAL ENERGY: LEGAL PROBLEMS OF RESOURCE DEVELOPMENT* 3 (1975).

²⁵ Lindsey, *supra* note 9, at 55.

²⁶ Badiei, *supra*, note 2, at 113.

²⁷ Ralph B. Konstant, *Summary of Geothermal Law*, in *NATURAL RESOURCES LAW MANUAL* 231 (Richard J. Fink ed., 1995) (citing 43 U.S.C. § 1331 and 1337 (1981)); The first exception is for offshore geothermal resources under the Outer Continental Shelf Lands Act. The other exception is for the Department of Defense (DOD) to develop geothermal resources on lands under the DOD. Under this exception, a geothermal plant was developed at the China Lake Naval Weapons Center in Coso, California.²⁸ The Coso plant consists of two separate plants (Navy One and Two) utilizing a steam system to generate energy from steam at a temperature of 311°F driving 6 turbine engines. See Naval Air Warfare Center Weapons Division, *Geothermal Power Generation at Coso Hot Springs*, at <http://www.nawcwpns.navy.mil/techtransfer/whitpaps/geo-therm.htm>.

²⁸ Badiei, *supra*, note 2, at 113.

²⁹ 30 U.S.C. § 1002 (2004) The Act also provides that the Secretary of the Interior through the United States Geological Services (USGS), in consultation with the Secretary of Energy, shall establish a program for hot dry rock geothermal energy on public lands.

³⁰ *Id.*

³¹ A lessee is “entitled to use so much of the surface of the land covered by his geothermal lease to be necessary for the production, utilization, and conservation of geothermal resources.” U.S.C. § 1013 (2004).

³² 30 U.S.C. § 1004 (2004).

³³ Section 1026 of the Act designates the monitoring and determination of adverse effects of proposed development within National Parks, which is subject to notice and public comment. Specifically the Act provides that the Secretary “shall determine on the basis of scientific evidence if exploration, development or utilization of the lands subject to the lease is reasonable likely to result in a significant adverse effect on a significant thermal feature within the National Park System.” 30 U.S.C. § 1026 (2004). For projects that the Secretary determines are “reasonably likely to result in a significant adverse effect on a significant thermal feature within a unit of the National Park System, the Secretary shall not issue such lease.” 30 U.S.C. § 1026 (2004).

³⁴ 30 U.S.C. § 1002 (2004).

³⁵ *United States v. Union Oil*, 549 F.2d 1271 (9th Cir. 1977).

³⁶ *Id.* at 1273-1274.

³⁷ *Id.* at 1273 (“The reason is evident. Although steam from underground sources was used to generate electricity at the Larderello Field in Italy as early as 1904, the commercial potential of this resource was not generally appreciated in this county for another half century. No geothermal power plants went into production in the United States until 1960.”).

³⁸ *United States v. Union Oil*, 549 F.2d 1271, 1274 (9th Cir. 1977).

³⁹ *Id.*

⁴⁰ Konstant, *supra* note 28, at 231 (“The state of Oregon has declared as a matter of statute that geothermal resources are part of the surface estate.”). However, the 10th Circuit has agreed with the *Union Oil* court and held in *Rosette v. United States* that “geothermal resources. . . were “minerals” with the reservations of the [SRHA] patents.” *Rosette v. Use*, 277 F.3d 1222 (10th Cir. 2002).

⁴¹ *Bedroc Limited, LLC v. United States*, 541 U.S. ____ 2004 (2004).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Occidental v. Simmons*, 543 F. Supp. 870, 877 (N.D. Ca. 1982).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Sierra Club v. Hathaway*, 579 F.2d 1162 (9th Cir. 1978)(citing DEPARTMENT OF THE INTERIOR, FINAL ENVIRONMENTAL IMPACT STATEMENT FOR THE GEOTHERMAL LEASING PROGRAM at III-2).

⁵⁰ The Ninth Circuit case to address this question is *Sierra Club v. Hathaway*.⁵² *Sierra Club* brought suit to prevent the Secretary of the Interior from executing lease agreements for geothermal resources in the Alvord Desert Geothermal Area of southeastern Oregon based on the Interior's failure to draft an EIS as required by NEPA. The court, in holding for the Interior, noted that the lease in question was only in the exploration stage and that the DOI conducted a programmatic EIS for leasing under the Geothermal Steam Act, which found that exploration practices do not ordinarily cause appreciable environmental loss.

⁵¹ *Sierra Club v. Hathaway*, 579 F.2d 1162 (9th Cir. 1978)(citing 30 U.S.C. § 1101).

⁵² *Id.* (citing DEPARTMENT OF THE INTERIOR, FINAL ENVIRONMENTAL IMPACT STATEMENT FOR THE GEOTHERMAL LEASING PROGRAM at III-2.D) ("A programmatic EIS is one which addresses a specific long-term development program of national scope that will proceed in distinct phases. A programmatic EIS deals with the broad environmental ramifications of a program, whereas a regional or site-specific EIS catalogues the environmental implications for a local area.").

⁵³ *Id.*

⁵⁴ Including but not limited to, the prevention or control of (1) fires, (2) soil erosion, (3) pollution of the surface and groundwater, (4) damage to fish and wildlife or other natural resources, (5) air and noise pollution, and (6) hazards to public health and safety during lease activities. " *Sierra Club v. Hathaway*, 579 F.2d 1162 (9th Cir. 1978) citing 30 C.F.R. § 270.34 (h).

⁵⁵ Badiei, *supra*, note 2, at 116.

⁵⁶ Laura MacGregor Bettis, Comment, *In Hot Water: Can Idaho's Ground Water Laws Adequately Govern Low Temperature Geothermal Resources?*, 39 IDAHO L. REV. 113 (2002)(Noting that Idaho has classified geothermal resources as *sui generis* but "are declared to be closely related to and possibly affecting and affected by water and mineral resources in many instances. Washington attempted a more practical distinction by defining geothermal resource as only the natural heat energy of the earth from which it is technologically practical to produce electricity commercially and the medium by which such heat energy is extracted from the earth, including liquids. . ." While Hawaii and Texas use a mineral classification, Wyoming and Utah treat geothermal resources as groundwater.).

⁵⁷ *Pariani v. California*, 105 Cal. App. 3d 923 (Cal. Ct. App. 1980).

⁵⁸ *Geothermal Kinetics v. Union Oil*, 75 Cal. App. 3d 56 (Cal. Ct. App. 1977).

⁵⁹ *Pariani*, 105 Cal. App. 3d 923 (Cal. Ct. App. 1980).

⁶⁰ *Occidental v. Simmons*, 543 F. Supp. 870, 874 (N.D. Ca. 1982).

⁶¹ *Pariani*, 105 Cal. App. 3d 923 (Cal. Ct. App. 1980).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* ("The minerals arsenic, boron, and ammonia are present in the steam and its condensate in such amounts as to necessitate injection of the condensate into the ground through reinjection wells to avoid detrimental impact on the surrounding area.").

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Geothermal Kinetics v. Union Oil*, 75 Cal. App. 3d 56 (Cal. Ct. App. 1977).

⁶⁸ *Id.* at 58.

⁶⁹ *Id.* at 61.

⁷⁰ *Id.* at 62.

⁷¹ *Id.* at 63.

⁷² *Id.* at 64.

⁷³ CAL. PUB. RES. CODE § 3700 (2004).

⁷⁴ CAL. CODE REGS. TIT. 14, § 1900.

⁷⁵ CAL. DIVISION OF OIL AND GAS, DRILLING AND OPERATING GEOTHERMAL WELLS IN CALIFORNIA (1990).

⁷⁶ CAL. CODE REGS. TIT. 14, § 1970.

⁷⁷ CAL. DIVISION OF OIL AND GAS, DRILLING AND OPERATING GEOTHERMAL WELLS IN CALIFORNIA (1990).

⁷⁸ Secondary compliance laws include applicable state water law, Coastal Zone Management Act, Endangered Species Act, Wetland fill permits for construction of pipelines, waste discharge regulations for fluids and injection of water into geothermal resources under the National Pollution Discharge Elimination System (NPDES), local fish and game regulation for a pipeline crossing a stream bed and local building and planning departments.

⁷⁹ Nancy S. Bryson, *supra* note 5.

FEDERALISM AND SEPARATION OF POWERS

TEN REASONS WHY THE NINTH CIRCUIT SHOULD BE SPLIT

By DLARMUID F. O'SCANNLAIN*

Editor's Note: This article is the first installment of a series entitled "Ninth Circuit Split: Point/Counterpoint." Judge O'Scannlain's article will be followed by a rebuttal from Judge Alex Kozinski, also of the Ninth Circuit, in the next issue of Engage.

I have had the privilege of serving as a judge on the Ninth Circuit Court of Appeals for nearly two decades. Needless to say, I feel a deep attachment to the court on which I sit and a sincere admiration for its leaders. Nevertheless, since completing an LL.M. in Judicial Process with the Graduate Program for Appellate Judges in the early 1990s, I have been convinced that the Ninth Circuit must be restructured into at least two smaller circuits. Such a realignment is the only means of ensuring the effective administration of justice for the nearly sixty million Americans¹ who reside within the nine states and two territories that comprise the Ninth Circuit.²

The administrative considerations that compelled me to reach that troubling conclusion more than a decade ago have grown significantly more urgent in recent years. Ultimately, the Ninth Circuit simply has too many judges, encompasses too vast an expanse of territory, and is burdened with too large a volume of filings to operate effectively.

An increasing number of lawmakers share my concerns, and there are currently five bills to split the circuit pending in Congress. Indeed, it is no longer a question of *whether* the Ninth Circuit will be split but of *when* the split will take place and *which* realignment proposal will be adopted.

I set forth below ten reasons—rooted in history, empirical evidence, and my own judicial experience—supporting the conclusion that the Ninth Circuit should be split. In light of these considerations and the growing congressional momentum in favor of realignment, the split's opponents must now bear the heavy burden of establishing that the status quo should be maintained.

I. The Boundaries of the Federal Judicial Circuits Have Been Repeatedly Redrawn Since the Founding

Contrary to the impression that some split opponents seek to convey, the boundaries of the federal judicial circuits are not set in stone. Throughout our nation's history, Congress has repeatedly redrawn the circuits' boundaries to accommodate territorial expansion and population changes. Splitting the Ninth Circuit in response to the Western states' burgeoning population is simply the next logical step in this historical progression.

The steady, evolutionary process of circuit realignment began shortly after the Founding. The Judiciary Act of 1789 created three circuits: the Eastern, Middle, and Southern.³ In 1802—a mere thirteen years later—Congress doubled the

number of circuits to six.⁴ As part of that development, the Eastern Circuit, which encompassed New York and New England, was divided in two by separating New York, Vermont, and Connecticut from Massachusetts, New Hampshire, and Rhode Island.⁵

As the United States expanded throughout the early nineteenth century, Congress created three more circuits and then continuously reconfigured their boundaries in response to the nation's rapid growth.⁶ Indeed, Congress realigned the circuits *thirteen* times between the Founding and the end of the Civil War.⁷ In 1866, Congress created the precursor to the present-day Ninth Circuit when it grouped the sparsely populated states of California, Oregon, and Nevada into a single judicial circuit.⁸ In 1891, the Evarts Act⁹ added Washington, Idaho, Montana, and Alaska to the Ninth Circuit.¹⁰ With the exception of the later additions of Hawaii, Arizona, Guam, and the Northern Mariana Islands,¹¹ the Ninth Circuit's boundaries have since remained unchanged.

Notwithstanding the Ninth Circuit's stasis, the unrelenting process of circuit realignment continued elsewhere throughout the twentieth century. In 1929, the Tenth Circuit was split from the vast Eighth Circuit, which, until then, had encompassed together with the Ninth Circuit nearly all of the United States west of the Mississippi.¹² Similarly, in 1948, the District of Columbia Circuit was carved out of the Fourth Circuit.¹³

Although bills to split the Ninth Circuit were introduced as early as the 1940s,¹⁴ it was during the 1970s that Congress first began to consider seriously whether the Ninth Circuit should be restructured to accommodate California's rapidly growing population. The congressionally appointed Hruska Commission issued a report in 1973 that recommended splitting both the Fifth and Ninth Circuits.¹⁵ While the Ninth Circuit's leadership rejected this realignment proposal, the Fifth Circuit's judges requested implementation of the Commission's recommendation, and in 1981, the Eleventh Circuit was created by splitting the Fifth Circuit in two.¹⁶

It is evident that circuit realignment has played an exceedingly important role in the historical development of the federal court system. For two centuries, Congress has consistently relied upon this well-established mechanism to ensure that the federal judiciary is not overwhelmed by population growth and caseload increases. The Ninth Circuit, however, has resisted this evolutionary process. Today, this judicial vestige of the sparsely populated western frontier is home to nearly one in five Americans. As Congress has repeatedly done with other circuits, it should respond to this demographic shift by dividing the overburdened Ninth Circuit into smaller units that will be better able to administer justice effectively.

II. Two Congressionally Appointed Commissions Have Recommended That the Ninth Circuit Be Restructured

In 1972, Congress created the Commission on Revision of the Federal Court Appellate System to study the circuits' configuration and the appellate courts' internal operating procedures.¹⁷ The Commission, which was chaired by Senator Roman Hruska and thus popularly known as the Hruska Commission, submitted a report a year later that recommended splitting the Ninth Circuit by dividing California and creating a northwest and southwest circuit.¹⁸ The Commission concluded that a restructuring was necessary because of frequent delays in the Ninth Circuit's disposition of appeals, the unwieldy number of Ninth Circuit judges,¹⁹ and inconsistent resolution of appeals by different Ninth Circuit panels.²⁰

The Ninth Circuit's leadership rejected the Hruska Commission's recommendation, and it was, of course, never implemented. Time only exacerbated the Ninth Circuit's operational difficulties, however, and in 1997, the Senate unanimously passed a bill that would have created a "new" Ninth Circuit comprised of California, Nevada, and two territories and a Twelfth Circuit encompassing the remaining states of the current circuit.²¹ The House requested further study of the realignment issue, and Congress accordingly created the Commission on Structural Alternatives for the Federal Courts of Appeals.²² The Commission, which was commonly known as the "White Commission" after its chairman, retired Supreme Court Justice Byron R. White, included among its members Ninth Circuit Judge Pamela Ann Rymer.²³

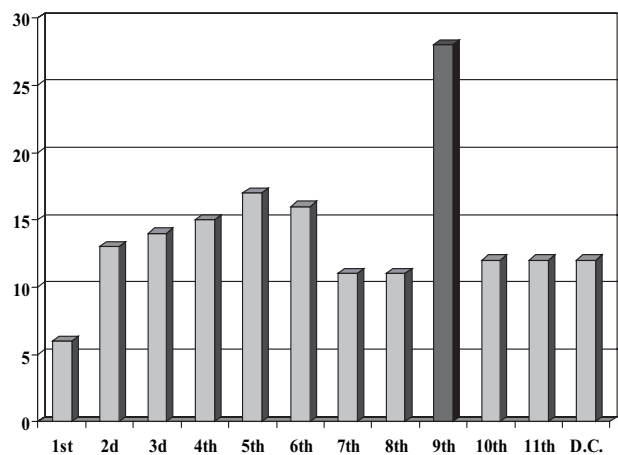
The White Commission recommended reorganizing the Ninth Circuit into three semi-autonomous units comprised of seven to eleven active circuit judges.²⁴ It endorsed this restructuring because growth in the number of Ninth Circuit judges had impeded the effectiveness of the circuit's en banc process.²⁵ The Commission specifically concluded that "the law-declaring function of appellate courts requires groups of judges smaller than the present Ninth Circuit Court of Appeals."²⁶ Although the White Commission stopped short of recommending a formal "split" of the Ninth Circuit, the circuit's leadership was unwilling to countenance any change to the status quo and resoundingly rejected the Commission's report.

The Hruska and White Commissions together expended thousands of hours studying the Ninth Circuit's operations. In light of their collective expertise on matters of judicial administration, the onus rests upon the split's opponents to rebut the conclusion of both Commissions that the Ninth Circuit must be reconfigured.

III. The Large Number of Ninth Circuit Judges Inhibits Collegiality

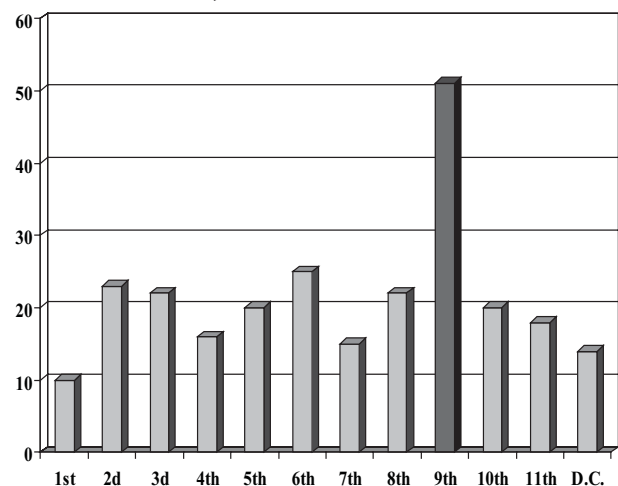
The Ninth Circuit has twenty-eight authorized judgeships, which is more than double the average of all other circuits.²⁷ Indeed, the Ninth Circuit has eleven more judgeships than the next-largest circuit, the Fifth, and nearly five times more than the smallest circuit, the First, which has only six authorized judgeships. (See Exhibit 1).²⁸

Exhibit 1: NUMBER OF AUTHORIZED JUDGESHIPS BY CIRCUIT



This intercircuit disparity is exacerbated by the fact that there are also twenty-three senior judges serving on the Ninth Circuit, most of whom continue to hear cases regularly.²⁹ The total number of Ninth Circuit judgeships (authorized and senior) therefore stands at fifty-one.³⁰ No other circuit has more than twenty-five total judgeships, and the average among all other circuits is nineteen. (See Exhibit 2).³¹

Exhibit 2: NUMBER OF AUTHORIZED JUDGES (AUTHORIZED + SENIOR) BY CIRCUIT



The Ninth Circuit's lengthy judicial roster has a detrimental effect on the court's decision-making process because it inhibits the development of collegiality and fosters fractiousness. The Ninth Circuit's judges typically participate in eight, week-long three-judge panel sittings per year. Thus, assuming that we sit with no visiting judges and no district judges—a mighty assumption in the Ninth Circuit, where we often enlist such extra-circuit help to deal with the overwhelming workload—we might sit with approximately twenty of our colleagues on three-judge panels over the course of a year. That is less than half of the total number of judges on the court. Because the frequency with which any set of judges hears cases together is therefore quite low, it becomes difficult to establish effective working relationships

in developing the law. As the White Commission perceptively observed, “One reason judges in larger decisional units have difficulty maintaining consistent law is that as the size of the unit increases, the opportunities the court’s judges have to sit together decrease.”³²

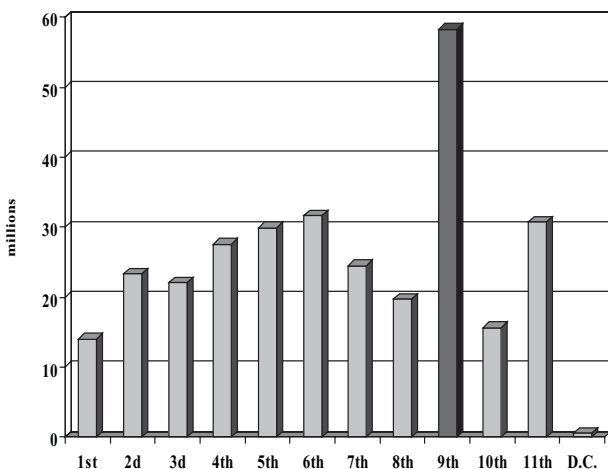
Consistency of law in the appellate context requires an environment in which a reasonably small body of judges has the opportunity to sit and to conference together frequently. Such interaction enhances understanding of one another’s reasoning and decreases the possibility of misinformation and misunderstandings. Unlike a legislature, a court is expected to speak with one consistent, authoritative voice in declaring the law. But the Ninth Circuit’s vast size hinders this process and encourages disparity, creating the danger that its deliberations will resemble those of a legislative—rather than a judicial—body.

IV. The Ninth Circuit Encompasses Nearly Forty Percent of the Total Land Mass of the United States

The Ninth Circuit stretches from the Rocky Mountains and the Great Plains along its eastern border to the Philippine Sea and the rainforests of Kauai in the west, from the Mexican Border and the Sonoran Desert in the south to the Bering Strait and the Arctic Ocean in the north. Because most cases are heard in Pasadena and San Francisco, the circuit’s vast geographic reach creates significant travel costs (and inefficiency) for those judges who must routinely travel to California from such distant locations as Billings, Montana, and Fairbanks, Alaska.

More than 58 million Americans—nearly one-fifth of the nation’s population—live within the Ninth Circuit’s expansive borders, which represents nearly three times the average population of all other circuits. (See Exhibit 3).³³

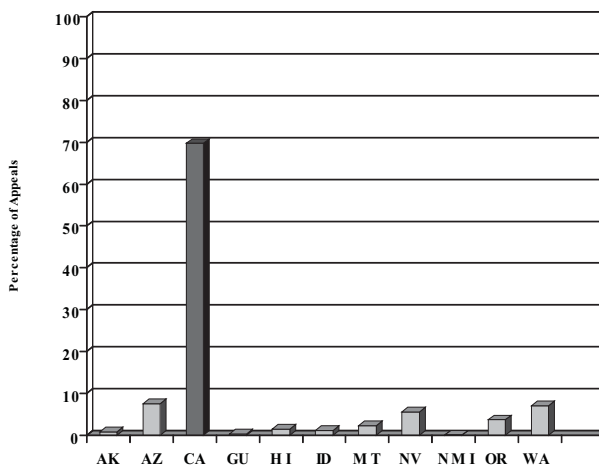
Exhibit 3: POPULATION BY CIRCUIT



This already substantial gap between the Ninth Circuit’s population and that of its counterparts is steadily increasing: Of the ten fastest-growing cities of over 100,000 residents, seven are located in the Ninth Circuit.³⁴

There are few discernible geographic, economic, or social features that bind together the circuit’s diverse states and territories. The northwestern states of Oregon, Washington, and Alaska, for example, have much more in common with each other than they do with Arizona and Nevada. Moreover, despite its diversity, the Ninth Circuit is dominated, for all intents and purposes, by one state: California. The Golden State accounts for nearly seventy percent of all appeals filed within the circuit; no other state contributes even ten percent of the circuit’s filings. (See Exhibit 4).³⁵

Exhibit 4: ORIGIN OF NINTH CIRCUIT CASES BY STATE/TERRITORY



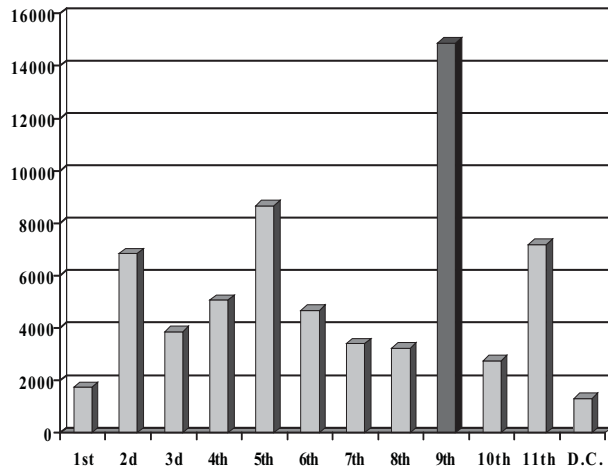
Because the court’s docket is dominated by cases that originate in California, Ninth Circuit judges are much more familiar with California law than with that of, say, Montana or Idaho. The division of the Ninth Circuit into two or three smaller circuits would create cohesive judicial units where judges would be able to become intimately familiar with the laws of all states from which they receive filings.

V. The Ninth Circuit’s Caseload Has Become Unmanageable

During 2004, there were 14,876 appeals filed in the Ninth Circuit.³⁶ To provide some perspective, the Ninth Circuit received 6,000 more filings than the next-busiest circuit, the Fifth, and more than triple the average of all other circuits. (See Exhibit 5).³⁷ Because of this staggering workload, the Ninth Circuit has become the second-slowest circuit in the disposition of appeals.³⁸ Indeed, I am aware of several recent cases where there was a delay of a year or more between the conclusion of briefing and the oral argument date.³⁹ During that period of stagnation, aggrieved parties could only wait patiently for the opportunity to seek judicial vindication of their rights.

The vast numbers of cases being decided by the Ninth Circuit compromises judges’ ability to keep current on the law of the circuit. In addition to handling his or her own share of nearly 15,000 annual cases, each Ninth Circuit judge is faced with the daunting task of reviewing all of his or her colleagues’ opinions—not to mention all the opinions issued

Exhibit 5: FILINGS BY CIRCUIT



by the Supreme Court along with the relevant public and academic commentary. This endeavor strains the capacity of even the most efficient judges. Moreover, if we heard fewer cases, three-judge panels could circulate opinions to the entire court *before* publication, which is the practice of many other appellate courts. Pre-circulation not only prevents intra-circuit conflicts, it also fosters a greater awareness of the body of law created by the court. As it now stands, I read the full opinions of my court no earlier than the public does—and frequently later, which can lead to some unpleasant surprises.

The near impossibility of comprehensively monitoring the law of the circuit greatly increases the likelihood that different panels of Ninth Circuit judges will reach divergent conclusions about the same legal issue. As the White Commission observed in recommending restructuring of the Ninth Circuit:

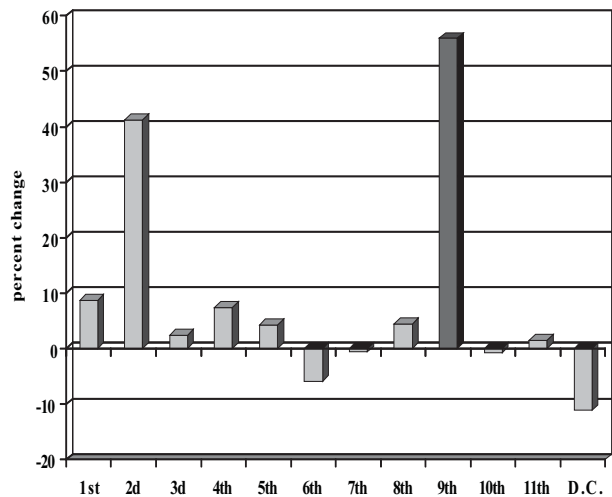
The inability of judges to monitor all the decisions the entire court of appeals renders . . . confirms our own judgment, based on experience, that large appellate units have difficulty developing and maintaining consistent and coherent law. We believe that judges operating in the smaller decisional units we propose—the regional divisions—will find it easier to monitor the law in their respective divisions and that those smaller decisional units will thus promote greater consistency.⁴⁰

The overriding interest in the timely disposition of appeals and the consistent resolution of recurring legal issues therefore weighs strongly in favor of restructuring the Ninth Circuit.

VI. The Ninth Circuit's Caseload Is Increasing More Rapidly Than Any Other Circuit's

Since 2000, the Ninth Circuit's caseload has increased 55.9%! The eleven other regional circuits experienced an average increase of only 4.7% during that period, which means that the Ninth Circuit's caseload is increasing nearly *twelve* times faster than its counterparts.⁴¹ (See Exhibit 6).⁴¹

Exhibit 6: INCREASE IN CASELOAD BETWEEN 2000-2004 BY CIRCUIT



This rapid increase in case filings is attributable not only to the Ninth Circuit's steady population growth but also to the Board of Immigration Appeals' decision to streamline its appellate process, which has drastically multiplied the number of petitions for review filed in the Ninth Circuit.⁴² As a result, 40% of the Ninth Circuit's docket is now comprised of immigration cases.⁴³

Because it is impossible for the Ninth Circuit to accommodate the present rate of near-geometric growth, the operational shortcomings occasioned by the court's already oppressive workload will only grow worse in the next few years. Indeed, if the current rate of growth in Ninth Circuit filings continues, the court will be burdened with more than 23,000 annual appeals by 2010, which would represent nearly a thousand appeals for each active judge currently on the court. Such an overwhelming number of filings would truly bring the wheels of justice to a halt in the Ninth Circuit.

VII. The Ninth Circuit Is Using Questionable Procedural Shortcuts to Ease Its Caseload Crisis

In response to the Ninth Circuit's burgeoning caseload, the court has developed a number of procedural innovations to facilitate the efficient resolution of appeals. While I commend our Chief Judge and Clerk of Court for instituting these measures, there are limitations—both practical and constitutional—to what such innovations can accomplish.

An excessive reliance upon procedural shortcuts creates the possibility that important judicial decisions will be taken out of Article III judges' hands and delegated to court staff who lack a constitutional mandate. For example, one of the circuit's principal procedural innovations is the use of oral and written screening panels to dispose of uncomplicated appeals on the basis of dispositions prepared by staff attorneys. I have the utmost confidence in the legal abilities of our staff attorneys and endorse the judicious use of such screening panels. I worry, however, that—in an effort to cope with our unmanageable workload—the circuit may

soon ask staff attorneys to undertake responsibilities that properly rest with Article III judges appointed by the President and confirmed by the Senate.

Moreover, as the Ninth Circuit's filings have increased, the court has begun to resort more frequently to the use of unpublished memorandum dispositions. Indeed, the circuit issued 867 published opinions in 2001, but only 724 in 2004, even though the court's caseload increased by several thousand appeals during that period.⁴⁴ There is, of course, nothing wrong with resolving a straightforward case through a memorandum disposition. It is possible, however, that the court is beginning to place too much reliance upon such unpublished dispositions and that—as a result of recent caseload pressures—the court is more regularly issuing memorandum dispositions in cases that warrant a reasoned, published opinion.

VIII. The Ninth Circuit's Limited *En Banc* Process Inhibits the Resolution of Intracircuit Conflicts

Because it was deemed impractical for all twenty-eight active judges to sit together to rehear cases *en banc*, the Ninth Circuit uses a limited *en banc* procedure whereby a randomly selected panel of eleven judges decides cases taken *en banc*.⁴⁵ No other circuit uses such a nontraditional *en banc* procedure.

The Ninth Circuit's limited *en banc* process enables a minority of circuit judges to make law for the entire circuit and leads to unrepresentative results. Judge Tallman eloquently decried this problem in his recent dissent in *Payton v. Woodford*, a six-to-five *en banc* decision:

Today, six judges of this court announce that the legal conclusion reached by *seven* of their colleagues (*plus* five Justices of the California Supreme Court) is not only wrong, but *objectively unreasonable* in light of clearly established federal law. According to the six judges in the majority, those twelve judges were so off-the-mark in their analyses of United States Supreme Court precedent that their shared legal conclusion . . . must be deemed objectively unreasonable.⁴⁶

If a different group of Ninth Circuit judges had been randomly selected to hear that case, it is likely that it would have been resolved differently. Indeed, the shortcomings of the limited *en banc* process are underscored by the fact that the Supreme Court subsequently granted *certiorari* in *Payton* and reversed the *en banc* court's decision.⁴⁷

Dividing the Ninth Circuit would create smaller circuits that—like all other circuits—could more readily convene *en banc* courts comprised of all active judges. Use of that traditional procedure would enable the reconfigured circuits to issue *en banc* decisions that truly represent the views of the entire court.

IX. A Significant Number of Federal Judges Support Splitting the Ninth Circuit

Notwithstanding the powerful pressures typically exerted by the status quo, there is substantial support among federal judges for a restructuring of the Ninth Circuit. Including myself, there are nine Ninth Circuit judges who publicly support splitting the circuit: Judges Sneed (California), Beezer (Washington), Hall (California), Trott (Idaho), Fernandez (California), T.G. Nelson (Idaho), Kleinfeld (Alaska), and Tallman (Washington). Moreover, Judge Rymer (California), who served on the White Commission, is on record as stating that our Court of Appeals is too large to function effectively.

Four Supreme Court Justices have publicly endorsed restructuring of the circuit. Justices Stevens, O'Connor, Scalia, and Kennedy each wrote to the White Commission in support of a realignment of the Ninth Circuit.

[T]he Justices expressed concern about the ability of judges on the Ninth Circuit Court of Appeals to keep abreast of the court's jurisprudence and about the risk of intracircuit conflicts in a court with an output as large as that court's. Some expressed concern about the adequacy of the Ninth Circuit's *en banc* process to resolve intracircuit conflicts.⁴⁸

The views of these federal judges, among many others, are based upon years of collective judicial experience, and they should not be lightly discounted.

X. There Are Five Viable Split Bills Pending in Congress

Many members of Congress, including Representative F. James Sensenbrenner, Chairman of the House Judiciary Committee, have publicly expressed concerns about the Ninth Circuit's ability to operate effectively, and there are now five split bills pending in Congress.⁴⁹ These bills offer a comprehensive solution to the Ninth Circuit's difficulties. Not only would the bills realign the circuit into smaller units, but they would also create new judgeships for California, which is the source of the vast majority of the Ninth Circuit's caseload.

H.R. 211⁵⁰ and S. 1301⁵¹ would create a "new" Ninth Circuit comprised of California, Hawaii, Guam, and the Northern Mariana Islands. The bills would also establish a Twelfth Circuit made up of Montana, Idaho, Nevada, and Arizona, as well as a Thirteenth Circuit encompassing Oregon, Washington, and Alaska. The bills would also create five permanent and two temporary circuit court judgeships for California. This proposal was passed by the House during the last session of Congress, but the Senate adjourned before it had an opportunity to vote on the measure.

H.R. 212 would create a "new" Ninth Circuit comprised of California, Nevada, and Arizona, and a Twelfth Circuit made up of Oregon, Washington, Idaho, Montana, Alaska, Guam, Hawaii, and the Northern Mariana Islands.⁵² Like H.R. 211

and S. 1301, it would create five permanent and two temporary judgeships for the “new” Ninth Circuit.

H.R. 3125⁵³ and S. 1296⁵⁴ would create a “new” Ninth Circuit encompassing California, Hawaii, Guam, and the Northern Mariana Islands. The remaining states of the current Ninth Circuit would become part of a new Twelfth Circuit. These two bills contain judgeship provisions similar to those in H.R. 211, H.R. 212, and S. 1301.⁵⁵

My principal concern is the urgent need to divide the Ninth Circuit into at least two smaller circuits, and I thus do not have a preference among these various restructuring proposals. All five bills promise to improve immeasurably the administration of justice in the Western United States and to remedy many of the operational shortcomings that currently plague my court. Each bill therefore warrants serious consideration.

Because the Ninth Circuit can no longer withstand the pressures being exerted upon it by unrelenting caseload growth, a restructuring of the circuit is now inevitable. It is my hope that those Ninth Circuit judges who have previously opposed a split will henceforth participate in planning the circuit’s future by sharing their insights into the most effective means of implementing the impending split. Without the input of all Ninth Circuit judges, the split we get may be less than ideal.

* Diarmuid F. O’Sannlain is a United States Circuit Judge, United States Court of Appeals for the Ninth Circuit. The views expressed herein are my own and do not necessarily reflect the views of my colleagues or of the United States Court of Appeals for the Ninth Circuit. (“I would like to acknowledge, with thanks, the assistance of Amir Cameron Tayrani, my law clerk, in helping to prepare this article.”).

Footnotes

¹ See U.S. Census Bureau, *United States, Regions, States and Puerto Rico Population Estimates and Population Change*, U.S. Dep’t of Commerce, at <http://www.census.gov/Press-Release/www/releases/archives/CB04-246.pdf> (last visited Aug. 29, 2005). Population estimates for the territories can be found at Central Intelligence Agency, *The World Factbook*, at <http://www.cia.gov/cia/publications/factbook> (last visited Aug. 29, 2005).

² 28 U.S.C. § 41 (2000); see also Admin. Office of the U.S. Courts, *Geographic Boundaries of United States Court of Appeals and United States District Courts*, U.S. Courts, at <http://www.uscourts.gov/images/CircuitMap.pdf> (last visited Aug. 23, 2005). The nine states and two territories are: Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, and Washington.

³ RUSSELL R. WHEELER & CYNTHIA HARRISON, *FED. JUDICIAL CTR., CREATING THE FEDERAL JUDICIAL SYSTEM* 4 (2d ed. 1994).

⁴ See *id.* at 10.

⁵ See *id.* at 5, 10.

⁶ *Id.* at 10-11, 13-14.

⁷ COMM’N ON STRUCTURAL ALTERNATIVES FOR THE FED. COURTS OF APPEALS, FINAL REPORT 8 (1998)[hereinafter WHITE COMMISSION REPORT].

⁸ WHEELER & HARRISON, *supra* note 3, at 19.

⁹ Act of Mar. 3, 1891, ch. 517, 26 Stat. 826. The Act is sometimes also referred to as the Circuit Court of Appeals Act of 1891.

¹⁰ WHEELER & HARRISON, *supra* note 3, at 18, 20.

¹¹ See *id.* at 26.

¹² *Id.* at 20-21.

¹³ *Id.* at 21-22.

¹⁴ WHITE COMMISSION REPORT, *supra* note 7, at 33.

¹⁵ *Id.*; see also COMM’N ON REVISION OF THE FED. COURT APPELLATE SYS., THE GEOGRAPHICAL BOUNDARIES OF THE SEVERAL JUDICIAL CIRCUITS: RECOMMENDATIONS FOR CHANGE (1973), reprinted in 62 F.R.D. 223, 228 (1973) [hereinafter HRUSKA COMMISSION REPORT].

¹⁶ WHITE COMMISSION REPORT, *supra* note 7, at 21.

¹⁷ Act of Oct. 13, 1972, Pub. L. No. 92-489, 86 Stat. 807.

¹⁸ HRUSKA COMMISSION REPORT, *supra* note 15, at 235.

¹⁹ The Hruska Commission was concerned that the Ninth Circuit could not operate effectively with the thirteen judgeships it was then authorized. *Id.* at 234-35. Today, the Ninth Circuit has twenty-eight authorized judgeships. 28 U.S.C. § 44 (2000).

²⁰ Specifically, the Commission noted:

Delays in the disposition of civil cases, often of two years or more, have seriously concerned both judges and members of the bar. The size of the court (13 authorized judgeships since 1968) and the extensive reliance it has been required to place on the assistance of district and visiting judges have threatened its institutional unity. Attorneys and judges have been troubled by apparently inconsistent decisions by different panels of the large court; they are concerned that conflicts within the circuit may remain unresolved.

HRUSKA COMMISSION REPORT, *supra* note 15, at 234-35.

²¹ Ninth Circuit Court of Appeals Reorganization Act of 1997, S. 1022, 105th Cong. § 305.

²² Act of Nov. 26, 1997, Pub. L. No. 105-119, § 305, 111 Stat. 2440, 2491.

²³ WHITE COMMISSION REPORT, *supra* note 7, at i.

²⁴ *Id.* at x, 40-45.

²⁵ *Id.* at 48.

²⁶ *Id.* at 47.

²⁷ 28 U.S.C. § 44 (2000). The average number of judges per circuit, if the Ninth Circuit is excluded, is about 13 judges.

²⁸ The information in Exhibit 1 was obtained from 28 U.S.C. § 44.

²⁹ U.S. Court of Appeals for the Ninth Circuit, *9th Circuit in the News: List of 9th Circuit Judges*, at <http://www.ca9.uscourts.gov/ca9/Documents.nsf/174376a6245fda7888256ce5007d5470/0dbdee40d48f66408825683c0058477e?OpenDocument> (last visited Aug. 26, 2005).

³⁰ At the time this article went to press, there were four vacancies among the Ninth Circuit's active judges, for a total of forty-seven active and senior judges serving on the court.

³¹ The information in Exhibit 2 was obtained from 28 U.S.C. § 44 and the Administrative Office of the United States Courts, whose website links to the various circuit court websites. See Admin. Office of the U.S. Courts, *Court Links*, U.S. Courts, at <http://www.uscourts.gov/allinks.html> (last visited Aug. 26, 2005).

³² WHITE COMMISSION REPORT, *supra* note 7, at 47.

³³ The information in Exhibit 3 was derived from the 2004 population estimates that can be found at U.S. Dep't of Commerce, *United States, Regions, States and Puerto Rico Population Estimates and Population Change*, U.S. Census Bureau, at <http://www.census.gov/Press-Release/www/releases/archives/CB04-246.pdf> (last visited Aug. 29, 2005). Population estimates for the territories can be found at Central Intelligence Agency, *The World Factbook*, at <http://www.cia.gov/cia/publications/factbook> (last visited Aug. 29, 2005).

³⁴ Press Release, U.S. Census Bureau, Port St. Lucie, Fla., is Fastest-Growing City, Census Bureau Says (June 30, 2005), available at <http://www.census.gov/Press-Release/www/releases/archives/population/005268.html>.

³⁵ The information in Exhibit 4 was obtained from the Ninth Circuit AIMS database for the period commencing January 1, 2004 and ending December 31, 2004 and is on file with the author.

³⁶ Admin. Office of the U.S. Courts, *Statistical Tables for the Federal Judiciary: Table B-1 Appeals Commenced, Terminated, and Pending, by Circuit*, U.S. Courts, at <http://www.uscourts.gov/judbus2004/appendices/b1.pdf> (last visited Aug. 31, 2005).

³⁷ The information in Exhibit 5 was obtained from statistical tables maintained by the Administrative Office of the U.S. Courts. See *supra* note 36.

³⁸ Admin. Office of the U.S. Courts, *Judicial Business of the United States Courts: Table B-4 Median Time Intervals in Cases Terminated After Hearing or Submission, by Circuit*, U.S. Courts, at <http://www.uscourts.gov/judbus2004/appendices/b4.pdf> (last visited Aug. 29, 2005). This statistic represents the median time from filing of the notice of appeal to final disposition.

³⁹ Metro. Life Ins. Co. v. Parker, No. 03-16620 (briefing completed: April 26, 2004; oral argument: June 15, 2005); White v. Digex, Inc., No. 03-17400 (briefing completed: June 25, 2004; oral argument: June 16, 2005); Gen. Components, Inc. v. H.T. Components U.S.A., Inc., No. 03-17070 (briefing completed: June 30, 2004; oral argument: June 13, 2005); Nocera, Inc. v. ASI Acquisition Corp., No. 03-17290 (briefing completed: July 27, 2004; oral argument: July 14, 2005).

⁴⁰ WHITE COMMISSION REPORT, *supra* note 7, at 47.

⁴¹ The information in Exhibit 6 was derived from statistical tables maintained by the Administrative Office of the U.S. Courts. See ADMIN.

OFFICE OF THE U.S. COURTS, U.S. COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY: TABLE B-3 SOURCES OF APPEALS AND ORIGINAL PROCEEDINGS COMMENCED, BY CIRCUIT, 2000 THROUGH 2004 (2005) (on file with the author).

⁴² See *Falcon Carriche v. Ashcroft*, 350 F.3d 845 (9th Cir. 2003) (upholding the constitutionality of the Board of Immigration Appeals' streamlining procedures).

⁴³ The information in this sentence was obtained from the Ninth Circuit AIMS database and is on file with the author.

⁴⁴ See *supra* note 43.

⁴⁵ The Ninth Circuit derives its authority to use a limited en banc procedure from Act of Oct. 20, 1978, Pub. L. No. 95-486, § 6, 92 Stat. 1629, 1633. A bill currently pending in Congress would remove that authority and require the Ninth Circuit to convene en banc panels comprised of all active judges. H.R. 1064, 109th Cong. (2005).

⁴⁶ *Payton v. Woodford*, 346 F.3d 1204, 1219 (9th Cir. 2003) (en banc) (footnote omitted) (Tallman, J., dissenting).

⁴⁷ *Brown v. Payton*, 125 S. Ct. 1432 (2005).

⁴⁸ WHITE COMMISSION REPORT, *supra* note 7, at 38 & n.90.

⁴⁹ See Jonathan D. Glater, *Lawmakers Trying Again To Divide Ninth Circuit*, N.Y. TIMES, June 19, 2005, at 16.

⁵⁰ Ninth Circuit Judgeship and Reorganization Act of 2005, H.R. 211, 109th Cong.

⁵¹ Ninth Circuit Judgeship and Reorganization Act of 2005, S. 1301, 109th Cong.

⁵² Ninth Circuit Court of Appeals Judgeship and Reorganization Act of 2005, H.R. 212, 109th Cong.

⁵³ Ninth Circuit Court of Appeals Judgeship and Reorganization Act of 2005, H.R. 3125, 109th Cong.

⁵⁴ Ninth Circuit Judgeship and Reorganization Act of 2005, S. 1296, 109th Cong.

⁵⁵ As this article goes to press, H.R. 3125 provides that four of the bill's seven new judgeships may be allocated to Arizona, California, or Nevada. I have been informed that this is a drafting oversight and that Representative Simpson, who sponsored H.R. 3125, intends to amend the bill so that all of the additional judgeships are situated in the "new" Ninth Circuit.

TOWARD A SIMPLER STANDARD FOR ABROGATING SOVEREIGN IMMUNITY

BY WILLIAM E. THRO*

In recent terms, the Supreme Court has repeatedly addressed issues related to the states' sovereign immunity.¹ In particular, the Court has focused on whether Congress, exercising its powers to enforce the Fourteenth Amendment,² has validly abrogated the States' sovereign immunity.³ Yet, despite the fact that the Court has addressed the issue on multiple occasions, the Court's analytical framework for determining the validity of abrogation is becoming more confused and uncertain. For example, the Court has declared that sovereign immunity bars employment discrimination claims based on age⁴ or disability,⁵ but does not bar a claim based on denial of an employment benefit.⁶ Similarly, the Court ruled that Congress' findings of unconstitutional discrimination by the States was insufficient to justify abrogation for some disability discrimination claims,⁷ but that those exact same congressional findings justified abrogation for other disability discrimination claims.⁸

This confusion and uncertainty is the direct result of the analytical framework for determining whether sovereign immunity is abrogated. In order to determine whether sovereign immunity has been abrogated, the Court applies the "congruence and proportionality" test established in *City of Boerne v. Flores*.⁹ Under this test, the Court decides the validity of legislation intended to enforce the Fourteenth Amendment by making sure that Congress "has identified sufficient constitutional violations to make its remedy congruent and proportional."¹⁰ However, while the "congruence and proportionality" test may be appropriate for determining the validity of legislation that creates new substantive rights, it is inappropriate for determining if sovereign immunity is abrogated.¹¹ This is so for three reasons. First, the test is designed to assess the validity of a statute that creates new substantive rights, not for determining whether sovereign immunity should apply. Second, in abrogation cases, the Court's interpretations of the various components of the "congruence and proportionality" test are ambiguous, if not contradictory. Third, as used in abrogation cases, the test itself is fundamentally flawed. Because of these ambiguities and flaws, the test has become "a standing invitation to judicial arbitrariness and policy-driven decisionmaking."¹²

The Court should abandon the current "congruence and proportionality test" for determining whether sovereign immunity is abrogated.¹³ In its place, the Court should declare that Congress' power to abrogate sovereign immunity is limited to claims of actual Fourteenth Amendment violations.¹⁴ In other words, to the extent that a federal statute provides substantive rights that are the same as those guaranteed by the Fourteenth Amendment,¹⁵ congressional abrogation of sovereign immunity is possible.¹⁶ Conversely, to the extent that a federal statute provides substantive rights that are greater than those provided by the Fourteenth Amendment, congressional abrogation is impossible. As a result, the question of whether sovereign immunity has been abrogated

will turn on whether the litigant has stated a claim for a constitutional violation. If so, then the State may be sued for damages.¹⁷ If not, then the claims are barred. Thus, the "Fourteenth Amendment violation" test will provide clarity and certainty.

The remainder of this essay explains why the Court should abandon the "congruence and proportionality test" and should adopt the alternative "Fourteenth Amendment violation" test. This purpose is accomplished in three distinct sections. First, the essay demonstrates that the Court's interpretation of the component parts of "congruence and proportionality" test has been both ambiguous and uncertain. Second, the essay comments on the "congruence and proportionality" test by exposing its fundamental flaws. Third, the essay explains the advantages of the alternative "Fourteenth Amendment violation" test.

I. Overview of the Congruence and Proportionality Test

In *Seminole Tribe v. Florida*,¹⁸ the Supreme Court reaffirmed the basic principle that Congress, acting pursuant to § 5 of the Fourteenth Amendment, may enact legislation that abrogates constitutional sovereign immunity for claims based on a particular statute.¹⁹ However, because the power to effectively nullify constitutional sovereign immunity is so extraordinary, in order to do so Congress must (1) unequivocally express its intent to abrogate in the text of the statute; and (2) act pursuant to § 5 of the Fourteenth Amendment.²⁰ Unless both conditions are satisfied, Congress' attempt to abrogate the States' sovereign immunity is invalid.²¹ Because it is relatively easy for Congress to satisfy the first condition, to express unequivocally its intent to abrogate,²² the cases inevitably focus on the second condition, whether Congress acted pursuant to § 5 of the Fourteenth Amendment. This question requires application of the "congruence and proportionality" test set forth in *City of Boerne v. Flores*.²³

The "congruence and proportionality" test involves three questions.²⁴ First, the Court must "identify with some precision the scope of the constitutional right at issue."²⁵ Second, after identifying the right at issue, the Court must determine "whether Congress identified a history and pattern of unconstitutional . . . discrimination by the States."²⁶ Third, if there is a pattern of constitutional violations by the States,²⁷ the Court determines whether the Congress' response is proportionate to the finding of constitutional violations.²⁸

However, despite its apparent simplicity, the Court's interpretations of the three parts are ambiguous and, in some instances, contradictory. Thus, it is necessary to examine each of the first components.

A. Precisely Identify the Right at Issue

First, the Court must "identify with some precision the scope of the constitutional right at issue."²⁹ This involves not only articulating the constitutional right, but also determining whether that right warrants heightened scrutiny.

That is, whether it involves a fundamental right or a suspect or quasi-suspect classification. If the right warrants heightened scrutiny, then it is easier for Congress to show a pattern of constitutional violations by the States.³⁰ Conversely, if the right does not warrant heightened scrutiny, the standard for abrogation remains high.³¹ To illustrate, in *Lane*, the Court found that the right at issue was “the constitutional right of access to the courts,”³² a right that is “subject to more searching judicial review” and is “protected by the Due Process Clause of the Fourteenth Amendment.”³³ Thus, the Court found that sovereign immunity had been abrogated for ADA Title II claims involving the fundamental right of access to the courts. However, in *Garrett*, the Court found that the claim at issue, discrimination against the disabled in employment, was not subject to heightened scrutiny.³⁴ Thus, the Court concluded that sovereign immunity had not been abrogated.³⁵

B. A History and Pattern of Unconstitutional Conduct by the States

Second, after identifying the right at issue, the Court must determine “whether Congress identified a history and pattern of unconstitutional . . . discrimination by the States.”³⁶ Although the inquiry seems straightforward, the Court’s opinions are ambiguous and uncertain regarding the significance of legislative history, the exact definition of a constitutional violation, and the number of constitutional violations necessary to establish a pattern.

Initially, the Court has been uncertain and unambiguous about the significance of legislative history. Put another way, it is unclear whether the examination is limited to the actual statutory text of the statute purporting to abrogate sovereign immunity or whether it extends to all materials and testimony considered by some congressional committee. For example, in *Garrett*, the Supreme Court declined to consider “unexamined, anecdotal accounts” of discrimination presented to a congressional task force.³⁷ Indeed, the Court declared, “Congress’ failure to mention States in its legislative findings addressing discrimination in employment reflects that body’s judgment that no pattern of unconstitutional state action had been documented.”³⁸ However, in *Lane*, the Supreme Court reviewed testimony in congressional committee hearings.³⁹

Additionally, the Court has been ambiguous and uncertain about the meaning of a constitutional violation by the State. On the one hand, the Court has repeatedly suggested that unconstitutional conduct by local governmental entities does not constitute a constitutional violation by the State.⁴⁰ However, in its most recent pronouncement, the Court held that the conduct of local governmental entities was relevant in determining whether the States had violated the Constitution.⁴¹

Furthermore, the Court has been inconsistent regarding the meaning of pattern. In *Garrett*, the Court found that the extensive congressional findings regarding unconstitutional discrimination against the disabled were insufficient to justify abrogation.⁴² Yet, three years later, in *Lane*, the Court found

that this exact same record of congressional findings was sufficient to justify abrogation.⁴³ This contradiction cannot be explained by simply asserting that *Garrett* was about employment discrimination and *Lane* concerned the fundamental right of access to the courts. As the lower federal courts have recognized,⁴⁴ *Lane* explicitly found that there were sufficient congressional findings to justify abrogation in any context.⁴⁵

Moreover, the Court has been ambiguous about what constitutes a pattern of unconstitutional violations. In *Kimel*, the Court has stated that constitutional violations by one State or even several States do not constitute a pattern of constitutional violations.⁴⁶ Similarly, Justice Kennedy suggested that if the States had engaged in a pattern of unconstitutional conduct, “one would have expected to find in decisions of the courts of the States and also the courts of the United States extensive litigation and discussion of the constitutional violations.”⁴⁷ Both of these pronouncements suggest that a pattern must involve a number of States and a number of violations. However, the exact parameters remain unclear.

C. A Proportionate Response to the Constitutional Violations by the States

Third, if there is a pattern of constitutional violations by the States,⁴⁸ the Court determines whether Congress’ response is proportionate to the finding of constitutional violations.⁴⁹ Although any judgment concerning proportionality is vague and somewhat amorphous, the Court has compounded the confusion by rendering inconsistent pronouncements on how the test is applied.

The Court’s opinions are contradictory as to exactly what is considered in the proportionality analysis. In *Florida Prepaid*, the Court balanced the abrogation of sovereign immunity against the purported pattern of constitutional violations.⁵⁰ In other words, the Court decided, “whether subjecting States and their treasuries to monetary liability at the insistence of private litigants is a congruent and proportional response to a demonstrated pattern of unconstitutional conduct by the States.”⁵¹ However, in all subsequent cases, the Court has balanced the substantive rights created by the statute for which abrogation was sought against the supposed pattern of constitutional violations.⁵²

Moreover, in those cases where the Court has balanced the substantive rights created by the statute, the Court has contradicted itself as to whether the inquiry is facial or as applied.⁵³ In *Hibbs*, *Garrett*, *Kimel*, and *Florida Prepaid*, the Court “measured the full breadth of the statute or relevant provision that Congress enacted against the scope of the constitutional right it purported to enforce.”⁵⁴ Thus, in *Hibbs*, the Court found proportionality because the substantive statute for which sovereign immunity was being abrogated was limited to “the fault line between work and family—precisely where sex-based overgeneralization has been and remains strongest—and affects only one aspect of the employment relationship.”⁵⁵ However, in *Lane*, the Court refused to address the scope of the substantive statute for

which sovereign immunity was being abrogated.⁵⁶ Instead, the Court simply declared that the proportionality standard was met because its holding only applied to “the class of cases implicating the accessibility of judicial services.”⁵⁷

II. Flaws of the Proportionality and Congruence Test

Although the Court frequently has been ambiguous and uncertain when interpreting the various components of the “congruence and proportionality test,” the more significant problem with the test is that it is fundamentally flawed.

First, the test effectively creates a hierarchy of constitutional violations. When a claim involves heightened scrutiny, the Court has suggested that *fewer* constitutional violations are necessary to establish a *pattern* of constitutional violations. If this is what the Court means, then one is forced to ask why this is so. A constitutional violation is a constitutional violation. Why should ten constitutional violations involving race or gender discrimination be more significant than ten constitutional violations involving disability or age discrimination? While it is certainly easier to establish an individual constitutional violation when the claim involves heightened scrutiny,⁵⁸ the number of constitutional violations necessary to constitute a *pattern* of constitutional violations should not be any lower—or any higher.

Second, to the extent that it relies on legislative history, the test effectively makes the views of individual legislators equal to the actual statutory text. As the Supreme Court has held, “[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”⁵⁹ Over a century and a half ago, the Court explained:

In expounding this law, the judgment of the court cannot, in any degree, be influenced by . . . the motives or reasons assigned by [legislators] for supporting or opposing amendments that were offered. The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself; and we must gather their intention from the language there used . . .⁶⁰

Although this principle is applicable to statutory interpretation, it is especially compelling when Congress would act to alter the constitutional balance between the States and the National Government by abrogating sovereign immunity. Where Congress makes such an effort, the Court must assure itself that Congress was convinced that the States were engaged in a pattern of unconstitutional activity. It is impossible for the Court to know if those who voted for a law were aware of particular testimony or the contents of a specific committee report the law that was approved that can be known with sufficient certainty.⁶¹

Third, to the extent that the test considers constitutional violations by local governmental entities in establishing a

pattern of constitutional violations, it treats the States unfairly. While state governments do have control over the acts and omissions of state agencies and institutions, they generally have little or no control over the acts or omissions of local governmental entities. If the States are going to lose their immunity because of constitutional violations, then it should be limited to violations that were within the States’ control.

Fourth, by emphasizing the substantive rights created by the statute rather than on the abrogation of sovereign immunity, the test focuses on the wrong inquiry.⁶² There is a fundamental distinction between enforcing the Fourteenth Amendment by creating new substantive rights and enforcing the Fourteenth Amendment by abolishing sovereign immunity. If Congress is going to enforce the Fourteenth Amendment by creating new substantive rights, then the proportionality inquiry should focus on the substantive rights created by the statute. However, if Congress is enforcing the Fourteenth Amendment by abrogating sovereign immunity, then the inquiry should focus on abrogation of sovereign immunity. The substantive rights created by the statute should be irrelevant.

Fifth, to the extent that the test utilizes an as-applied rather than facial approach, it “eliminates any incentive for Congress to craft § 5 legislation for the purpose of remedying or deterring actual constitutional violations.”⁶³ There is no need for Congress to be narrow and precise when the judiciary will simply justify abrogation using hypothetical situations.⁶⁴ Moreover, the as applied approach simply leads to more litigation as plaintiffs and the States seek to distinguish previous cases.

Sixth, by allowing Congress to abolish the sovereign immunity of *all* States for *all* time, the test fails to differentiate between the individuals States or to place any real limits on congressional power.⁶⁵ A State that has not violated the Constitution should not be punished for the wrongs of the other States. As Justice Scalia observed:

The constitutional violation that is a prerequisite to “prophylactic” congressional action to “enforce” the Fourteenth Amendment is a violation *by the State against which the enforcement action is taken*. There is no guilt by association, enabling the sovereignty of one State to be abridged under § 5 of the Fourteenth Amendment because of violations by another State, or by most other States, or even by 49 other States.⁶⁶

Before a State’s immunity is deemed abrogated, it should be able to “demand that *it* be shown to have been acting in violation of the Fourteenth Amendment.”⁶⁷ Moreover, if a State violated the Constitution in the 1980’s, it should not lose its immunity forever. If the abrogation of sovereign immunity is an appropriate remedy, it should be limited to a specific number of years, not forever.⁶⁸

III. The Advantages of the Fourteenth Amendment Test

Justice Scalia has declared that, with the exception of claims for racial discrimination, he will no longer apply the

“congruence and proportionality” test to Congress’ efforts to enforce the Fourteenth Amendment.⁶⁹ While Justice Scalia’s position applies to *both* statutes that create new substantive rights and statutes that abrogate sovereign immunity, his position is particularly compelling with respect to the attempts at abrogation.⁷⁰ As explained above, the Court’s interpretation of the test in the abrogation cases is ambiguous and the test is fundamentally flawed when applied in the abrogation cases. Thus, the “congruence and proportionality” test should be abandoned as the standard for determining whether abrogation of sovereign immunity is valid.

Instead, the Court should adopt a new test—the “Fourteenth Amendment violation” test—for determining if sovereign immunity is abrogated. In brief, if Congress has expressed unequivocally its intent to abrogate sovereign immunity for a particular federal statute,⁷¹ then sovereign immunity is *abrogated to the extent that the State has violated the Fourteenth Amendment*. Put another way, the abrogation question turns on whether the plaintiff alleges a violation of the Fourteenth Amendment.⁷² If so, then the state cannot claim sovereign immunity.⁷³ If not, then the claim for damages must be dismissed on sovereign immunity grounds. Such an approach has several advantages.

First and most importantly, there is no ambiguity or uncertainty. Under the “congruence and proportionality” test, the lower federal courts have to decide whether the States violated the Constitution in the past, whether these violations are sufficient to constitute a pattern, what is Congress’ response to the violations, and whether this response is proportionate to the pattern of violations. On each of these issues, the Supreme Court’s pronouncements are ambiguous, if not contradictory. In contrast, under the “Fourteenth Amendment violation” test, the lower federal courts simply have to determine whether the plaintiff states a claim for a violation of the Fourteenth Amendment. Although there inevitably will be some ambiguity on this issue, the issue is far more clear and certain than a multi-factored balancing test.

Second, because it is essentially a bright line rule, the “Fourteenth Amendment violation” test will constrain the judiciary. Like any judicial balancing test, the “congruence and proportionality” test involves “malleable standards” that are easily transformed into “vehicles for the implementation of individual judges’ policy preferences.”⁷⁴ In other words, the outcome becomes dependent not upon legal principles, but on the whim of a court majority.⁷⁵ Yet, while the question of whether a plaintiff has stated a claim for a constitutional violation will involve some ambiguity in some circumstances, the “Fourteenth Amendment violation” test gives little judicial discretion. In the overwhelming majority of cases, the inquiry will turn on legal principles.

Third, the “Fourteenth Amendment violation” test avoids conflicts with Congress. As Justice Scalia explained, the “congruence and proportionality” test. . .

casts this Court in the role of Congress’s taskmaster. Under it, the courts (and ultimately

this Court) must regularly check Congress’s homework to make sure that it has identified sufficient constitutional violations to make its remedy congruent and proportional. As a general matter, we are ill advised to adopt or adhere to constitutional rules that bring us into constant conflict with a coequal branch of Government. And when conflict is unavoidable, we should not come to do battle with the United States Congress armed only with a test (“congruence and proportionality”) that has no demonstrable basis in the text of the Constitution and cannot objectively be shown to have been met or failed.⁷⁶

In contrast, the “Fourteenth Amendment violation” test requires no review of legislative history or even the statutory text setting out the findings. Rather, if Congress has expressed its intent to abrogate, the only issue is whether the complaint states a claim for a constitutional violation.

Fourth, it does not treat “the States’ as some sort of collective entity which is guilty or innocent as a body.”⁷⁷ Under the “congruence and proportionality” test, constitutional violation by a few states can cause *all* States to lose their immunity. In other words, constitutional violations by Colorado, Indiana, Kentucky, and Virginia can cause Illinois, Iowa, Massachusetts, and Nevada to lose their immunity. In sharp contrast, under the “Fourteenth Amendment violation” test, a State loses its immunity only if that particular state itself is alleged to have violated the Fourteenth Amendment.

Fifth, it subjects the States to liability for damages in circumstances where the States presently avoid liability. For example, suppose that a State adopts a policy mandating that no disabled lawyer or lawyer over the age of forty may be hired in the Office of the Attorney General. Such a policy is unconstitutional because it irrationally discriminates based on disability and age. Yet, while the *Ex Parte Young* doctrine would allow a federal court to declare the policy unconstitutional and enjoin its further implementation, *Garrett* and *Kimel* preclude any claim for money damages.⁷⁸ However, under the “Fourteenth Amendment violation” test, the state is exposed to monetary liability because its policy violates the Constitution. Moreover, because a plaintiff merely has to state a claim for a constitutional violation in order to avoid dismissal, it is likely that the States will have to litigate some claims that are presently decided on a Motion to Dismiss.⁷⁹

Sixth and conversely, it allows the States to escape liability in circumstances where the States presently are exposed to damages. If a federal statute created substantive rights beyond those conferred by the Constitution, the State is immune from those claims. Its liability is limited to claims that are coextensive with the Constitution. To illustrate, *Hibbs* held that sovereign immunity was abrogated for violations of the family care provisions of the Family and Medical Leave Act.⁸⁰ Yet, the family care provisions of the Family and Medical Leave Act, while a desirable public policy, are not mandated

by the Constitution. Thus, the States would enjoy sovereign immunity from such claims under the “Fourteenth Amendment violation” test.

Finally, the “Fourteenth Amendment violation” test promotes respect for constitutional values. Although the lay public and many lawyers may view sovereign immunity as unjust, the principle is a constitutional value. It should yield only when it comes into conflict with another constitutional value.⁸¹ That is, it should apply unless and until the state acts contrary to another constitutional value. However, when the State acts consistent with the other constitutional values, then the constitutional value of sovereign immunity should prevail. Thus, unless a state chooses to waive its immunity, the State is immune from common law tort claims, contract claims, and federal statutory claims that do not involve the violation of constitutional rights. Essentially, these principles are embodied in the “Fourteenth Amendment violation” test.

Conclusion

Although the Supreme Court has decided numerous cases involving whether Congress has validly abrogated sovereign immunity, the Court’s abrogation jurisprudence remains ambiguous, uncertain, and, largely, unworkable. The reason for this confusion is the “congruence and proportionality” test. In determining whether sovereign immunity has been abrogated, the Court should abandon the “congruence and proportionality” test and replace it with a straightforward bright line “Fourteenth Amendment violation” test.

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Footnotes

¹ See *Tennessee v. Lane*, 541 U.S. 509 (2004); *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004); *Nev. Dep’t of Human Res. v.*

Hibbs, 538 U.S. 721 (2003); *Fed. Maritime Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002); *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Alden v. Maine*, 527 U.S. 706 (1999); *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

² See U.S. CONST. amend. XIV, § 5.

³ Not every case has focused on this issue. The Court has also addressed whether the Article I Commerce Clause may be used to abrogate sovereign immunity, *Seminole Tribe*, 517 U.S. at 47, whether sovereign immunity applies to proceedings in state court, *Alden*, 527 U.S. at 712, whether participation in interstate commerce constitutes a waiver of sovereign immunity, *College Sav. Bank*, 527 U.S. at 619, whether sovereign immunity applies in federal administrative proceedings, *Fed. Maritime Comm’n*, 535 U.S. at 747, and whether sovereign immunity bars the bankruptcy discharge of a state-held student loan, *Hood*, 541 U.S. at 443.

⁴ See *Kimel*, 528 U.S. at 91.

⁵ See *Garrett*, 531 U.S. at 374.

⁶ See *Hibbs*, 538 U.S. at 739-40.

⁷ See *Garrett*, 531 U.S. at 374.

⁸ See *Tennessee v. Lane*, 541 U.S. 509, 529 (2004).

⁹ 521 U.S. 507 (1997).

¹⁰ *Lane*, 541 U.S. at 558 (Scalia, J., dissenting).

¹¹ This Essay does not address the propriety of continuing to use the “congruence and proportionality” test to determine the validity of substantive legislation that is enacted to enforce the Fourteenth Amendment. Rather, it is limited to the propriety of using the test to determine the validity of the abrogation of sovereign immunity.

¹² *Id.* at 557-58.

¹³ Of course, there are four other exceptions to sovereign immunity. First, the “States, in ratifying the Constitution, did surrender a portion of their inherent immunity by consenting to suits brought by sister States or by the Federal Government.” *Fed. Maritime Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 752 (2002); see also *Virginia v. Maryland*, 540 U.S. 56 (2003) (State against State); *Chao v. Va. Dep’t of Transp.*, 291 F.3d 276 (4th Cir. 2002) (National Government against State). Second, when a State invokes the jurisdiction of a federal court, it exposes itself to the equivalent of a compulsory counterclaim that does not exceed in amount or differ in kind from the relief sought by the State. See *Okla. Tax Comm’n v. Citizen Band Potawatomi Tribe*, 498 U.S. 505, 509 (1991); *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 511-12 (1940); *United States v. Shaw*, 309 U.S. 495, 501-02 (1940). Third, under the terms of the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908), federal courts generally may enjoin state officers, in their official capacities, to conform their conduct to federal law. See *Quern v. Jordan*, 440 U.S. 332, 337 (1979). Fourth, a State may waive its sovereign immunity. *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999). However, this Essay is limited to the abrogation exception, which was first recognized in *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

¹⁴ Technically, sovereign immunity is immunity from all aspects of suit. It does not exist solely in order to “preven[t] federal-court judgments that must be paid out of a State’s treasury,” *Hess v. Port*

Auth. Trans-Hudson Corp., 513 U.S. 30, 48 (1994). It also serves to avoid “the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.” *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (internal quotation marks omitted). However, because private parties generally can obtain injunctive relief under the *Ex Parte Young* doctrine, the practical effect of sovereign immunity is largely limited to claims for damages.

¹⁵ Of course, the Fourteenth Amendment guarantees numerous rights. Both the Equal Protection Clause and Privileges or Immunities Clause guarantee a right to be free from various forms of discrimination. *See Johnson v. California*, 125 S. Ct. 1141, 1146 (2005) (Equal Protection); *Saenz v. Roe*, 526 U.S. 489, 503-04 (1999) (Privileges or Immunities). Moreover, although the Bill of Rights originally did not apply to the States, *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 249 (1833), the Court has held that the Due Process Clause incorporated most of the provisions of the Bill of Rights. *See* 2 DAVID M. O’BRIEN, CONSTITUTIONAL LAW AND POLITICS 310-11 (5th ed. 2003) (listing cases and specific provisions of the Bill of Rights); *cf.* MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986) (arguing that the Privileges or Immunities Clause incorporates all provisions of the Bill of Rights).

¹⁶ At present, there is no mechanism for private parties to recover money damages from the States or state agencies for violations of federal constitutional rights. Although 42 U.S.C. § 1983 allows private parties to recover damages from individuals who, acting under color of state law, violate constitutional rights, § 1983 liability cannot be imposed upon the States themselves. *See Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 70 (1989).

¹⁷ Although the States would not have a defense of sovereign immunity in such circumstances, the States should have a defense of qualified immunity. The doctrine of qualified immunity, which was created in the context of 42 U.S.C. § 1983 litigation, allows individuals to escape monetary liability for constitutional violations unless the law is clearly established. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Thus, the States would be liable for money damages only if there were a constitutional violation and the law was clearly established. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001).

¹⁸ 517 U.S. 44 (1996).

¹⁹ *Id.* at 58-65.

²⁰ *Id.* at 55-59.

²¹ *See Humenansky v. Regents of the Univ. of Minn.*, 152 F.3d 822, 824 (8th Cir. 1998).

²² Indeed, in *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), the Supreme Court found unmistakable intent to abrogate only after piecing together three statutes comprising part of the Age Discrimination in Employment Act, which incorporated by reference remedies available under the Fair Labor Standard Act and which were enacted at different times. Hence, while the intent must be clear, courts will at least look beyond the absence of a single unequivocal statement.

²³ 521 U.S. 507 (1997).

²⁴ *See generally* Bd. of Trustees of Univ. of Ala. v. *Garrett*, 531 U.S. 356, 365-74 (2001).

²⁵ *Id.* at 365.

²⁶ *Id.* at 368.

²⁷ If there is no pattern of constitutional violations by the States, then Congress has not acted properly and the inquiry ends. *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999). In such a situation, sovereign immunity has not been abrogated.

²⁸ *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 646 (1999).

²⁹ *Garrett*, 531 U.S. at 365.

³⁰ *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003).

³¹ *See* Erwin Chemerinsky, *Unanswered Questions: October Term 2003*, 7 GREEN BAG 2d 323, 328 (2004) (“*Together Lane and Hibbs* establish that Congress has more authority to act under section five of the Fourteenth Amendment, and thus to authorize suits against state governments, when it is dealing with claims of discrimination or violations of rights which receive heightened scrutiny.”).

³² *Tennessee v. Lane*, 541 U.S. 509, 530-31 (2004).

³³ *Id.* at 522-23.

³⁴ *Garrett*, 531 U.S. at 366.

³⁵ *Id.* at 374.

³⁶ *Id.* at 368.

³⁷ *Id.* at 370-71.

³⁸ *Id.* at 372.

³⁹ *See Tennessee v. Lane*, 541 U.S. 509, 530-31, 524-29 (2004).

⁴⁰ *Garrett*, 531 U.S. at 368-69; *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 89 (2000); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 640 (1999).

⁴¹ *Lane*, 541 U.S. at 527 n.16.

⁴² *Garrett*, 531 U.S. at 374.

⁴³ *Lane*, 541 U.S. at 528-29.

⁴⁴ *See Constantine v. Rector & Visitors of George Mason Univ.*, 411 F.3d 474, 487 (4th Cir. 2005) (“*After Lane*, it is settled that Title II was enacted in response to a pattern of unconstitutional disability discrimination by States and nonstate government entities with respect to the provision of public services. This conclusion is sufficient to satisfy the historical inquiry into the harms sought to be addressed by Title II.”); *Miller v. King*, 384 F.3d 1248, 1272 (11th Cir. 2004) (“*Lane* considered evidence of disability discrimination in the administration of public services and programs generally, rather than focusing only on discrimination in the context of access to the courts, and concluded that Title II in its entirety satisfies Boerne’s step-two requirement that it be enacted in response to a history and pattern of States’ constitutional violations. We are bound to that conclusion as to step two.”); *see also Cochran v. Pinchak*, 401 F.3d 184, 191 (3rd Cir. 2005) (agreeing with *Miller*).

⁴⁵ *Lane*, 541 U.S. at 528-29.

⁴⁶ *Kimel*, 528 U.S. at 90.

⁴⁷ *Garrett*, 531 U.S. at 376 (Kennedy, J., concurring).

⁴⁸ If there is no pattern of constitutional violations by the States, then Congress has not acted properly and the inquiry ends. *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999). In such a situation, sovereign immunity has not been abrogated.

⁴⁹ *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 646 (1999).

⁵⁰ *Id.* at 646-48.

⁵¹ *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 744 (2003) (Kennedy, J., dissenting).

⁵² *Tennessee v. Lane*, 541 U.S. 509, 531-33 (2004); *Hibbs*, 538 U.S. at 737-39; *Garrett*, 531 U.S. at 372; *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83 (2000).

⁵³ *See Lane*, 541 U.S. at 556-57 (Scalia, J., dissenting).

⁵⁴ *Lane*, 541 U.S. at 551-52 (Rehnquist, C.J., dissenting); *see also Garrett*, 531 U.S. at 372; *Kimel*, 528 U.S. at 83; *Fla. Prepaid*, 527 U.S. at 648.

⁵⁵ *Hibbs*, 538 U.S. at 738.

⁵⁶ *Lane*, 541 U.S. at 530-31.

⁵⁷ *Id.* at 531.

⁵⁸ For example, imposing different income tax rates for rich and poor is constitutional, but imposing different tax income rates for African-Americans and whites is clearly unconstitutional.

⁵⁹ *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998).

⁶⁰ *Aldridge v. Williams*, 44 U.S. (3 How.) 9, 24 (1845). As Justice Scalia noted in another context:

[I]t is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated. . . . Government by unexpressed intent is similarly tyrannical. It is the law that governs, not the intent of the lawgiver. That seems to me the essence of the famous American ideal set forth in the Massachusetts constitution: A government of laws, not of men. Men may intend what they will; but it is only the laws that they enact which bind us.

ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17 (1997).

⁶¹ Thus, statutory text should be the sole touchstone for determining that a majority of both Houses of Congress, and the President who signed the bill into law, were convinced that the States were acting with the requisite disregard for the Federal Constitution.

⁶² As explained above, every case after *Florida Prepaid* has focused on the substantive rights created by the statute rather than on the abrogation of sovereign immunity.

⁶³ *Tennessee v. Lane*, 541 U.S. 509, 552 (2004) (Rehnquist, C.J., dissenting).

⁶⁴ *Id.*

⁶⁵ *See Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 647-48 (1999).

⁶⁶ *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 741-42 (2003) (Scalia, J., dissenting).

⁶⁷ *Id.* at 743 (Scalia, J., dissenting).

⁶⁸ This approach is best illustrated by the Voting Rights Act, 42 U.S.C. §§ 1971-1973o, which was passed pursuant to Congress' power to enforce the Fifteenth Amendment. *See Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 373 n.8 (2001) ("Section 2 of the Fifteenth Amendment is virtually identical to § 5 of the Fourteenth Amendment"). The Voting Rights Act does not apply to *all* States or even to *all* jurisdictions within a particular State. *See* 42 U.S.C. § 1973b(b). Rather, it applies only to those States, or jurisdictions within a state, which have been identified by Congress as having violated voting rights. *See id.* In other words, those States that have not been identified as acting in violation of the Constitution are not subject to its remedial terms. Moreover, the restrictions imposed by the Voting Rights Act are limited in duration. The statute allows jurisdictions to seek removal from its coverage. *See* 42 U.S.C. § 1973k. Once the violations have been corrected, and there is no likelihood of further violations, the State's sovereignty over its elections may be restored.

⁶⁹ *Lane*, 541 at 565 (Scalia, J., dissenting).

⁷⁰ While many of the criticisms of the test are equally applicable when the test is applied to statutes that create new substantive rights, it must be emphasized that a statute that creates new substantive rights is fundamentally different from a statute that simply abrogates sovereign immunity.

⁷¹ The requirement that Congress express its intent unequivocally is separate and distinct from the "congruence and proportionality" test or the "Fourteenth Amendment violation" test.

⁷² If the trial court determines that sovereign immunity has been abrogated, then the State should have the right to appeal immediately the denial of immunity. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 141-47 (1993).

⁷³ However, as explained *supra* note 17, the States should have a defense of qualified immunity.

⁷⁴ *Lane*, 541 U.S. at 556 (Scalia, J., dissenting).

⁷⁵ Arguably, this is exactly what happened in *Garrett* and *Lane*.

⁷⁶ *Lane*, 541 U.S. at 558 (Scalia, J., dissenting).

⁷⁷ *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 742 (2003) (Scalia, J., dissenting).

⁷⁸ *See Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001); *Kimel*, 528 U.S. at 91-92.

⁷⁹ While this additional litigation certainly will be a disadvantage to the States, it is outweighed by the advantage of having a clear certain rule that allows the States to assert immunity for all federal claims that do not involve constitutional violations.

⁸⁰ *Hibbs*, 538 U.S. at 724, 740.

⁸¹ Of course, the Supremacy Clause is also a constitutional value. Yet, when a state's statute or policy violates the Supremacy Clause, the *Ex Parte Young* doctrine ensures that state officials obey the Constitution.

FINANCIAL SERVICES AND E-COMMERCE

THE UNDUE BURDENS OF THE BANK SECRECY ACT

By JAMES M. ROCKETT*

The USA PATRIOT Act¹ was enacted into law in late-October 2001, less than 45 days after the horrifying events of 9/11. There was virtually no debate on the USA PATRIOT Act since during the majority of that time Congress itself was out of session due to the anthrax scare during much of the period following 9/11. Title III² of the USA PATRIOT Act was, in essence, a wholesale importation of the “Know Your Customer” regulation that had been proposed prior to 9/11, and which had provoked vigorous criticism. The Know Your Customer proposal had inflamed the American public resulting in more than 300,000 comments condemning the proposal as an excessive governmental intrusion into the daily financial affairs of the public. But, following 9/11 we entered a new era and Americans were prepared to sacrifice many aspects of what had been our daily lives to prevent the horrors of another terrorist attack. And Title III of the USA PATRIOT Act was enacted based on that premise; In essence, Congress told us that if banks had just watched the flow of dollars we could have prevented the events of 9/11.³ Based on the evidence available now, this was and remains cynically disingenuous.

Lack of Balance in BSA

Title III of the USA PATRIOT Act has imposed extraordinary burdens on the banking system without any evidence that it has worked or will work to detect or deter terrorism.⁴ The burdens created by Title III and the current Bank Secrecy Act⁵ (BSA)/Anti-Money Laundering (AML) climate are excessive and should not be tolerated by our free society. As a factual matter, the AML regulatory process is out of balance.

Balance occurs when regulators, seeing minor flaws in compliance, identify these shortcomings in a report of examination and enter into a collaborative process to assist banks in meeting their compliance obligations. Lack of balance occurs:

- Where regulators, as is now the case, immediately proceed into an enforcement action for the slightest compliance flaws.
- When programs that were fully compliant as recently as last exam are now resulting in enforcement actions.
- When banks are automatically put in the penalty box for indeterminate periods and sit frozen with no ability to pursue any strategic growth opportunities, while banking regulators conduct a BSA compliance review.⁶
- When entire classes of customers are deemed high risk and banks must either disengage from these customers or face the likelihood of enforcement actions.

- When a regulator tells the banks it supervises that one failure to file a single Suspicious Activity Report (SAR) will result in a formal enforcement action while taking the position that filing too many SARs indicates that a bank's customer base is either too high risk or its compliance program is seriously defective.
- When the Department of Justice and local district attorneys threaten criminal prosecution for a failure to file a SAR.

Adverse Economic Impact of AML Environment

The consequences of this lack of balance are predictable but need to be examined. First, and most obviously, banks are incurring enormous compliance costs. These are not small amounts of money that can be easily absorbed. Our largest banks are investing tens of millions of dollars each and mid-size and community banks are spending proportionately even more on everything: regulatorily-required technology systems, compliance personnel, training account officers and new account clerks and tellers and loan officers and branch personnel, internal auditors, external consultants, independent auditors, executive management time, directors' time, monitoring accounts and financial transactions by customers; and filing largely meaningless SARs with the government. These monies are being taken from banks and their shareholders, under threat of regulatory enforcement penalties or even criminal prosecution, without any recompense from the government. These are not traditional “costs of doing business” nor are they routine processes of compliance that with time will be regularized. These are law enforcement expenses that should rightfully be borne by the government.

Secondly, and even more importantly, the impact of the Bank Secrecy Act and Title III on the U.S. economy is staggering. This is a fact that has not been examined with any scholarly precision and is probably immeasurable in real dollars. But, cost structures of this magnitude have to be passed on to the users of banking services either directly or indirectly. These costs are also putting U.S. banks in an uncompetitive position in the rapidly globalizing world of financial services.

There is also a significant but unquantifiable loss of foreign investment in the United States. Because of enhanced due diligence on foreign-originated transactions, many foreigners have become increasingly reluctant to do personal business or invest in the United States. This trend is rapidly accelerating and will only be greatly exaggerated by the Treasury Department's proposal to force U.S. financial institutions to collect and turn over data related to cross-border wire transfers.⁷ This also comes at a time when the

U.S. economy is most vulnerable and can least afford such a foreign pullback.

However it is not just the American consumer of banking services, or foreign investors, or the banks themselves that are paying the price. An entire industry of money services businesses is being driven out of the banking system and, in most instances, affecting those who can least afford it: the poor migrant and immigrant workers who come to the U.S. to perform labor at low wages and who want to cash a check or send funds back home to their families. Despite the Financial Crimes Enforcement Network (FinCEN) and the bank regulators having protested that they do not intend to create this result, the facts speak for themselves: money transmitters are viewed as “high risk” customers and the enhanced due diligence requirements are so onerous that bankers are faced with the Hobson’s choice of either undertaking ongoing monitoring (of not just the bank customer but the customer’s customer) at great expense or risking regulatory enforcement action. The only prudent decision is to withdraw from providing banking services to such money transmitters.⁸

But the money transmitters aren’t alone in being deemed to be “high risk.” In a list that on its face is preposterous, the bank regulators have identified the following “high risk” banking customers:

- Foreign banks
- Money Services Businesses (currency dealers or exchangers, check cashers, money transmitters, and issuers, sellers, or redeemers of travelers’ checks, money orders and stored value cards)
- Non-bank financial institutions (casinos (tribal and non-tribal), card clubs, brokers and dealers in securities)
- Senior foreign political figures and their family members and close associates
- Non-resident aliens and accounts of foreign persons
- Foreign corporations with transaction accounts, particularly offshore corporations in high-risk geographies
- Deposit brokers, particularly foreign deposit brokers
- Cash intensive businesses (e.g., convenience stores, restaurants, retail stores, liquor stores, cigarette distributors, privately owned ATM operators, vending machine operators, and parking garages)
- Non-governmental organizations and charities (domestic and foreign)
- Professional service providers (attorneys, accountants, doctors, real estate brokers)
- Import-export companies
- Jewelry, gem and precious metal dealers

- Travel agencies
- Car, boat and airplane dealerships

With this guidance for “high risk” is there any wonder banks are filing hundreds and thousands of useless SARs which are ignored by the very government that mandates them?⁹ Each new SAR builds an even denser haystack in which the needle becomes more imperceptibly embedded. And, if and when a terrorist attack actually takes place, somewhere an ignored SAR will be languishing among the hundreds of thousands of SARs filed because of the current indiscriminate regulatory environment.

Fighting Terrorism or Financial Spying?

This brings us to another question about the whole BSA/AML construct and that is: why has this been sold to the American public in such a disingenuous manner? The American public largely believes the PATRIOT Act was passed under anti-terrorism rubric. In fact, the banking system is not and will never be an effective vehicle to combat terrorist financing. The 9/11 terrorists used approximately \$500,000 over a period of several years to finance their horrifying acts. During that time hundreds of trillions of dollars flowed through the banks of this country. There were no characteristics or patterns that would have distinguished the 9/11 terrorists from any other foreign students in the U.S. who received money from home and paid tuition and living expenses with those funds. Nothing that U.S. banks are now being required to do will actually identify terrorists; that job must be done by old-fashioned investigative work by intelligence agencies. And we could certainly craft laws that will allow them access to financial records if they have good cause to suspect terrorist financing is taking place.

What this highlights is what I will call the “equivalency” flaw of the current BSA/AML construct. By this I mean that the laws and regulations and the manner of their enforcement make no distinction between, and basically equate terrorist financing with, maintaining an account for Augusto Pinochet¹⁰ or a common crime, such as check kiting or a Ponzi scheme.¹¹ It is one thing to say that we are preventing terrorist financing by setting up this elaborate, costly, intrusive bank account spying network; it is quite another to burden our society with a blatantly ineffective regulatory scheme in order to prevent current or former foreign government officials from maintaining U.S. bank accounts. That could be handled much like Office of Financial Asset Control regulations. And to have check kites or Ponzi schemes governed by the same rules is just plain silly.

Finally, the American public has to be told candidly that every financial transaction that they undertake is being monitored for suspicious characteristics and anything that they do that is out of pattern is reported to the government. At a time when financial privacy has become a rallying cry, our citizens should know the truth about the unprecedented government scrutiny of their financial activities by deputizing their banks to indiscriminately spy on them. And this spying

is not limited to “terrorist financing;” it is a general spy network that reports any unusual financial activity to the of abuse inherent in such a scheme.

Back some 30 years ago, a quaint regulation called Reg Q allowed banks to give out toasters to new customers who opened bank accounts. How far we have come? Now, under the guise of the USA PATRIOT Act, the Bank Secrecy Act and the AML regulations, instead of toasters banks are required to give customers the equivalent of ankle bracelets to monitor their every move. This is not progress and should not be viewed as consistent with the freedoms that the U.S. Constitution was established to protect.

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Footnotes

¹ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism, USA PATRIOT Act of 2001, P.L. 107-56 (2001).

² International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001, Title III, USA PATRIOT Act of 2001 (2001).

³ For example, on September 27, 2001 United Press International quoted Senator Paul Sarbanes, then-Chairman of the U.S. Senate Banking Committee as follows: “We meet, of course, in the shadow of the terrorist attacks of September 11. It is more urgent now than ever before for us to develop and put into place the array of tools necessary to trace and interdict the funds on which terrorists like Osama bin Laden rely for their operations.”

⁴ Senator Norman Coleman, Chairman of the Senate Permanent Investigations Committee, which investigated the Riggs Bank matter, stated during a speech to The Federalist Society on April 26, 2005 at the National Press Club that he was unaware of any evidence that bank compliance with Title III or the Bank Secrecy Act had resulted in identifying any terrorist activities.

⁵ The Currency and Foreign Transactions Reporting Act, also known as the Bank Secrecy Act, 31 U.S.C. Sections 5311-5330 and 12 U.S.C. Sections 1818(s), 1829(b), and 1951-1959.

⁶ The “penalty box” is a phrase currently in common use referring to the fact that USA PATRIOT Act Section 327, which amended the Bank Merger Act (12 U.S.C. Section 1828(c)) to require that: “In every case, the responsible agency shall take into consideration the effectiveness of any insured depository institution involved in the proposed merger transaction in combating money laundering activities, including in overseas branches.” In general, bank regulators have interpreted this provision to require that they withhold approval of any expansionary application where deficiencies in BSA compliance are believed to exist. The institution so affected is said to be in the

“penalty box” where they remain for an indeterminate period, usually a minimum of one year and in many instances more. During this period, the bank’s strategic growth opportunities are stifled and the adverse economic impact on the bank can be severe.

⁷ On April 10, 2005 the New York Times reported that: “The Bush administration is developing a plan to give the government access to possibly hundreds of millions of international banking records in an effort to trace and deter terrorist financing, even as many bankers say they already feel besieged by government antiterrorism rules that they consider overly burdensome. The initiative . . . would vastly expand the government’s database of financial transactions by gaining access to logs of international wire transfers into and out of American banks.” Eric Lichtblau, *U.S. Seeks Access to Bank Records to Deter Terror*, N.Y. TIMES, April 10, 2005.

⁸ On April 26, 2005, FinCEN and the five principal federal banking agencies issued an “Interagency Interpretive Guidance on Providing Banking Services to Money Services Businesses Operating in the United States.” This document purports to clarify the expectations of the regulators and to confirm that banks have “the flexibility to provide services to a wide range of money services businesses while remaining in compliance with the Bank Secrecy Act.” Time will tell whether this document will have its intended effect. However, the document repeats the onerous, time-consuming and expensive due diligence requirements applying to “high risk” money service business customers of banks.

⁹ For example, see Rob Blackwell, *FinCEN Figures Show SAR Glut Is Worsening*, THE AMERICAN BANKER, April 15, 2005. According to this article American banks are filing an average of 36,000 SARs per month for the 6-month period ending March 31, 2005.

¹⁰ The maintenance of accounts for foreign government officials, including former Chilean president Augusto Pinochet, resulted in civil and criminal penalties assessed against Riggs Bank. This has been widely reported and is summarized in a report of the U.S. Senate Permanent Subcommittee on Investigations. For example, see Rob Blackwell, *OCC, Fed, Citi Take Hits in Levin Report*, AMERICAN BANKER, March 16 2005.

¹¹ The widely reported case in which AmSouth was fined \$50 million involved the failure to file a SAR based on the existence of a Ponzi scheme.

A DISSENTING VIEW: SOME GUARDED OPTIMISM ON COMBATING TERRORISTS' MONEY LAUNDERING~

By WARREN BELMAR AND ANDREW COCHRAN*

We will not win the terrorism war only by pursuing the money-laundering techniques of the terrorists and their financiers, but that effort will play an important role. Foreign countries must participate in ways they have not done so before, and anti-laundering enforcement is but one tool, with emphasis on infiltration of the terrorists and their allies. We'll also need to ensure that new money-laundering tools aren't misused to erode our civil liberties. But recent successes provide reason for hope amidst an attitude of healthy skepticism.

The PATRIOT Act and Its Initial Use Give Some Reasons for Optimism

The PATRIOT Act introduces new measures that enable law enforcement to pursue the flow of money, share information, and enlist the aid of foreign jurisdictions in ways not done before. The provisions which suggest a different outcome for the use of anti-laundering tools include mandates that (1) domestic law enforcement agencies share information among themselves and with foreign governments, and (2) the U.S. can cut off foreign financial institutions and entire countries from access to our financial system for failure to assist in investigations of financial flows. Moreover, the Act authorized FinCEN to play the primary role in gathering and disseminating the records that would document potential terrorist financing flows, an authorization the Clinton Administration never pursued with vigor.

Just since October 26 2001, the effective date of the Act, there have been some notable successes in applying the Act. Treasury Department and law enforcement authorities credit the new legal authorities with success in simultaneously freezing the assets of Al Barakaat here and in the United Arab Emirates. The U.A.E. action, an unprecedented cooperative effort by an Arab country against a major Arab financial institution, indicated the potential success of the information-sharing provisions. Recent actions by the Treasury to freeze the assets of American Moslem-based charitable organizations were the result of infiltration and money-laundering investigations not previously undertaken in the U.S., and indicate a level of enforcement not seen in this nation's longstanding war on drugs. Under the implied threat of the unprecedented sanctions under the Act, at least five countries have changed banking laws to add more stringent money-laundering provisions. The latest Treasury statement with respect to the Republic of Nauru, a country notorious for its role in Russian money laundering, advised banks of the requirement under the PATRIOT Act to avoid doing business with shell banks, and since, according to senior Treasury officials, every single bank in Nauru is a shell bank, the pronouncement effectively ended all U.S. banking relationships with the country.

These actions are evidence of a new seriousness in

enforcement, but they are not long-term proof of success in the use of money-laundering tools against terrorism. A recent New York Times article put it best: "As the inquiry proceeds, government officials said, the effort is as much directed at detecting financial patterns that could signal another potential attack as it is at unraveling the financing of the Sept. 11 attacks. Despite the progress that has been made, there are some frustrations among law enforcement officials about the pace of the financial investigation, government officials said, largely resulting from the complexity of obtaining and analyzing a huge volume of foreign records. Those difficulties have as yet prevented investigators from analyzing financial records from Germany, a focal point in the hijacking conspiracy." Only if foreign governments provide the level of cooperation never given before, and only if American law enforcement uses the anti-laundering tools as one part of an expanded effort to infiltrate terrorist groups and their financiers, can we expect some success. Additionally, low-dollar-volume methods of financing, such as a stream of ATM withdrawals and credit card use, are much more impervious to any investigative technique.

Assuming that foreign governments continue to cooperate, whether as a result of a U.S. Government threat of sanctions or otherwise, the PATRIOT Act does appear to have raised the cost of establishing and employing a worldwide laundering network. Such a network will now take more time and more transactions, with the attendant cost, to move the same amount of money. In this way, the Act resembles the export licensing and enforcement regime built during the Reagan Administration to block shipments of technology to the old Soviet Union. That effort did not end all such shipments, but required the Communist leaders to devote far more resources to procurement. Perhaps that will be the result of the new emphasis on money laundering investigations in the war on terrorism.

~ While written in 2001, the authors felt this is a good counterpoint to the preceding article.

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FREE SPEECH AND ELECTION LAW

THE HELP AMERICA VOTE ACT OF 2002 - A STATUTORY PRIMER

By HANS A. VON SPAKOVSKY*

The Help America Vote Act of 2002 (HAVA) was signed into law by President Bush on October 29, 2002.¹ HAVA was the end result of two years of studies and reports by numerous task forces that were formed after the 2000 presidential election to correct perceived problems with the election administration process in the United States. American elections are administered through a very decentralized system run almost entirely by the country's more than 3,000 county governments. HAVA's provisions were the result of compromises and negotiations on issues that were very controversial and that threatened to kill the bill on more than one occasion as it worked its way through Congress. As a result, while some of its provisions are clear, many others are not and seem to have been left deliberately ambiguous or vague because the parties involved in the negotiations could not agree on their exact meaning.

Many of HAVA's requirements became effective in 2004 but others will not come into effect until 2006. HAVA covers all 50 states, the District of Columbia, Puerto Rico, Guam, American Samoa, and the U.S. Virgin Islands (collectively "the States").² Congress also appropriated funding for the States to help them comply with HAVA,³ from buying new voting equipment to creating statewide computerized voter registration databases. HAVA also established a new federal election administration agency, the Election Assistance Commission (EAC).⁴

It is important to understand that HAVA only applies to federal elections. Congress stated in the preamble to HAVA that it was intended:

To establish a program to provide funds to States to replace punch card voting systems, to establish the Election Assistance Commission to assist in the administration of Federal elections and to otherwise provide assistance with the administration of certain Federal election laws and program, to establish minimum election administration standards for States and units of local government with responsibility for the administration of Federal elections, and for other purposes.⁵

While HAVA only applies to federal elections, the practical and cost-related difficulties of maintaining two separate voter registration and election systems, one for state elections and one for federal elections, make it virtually certain that these mandates will also be applied to local elections by almost all of the States.

Title I and II – Funding

Title I and II of HAVA contain various provisions requiring payments to States for improving the administration of elections for Federal office and for meeting the federal mandates imposed by Title III. The funding provided under Title I can be used to replace punch card and lever voting machines, although the use of either type of voting machine is not prohibited by HAVA. To be eligible for funding to meet the requirements of Title III, the States were required to draft state plans that outlined how the funding would be used to improve election administration and the voting process.⁶ These plans were published by the EAC in the Federal Register, and HAVA contains a safe harbor prohibiting any lawsuit from being brought against a State based on information contained in a plan (except for criminal acts).⁷

United States Election Assistance Commission

Title II establishes the new EAC governed by four commissioners, two Democrats and two Republicans, appointed by the President and approved by the Senate.⁸ Any actions taken by the EAC must have the approval of at least three commissioners⁹ and Section 209 specifically limits the regulatory power of the EAC. It has no authority "to issue any rule, promulgate any regulation, or take any other action which imposes any requirement on any State" except to the extent permitted under Section 9(a) of the National Voter Registration Act of 1993 (NVRA), which establishes a federal mail voter registration form.¹⁰ HAVA also established two advisory boards to make recommendations to the EAC.¹¹ States are represented on the EAC Standards Board by two members from each State, a state election official chosen by the chief state election official and a local election official chosen by local election officials. The EAC Board of Advisors is made up of members from various national associations of state officials, federal government agencies, and appointments by Congress.¹²

The EAC has two main duties. The first is to administer funding to the States. As of February 9, 2005, the EAC reported that it had given out \$2.2 billion in grants to the States under HAVA.¹³ The second is to act as a national clearinghouse and facilitator for research on election administration, including developing best practices and voluntary guidance for the states on compliance with the requirements of Title III.¹⁴ The EAC is also developing national "voting system guidelines" for voting equipment and the testing and certification of voting equipment.¹⁵ However, unlike the voting system standards outlined in Title III, discussed later in this paper, these voting system guidelines are voluntary.¹⁶ It will be entirely optional for the States to use voting equipment that is designed, built and tested to meet these new voting system guidelines. There are already such voluntary standards in place, developed in

1990 by the Office of Election Administration of the Federal Election Commission in conjunction with the National Association of State Election Directors.¹⁷ These guidelines were revised in 2002¹⁸ and have always been voluntary, although almost all manufacturers of voting equipment have designed their voting machines to meet these standards, and have had their equipment tested by the laboratories certified to conduct such testing by NASED. The OEA was transferred to the EAC by Section 801 of HAVA.¹⁹

The only other regulatory power of the EAC is the ability to conduct an audit of any State that receives grant funds.²⁰ At least one mandatory audit has to be conducted by the Comptroller General during the life of the grant program; such funding can be recouped from the State if the State is out of compliance, i.e., it has not used the funding for the purposes for which it was intended.²¹ The EAC has already voted to conduct one special audit of the State of California because of allegations of the misuse of HAVA funds by the former secretary of state.²²

Title III – Uniform and Nondiscriminatory Election Technology and Administration Requirements

Title III imposes new uniform election technology and election administration mandates on the States, including provisional balloting and voter identification requirements for first-time voters who register by mail. However, section 304 provides that these requirements are “minimum standards” and that nothing prevents a State from establishing standards which are “more strict” so long as such requirements are not inconsistent with federal law.²³ Section 305 provides that the specific choices on the methods of complying with the requirements of Title III are left to the discretion of the State.²⁴ Both of these provisions were obviously intended to allow States to maintain their traditional role in the administration of elections, particularly in making decisions on the eligibility of individuals to vote.

Voting Machines

Section 301 of Title III sets forth mandatory standards for voting systems used in federal elections.²⁵ It applies to all States as of January 1, 2006, when voting equipment must:

- allow a voter to verify his choices on the ballot before the ballot is cast
- allow a voter to change the ballot or correct any error
- notify the voter if he has selected more than one candidate for a single office (overvoted)
- produce a permanent paper record with a manual audit capacity
- be accessible for disabled voters such that they can cast a vote independently and in private in the same manner as other voters
- provide alternative language capabilities as required by section 203 of the Voting Rights Act

- have an error rate in counting ballots that complies with the error rate standards in effect on the date of enactment of HAVA (the 2002 FEC standards), an error rate that is only attributable to the voting system itself and not mistakes made by voters

The accessibility requirement for disabled voters can be satisfied by having one direct recording electronic voting machine in each polling place.²⁶ For jurisdictions using paper ballots, punch cards, and central count systems (including mail-in ballots), the overvote notification requirement can be met through a voter education program that notifies each voter of the effect of casting multiple votes for an office and explains how to correct the ballot.²⁷ HAVA does not, therefore, outlaw the use of punch-card voting machines or central count optical scan voting systems that do not notify a vote when he has selected too many candidates in a particular race.

A controversy has arisen over the use of direct recording electronic voting machines (DRE's).²⁸ Critics of DRE's question the security of the software and the ability of bugs, viruses, or trojan horses inserted into the software to alter an individual's vote without the voter or election officials knowing it. They are calling for all DRE's to have voter verified paper audit trails or VVPAT's—this would require all DRE's to print out a paper receipt or ballot reflecting all of the voter's electronic choices that can be checked by the voter before the electronic ballot is actually cast.²⁹ The HAVA manual audit standard merely requires that DRE's print out a paper receipt showing the total number of ballots cast on each machine at the end of election day when voting stops. Therefore, HAVA does not require VVPAT's and all of the current DRE's on the market can satisfy this HAVA requirement.

Finally, all States are required to adopt a uniform and nondiscriminatory standard that defines what constitutes a vote and what will be counted as a vote for each category of voting systems.³⁰ This provision was clearly intended to prevent the problems that occurred in Florida in 2000 when election officials in different counties were applying different standards and rules for determining which punch card ballots constituted a vote.

Provisional Ballots and Voter Information

Effective January 1, 2004, section 302(a) requires States to allow provisional voting in federal elections. Voters who assert they are registered and eligible in the applicable jurisdiction where they are attempting to vote but whose names do not appear in the “official list of eligible voters for the polling place,” or voters whose eligibility to vote is challenged by an election official, must be provided a provisional ballot.³¹ Voters who do not provide the identification documentation required by HAVA also must be given a provisional ballot.³² The ballot must be transmitted to appropriate State or local officials so the individual's eligibility can be “promptly” verified under applicable State

law. It is left up to the State to determine whether the ballot should be counted. States have to establish a website or toll-free telephone number that the provisional voter can access to determine if the vote was counted and, if not, the reason it was not counted. Under Section 302(a)(5), this requirement applies to all States, but States that are exempt from the NVRA³³ may comply by using voter registration procedures established under state law. Section 302(c) also requires provisional ballots for individuals who vote after the usual time set for a poll to close under State law because of a court order extending polling hours. These provisional ballots must be kept segregated and apart from other provisional ballots.³⁴

Section 302(b) requires certain information for voters to be posted at each polling place on election day during every federal election, including sample ballots, poll hours, instructions on how to vote regular and provisional ballots, rules for mail-in registrants subject to HAVA's identification requirements, and general information on voting rights and prohibitions on fraud and misrepresentation under state and federal law. The Department of Justice has developed a suggested summary of the federal statutes on voting rights and election crimes for the States to use in providing this voter information in each polling place.³⁵

Statewide Voter Registration List

Section 303(a)(1) requires States to create a single, uniform, centralized, and interactive computerized statewide voter registration list for use in federal elections. This list must contain registration information and a unique identifier for every registered voter in the state.³⁶ All election officials in the State must be able to obtain immediate electronic access to the information in the database. Under Section 303(a)(1)(B), the computerized list requirement applies to all States, except any state which does not presently require voter registration for federal elections (which exempts North Dakota³⁷).

Section 303(a)(2) requires states to do list maintenance on the statewide computerized list according to specific standards. For example, any removals from the statewide list must be done "in accordance with" the NVRA and the statewide list must be coordinated with "other agency databases within the State," including state felony and death records, to remove ineligible voters. Under Section 303(a)(2)(A)(iii), these list maintenance requirements apply to all States, except those half-dozen States which are exempt from the NVRA which "shall remove the names of ineligible voters from the computerized list in accordance with State law."

Section 303(a)(5) provides that States may not accept or process any type of application for voter registration for federal elections unless the application includes the applicant's driver's license number (if the applicant has such number) or the last four digits of the applicant's social security number (if the applicant has no driver's license number). If the applicant has neither number, then the State must assign an identifying number. The State must also verify the accuracy of this information by matching it against the State

driver's license database and the federal social security number database. Under Section 303(a)(5)(D), these verification requirements apply to all States, except that they are "optional" for those handful of States that are "permitted" under the grandfather clause of the federal Privacy Act of 1974³⁸ to require registrants to provide a complete social security number.

The effective date of all of the statewide registration list requirements of Section 303(a) was January 1, 2004, except that the effective date could be delayed until January 1, 2006, by those States that certified to the EAC by December 31, 2003 that they could not meet the original deadline for good cause. Forty-four states requested such a waiver from the EAC—only Alaska, Arizona, Georgia, Guam, Hawaii, Kentucky, Minnesota, South Carolina, South Dakota, and West Virginia did not.

Voter Identification

Under Section 303(b), individuals who register to vote by mail who have not previously voted in a federal election in the State must provide specific identification documentation either at the time of registration or the first time they vote.³⁹ These identification requirements survived a very contentious fight in Congress as they were being debated. The Department of Justice issued an opinion at the time stating that they did not violate the Voting Rights Act. A copy of this February 26, 2002, letter to Senator Christopher Bond, as well as other information about HAVA, is available on the Department's website.⁴⁰

There are a number of exemptions to this identification requirement. For example, if an individual provides his driver's licence number or the last four digits of his social security number on the application form and the State is able to match the same number, name and date of birth with an existing State identification record, then the identification requirement does not apply. It also does not apply to individuals who are entitled to vote by absentee ballot under the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA),⁴¹ the Voting Accessibility for the Elderly and Handicapped Act,⁴² or any other federal law.

Section 303(b) also requires that changes be made in the content of the national NVRA mail-in registration form by adding a citizenship and voting age question.⁴³ The States are specifically directed that if an applicant fails to answer the question of whether he is a citizen, the registrar must notify the applicant of the failure and give him an opportunity to complete the form in a timely manner to allow for the completion of the form prior to the next federal election (subject to State law). The effective date for Section 303(b) was bifurcated. Individuals who registered to vote by mail for federal elections after January 1, 2003 are covered by the identification requirement. States also had to be prepared to receive identification materials submitted by individuals in conformity with the new Section 303(b) requirements after January 1, 2003. States had to start requiring identification

from first-time voters in the first federal election conducted after January 1, 2004.

Miscellaneous Provisions

HAVA contains a number of other miscellaneous provisions taking various actions such as establishing a “Help America Vote College Program”⁴⁴ and the “Help America Vote Foundation,”⁴⁵ amending UOCAVA,⁴⁶ and directing the Attorney General to conduct a review of the adequacy of existing criminal statutes concerning the use of the Internet for elections.⁴⁷ HAVA also includes a provision stating that the granting of funds by the EAC has no effect on the preclearance requirements of Section 5 of the Voting Rights Act that apply to certain States and jurisdictions.⁴⁸

Enforcement

Enforcement authority for the requirements of Title III is given to the Attorney General under Section 401.⁴⁹ The Attorney General may bring a civil action against any State or jurisdiction in federal court for declaratory and injunctive relief. The Department of Justice has already brought two such enforcement actions, both settled by consent decrees, against San Benito County, California, and Westchester County, New York.⁵⁰ HAVA did not explicitly create a private right of action for individuals to sue States over violations of the law, as for example, it did in the NVRA.⁵¹ Although the legislative record clearly shows that Congress did not intend to create a private right of action, several federal courts have already recognized such a right under §1983 in litigation commenced prior to the 2004 general election and discussed below.⁵²

For States to receive any funding under HAVA, they had to establish an administrative complaint procedure that is uniform and nondiscriminatory, allows for a hearing upon request, and makes final determinations within a set period of time.⁵³

Litigation

A number of court decisions have already been issued construing certain provisions of HAVA. Just prior to the November 2004 election, various state Democratic Party organizations, along with the NAACP, ACORN, People for the American Way, Common Cause and certain labor organizations, filed lawsuits in Michigan, Missouri, Ohio, Florida and Colorado claiming violations of HAVA’s provisional balloting requirements as well as the handling of the citizenship question on voter registration forms. Although the defendant state governments and the Department of Justice, which filed amicus briefs in a number of these cases, argued that HAVA did not create a private right of action, all of the courts recognized such a right under 42 U.S.C. §1983, at least with regard to the provisional balloting issue.

The provisional balloting lawsuits revolved around the definition of “jurisdiction” in Section 302(a), which requires a provisional ballot be provided to a voter who declares he is a registered voter in the “jurisdiction” and eligible to vote. The plaintiffs argued that the use of the word “jurisdiction”

meant that the state had to provide (and count) a provisional ballot for an eligible voter as long as he was registered within the jurisdiction of the local election authority, be it a town, city or county, no matter what precinct he appeared in. All of the states that were named as defendants in the litigation had implemented rules either allowing provisional ballots to only be given to individuals who were in the correct precinct according to their voter registration address or providing that provisional ballots would be counted only if they were cast in the voter’s assigned precinct. The States of Missouri and Florida won these suits at the federal district court level, with the courts ruling that the plaintiffs could assert a private right of action and that, although election officials had to provide provisional ballots to voters who were not in the correct precinct, they did not have to count them.⁵⁴ Colorado won a similar decision in state court.⁵⁵

The plaintiffs in Michigan and Ohio won at the district court level,⁵⁶ but only days before the election, the Sixth Circuit Court of Appeals overturned those decisions.⁵⁷ The Sixth Circuit held that plaintiffs could assert a private HAVA right of action under §1983; that election officials had to provide provisional ballots to a voter who was in the wrong precinct; but that States were not required by HAVA to count the provisional ballots of voters who were not in their assigned precincts. The court explained that HAVA’s provisional balloting requirement was not intended to preempt traditional precinct voting and Congress left to the States the decision of whether to count such ballots.⁵⁸ The States have split on this issue, with 28 only counting provisional ballots cast in a voter’s precinct, and 17 states counting provisional ballots cast outside the precinct.⁵⁹

Florida was also sued because it would not allow individuals to register who failed to answer the new HAVA citizenship question on the voter registration form. The plaintiffs claimed this violated the Voting Rights Act. However, the case was dismissed after the court ruled that the defendants complied with state law and the plaintiffs lacked standing to assert any claims under the Voting Rights Act.⁶⁰

Summary

The Help America Vote Act was the first federal legislation affecting voter registration and the election process since the National Voter Registration Act of 1993. It also was the first time Congress ever appropriated federal funds for the States to help pay for the administration of federal elections. Both federal and state election officials and legislators are still evaluating the effects of this statute, which has some provisions that are not yet effective. There is also certain to be more litigation similar to what was filed last November as all of HAVA’s requirements are implemented by the States, particularly the new statewide voter registration lists with the statute’s maintenance and information verification standards. With a new federal election agency in place that is collecting data on election administration and providing grants for new research on election issues, there is also bound to be more attempts in the future to pass new

federal statutes or to amend HAVA based on analysis of the effects of the statute on our entire voter registration and election process.

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Footnotes

¹ Public Law 107-252, 42 U.S.C. §§15301-15545.

² Section 901, 42 U.S.C. §15541.

³ See for example, Consolidated Appropriations Resolution, Public Law 108-7 (included \$1.515 billion in funding for HAVA).

⁴ Information about the EAC is available at its website at www.eac.gov.

⁵ Public Law 107-252 (emphasis added).

⁶ Section 253 and 254, 42 U.S.C. §§15403, 15404.

⁷ Section 254(c), 42 U.S.C. §15404(c).

⁸ Section 203, 42 U.S.C. §15323.

⁹ Section 208, 42 U.S.C. §15328. This rule prevents two commissioners of the same party from overruling the third commissioner if the fourth seat is vacant. It also removes any incentive a president or the Senate might have to delay the seating of a fourth commissioner, thereby allowing two commissioners to dominate the EAC.

¹⁰ 42 U.S.C. §15329.

¹¹ Section 211, 42 U.S.C. §15341.

¹² Section 214, 42 U.S.C. §15344.

¹³ Press Release, U.S. Election Assistance Comm'n, U.S. Election Assistance Commission Reports to Congress on Election Reform Progress in 2004 (February 9, 2005), *available at* http://www.eac.gov/news_020905.asp.

¹⁴ The EAC has already issued "Best Practices for Facilitating Voting by U.S. Citizens Covered by the Uniformed and Overseas Citizens Absentee Voting Act" and "Best Practices in Administration, Management and Security in Voting Systems and Provisional Voting," *available at* www.eac.gov.

¹⁵ Section 202, 42 U.S.C. §15322.

¹⁶ Section 221, 42 U.S.C. §15361.

¹⁷ Performance and Test Standards for Punchcard, Marksense and Direct Recording Electronic Voting Systems (Approved January 1990).

¹⁸ FEDERAL ELECTION COMMISSION, VOTING SYSTEM STANDARDS, VOLUMES I AND II, May 2002.

¹⁹ 42 U.S.C. §15531.

²⁰ Section 902, 42 U.S.C. §15542.

²¹ *Id.*

²² Press Release, U.S. Election Assistance Commission, U.S. Election Assistance Comm'n to Conduct Special Audit of California's HAVA Funding, (January 27, 2005), *available at* http://www.eac.gov/news_012705.asp.

²³ 42 U.S.C. §15484.

²⁴ 42 U.S.C. §15484.

²⁵ 42 U.S.C. §15481.

²⁶ 42 U.S.C. §15481(a)(3)(B).

²⁷ 42 U.S.C. §15481(a)(1)(B). A central count voting system is one where the ballots, whether they are punchcard or optiscan paper ballots, are transported to a central location for counting or scanning. Precinct-based systems allow the ballots to be counted or scanned at the polling place.

²⁸ DRE's have a computer screen on which the voter views the ballot. Choices are made by either touching the screen, pushing a button, or turning a dial, and the votes are recorded on a computer memory chip. Most new DRE's also have an audio feature that allows a voter to listen to the ballot choices through the use of headphones.

²⁹ See e.g., <http://www.verifiedvoting.org/>.

³⁰ 42 U.S.C. §15481(a)(6).

³¹ 42 U.S.C. §15482(a).

³² 42 U.S.C. §15483(b)(2)(B).

³³ Six states are exempt from the NVRA because they allow election day registration—Minnesota, New Hampshire, Wisconsin, Wyoming, and Idaho—or no registration—North Dakota.

³⁴ This allows ballots that are cast under a court order that is later overturned by a higher court to be separated from valid ballots, which cannot be done if such ballots disappear into the anonymity of the ballot box.

³⁵ See <http://www.usdoj.gov/crt/voting/misc/poster.12.23.03.html>.

³⁶ 42 U.S.C. §15483.

³⁷ Electionline.org, *Election Preview 2004: What's Changed, What Hasn't and Why* (page 47), *available at* <http://www.electionline.org/index.jsp?page=Publications>.

³⁸ Section 7, 5 U.S.C. §532a note. There are seven states that require full social security numbers to register to vote: Georgia, Hawaii, Kentucky, New Mexico, South Carolina, Tennessee, and Virginia. However, Georgia's right to this exemption to the Privacy Act is being litigated in *Schwier v. Cox*, Civil No. 1:00-CV-2820 (N.D. Ga. January

31, 2005), with the district court ruling that Georgia is not eligible for the exemption. The case is currently on appeal.

³⁹ 42 U.S.C. §15483(b). Acceptable documentation includes “a current and valid photo identification; or . . . a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter.” *Id.*

⁴⁰ See www.usdoj.gov/crt/voting/hava/hava.html.

⁴¹ 42 U.S.C. §1973ff-1 *et seq.*

⁴² 42 U.S.C. §1973ee-1(b)(2)(B)(ii).

⁴³ The form must include the question: “Are you a citizen of the United States of America?” with a box for the applicant to check yes or no. 42 U.S.C. §15484(b)(4)(A)(i).

⁴⁴ 42 U.S.C. §15521.

⁴⁵ 36 U.S.C. §152601.

⁴⁶ See Title VII, Sections 701-707.

⁴⁷ 42 U.S.C. §15543.

⁴⁸ 42 U.S.C. §15545(b).

⁴⁹ 42 U.S.C. §15511. The Attorney General has assigned responsibility for HAVA to the Civil Rights Division.

⁵⁰ See <http://www.usdoj.gov/crt/voting/litigation/caselist.htm#hava>.

⁵¹ See 42 U.S.C. §1973gg-9(b).

⁵² In fact, Senator Dodd (Ct.), a Senate conferee and sponsor of HAVA, complained about HAVA’s limited enforcement provisions: “While I would have preferred that we extend [a] private right of action. . . , the House simply would not entertain such an enforcement provision.” 148 CONG. REC. S10488-02, S10512 (daily ed. Oct. 16, 2002).

⁵³ 42 U.S.C. §15512. It is interesting to note that in none of the HAVA lawsuits filed over the 2004 election did any of the plaintiffs take advantage of these administrative procedures by filing a complaint with the States.

⁵⁴ *Florida Democratic Party v. Hood*, 342 F. Supp. 2d 1073 (N.D. Fla. 2004); *Hawkins v. Blunt*, No. 04-4177 (W.D. Mo. October 12, 2004).

⁵⁵ *Colorado Common Cause v. Davidson*, No. 04-7709 (D.C.Co. Oct. 18, 2004).

⁵⁶ *Bay County Democratic Party v. Land*, 347 F. Supp. 2d 404 (E.D. Mich. 2004); *Sandusky County Democratic Party v. Blackwell*, 339 F. Supp. 2d 975 (N.D. Ohio 2004).

⁵⁷ *Sandusky County Democratic Party v. Blackwell*, 386 F.3d 815 (6th Cir. 2004); *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565 (6th Cir. 2004).

⁵⁸ 387 F.3d at 578.

⁵⁹ Electionline.org, *The 2004 Election* (page 5), available at <http://www.electionline.org/index.jsp?page=Publications>.

⁶⁰ *Diaz v. Hood*, 342 F. Supp. 2d 1111 (S.D. Fla 2004).

INTELLECTUAL PROPERTY

HOW INTELLECTUAL PROPERTY BECAME CONTROVERSIAL: NGOs AND THE NEW INTERNATIONAL IP AGENDA

By MARK F. SCHULTZ AND DAVID B. WALKER*

I. Introduction

Until fairly recently, few questioned whether the nations of the world *should* promote intellectual property protection. For a long time, international discussions about intellectual property have been based on a premise that protecting intellectual property rights is beneficial to economic development and social good. This consensus arose from the understanding that intellectual property rights provide the necessary incentive to spur innovation in the arts and sciences, thus driving social and economic development. As a result, the intellectual property agenda at international organizations like the World Intellectual Property Organization (WIPO) focused on technical matters, such as establishing reciprocal intellectual property protection between nations and harmonizing intellectual property laws.

International intellectual property has become a far livelier subject in recent years with the rise of a counter-agenda far more skeptical of the value of intellectual property rights. This paper describes this counter-agenda, which it calls the “New International IP Agenda.” Proponents of the New International IP Agenda contend that even if some intellectual property rights are a good thing, more are not necessarily better. They believe that the world’s intellectual property laws have expanded to the point where they no longer strike a proper balance between the rights of intellectual property owners and the public good.¹ They assert that intellectual property rights may impede research and innovation, distort pharmaceutical research priorities, interfere with economic development in the developing world, and raise the cost of a host of items needed by the poorest of the poor, including pharmaceuticals, software, and educational materials. A group of developing countries led by Brazil and Argentina *thus* has proposed that there should be a presumption *against* increased international protection of IP rights, allowing “higher standards of protection . . . only when it is clearly necessary . . . and where the benefits outweigh the costs of protection.”²

A large number of issues fall under the New International IP Agenda, which is unified by a common thread of IP skepticism and a network of non-governmental organizations (NGOs) and activists. Attempts to expand or strengthen intellectual property rights are likely to be vigorously opposed by part or all of this network³—software patents in the European Union, patent harmonization efforts at WIPO, increased patent protection in India, and many other such efforts. Some activists propose to replace, or at least counterbalance, the current model of using IP rights to encourage the production of public goods (such as pharmaceuticals and educational materials) with government funding and “open access” or “open source” development.

Proposals include compulsory licensing of pharmaceuticals,⁴ treaty obligations to publicly fund “open access” pharmaceutical R&D, governmental preferences for open source software, and international administration of infrastructure resources.

There may be some question as to how seriously to regard the New International IP Agenda, as radical change seems unlikely in the consensus-driven world of international organizations. Some, therefore, dismiss the revolutionary IP proposals advanced by NGOs as mere posturing to impress donors. In this view, Brazil, Argentina, and their allies in the NGO community advance radically anti-IP proposals to gain attention and improve their bargaining positions. While there is something to be said for such real politick interpretations, one ought to give credit where credit is due.

If ideas matter, then the proponents of the New International IP Agenda should be considered formidable. The NGOs pushing this agenda are well-funded, well-organized, and smart.⁵ They are also persistent, as they have proposed to curtail intellectual property rights in one international forum after another, even where IP was not the main issue: the WTO, WIPO, UNESCO’s proposed Convention on Cultural Diversity, the U.N.’s World Summit for the Information Society, the World Health Organization, and others. Moreover, they have had some successes. As discussed below, at the urging of Brazil and Argentina, the World Intellectual Property Organization is currently considering the adoption of a “development agenda,” which would bring many of the New International IP Agenda issues before WIPO. Also, as of June 2005, patent law harmonization talks at WIPO, which would likely result in expanded patent protection in many countries, are on “indefinite hold” due to the assertion by Brazil, Argentina, and India of New International IP Agenda issues during the talks.⁶

Many in the U.S. who are interested in intellectual property issues remain only peripherally aware of the growing importance of international issues. While they certainly know that international harmonization efforts have brought about significant changes in U.S. intellectual property laws, many are unfamiliar with the New International IP Agenda, its strength, and the wide-ranging activities and energy of its proponents. The United States is unlikely to take on any obligations that implement the New International IP Agenda any time soon. Nevertheless, its representatives are required to defend IP rights with increasing frequency in international debates. Moreover, U.S. intellectual property owners find themselves facing a future where the questions are no longer how soon and how well other countries enforce intellectual

property rights, but rather, whether they should or will do so at all.

This paper describes the New International IP Agenda, its major initiatives, and the key players. While a comprehensive treatment would be impossible (and rapidly out of date anyway), this paper provides an overview of some of the most important issues. It describes activities and policy proposals in three specific areas and briefly critiques the approaches advocated by New International IP Agenda proponents. The issues discussed are: (1) intellectual property and international development; (2) public health and pharmaceuticals; and (3) information infrastructure and the digital divide.

II. International Development and Intellectual Property Law

The New International IP Agenda largely draws its impetus from concern for the developing world. One of the most contentious arguments regarding international IP policy is whether strong intellectual property protection aids developing nations. Developed nations have urged the developing world to increase protection and enforcement of intellectual property rights—a move they assert will help people of developing nations just as much as intellectual property owners in the developed world. Proponents of the New International IP Agenda express skepticism regarding the efficacy of IP rights in helping the developing world and cynicism regarding the motives of developed nations and intellectual property owners.

A. The New International IP Agenda's View of IP's Impact on Development

Much of the current controversy can be traced, ironically, to one of the greatest recent successes of IP proponents—the linkage of trade liberalization to increased intellectual property protection.⁷ The developing world has long had the weakest protection for intellectual property but the greatest desire for access to the markets of developed nations. In the last decade, the United States and other developed nations have used the incentive of access to markets to persuade developing countries to enhance and enforce intellectual property laws.⁸ In 1994, as part of establishing the World Trade Organization (WTO), WTO members entered into the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement),⁹ which established universal, relatively strong minimum standards for intellectual property protection.¹⁰ The WTO has fairly significant enforcement powers, thus giving the TRIPS Agreement some real “teeth.”¹¹ The United States and the EU have also brought IP protection into bilateral trade agreements with developing nations, securing “TRIPS-Plus” agreements, with IP protection more demanding than the minimum standards of TRIPS.¹² This “marriage of convenience” between trade and intellectual property¹³ has increased pressure on developing nations to increase their protection and enforcement of intellectual property rights.¹⁴

With this increased pressure on developing nations has come increased concern that TRIPS and TRIPS-plus

agreements are not in the best interests of these nations or their citizens. In 2000, the year that TRIPS obligations came into effect for developing nations,¹⁵ these concerns came to a head. The U.N.’s Sub-Commission on the Promotion and Protection of Human Rights took an extremely critical look at TRIPS. In Resolution 2000/7 on Intellectual Property Rights and Human Rights, it declared that “there are apparent conflicts between the intellectual property rights regime embodied in the TRIPS Agreement . . . and international human rights law.”¹⁶ It saw negative affects across a broad range of areas: (1) technology transfer to developing countries; (2) “the right to food;” (3) “bio-piracy;” (4) “indigenous communities’ . . . control over their own genetic and natural resources and cultural values;” (5) “access to patented pharmaceuticals;” and (6) “enjoyment of the right to health.”¹⁷ The Declaration called on a wide array of actors—governments, intergovernmental organizations, including WIPO, the World Health Organization, the United Nations Development Programme, the United Nations Conference on Trade and Development, the United Nations Environment Programme, and NGOs to take up a critical examination of TRIPS.¹⁸

Many have accepted the Commission’s challenge to examine TRIPS and IP rights in general more skeptically. The U.N.’s human rights bureaucracy has further examined and criticized intellectual property’s effect on human rights.¹⁹ Prominent among these efforts have been U.N. Human Rights Commission resolutions that view IP rights as adversely affecting access to medicine and thus exacerbating the AIDS crisis.²⁰ A number of NGOs and developing nations have also furthered this skeptical examination of intellectual property’s impact on development. Most prominent among developing nations have been Brazil and Argentina, which lead a group of nations known as the “Friends of Development,” which includes Bolivia, Cuba, the Dominican Republic, Ecuador, Egypt, Iran, Kenya, Sierra Leone, South Africa, Tanzania and Venezuela.²¹

The discussion has proceeded along two lines of argument, one philosophical and the other pragmatic. The philosophical argument frames the effect of intellectual property rights on development as a human rights issue. The pragmatic argument focuses on the tremendous and immediate needs of the developing world.

Advocates for the New International IP Agenda argue that access to health or medicine²² and access to knowledge²³ are human rights. The reason for doing so is, in part, strategic. Human rights expert, Prof. Laurence Helfer described the long term strategy as follows:

Looking simply at treaty texts . . . there appear to be few clear-cut conflicts [between intellectual property and human rights]. . . . But treaty text alone does not tell the whole story. Human rights law is notably elastic, and contains a variety of mechanisms to develop more precise legal norms and standards over time. Advocates endorsing

a conflictual approach to intellectual property are likely to press human rights bodies to develop specific interpretations of ambiguous rights to compete with the precise, clearly defined rules in TRIPS.²⁴

By advocating these human rights of access, IP skeptics seek to create a conflict with intellectual property rights, which give their owners the right to control and exclude others: from medicine, in the case of pharmaceutical patents, and from knowledge, in the case of copyright. Since advocates view “human rights obligations” as having “primacy” “over economic policies and agreements,”²⁵ then it follows that intellectual property rights are secondary, to be treated as limited exceptions.²⁶

The pragmatic argument against increased intellectual property rights in the developing world is fairly straightforward: The needs of developing countries are staggering; anything that gets in the way of alleviating those needs, including intellectual property rights, is suspect. This argument arouses sympathy—who can argue with wanting to supply a sick mother with the AIDS drugs she needs to live or a child the books she needs to learn? It also tends to bring activists on narrower issues into the network of IP skeptics, for example, medical groups with respect to patents²⁷ and librarians with respect to copyright.²⁸ A further pragmatic argument against IP in general and TRIPS in particular is that corporations in the developed world hold most IP rights, so TRIPS and other agreements offer few benefits to the people of developing nations.²⁹

These criticisms of intellectual property’s impact on development have led to a number of initiatives, the latest and most important of which is the push for the World Intellectual Property Organization to adopt a “development agenda.” At WIPO’s Fall 2004 meeting, a group of developing countries and NGOs led by Brazil and Argentina proposed that WIPO adopt a “Development Agenda,” which would broaden WIPO’s mandate beyond its traditional focus to consider how to promote development and to ensure that the “costs do not outweigh the benefits of IP protection.”³⁰ A stated goal of Development Agenda proponents is to alter what they see as WIPO’s “pro-IP bias.” They want WIPO to adopt a presumption *against* increased IP rights, allowing “higher standards of protection . . . only when it is clearly necessary . . . and where the benefits outweigh the costs of protection.”³¹ The General Assembly of WIPO agreed to study the proposal further in a series of meetings throughout 2005 that will result in a report to be considered at WIPO’s 2005 General Assembly meeting in September. This decision was essentially a victory for the Brazil/Argentina proposal, albeit a merely preliminary one. The question now is whether WIPO will adopt some version of a development agenda at its 2005 General Assembly meeting and what its content will be.³²

By considering the Development Agenda, WIPO opens itself to a fundamental change in direction. While radical

change in a large international organization is hardly a safe bet, many opponents of strong intellectual property rights see this opening as a chance to advance proposals to change the world’s intellectual property system dramatically. A large coalition of NGOs, developing world politicians, and activists signed onto the “Geneva Declaration”³³ in support of the WIPO development agenda. Among other things, the Geneva Declaration asserts that “[h]umanity faces a global crisis in the governance of knowledge, technology and culture” and that the current international IP regime is “intellectually weak, ideologically rigid, and sometimes brutally unfair and inefficient” for developing countries.³⁴ A number of proposals to change the world’s IP system radically have come from supporters of the Geneva Declaration.

Among these proposals is a treaty to promote “Access to Knowledge” (often referred to as the “A2K Treaty”).³⁵ Over the past year, various NGOs and governmental representatives have advocated that an A2K Treaty as a potential goal of the Development Agenda.³⁶ The A2K Treaty proposal received a major boost in late July 2005 when Brazil proposed that it become the focus of the WIPO Development Agenda.³⁷ As of this writing, the proposal is still a draft with many open issues, but the A2K Treaty proposal clearly is consistent with the contention that access to knowledge is a fundamental human right that should trump intellectual property rights. Among other things, the draft proposes imposing an expansive version of U.S.-type fair use exceptions to copyright law; limits on legal recognition of copy protection and digital rights management technology; restrictions on the patentability of inventions arising from government-funded research; broader compulsory licensing of copyrighted material; proposals calculated to encourage open access publishing models and free/open source software; proposals for a protocol on the transfer of technology and knowledge to developing countries; and funding obligations for the public development of “knowledge goods.”³⁸ At the moment, the A2K Treaty reads more like a wish list embodying favorite proposals of IP skeptics rather than anything likely to be adopted as a treaty. Nevertheless, Brazil’s advocacy of the proposal puts it on the international policy agenda.

Recent events indicate that the controversy regarding development and intellectual property will be active for years to come. The following items show the continuing salience of the IP and development controversy:

- The WIPO Development Agenda will be discussed at least for the rest of 2005. If nothing else, Development Agenda discussions appear likely to continue in WIPO, regardless of the current disagreement as to the proper forum within WIPO.
- Brazil has once again threatened to issue compulsory licenses or even to invalidate patents entirely for AIDS drugs.³⁹

- Intellectual property and development issues have intruded on discussions regarding the Convention on Cultural Diversity, which seeks to give countries the right to impose legislation to protect national culture, much like France's famously protectionist cultural regulations.⁴⁰
- Intellectual property and development issues have also figured in discussions of the World Summit on the Information Society, which is mainly focused on digital divide issues.⁴¹
- Finally, and perhaps most dramatically, Brazil, Argentina, and India recently derailed longstanding patent harmonization talks at WIPO because of development issues. The dispute caused the U.S. Patent and Trademark Office to issue a press release publicly questioning the mission and viability of WIPO as a forum for such discussions.⁴² While such talks likely will continue in another forum,⁴³ the controversy regarding IP and development will also be raised in other contexts and other fora.

If nothing else, the Development Agenda appears to have introduced into international IP negotiations a new element of controversy, which does not appear to be likely to abate anytime soon.

B. Critique of the New International IP Agenda's Views on Economic Development

One of the central problems with the criticisms of IP's impact on developing nations is that they focus only on barriers to obtaining products from *outside* of a developing country, ignoring the benefits that would accrue from promoting innovation *within* that country. This treats the people of the developing world as victims, forever needing help from outside corporations and more developed countries. There is no reason to believe that people in developing nations are any less inventive than people elsewhere. But innovation and creativity require a particular kind of nourishment. As development expert Robert Sherwood has explained:

If people seem to be more inventive in the United States or Europe or Japan, it is not an accident. It is not because of genes or schooling or intelligence or fate. Implementation of the intellectual property system is critical because of the habit of mind which is fostered in the population. Human ingenuity and creativity are not dispersed unevenly across the globe. Those talents are present in every country. In some, unfortunately, the enabling infrastructure of effective intellectual property protection is missing.⁴⁴

Like people everywhere, people of developing nations can and do invent things. Indeed, when they immigrate to developed countries they are often among the most creative

and inventive people in their new homes. The problem in developing countries is that there is little reward for innovation. In his acclaimed book, *The Mystery of Capital*,⁴⁵ Hernando de Soto identified the lack of well-defined property rights as the root of many of the troubles of the developing world. Without clear, enforceable property rights, people in developing nations cannot unlock the value of the capital they hold. In developed nations, property rights and the rule of law help people to secure loans, raise investment, enter contracts, and make plans knowing that what they have today will not be taken tomorrow. Not so in much of the developing world. De Soto estimates that poor people in developing nations hold trillions and trillions of dollars worth of capital, but it remains "dead capital" because the lack of property rights prevents it from being developed.⁴⁶ De Soto's argument largely focuses on real property, but it applies to intellectual property with equal force. A vast amount of intellectual capital in the developing world is underdeveloped.⁴⁷ Not only do developing nations miss the economic benefits such innovation would bring, they miss the benefit of local knowledge being applied to solve local problems.

Intellectual property rights also help to ensure that the poor get the things they need, even if they must come from outside of their home countries. The simple, oft-repeated argument is that companies cannot afford to perform research for things like new drugs if they are not compensated.⁴⁸ Although simple, the argument is powerful. Somebody has to pay R&D costs. In some instances, it may be developed world consumers paying higher prices to, in effect, subsidize lower prices in the developing world.⁴⁹ In other instances, however, there may not be a market in the developed world sufficient to support R&D, thus preventing product development from ever happening.⁵⁰ Another more subtle benefit of intellectual property rights is that the commercialization of intellectual property reduces coordination problems and has positive spin-off effects.⁵¹ A company with proprietary rights is more likely to set up a distribution network, educate doctors and consumers, ensure reliable distribution, hire and train local executives, technicians, and/or sales representatives, and take other such actions that benefit the local economy now and in the future.

Nevertheless, the criticisms of TRIPS and other agreements linking intellectual property to trade do have some validity. When intellectual property rights are seen solely as a trade issue, developing countries are more likely to act solely to mollify trading partners than to benefit their local economies. Without real commitment, neither the local economy nor foreign intellectual property owners are likely to benefit.⁵²

WIPO and other institutions could do more to help developing nations implement intellectual property systems that benefit IP owners in their own countries as well as trading partners. Prof. Jerome Reichman has advocated such an approach: "at the WTO, the primary goal . . . should be to find ways in which everyone wins by implementing the TRIPS standards. When each of the developing countries comes up

for review by the Council for TRIPS, the developed countries should approach the issues by asking, ‘how can we help you to implement these international minimum standards so that you win and we win, too?’⁵³ Reichman proposes a variety of forms of assistance in implementing IP systems that provide local benefits.⁵⁴ There are a number of other useful proposals for how technical assistance might greatly benefit developing countries. For example, Prof. Srividhya Ragavan contends that countries like India need to develop the flexibility and sophistication present in the patent systems of the developing world.⁵⁵ She describes how this lack of sophistication is causing some innovations in India to go unpatented, thus hurting investment and development.⁵⁶ Other creative proposals encourage least developed countries to pool resources and rely on other nations’ patentability determinations in order to give their citizens the benefit of patent protection, while reducing the cost of establishing and maintaining a patent system.⁵⁷ In the end, it is in the interest of developed countries to help developing countries implement IP systems that produce true domestic benefits, as such systems produce stable, lasting support for intellectual property rights.⁵⁸

Finally, it must be noted that intellectual property laws may be necessary but not sufficient to spur economic growth and innovation in developing nations. Many institutions (including intellectual property rights) must be developed to support a healthy market economy. This is one of the essential insights of the new institutional economics, which examines how all of the institutions of an economy—such as customs, mores, laws, regulations, social norms, and organizations—interact to affect economic performance.⁵⁹ As the Nobel-winning founder of new institutional economics, Douglass North, notes, developing an economy so that it can take advantage of modern technology is a “tall order.”⁶⁰ Among the necessary institutions are a legal system that provides the right incentives, impartial enforcement of the law, entrepreneurial organizations, a supportive polity, and other formal and informal institutions that support entrepreneurial activity.⁶¹ It is not too much to expect countries like India, Brazil, and Argentina, with sophisticated economies, advanced legal systems, and democratic political systems to take advantage of the benefits that IP protection can provide their citizens and economy. We ought to take a far more charitable view of countries whose institutions have been devastated by thuggish governments, abject poverty, war, and disease. People in such countries stand a realistic chance of benefiting from intellectual property rights only if at least some of the other institutions necessary to encourage innovation, such as freedom, security, and the rule of law, are in place.⁶²

III. Public Health and Pharmaceuticals

In the past several years, the most contentious international IP issues have centered on providing affordable drugs to the poor in developing countries. The establishment of TRIPS brought this issue to a head, as discussed in the previous section, by establishing minimum standards for IP protection for all WTO members. TRIPS required a substantial

change in patent policy for many developing countries, as some had not protected pharmaceutical products before (only processes) while others exempted medicines from patent protection.⁶³ These changes led many to fear that TRIPS would lead to increased drug prices and consequently less medicine in the poorest nations. Thus was born the conception of “access to health” as a human right that conflicts with intellectual property rights.⁶⁴ While many aspects of these concerns were addressed in the previous section in connection with development, two further issues merit specific discussion as they are among those that are driving the New International IP Agenda. The first is compulsory licensing, while the second is the funding and encouragement of R&D in medicines for the diseases of the poor.

A. Compulsory Licensing

“The term ‘non-voluntary’ or ‘compulsory’ licensing refers to the practice by a government to authorize itself or third parties to use the subject matter of a patent without the authorization of the right holder for reasons of public policy. In other words, the patentee is forced to tolerate, against his will, the exploitation of his invention by a third person or by the government itself.”⁶⁵ Current discussion of compulsory licensing is focused on pharmaceutical patents. Development activists and developing nations see the right to compel a license as an aid to ensuring affordable access to health care.

Compulsory licensing of patented inventions has a long history.⁶⁶ Governments have imposed compulsory licenses of patented inventions when a patent was not being “worked” (i.e., the patent owner was sitting on its rights rather than practicing the invention), as a remedy for anti-competitive behavior, and where the patent covered necessities like food or medicine.⁶⁷ By the early 1990s, the majority of countries had some form of compulsory licensing in their patent laws, although use was rare.⁶⁸

In negotiating TRIPS, compulsory licensing became an issue largely because developing nations wanted to preserve their ability to use compulsory licensing to secure drugs inexpensively. This issue was contentious—in fact it was one of the issues that broke down an earlier attempt to revise the Paris Convention in WIPO during the 1980s, which failed after six years of discussions.⁶⁹ This failure caused negotiators to move their harmonization talks to GATT negotiations, ultimately resulting in TRIPS.⁷⁰ The parties were able to resolve some of their differences in the context of TRIPS: In the end, the prerogative of compulsory licensing remained, subject to a number of safeguards set forth in Article 31 of the TRIPS Agreement. These safeguards include a requirement that compulsory licenses be imposed on a case-by-case basis and subject to judicial review, that they be non-exclusive, that there be adequate remuneration, and that, except in the case of a national emergency, the country imposing them make “efforts to obtain authorization from the right holder on reasonable commercial terms and conditions” for a reasonable period of time.⁷¹ A detailed analysis of the compulsory licensing right under TRIPS is beyond the scope

of this paper. It is important to note, however, that its interpretation and implementation has been the subject of much debate and dissatisfaction among developing nations and NGOs.

There was some doubt initially as to the conditions under which a country could impose a compulsory license under TRIPS. In particular, there was doubt as to what constituted a national emergency, allowing nations to forego negotiating with patent owners. There was also concern that nations without their own manufacturing capacity would not be able to take advantage of compulsory licensing. In 2001, WTO members negotiated the so-called Doha Declaration on Public Health, which clarified these issues. Article 5 states that “[e]ach member has the right to grant compulsory licences and the freedom to determine the grounds upon which such licences are granted,” and “the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency.” The declaration thus reinforces the right to compulsory licensing and asserts that each nation may determine for itself when a public health emergency exists.⁷² A further clarification in 2003 set up a process to allow countries to import generics if they were without manufacturing capacity to create their own generics under compulsory licenses. The process allows for the issuance of a waiver from TRIPS requirements, subject to a number of safeguards.⁷³

The end result of these negotiations and clarifications regarding compulsory licensing has left proponents of the New International IP Agenda very unhappy.⁷⁴ Compulsory licensing is favored by activists as a solution to what they perceive as price gouging and neglect by big pharmaceutical companies.⁷⁵ It is rarely used;⁷⁶ activists would like to see it used more often.⁷⁷ More frequent use may, however, be impractical. TRIPS still imposes a number of safeguards, including adequate remuneration and judicial review.⁷⁸ Any compulsory license can be challenged in the WTO on the basis of failure to comply with these safeguards or other parts of TRIPS.⁷⁹ Nations that impose compulsory licenses will likely be subject to diplomatic pressure.⁸⁰ Finally, if a country does not have its own domestic manufacturing capacity, it must secure a foreign generic source that is willing to undersell the patent owner enough to make all the other potential difficulties worthwhile.⁸¹

B. Medical Research and Development

Perhaps partly in response to the difficulties of implementing compulsory licensing, advocates for the New International IP Agenda have turned their attention to a proposed medical R&D treaty.⁸² The medical R&D treaty (MRD Treaty) proposes a new international framework for financing pharmaceutical research through public funding as an alternative to the patent system. The premise underlying the MRD Treaty proposal is that the current system is “designed to increase drug prices, as the sole mechanism to

increase investments in R&D.”⁸³ Proponents believe that the current system causes many ills: “problems of rationing and access to medicine; costly, misleading and excessive marketing of products; barriers to follow-on research; skewing of investment toward products that offer little or no therapeutic advance over existing treatments, and scant investment in treatments for the poor, basic research or public goods.”⁸⁴

The MRD treaty is supposed to solve these problems through an obligation to fund publicly research in areas chosen by the treaty’s governing body. Member states would agree to spend a certain percentage of GDP on medical research, with the percentage based on national income.⁸⁵ They would appoint a committee to determine research priorities for members.⁸⁶ The treaty would allow for a variety of methods of funding for research, but public finance, either direct or indirect, is generally contemplated. Funding may include: “direct funding of profit or non-profit research projects, market transactions such as purchases of medicine that provide incentives for research and development, payment of royalties to patent owners, tax credits, innovation prizes, investments in competitive research intermediators, research and development obligations imposed on sellers of medicines or other alternatives that have the practical effect of either directly or indirectly financing QMRD.”⁸⁷ There are further provisions mandating open access to government funded research,⁸⁸ changes to patent and copyright law to make it more amenable to research and development,⁸⁹ and agreement to forego use of TRIPS enforcement procedures.⁹⁰

MRD Treaty supporters believe that it would cure what they see as major distortions in the current system for encouraging innovation. Supporters assert that the recent emphasis on patent protection has not promoted new cures, but rather only higher drug prices.⁹¹ They contend that the drugs needed most by people in developing countries (drugs for malaria are an oft-cited example) are not developed under the current system, because the market incentives point toward cures for diseases prevalent in the developed world.⁹²

C. Critique of Public Health Proposals

The premise underlying the New International IP Agenda’s public health initiatives is that patent rights block access to medicine. Advocates draw this conclusion from the following observations:

- Much of the developing world lacks access to medicine;
- Even if sick people did have access, few could afford the prices charged by Western pharmaceutical companies;
- Patents give patent owners exclusive rights over manufacture, sale, and use of their inventions (i.e., the right to deny “access”);
- Patent owners use these rights to extract higher prices for their patented drugs.

There is not much to quibble with in the facts listed above; the question is whether they present the entire picture and whether the conclusions drawn from them are accurate. Critics see (1) a lack of access and affordability to medicine, and (2) identify patents as the source of a right to deny access and extract higher prices for patented products, and thus conclude that the first is caused by the second. As they see it, patents enable pharmaceutical companies to hold out for high prices. Since they have lucrative markets elsewhere, the argument goes, pharmaceutical companies can and do choose to ignore markets (and thus people) that are too poor to offer an attractive return. Patent rights are thus seen as an obstacle to affordable medicine. Critics contend that they leave developing nations with no alternative but to pay high prices (which causes rationing) or go without (thus the lack of access for many of the poor).

These conclusions place far too much blame on patents and pharmaceutical companies for problems with access to medicine. First, some perspective is necessary. Vast numbers of people do indeed lack access to medicine and the results are tragic. In most instances, however, people lack not just patented drugs but medical care in general, as well as the other benefits of a developed market economy. As discussed below, alleviating the medical needs of the developing world is a challenging, complex problem in which patented drugs play a limited role (albeit important in specific cases). Second, one ought to consider the role of various players and factors in creating and alleviating the needs of the developing world. Are the health problems of the developing world created or exacerbated by greedy pharmaceutical companies that attempt to exploit every last bit of market power? Despite frequent vilification, evidence suggests otherwise. Although pharmaceutical companies must satisfy shareholders and ensure they have revenue to do the R&D necessary for the next drug breakthrough, they also cut prices for the developing world and engage in charitable efforts. Some governments do their best for their people under challenging conditions, while others mismanage their priorities, and still others oppress and prey upon their citizens. It is myopic to focus on and blame patents for larger problems that stem from the mismanagement and malevolence of political leaders. Third, as implied by the previous point, much of this debate comes down to a clash of visions. Many working on these issues are simply impatient with anything that they perceive as getting in the way of saving lives. But others see private corporations, capitalism, and private property rights as too arbitrary and inequitable to entrust with something as important as public health. They are deeply suspicious of the motives of private interests and their supporters. They see government led solutions as far more fair and efficient. The roots of this clash of visions are deep. This paper can do little more than point out how it affects international IP issues and critique the effectiveness of the proposals offered by proponents of the New International IP Agenda.

1. Patents and Access to Medicine

A vast number of people in the developing world lack access to medicine, but is it patent owners who are denying

them this access? The World Health Organization (WHO) estimates that “1.7 billion people today still have no regular access to quality essential medicines.”⁹³ WHO further notes that “in some of the lowest income countries in Africa and Asia, more than half of the population have no regular access to essential medicines.”⁹⁴ It would be heartless to discount the magnitude of this tragedy, but it is important to understand the causes of it. The simple logic of the syllogism “people lack access to medicine; patent rights allow the denial of access; therefore patents cause the problem of access to medicine” is lacking. Two questions are key to understanding the problem: First, how many of the drugs most needed by the developing world are covered by patents? Second, what is the importance of any other factors, besides patents, that drive up prices and impede access?

A closer look at the evidence suggests that the claim that patents are a major cause of problems with access to medicine is at least somewhat exaggerated. Most discussions of this issue look to WHO’s Model List of Essential Medicines for guidance as to which medicines are most important to human health.⁹⁵ A study by Prof. Amir Attaran reviewed the patent status of 319 products on the Essential Medicines list in 65 developing countries.⁹⁶ He found that only seventeen of the essential medicines on the list (1.4 percent) are patented in any of the 65 developing countries he studied.⁹⁷ Some aspects of Attaran’s work have been criticized. Many of the essential medicines that are patented are for antiretrovirals used to fight HIV, so, given the scope of the AIDS crisis, these patented drugs are needed by many millions of people.⁹⁸ Moreover, some of Attaran’s critics take the position that “For the African market, every dollar that can be cut off the price of [AIDS drugs] is important . . . Everything possible needs to be done. Every barrier for cheaper medicine needs to be removed.”⁹⁹ While these criticisms would help to rebut an assertion that patents could not possibly raise any barrier to access at all, they hardly show that patents are the major cause of problems with access to medicine.

If 98% of the drugs on WHO’s essential medicines list are off patent, and yet 1.7 billion people still do not have access to them, then patents do not appear to be the main problem.¹⁰⁰ In fact, a WHO report issued a few years ago noted that “Most of the 13 million deaths a year from infectious diseases can be prevented. Low-cost health interventions already exist to either prevent or cure the infectious diseases which take the greatest toll on human lives. And most of these interventions have been widely available for years.”¹⁰¹

2. The Role of Corporations and Governments in Access to Medicine

Millions are dying, but could be saved with low cost treatments. What is the cause of this seemingly avoidable tragedy? The WHO Report cited above provides several reasons: “Inadequate funding of health care in developing countries is one reason. Government failure to prioritize, lack of cross-sectoral collaboration and the inability of weak health service delivery systems to reach the entire population—

particularly the most vulnerable and difficult-to-reach—are contributing factors.”

In this report, WHO thus laid the blame for lack of access to medicine on poorly funded and underdeveloped health systems. Why are health systems poorly funded and underdeveloped? One obvious cause is poverty. A poorly developed economy and tax base means that resources are not available for public health. It also means that private institutions dedicated to health (e.g., pharmacies, hospitals, clinics) or incidental to its delivery (e.g., communications, transportation) are weak or non-existent. Why some countries are poor is, of course, the subject of a vast amount of research and ideological debate far beyond the scope of this particular discussion. In any event, nobody claims that drug patents are the cause of poverty. Unless we are willing to view poverty as a permanent condition of some nations, we ought to look to short term solutions, such as aid and charity, to alleviate the challenge of drug affordability. Poverty itself ought to receive the lions’ share of attention and energy of advocates for developing nations, rather than placing blame on the system of private property rights that supports medical research and development. As the International Policy Network (IPN), a London-based free-market think tank, concluded in a recent report on access to health issues: “it is unlikely that good health will ever be sustained without long-term wealth creation that can pay for the ongoing improvements in water, sanitation, hospitals and medical research. Those who genuinely hope to improve the health of the world’s poorest people should therefore look to wealth creation as the fundamental solution to global health problems.”¹⁰²

Beyond broader ideological debates about economic development, there are specific things that governments do to exacerbate the problem. A recent study found that governments impose import tariffs, value added taxes, and other fees on essential medicines.¹⁰³ For example, Brazil charges an import tariff of 11.7%, a VAT tax of 18%, and a state tax of 6% on imported drugs.¹⁰⁴ Note that these charges are often compounded, as taxes and fees at each level of distribution are based on a price that already includes earlier taxes and fees.¹⁰⁵ The authors of the study concluded that hidden costs raised prices an average of 68.6% in the countries studied.¹⁰⁶ Many of these costs are well within the power of governments to reduce and thus one of the first places where they should seek cost reductions.

In addition to increasing costs, some governments display questionable priorities. In the report cited above, IPN criticized a number of countries for defense budgets that exceeded public health budgets.¹⁰⁷ “For instance, the government of Pakistan spends 4.7 per cent of its GDP on defence, but a mere 1 per cent on healthcare.”¹⁰⁸ IPN found similar gaps in many other countries, the majority of which faced no significant external threats.¹⁰⁹ Similarly, India and Brazil¹¹⁰ are aggressively funding space programs, with India planning to send an unmanned ship to the Moon by 2008.¹¹¹ Although sovereign nations can and should determine their

own spending priorities, they open themselves to criticism when they claim inability to meet the basic health needs of citizens but spend money on projects largely calculated to enhance their prestige.

There is another problem that is rarely raised in the polite world of international organizations and NGOs: Some governments do not have the best interests of all their citizens at heart. Recent notable examples include the complicity of the government of Sudan in genocide in Darfur¹¹² and Zimbabwean President Robert Mugabe’s destruction of the homes of over 700,000 people he deems political opponents.¹¹³ Can such governments be trusted to invest in public health or to use medical aid properly? Some donors say no. The Boston Globe reported “that Zimbabwe receives \$4 in donor support for each person infected with HIV, compared to \$187 per infected person in neighboring Zambia.”¹¹⁴ The Globe notes that “[t]he reason is simple: Donors fear the government of President Robert Mugabe would either steal some of the AIDS money or divert it for political ends.”¹¹⁵ In some places, the problem of access to medicine has little to do with complex issues of intellectual property rights or basic economic policy, but rather starts with denial of fundamental political and human rights.

Conversely, pharmaceutical companies are hardly the greedy, heartless robber barons that appear in the one-dimensional portrayals of some critics. Pharmaceutical companies often lead the way in providing solutions to access to health problems. Since 2000, pharmaceutical companies have provided some AIDS drugs to the least developed countries at discounts of up to 90% or more.¹¹⁶ Critics are dismissive of their efforts, contending that the deals come with too many conditions or, more commonly, that even very low prices are still too expensive in countries where per capita incomes are very low.¹¹⁷ A common complaint has been that despite drastically lowered prices (in many cases at cost, and in a few instances, free), not many are being treated.¹¹⁸ Pharmaceutical companies might be excused if they feel that they cannot win with some critics. Oxfam’s response to Merck and others slashing prices on AIDS drugs typifies the ideological rigidity of some critics: “Oxfam said the action by companies was undermined by their tough stance in defence of patents, which was preventing developing countries from securing the lowest-cost supply of medicines. . . . ‘As long as these kind of price cuts are not seen as a solution to this problem, then they are welcome. But if it is seen as an alternative, then it is going to be a flawed alternative.’”¹¹⁹ Notwithstanding such antipathy, if pharmaceutical companies behave charitably where it is warranted, then it is up to private donors, developed country aid, and public health services to meet them halfway.

In some instances, pharmaceutical companies have instituted charitable programs to alleviate particular illnesses. For example, Merck’s Mectizan Donation Program has teamed with public health agencies and NGOs to combat river blindness, the second leading cause of blindness in the world.¹²⁰ Dr. Gilbert Burnham of Johns Hopkins University

has described¹²¹ the tremendous success of this program: “The Mectizan Donation Program is really one of the great public health success stories. It is the benchmark for all other disease prevention efforts in the developing world.”¹²² Pfizer instituted a similar program for donating Diflucan, an antifungal medication helpful to AIDS patients.¹²³ Some activists cannot be persuaded that a pharmaceutical company could have benevolent motives and have greeted the Diflucan program with skepticism.¹²⁴

3. A Clash of Visions: Public Funding of R&D vs. Private Property Rights

Proponents of the proposed medical R&D treaty (MRD) discussed earlier might be credited with at least offering a solution to patch a large hole in their attacks on pharmaceutical companies: If pharmaceutical companies cannot profit from their inventions, then how can they be expected to develop new medicine? MRD treaty proponents don’t expect them to do so. Instead, they expect government led development to fill this gap. Of course, those who advocate an MRD treaty do not see it as a “patch” for the hole in their argument; they see government coordination of R&D as more fair and efficient.

This is an old argument that has recurred often over the last several decades. Most relevant were debates in the late ‘80s of the relative merits of a Japanese style industrial policy versus a U.S. style private sector led technological development. Market solutions seem to have proven themselves over time, but critics are not deterred. This debate largely comes down to a clash of visions between those who advocate centralized, government solutions to societal challenges and those who advocate decentralized private solution. As Friedrich Hayek and others have advocated, decentralized solutions are more efficient and conducive to human development.¹²⁵ They put decision making in the hands of those who have the most knowledge and accord them freedom to do as they think is right. Still, advocates of centralized solutions insist that centralization offers economies of scale and greater democracy.

Less philosophically, there are several reasons to believe that the MRD treaty would not meet its goals. Treaty advocates hope to make R&D decision making more responsive to public needs. Government funding of health research is already common, however, and complaints about politically distorted priorities are also common. The treaty mandates a committee of 18 experts who will set research priorities. Will this committee’s decisions be any less politicized than other government efforts? Moreover, setting aside likely political rent seeking, how will a committee possess enough knowledge to best set priorities? Pharmaceutical companies strive hard to determine the needs of their customers. They conduct extensive market research, focus groups with doctors, and have a network of sales representatives who communicate directly with doctors. It is hard to conceive that any centralized process could match such a decentralized information gathering project.

Still, the proposed MRD treaty might be inefficient at worst and might even do some good (throwing money at R&D is no panacea, but it can sometimes help), but for its provisions disfavoring intellectual property rights. Most important, signatories would forego enforcing the intellectual rights of their citizens through TRIPS. This provision sets the treaty into direct opposition to the private IP system, thus necessitating the question whether centralized, government driven processes should be preferred to decentralized, private decision making. Experience advises against such experiments, but, as noted, this issue comes down to a clash of visions. Some continue to advocate centralized solutions.

IV. Information Infrastructure and the Digital Divide

A. Introduction

Proponents of the New International IP Agenda also have interjected themselves into international efforts to address inequities in information infrastructure between developed and developing countries and to bridge the Digital Divide.¹²⁶ They have promoted their agenda of IP skepticism through advocacy of a fundamental human right of “access to knowledge” as discussed above. In addition to efforts to advance a development agenda at WIPO,¹²⁷ they have been extremely active in the World Summit on the Information Society (WSIS). Throughout the summit, advocates of the New International IP Agenda, both national governments and NGOs, have made concerted efforts to advance an anti-IP agenda. Although the Summit has not adopted openly anti-IP positions,¹²⁸ substantial portions of the New International IP Agenda have been discussed and integrated into WSIS principles.

B. The World Summit on the Information Society

The World Summit on the Information Society (WSIS) has become a major forum for those interested in advancing the New International IP Agenda. WSIS originated in the International Telecommunications Union (ITU) through a resolution sponsored by the government of Tunisia in 1998.¹²⁹ The Summit later was established by resolution of the United Nations General Assembly in 2002.¹³⁰ The Summit was planned to be held in two sessions, the first in Geneva in late 2003 and the second in Tunisia in 2005.

The WSIS Principles and Plan establish a broad-based development agenda¹³¹ and repeat some of the human rights arguments advanced by advocates of the New International IP Agenda¹³²—namely that “everyone has the right to freedom of opinion and expression; that this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”¹³³ More specifically, the key principles or themes of WSIS are that all stakeholders should work together to:

- improve access to information and communication infrastructure and technologies as well as to information and knowledge

- build capacity
- increase confidence and security in the use of information and communication technologies (“ICTs”)
- create an enabling environment at all levels;
- develop and widen ICT applications
- foster and respect cultural diversity
- recognize the role of the media
- address the ethical dimensions of the Information Society
- encourage international and regional cooperation¹³⁴

Some of these themes have considerable resonance with advocates of the New International IP Agenda; these are the themes that will be addressed in this paper.

The WSIS defines stakeholders to include Governments, the private sector, civil society, and the United Nations and other international organizations, which each have an important role and responsibility in the development of the Information Society and, as appropriate, in decision-making processes.¹³⁵ More specifically, the WSIS Plan acknowledges that the private sector and civil society, in dialogue with governments, have an important consultative role to play in devising national strategies.¹³⁶ The WSIS thus ensures that NGOs who are skeptical of intellectual property will have a ready forum to advance the New International IP Agenda for some time to come.

In fact a large number of non-government organizations (NGOs) have been intimately involved in the Summit from the beginning. The WSIS has a formal process through which an NGO may become accredited to participate in WSIS events and preparatory committee meeting.¹³⁷ As of February 2005, hundreds of NGOs were accredited to participate.¹³⁸ In a larger sense, many NGOs with seemingly disparate charters have banded together to form the Conference of NGOs (CONGO) that works “to ensure that NGOs are present when governments discuss issues of global concern at the United Nations and to facilitate NGO discussions on such issues.”¹³⁹

Perhaps most relevant of the WSIS themes to the New International IP Agenda is the access to information and knowledge, which echoes some of the human rights positions of the Agenda. This theme not only addresses removing barriers to equitable access to information but also promotes awareness and consideration of different software models. This theme closely ties development to access to information and encourages removal of barriers to equitable access to information for economic, social, political, health, cultural, educational, and scientific activities as a path to sharing and strengthening global knowledge.¹⁴⁰ They contend that a rich public domain is essential for growth of the information society. WSIS also promotes universal access with equal opportunities for all scientific knowledge and open access

initiatives for creation and publication of scientific and technical information.¹⁴¹

The WSIS Principles declare a commitment to turning the digital divide into a digital opportunity for all, particularly for those who risk being left behind and being further marginalized.¹⁴² To overcome the digital divide, WSIS encourages more efficient use of existing approaches and mechanisms and fully exploring new ones, in order to provide financing for the development of infrastructure, equipment, capacity building and content, which are essential for participation in the Information Society.¹⁴³ Recognizing the potential of ICT for development, the WSIS advocates:

1) developing countries to increase their efforts to attract major private national and foreign investments for ICTs through the creation of a transparent, stable and predictable enabling investment environment;

2) developed countries and international financial organisations to be responsive to the strategies and priorities of ICTs for development, mainstream ICTs in their work programmes, and assist developing countries and countries with economies in transition to prepare and implement their national e-strategies. Based on the priorities of national development plans and implementation of the above commitments, developed countries should increase their efforts to provide more financial resources to developing countries in harnessing ICTs for development;

3) the private sector to contribute to the implementation of this Digital Solidarity Agenda¹⁴⁴

To assist in bridging the Digital Divide, a Digital Solidarity Fund has been created to finance development projects that will enable excluded people and countries to enter the new era of the Information Society.¹⁴⁵ More than one hundred and twenty cities have committed to implement what is known as the “Geneva Principle.”¹⁴⁶ The Geneva Principle stipulates that public calls for bids in the field of ICT shall include a digital solidarity clause requiring the company that obtains the contract to contribute one percent of the transaction to the Digital Solidarity Fund.¹⁴⁷

Although the WSIS Principles do not explicitly endorse a particular software model, they do promote increasing awareness among all stakeholders of the possibilities offered by different software models, including proprietary, open-source and free software, in order to increase competition, access by users, diversity of choice, and to enable all users to develop solutions which best meet their requirements.¹⁴⁸ Affordable access to software is touted as an important component of a truly inclusive Information Society.¹⁴⁹ Although the Principles do not fully endorse the government bias for one software model over another, the fact that they

promote consideration of open source and free software is some victory for advocates of the New International IP Agenda. In fact, those advocates have been instrumental in shaping the criteria for considering the various software models to include areas in which open software advocates believe they have an inherent advantage over proprietary software—namely increasing competition, access by users, diversity of choice, and affordable access. Though they have not been successful in incorporating openly anti-IP positions that likely would be rejected by some countries, including the United States, it is clear that they are shaping the discussion and having a considerable impact.

The WSIS also calls on governments to establish an enabling environment for the Information Society at the national and international level, wherein ICTs are used as an important tool for good governance.¹⁵⁰ WSIS advocates Government intervention, as appropriate, to correct market failures, to maintain fair competition, to attract investment, to enhance development of ICT infrastructure and applications, to maximize economic and social benefits, and to serve national priorities.¹⁵¹ Not coincidentally, proponents of the New International IP Agenda advocate government intervention in favor of open source software to correct the failure of the commercial software market to maintain fair competition, to enhance development of software applications, and to maximize economic and social benefits.¹⁵²

The WSIS Principles assert that both (1) intellectual property protection and (2) wide dissemination, diffusion, and sharing of knowledge are important to encourage innovation and creativity in the Information Society.¹⁵³ This dichotomy sets up exactly the equal footing for access to knowledge advanced by the New International IP Agenda. The WSIS Principles consider meaningful participation by all in intellectual property issues and knowledge sharing through full awareness and capacity awareness to be a fundamental part of an inclusive Information Society.¹⁵⁴ Once again the Principles ensure that NGOs and not just governments will have a seat at the table for discussions regarding the proper interplay of intellectual property protection and access to knowledge.

IV. Conclusion

The New International IP Agenda has brought new controversy into international IP policy discussions. This broad agenda, united by a thread of skepticism regarding intellectual property and a common network of NGOs and activists, has been asserted in many different contexts. Discussions and negotiations regarding a wide variety of topics, including international development, pharmaceuticals, software patents, the digital divide, and cultural policy, now include contentious debates regarding the morality and efficacy of intellectual property rights.

So far, the breadth and visibility of the New International IP Agenda has been more impressive than any results arising from it. Nevertheless, its proponents have put their issues on the agenda of international organizations including WIPO,

the WTO, and the U.N. They have polarized discussions regarding a wide variety of intellectual property issues, most notably stalling patent harmonization negotiations and blocking software patents in the EU.

International IP policy has entered a new age of controversy. Intellectual property owners and those who support intellectual property rights will need to better articulate their case and meet the wide ranging challenge of IP skeptics.

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Footnotes

¹ See James Boyle, *A Manifesto on WIPO and the Future of Intellectual Property*, 9 DUKE L. & TECH. J. 0009 (2004) (“[T]he fundamental principle of balance between the public domain and the realm of property seems to have been lost. The potential costs of this loss of balance are just as worrisome as the costs of piracy that so dominate discussion in international policy making.”).

² Proposal to Establish a Development Agenda for WIPO: An Elaboration of Issues Raised in Document WO/GA/31/11.7 (April 6, 2005)(submission by the Group of Friends of Development to WIPO Intersessional Intergovernmental Meeting IIM/1/4-2005) [hereinafter Submission by the Group of Friends of Development to WIPO], available at http://www.wipo.int/edocs/mdocs/mdocs/en/iim_1/iim_1_4.pdf (last visited Aug. 2, 2005).

³ Not every individual member of this international network of NGOs, academics, activists, politicians, and bureaucrats has the same concerns and opinions. In particular, many of the parts of this network are far more moderate than the whole. Individuals working on international IP issues often contend that they support the general principles of intellectual property law, professing to want only to address particular problems and/or to restore what they see as a proper balance between private ownership and the public good. On the one hand, this assertion is clearly true, especially with respect to many thoughtful academics, results-oriented development specialists, and the more pragmatic elements of the open source movement. On the other hand, there are some who laud “balance” in principle, but appear to oppose IP rights consistently in practice. These across-the-board-skeptics are not just fringe players, but rather constitute an important and serious part of the network, organizing many of the important initiatives and playing a prominent role in discussions at international organizations. The primary example is the Consumer Project on Technology (often called CPTech), which consistently opposes IP rights. Its leaders speak frequently at international intergovernmental and non-governmental IP forums, and CPTech plays a key organizing role by initiating treaty proposals, hosting events, issuing research, and organizing e-mail discussion lists. See CPTech.org, *About the Consumer Project on Technology*, at <http://www.cptech.org/about.html> (last visited June 11, 2005).

⁴ Under compulsory licensing, the government takes for itself or gives to others the right to use a patented invention, thus depriving

the patent owner of its ability to extract a royalty of its choosing. Under some compulsory licensing schemes the patent owner has some opportunity to negotiate a royalty, but its leverage is greatly reduced and thus, most likely, its payment. *See infra* note 66-69 and accompanying text.

⁵ *See id.* As noted above, one of the key leaders of the New International IP Agenda is the U.S.-based CPTECH, which was founded by Ralph Nader and funded by George Soros, the Rockefeller Foundation, the Ford Foundation, the MacArthur Foundation and others. A perusal of CPTECH's website quickly shows the incredible breadth and sophistication of its international activities promoting skepticism of intellectual property.

⁶ Press Release, United States Patent Office, Patent Law Harmonization Talks Stall; Brazil, Argentina, India Oppose Compromise (June 14, 2005), *available at* <http://www.uspto.gov/main/homepagenews/bak2005jun14.htm> (last visited June 20, 2005).

⁷ Although the successful linkage to trade has inspired a lot of the controversy, a number of other issues have brought intellectual property to the attention of the development community in the last decade: the AIDS crisis (*see* Section III below), the growing importance of IP to the world economy, and concern that Western companies were appropriating indigenous knowledge and culture without compensation. The latter issue has led to proposals for rights in "traditional knowledge," whereby indigenous people would be given some measure of control over and/or compensation for pharmaceuticals, art, and entertainment made based on the knowledge of indigenous communities. While traditional knowledge has been an important topic in international forums for the past decade, it is outside of the scope of the paper. While IP skeptics are sometimes willing to make an exception for protection of traditional knowledge, they often see such information as belonging in the public domain which sometimes puts them at odds with traditional knowledge advocates. *See* Anupam Chander & Madhavi Sunde, *The Romance of the Public Domain*, 92 CALIF. L. REV. 1331 (2004).

⁸ *See* Jagdish Bhagwati, *Comment on Services and Intellectual Property Rights*, in *THE NEW GATT: IMPLICATIONS FOR THE UNITED STATES* 111, 112-114 (Susan Collins & Barry Bosworth eds., 1994) (discussing reasons developing nations reluctantly accepted increased IP protection in exchange for trade liberalization).

⁹ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS – RESULTS OF THE URUGUAY ROUND, vol. 31, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement].

¹⁰ They were strong relative to what existed before. For details regarding the differences from prior agreements, *see, e.g.*, J.H. Reichman, *The TRIPS Agreement Comes of Age: Conflict or Cooperation with the Developing Countries?*, 32 CASE W. RES. J. INT'L L. 441 (2000).

¹¹ Ralph Oman, *Berne Revision: The Continuing Drama*, 4 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 139, 144 (1993).

¹² *See* David Vivas-Eugui, *Regional and Bilateral Agreements and a Trips-Plus World: The Free Trade Area of the Americas (FTAA)* (2003), *available at* [http://www.geneva.uno.info/pdf/FTAA\(A4\).pdf](http://www.geneva.uno.info/pdf/FTAA(A4).pdf) (last visited Aug. 4, 2005).

¹³ *See generally* R. Michael Gadbaw, *Intellectual Property and International Trade: Merger or Marriage of Convenience?*, 22 VAND.

J. TRANSNAT'L L. 223 (1989) (discussing linkage of intellectual property and trade policies).

¹⁴ *See* Vivas-Eugui, *supra* note 14.

¹⁵ TRIPS imposed a three-tiered system of implementation: Developed nations had to comply almost immediately, developing nations had five years (until January 1, 2000), and least developed nations originally had ten years. The time for least developed nations to comply with requirements regarding pharmaceutical patents was extended to 2016, and a number of waivers are also available to them, so it will be some time before they are fully obligated. *See* WORLD TRADE ORGANIZATION, FREQUENTLY ASKED QUESTIONS ABOUT TRIPS IN THE WTO, *available at* http://www.wto.org/english/tratop_e/tripf_e.htm (last visited Aug. 3, 2005).

¹⁶ *Intellectual Property Rights and Human Rights*, Res. 2000/7, U.N. Sub-Comm'n. on the Promotion and Protection of Human Rights, 52nd Sess., pmb. ¶ 11, U.N. Doc. E/CN.4/Sub.2/RES/2000/7 (hereinafter Resolution 2000/7) (stating that "actual or potential conflicts exist between the implementation of the TRIPS Agreement and the realization of economic, social and cultural rights").

¹⁷ *See id.* The Declaration's view of the conflict between intellectual property and human rights largely is derived from the International Covenant on Economic, Social and Cultural Rights, which recognizes the right "to enjoy the benefits of scientific progress and its applications." International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, arts. 15(1)(c), S. EXEC. DOC. D, 95-2, at 18 (1977), 993 U.N.T.S. 3, 9 (*entered into force* Jan. 3, 1976) [hereinafter ICESCR]. The United States has never ratified this treaty, reflecting a Cold War divide in which the USSR and socialist nations embraced ICESCR and its socialist vision of human rights. *See* N.D. White, *The Law of International Organizations* 232 (1996); J. Oloka-Onyango, *Reinforcing Marginalized Rights in an Age of Globalization: International Mechanisms, Non-State Actors, and the Struggle for Peoples' Rights in Africa*, 18 AM. U. INT'L L. REV. 851, 852 (2003); *see also* Nsongurua J. Udombana, *Articulating the Right to Democratic Governance in Africa*, 24 MICH. J. INT'L L. 1209, 1224 (2003).

¹⁸ *See* Resolution 2000/7, *supra* note 18.

¹⁹ *See* Laurence R. Helfer, *Human Rights and Intellectual Property: Conflict or Coexistence?*, 5 MINN. INTELL. PROP. REV. 47, 56 (2003) (detailing several U.N. human rights initiatives related to intellectual property).

²⁰ *See Access to Medication in the Context of Pandemics such as HIV/AIDS*, Res. 2001/33, U.N. Comm'n. on Human Rights, U.N. Doc. E/CN.4/RES/2001/33 (2001) (mandating that states "adopt legislation or other measures, in accordance with applicable international law" to "safeguard access" to medicine "from any limitations by third parties"); *Id.* at ¶ 3(b); *see also Access to Medication in the Context of Pandemics such as HIV/AIDS*, Res. 2002/32, U.N. Comm'n. on Human Rights, U.N. Doc. E/CN.4/2002/2000 (2002); *Access to Medication in the Context of Pandemics such as HIV/AIDS*, Res. 2003/29, U.N. Comm'n. on Human Rights, U.N. Doc. E/CN.4/2003/L.11/Add.3 (2003).

²¹ Submission by the Group of Friends of Development to WIPO, *supra* note 4.

²² *See* CPTECH, HEALTH CARE AND INTELLECTUAL PROPERTY, *available at* <http://www.cptech.org/ip/health/> (last visited June 22, 2005) (collecting resources and advocacy on "access to health").

²³ See CPTECH, ACCESS TO KNOWLEDGE (A2K), available at <http://www.cptech.org/a2k/> (last visited June 22, 2005) (collecting resources and advocacy on “access to knowledge”).

²⁴ Helfer, *supra* note 21, at 57.

²⁵ Resolution 2000/7, *supra* note 18, at ¶ 3.

²⁶ See, e.g., Martin Khors, *Offsetting IPRs' Adverse Effects on Access to Knowledge*, SOUTH NORTH DEVELOPMENT MONITOR, Feb. 4, 2005, available at http://www.choike.org/nuevo_eng/informes/2630.html (last visited June 18, 2005) (stating that Access to Knowledge treaty advocates contend “that a treaty on access to knowledge should be based on the human rights model, in which access of knowledge is acknowledged as a human right, that this right is primary, and the rights to holders of copyrights or patents are seen as secondary or exceptions, and should thus be limited and in ways that would not threaten the primary human rights.”).

²⁷ See, e.g., ELLEN ‘T HOEN, MEDECINS SANS FRONTIERES, A GUIDE TO THE POST-2005 WORLD: TRIPS, R&D AND ACCESS TO MEDICINES, (Jan. 18, 2005), available at http://www.msf.org/msfinternational/invoke.cfm?component=article&objectid=88694E5B-0FED-434A-A21EDA1006002653&method=full_html (last visited June 20, 2005).

²⁸ See, e.g., INTERNATIONAL FEDERATION OF LIBRARY ASSOCIATIONS, LIBRARY-RELATED PRINCIPLE FOR THE INTERNATIONAL DEVELOPMENT AGENDA OF THE WORLD INTELLECTUAL PROPERTY ORGANIZATION (Jan. 26, 2005), available at <http://www.ifla.org/III/clm/pl/Library-RelatedPrinciples-en.html> (last visited June 20, 2005).

²⁹ See, e.g., Alan Deardorff, *Should Patent Protection Be Extended to All Developing Countries?*, in THE MULTILATERAL TRADING SYSTEM: ANALYSIS AND OPTIONS FOR CHANGE 435, 446 (Robert Stern ed., 1993) (arguing that least developed nations will be net losers under TRIPS because too little innovative activity originates in those countries); Chakravarthi Raghavan, *Patents No Longer Efficient for Biomedical Research*, THIRD WORLD NETWORK (Nov. 2002), available at <http://www.twinside.org.sg/title/twe293c.htm> (last visited June 20, 2005) (describing purported “rent seeking” behavior associated with patents and decrying “costs to the developing world of being forced to accept the global monopolies created for big pharmaceutical corporations through the WTO’s TRIPS Agreement”).

³⁰ Proposal by Argentina And Brazil for the Establishment of a Development Agenda for WIPO, 2 (Submission by Argentina and Brazil to WIPO General Assembly Meeting WO/GA/30/11-2004) (Aug. 27, 2004), available at http://www.wipo.int/documents/en/document/govbody/wo_gb_ga/pdf/wo_ga_31_11.pdf (last visited June 20, 2005).

³¹ Submission by the Group of Friends of Development to WIPO, *supra* note 4, at 7.

³² As this paper goes to press in August 2005, the Development Agenda’s future awaits further debate and decision by WIPO’s General Assembly in meetings scheduled for late September and early October 2005. See *Unfinished WIPO Development Agenda Left to General Assembly*, 2 INTELLECTUAL PROPERTY WATCH 1 (August/September 2005) available at http://www.ip-watch.org/IP-W-August_Sept.2005.pdf. The parties participating in the Development Agenda meetings have been unable to reach agreement on most issues and have left resolution to the General Assembly. *Id.* The most intense debate over the Development Agenda at the moment is procedural. Those who embrace the Development Agenda seek ongoing meetings at WIPO devoted exclusively to pursuing the Development Agenda. See *id.* The United States and others who are skeptical of the Development Agenda seek to reduce its prominence by moving discussions to a standing committee

with other responsibilities. See *id.* Meanwhile, Brazil and others have advanced substantive proposals that call for consideration of the Access to Knowledge Treaty described below.

³³ OPEN SOCIETY INSTITUTE, GENEVA DECLARATION ON THE FUTURE OF THE WORLD INTELLECTUAL PROPERTY ORGANIZATION (Sept. 29, 2004), available at http://www.soros.org/initiatives/information/news/wipo_20040929/wipo_declaration.pdf (last visited June 20, 2005).

³⁴ *Id.*

³⁵ See CPTECH.org, *supra* note 25 (collecting resources and advocacy on “access to knowledge”); see also *May 9, 2005 Draft Treaty on Access to Knowledge*, available at <http://www.cptech.org/a2k/consolidatedtext-may9.pdf> (May 9, 2005).

³⁶ See generally CPTECH.org, *supra* note 25.

³⁷ See *Unfinished WIPO Development Agenda Left to General Assembly*, 2 INTELLECTUAL PROPERTY WATCH 1, 4 (August/September 2005), available at http://www.ip-watch.org/IP-W-August_Sept.2005.pdf.

³⁸ See CPTECH.org, *May 9, 2005 Draft Treaty on Access to Knowledge*, available at <http://www.cptech.org/a2k/consolidatedtext-may9.pdf> (May 9, 2005).

³⁹ *Brazil Holds Out Possibility Of Compulsory License For Aids Drugs*, FDA WEEK, June 17, 2005.

⁴⁰ The Convention on Cultural Diversity would allow nations to set quotas on foreign entertainment products (notwithstanding trade agreements). Some language condemning piracy upset development advocates, who attempted to replace it with language promoting access to knowledge issues. In the end, “[a]ll elements of the previous drafts that dealt with intellectual property rights and piracy were removed from the substantive clauses of the Convention. The only reference to IP is now in the preamble . . . with the exception of an additional preamble provision on the importance of the protection of indigenous knowledge, [all proposals to add IP related language] have been defeated.” Garry Neil, *Report by Garry Neil (INCD) on Final Round of UNESCO Negotiations*, MEDIA TRADE MONITOR (May 31, 2005), available at <http://www.mediatrademonitor.org/node/view/213> (last visited June 20, 2005).

⁴¹ See *infra* Section V.

⁴² See USPTO Press Release, *supra* note 8. (“The impasse . . . raises serious questions as to whether WIPO is even a viable forum for further meaningful patent discussions . . . WIPO appears to be facing a serious identity crisis, underscoring the need to consider alternative approaches for achieving harmonization so that we can realize efficiencies and better patent quality worldwide. Our users have spoken in no uncertain terms about their need for progress in this area.”).

⁴³ IP negotiations have been removed from WIPO before because of such an impasse. An attempt to revise the Paris Convention in WIPO failed after 6 years of discussions, causing negotiators to move their harmonization talks to GATT negotiations, ultimately resulting in TRIPS. See JEROME H. REICHMANN & CATHERINE HASENZAH, INTERNATIONAL CENTRE FOR TRADE AND SUSTAINABLE DEVELOPMENT, NON-VOLUNTARY LICENSING OF PATENTED INVENTIONS: HISTORICAL PERSPECTIVE, LEGAL FRAMEWORK UNDER TRIPS, AN OVERVIEW OF THE PRACTICE IN CANADA AND THE USA, 12-13 (June 2003), available at http://www.ictsd.org/pubs/ictsd_series/iprs/CS_reichman_hasenzahl.pdf (last visited Aug. 3, 2005).

- ⁴⁴ ROBERT M. SHERWOOD, *INTELLECTUAL PROPERTY AND ECONOMIC DEVELOPMENT* (ch. 9) (Westview Press 1990), *available at* <http://www.kreative.net/ipbenefits/iped/default.htm> (last visited June 20, 2005).
- ⁴⁵ HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (2001).
- ⁴⁶ *See id.*
- ⁴⁷ *See* SHERWOOD, *supra* note 46.
- ⁴⁸ *See, e.g.,* REICHMANN & HASENZAH, *supra* note 45, at 24.
- ⁴⁹ There is nothing unusual about this state of affairs, as companies take advantage of patents, product differentiation, language differences, and other opportunities to engage in price discrimination among consumers in different countries, thus maximizing their overall revenue. At some level, we may also find it morally acceptable to have developed world consumers subsidize poorer consumers. *See* Thomas Cotter, *Market Fundamentalism and the TRIPS Agreement*, 22 CARDOZO ARTS & ENT. L.J. 307, 337 (2004) (making such a moral argument). An inability to secure a certain return (or *any* return) in some countries could, however, make a difference at the margins where a drug or other product has a smaller market and/or less price elasticity in the developed world.
- ⁵⁰ *See* Alan O. Sykes, *TRIPS, Pharmaceuticals, Developing Countries, and the Doha "Solution"*, 3 CHI. J. INT'L L. 47, 62-63 (2002) (discussing dearth of research on "essential medicines" for diseases that plague developing world and arguing that lack of research may be attributable to lack of intellectual property protection).
- ⁵¹ *See generally* F. Scott Kieff, *Property Rights and Property Rules for Commercializing Inventions*, 85 MINN. L. REV. 697 (2001).
- ⁵² *See* Srividhya Ragavan, *A "Patent" Restriction On Research & Development: Infringers Or Innovators?*, 1 J. L., Tech & Policy 73 (2004) (stating that IP law harmonization will "suffer unless developing countries can benefit from it. Otherwise, even developing countries that amend patent legislation to become TRIPS compliant will relax implementation"); Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century*, 50 AM. U. L. REV. 131, 207-11 (2000) (noting this dynamic at work in China and advocating local benefits from IP to as a way to promote greater IP protection).
- ⁵³ Reichman, *supra* note 12, at 465.
- ⁵⁴ *See id.*
- ⁵⁵ *See* Ragavan, *supra* note 54.
- ⁵⁶ *Id.*
- ⁵⁷ *See* Robert M. Sherwood et al., *Promotion of Inventiveness in Developing Countries Through a More Advanced Patent Administration*, 39 IDEA 473 (1999).
- ⁵⁸ *See* Ragavan, *supra* note 54, at 97-98 (citing example of Indian computer industry supporting IP rights once it realized that they were in their own economic interest, as well as examples of Japan, Hong Kong, Taiwan, and South Korea supporting IP rights once they produced local benefits).
- ⁵⁹ For a primer on applying the new institutional economics to development issues, *see* FREDERIC SAUTET, MERCATUS CENTER, GEO.MASON UNIV, *THE ROLE OF INSTITUTIONS IN ENTREPRENEURSHIP: IMPLICATIONS FOR DEVELOPMENT POLICY* (2005), *available at* <http://www.mercatus.org/pdf/materials/1053.pdf> (last visited June 20, 2005).
- ⁶⁰ Douglass C. North, *Privatization, Incentives and Economic Performance*, ECONOMICS WORKING PAPER ARCHIVE (Wash. U. Economics, Working Paper No. 8, 1994), *available at* <http://econwp.wustl.edu:8089/eps/eh/papers/9411/9411002.pdf> (last visited June 20, 2005); *also published in* THE PRIVATIZATION PROCESS: A WORLDWIDE PERSPECTIVE (Terry L. Anderson & Peter J. Hill eds., 1996).
- ⁶¹ *Id.*; *see also* Sautet, *supra* note 61.
- ⁶² On the other hand, the poor institutional climate of least developed countries also often makes charitable assistance ineffective. For example, access to medicine may not be a failure of the intellectual property system so much as a failure of governments and the public health system to deliver basic health care. *See infra* nn. 104 - 127 and accompanying text.
- ⁶³ *See* Theresa Beeby Lewis, *Patent Protection for the Pharmaceutical Industry: A Survey of the Patent Laws of Various Countries*, 30 INT'L LAW 835 (1996).
- ⁶⁴ *See supra* note 26 and accompanying text.
- ⁶⁵ REICHMANN & HASENZAH, *supra* note 45, at 10.
- ⁶⁶ It stretches back to the 1883 at least. *See id.* at 10-11 (describing history of compulsory licensing in various treaties and countries).
- ⁶⁷ *Id.* at 10; *see also* Gianna Julian-Arnold, *International Compulsory Licensing: The Rationales and the Reality*, 33 IDEA 349, 349-50 (1993).
- ⁶⁸ Friedrich-Karl Beier, *Exclusive Rights, Statutory Licenses and Compulsory Licenses in Patent and Utility Model Law*, 30 INT'L REV. INDUS. PROP. & COPYRIGHT L. 251, 265-66 (1999).
- ⁶⁹ *See* REICHMANN & HASENZAH, *supra* note 45.
- ⁷⁰ *See id.*
- ⁷¹ TRIPS Agreement, *supra* note 11, at ¶ 31.
- ⁷² Another provision gave those least developed countries that had not yet enacted pharmaceutical patent protection until 2016 to do so, with the opportunity to seek further extensions.
- ⁷³ Press Release, World Trade Organization, *Decision Remove Final Patent Obstacle to Cheap Drug Imports* (Aug. 30, 2003), *available at* http://www.wto.org/english/news_e/pres03_e/pr350_e.htm (last visited Aug. 4, 2005).
- ⁷⁴ *See, e.g.,* Press Release, Health Gap Global Access Project, *The Incredible Shrinking Doha Declaration* (August 26, 2003), *available at* http://www.healthgap.org/press_releases/03/082603_HGAP_BP_WTO_Shink_Doha.html (last visited June 21, 2005) (asserting that implementation of the Doha Declaration shows that "the U.S. remains more committed to maximizing profits for the most profitable industry in the world, Big Pharma, than it is to the million of lives at stake").

⁷⁵ See *id.*; CECILIA OH, THIRD WORLD NETWORK, TRIPS AND PHARMACEUTICALS: A CASE OF CORPORATE PROFITS OVER PUBLIC HEALTH, (2000), available at <http://www.twinside.org.sg/title/twr120a.htm> (last visited June 22, 2005) (asserting that “[o]f the 50% of the patients in developing countries who lack access to essential drugs, many die because the drugs are patented and therefore too expensive”).

⁷⁶ See CPTECH, RECENT HEALTH-RELATED COMPULSORY LICENSES AND DISPUTES, available at <http://www.cptech.org/ip/health/cl/recent-examples.html> (last visited June 22, 2005) (collecting examples of a handful of [mostly unsuccessful] initiatives to impose compulsory licensing).

⁷⁷ JAMES LOVE, CPTECH, CPTECH STATEMENT ON WTO DEAL ON EXPORTS OF MEDICINES (Aug. 2003), available at <http://www.cptech.org/ip/wto/p6/cptech08302003.html> (last visited June 22, 2005) (“The next step for public health activists will be to be more pro-active on trade and public health, both locally and globally. Locally it is now time for countries to give effect to paragraph 4 of the Doha Declaration, and actually issue compulsory licenses to promote access to medicine for all.”).

⁷⁸ TRIPS Agreement, *supra* note 11, at ¶ 31.

⁷⁹ See Cotter, *supra* note 51, at 334.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² See CPTECH, PROPOSAL FOR MEDICAL R&D TREATY, available at <http://www.cptech.org/workingdrafts/rndtreaty.html> (last visited Aug. 4, 2005).

⁸³ Letter from James Love, Director, CPTECH, to World Health Organization Commission on Intellectual Property, Innovation and Health (Feb. 24, 2005), available at <http://www.cptech.org/workingdrafts/rndsignonletter.html> (last visited Aug. 4, 2005).

⁸⁴ *Id.*

⁸⁵ CPTECH, MEDICAL RESEARCH AND DEVELOPMENT TREATY ¶ 4, (Feb. 7, 2005) (hereinafter MRDT), available at <http://www.cptech.org/workingdrafts/rndtreaty4.pdf> (last visited June 22, 2005).

⁸⁶ *Id.* at ¶ 5.

⁸⁷ *Id.* at ¶ 7.

⁸⁸ *Id.* at ¶ 13.

⁸⁹ *Id.* at ¶¶ 14, 15.

⁹⁰ *Id.* at ¶ 16.

⁹¹ Andrew Jack, *WHO Members Urged to Sign Kyoto-Style Medical Treaty*, FIN. TIMES 7, February 25, 2005.

⁹² See *id.*

⁹³ WORLD HEALTH ORGANIZATION, WHO MEDICINES STRATEGY: COUNTRIES AT THE CORE 2004 – 2007 14 (2004), available at http://www.who.int/medicines/strategy/MedicinesStrategy2004_2007/MedicinesStrategy2004_7English.pdf (last visited Aug. 4, 2005).

⁹⁴ *Id.* at 3. (“In developing countries, where an estimated 40 million people are infected with HIV/AIDS, life-saving antiretroviral medicines . . . are available to only 300,000 of the 5-6 million people currently in need of treatment.”).

⁹⁵ WORLD HEALTH ORGANIZATION ESSENTIAL DRUGS AND MEDICINES HOMEPAGE, available at <http://www.who.int/medicines> (WHO defines essential medicines as follows: “Essential medicines are those that satisfy the priority health care needs of the population. They are selected with due regard to public health relevance, evidence on efficacy and safety, and comparative cost-effectiveness. Essential medicines are intended to be available within the context of functioning health systems at all times in adequate amounts, in the appropriate dosage forms, with assured quality and adequate information, and at a price the individual and the community can afford.”) (Note that the essential medicines concept considers cost, so it may, by definition, exclude certain more costly patented drugs. (But WHO does not directly consider patent status in creating the list.). On the other hand, it includes a number of relatively expensive antiretrovirals used against the HIV virus, presumably because they are no inexpensive substitutes, which makes them “essential.” The list is thus as authoritative a list of the most important drugs as is likely to exist.) (last visited June 22, 2005).

⁹⁶ Amir Attaran, *How Do Patents And Economic Policies Affect Access To Essential Medicines In Developing Countries?* 23 HEALTH AFF. 155 (2004).

⁹⁷ *Id.*

⁹⁸ See Letter from Connie Liu, Global Health Chair, American Medical Student Association & Sanjay Basu, AIDS Program, Yale University School of Medicine, to Dr. Amir Attaran, Royal Institute of International Affairs and Idealith Research Foundation (May 11, 2004), available at <http://content.healthaffairs.org/cgi/eletters/23/3/155> (last visited June 20, 2005).

⁹⁹ Consumer Project on Technology, *Comment on the Attaran/Gillespie-White and PhRMA Surveys of Patents on Antiretroviral drugs in Africa* (Oct. 16, 2001), <http://www.cptech.org/ip/health/africa/dopatents/matterinafrica.html> (last visited June 22, 2005).

¹⁰⁰ As the WHO report cited previously describes, billions of people “have no regular access to quality essential medicines.” WORLD HEALTH ORGANIZATION, THE WHO REPORT ON INFECTIOUS DISEASES 1999: REMOVING OBSTACLES TO HEALTHY DEVELOPMENT (1999), available at <http://www.who.int/infectious-disease-report/pages/ch4text.html> (Not just to some medicines or to patented medicines. Rather, the problem is a total failure of the public health system.) (last visited June 22, 2005).

¹⁰¹ *Id.*

¹⁰² PHILIP STEVENS, INTERNATIONAL POLICY NETWORK, DISEASES OF POVERTY AND THE 10/90 GAP 10 (2004), available at http://www.fightingdiseases.org/pdf/Diseases_of_Poverty_FINAL.pdf (last visited Aug. 4, 2005).

¹⁰³ Libby Levinson & Richard Laing, *The Hidden Costs of Essential Medicines*, 33 ESSENTIAL DRUGS MONITOR 20 (WHO 2003), available at http://www.who.int/medicines/library/monitor/33/EDM33_20-21_Hidden_e.pdf (last visited Aug. 4, 2005).

¹⁰⁴ *Id.* at 21.

¹⁰⁵ *Id.*

- ¹⁰⁶ *Id.* A different study looked at a wider sample of countries and concluded that “the global average of these combined taxes was eighteen percent of the total price, with Malaysia having the lowest rate at 0.01 percent and India the highest at fifty-five per cent.” International Policy Network, *supra* note 104, at 9 (citing EUROPEAN COMMISSION, WORKING DOCUMENT: DEVELOPING COUNTRIES’ DUTIES AND TAXES ON ESSENTIAL MEDICINES USED IN THE TREATMENT OF THE MAJOR COMMUNICABLE DISEASES (2003), available at <http://trade-info.cec.eu.int/doclib/html/113184.htm>) (last visited Aug. 4, 2005).
- ¹⁰⁷ INTERNATIONAL POLICY NETWORK, *supra* note 104, at 9 – 10.
- ¹⁰⁸ *Id.* at 9.
- ¹⁰⁹ *Id.* at 9 – 10.
- ¹¹⁰ Daniel Dutra, *Brazil Space Program to Get Greater Funding*, BRAZZIL MAGAZINE (Jan. 28, 2005), available at <http://www.brazzilmag.com/content/view/1283/49/> (last visited Aug. 4, 2005).
- ¹¹¹ K.S. Jayaraman, *India Approves Moon Mission*, SPACE.COM, Aug. 19, 2003, available at http://www.space.com/missionlaunches/india_moon_030819.html (last visited Aug. 5, 2005).
- ¹¹² Glenn Kessler & Colum Lynch, *U.S. Calls Killings In Sudan Genocide*, WASH. POST, Sept. 10, 2004, at A1.
- ¹¹³ Warren Hoge, *Zimbabwe’s policy called ‘disastrous’: U.N. Report Blames President Mugabe for Causing 700,000 People to be Homeless*, NEW YORK TIMES, July 23, 2005, at A9.
- ¹¹⁴ John Donnelly, *In Zimbabwe, Aids Care Done On the Cheap*, BOSTON GLOBE, May 3, 2005.
- ¹¹⁵ *Id.*
- ¹¹⁶ See Michael Fleshman, *Drug Price Plunge Energizes Aids Fight*, 15 AFRICA RECOVERY 1 (June 2001), available at <http://www.un.org/ecosocdev/geninfo/afrec/vol15no1/151aids1.htm> (last visited Aug. 4, 2005).
- ¹¹⁷ See, e.g., Zadie Neufville, *HEALTH-JAMAICA: AIDS Drug Concessions Deemed Insufficient*, INTER PRESS SERVICE, Feb. 22, 2002, available at <http://www.aegis.com/news/ips/2002/ip020216.html> (last visited Aug. 4, 2005); GUMISAI MUTUME, THIRD WORLD NETWORK, AIDS ACTIVISTS MARCH AGAINST PHARMACEUTICAL COMPANIES (March 12, 2001), available at <http://www.twinside.org.sg/title/against.htm> (last visited Aug. 4, 2005).
- ¹¹⁸ See *id.*
- ¹¹⁹ NATIONAL UNION OF PUBLIC AND GENERAL EMPLOYEES NEWS, AIDS DRUG PRICE CUTS DISTRACTS FROM REAL ISSUE: OXFAM (March 8, 2001), available at http://www.nupge.ca/news_2001/news_ma01/n08ma01b.htm (last visited Aug. 2, 2005).
- ¹²⁰ Gilbert Burnham and T. Mebrahtu, *Review: The Delivery of Ivermectin (Mectizan)* 9 TROPICAL MEDICINE & INTERNATIONAL HEALTH A26 (2004), available at <http://www.blackwell-synergy.com/doi/full/10.1111/j.1365-3156.2004.01211.x> (follow “View/Print PDF article (598K)” hyperlink).
- ¹²¹ See *id.*
- ¹²² JOHN HOPKINS BLOOMBERG SCHOOL OF PUBLIC HEALTH, MECTIZAN STUDIES PRESENTED AT SYMPOSIUM (May 17, 2004), available at http://www.jhsph.edu/publichealthnews/articles/Burnham_Mectizan_event.html (last visited Aug. 4, 2005).
- ¹²³ See DIFLUCAN PARTNERSHIP, DIFLUCAN PARTNERSHIP PROGRAMME, available at <http://www.diflucanpartnership.org/en/welcome/> (last visited June 15, 2005).
- ¹²⁴ See, e.g., Press Release, Treatment Action Campaign, Diflucan Watch: Assessment of Pfizer’s Diflucan Donation (July 19, 2001), available at http://www.tac.org.za/newsletter/2001/ns19_07_2001.txt (“TAC believes the donation is a greedy attempt to squeeze the maximum profits out of Diflucan in the dying days of Pfizer’s patent on the drug.”).
- ¹²⁵ See FRIEDRICH A. HAYEK, THE FATAL CONCEIT: THE ERRORS OF SOCIALISM (University of Chicago Press 1991).
- ¹²⁶ The Digital Divide is the phrase often used to describe the uneven distribution of the benefits of the information technology revolution between the developed and developing countries and within societies.
- ¹²⁷ See *supra* notes 32 - 39 and accompanying text.
- ¹²⁸ The Geneva Phase of the Summit established a Declaration of Principles (hereinafter WSIS Principles) and Plan of Action (hereinafter WSIS Plan) for the summit designed to support “An Information Society for All” (see, respectively, WORLD SUMMIT ON THE INFORMATION SOCIETY, DECLARATION OF PRINCIPLES, BUILDING THE INFORMATION SOCIETY: A GLOBAL CHALLENGE IN THE NEW MILLENNIUM, WSIS-03/GENEVA/DOC/4-E(2003), http://www.itu.int/wsis/documents/doc_multi.asp?lang=en&id=1161|1160 (last visited Aug. 5, 2005) and WORLD SUMMIT ON THE INFORMATION SOCIETY, PLAN OF ACTION, WSIS-03/GENEVA/DOC/5-E (2003), available at http://www.itu.int/wsis/documents/doc_multi.asp?lang=en&id=1161|1160 (last visited Aug. 5, 2005)).
- ¹²⁹ See International Telecommunication Union Res. 73 (1998), available at <http://www.itu.int/council/wsis/R73.html> (last visited Aug. 5, 2005).
- ¹³⁰ See G.A. Res. 56/183, U.N. Doc. A/RES/56/183 (Jan. 31, 2002), available at http://www.itu.int/wsis/docs/background/resolutions/56_183_unga_2002.pdf (last visited Aug. 5, 2005).
- ¹³¹ WSIS Plan, *supra* note 130, at ¶ 4 (“The objectives of the Plan of Action are to build an inclusive Information Society; to put the potential of knowledge and ICTs at the service of development; to promote the use of information and knowledge for the achievement of internationally agreed development goals, including those contained in the Millennium Declaration; and to address new challenges of the Information Society, at the national, regional and international levels.”).
- ¹³² See Section II.A *supra*.
- ¹³³ WSIS Principles, *supra* note 130, at ¶ 4.
- ¹³⁴ WSIS Principles, *supra* note 130, at ¶ 19.
- ¹³⁵ WSIS Principles, *supra* note 130, at ¶ 20.
- ¹³⁶ WSIS Plan, *supra* note 130, at ¶ 3.
- ¹³⁷ See WORLD SUMMIT ON THE INFORMATION SOCIETY, ACCREDITATION AND REGISTRATION NGOs AND CIVIL SOCIETY ENTITIES (Feb. 2005), available at <http://www.itu.int/wsis/participation/accreditation/cs.html> (last visited Aug. 5, 2005).

¹³⁸ See INTERNATIONAL TELECOMMUNICATION UNION, LIST OF ACCREDITED CIVIL SOCIETY ENTITIES AND NON-GOVERNMENTAL ORGANIZATIONS FOR THE WORLD SUMMIT ON THE INFORMATION SOCIETY (Feb. 2005), *available at* <http://www.itu.int/wsis/participation/accreditation/lists/civil-society.pdf> (last visited Aug. 5, 2005). In addition, NGOs that are in a consultative status to the United Nations Economic and Social Council (ECOSOC) are not required to submit to formal accreditation, and need only submit an expression of interest to participate. For a list of NGOs in a consultative status to ECOSOC, *see* UNITED NATIONS, NGOS IN CONSULTATIVE STATUS WITH ECOSOC (July 25, 2005), *available at* http://www.un.org/esa/coordination/ngo/pdf/INF_List.pdf (last visited Aug. 5, 2005); *see also* U.N. ECON. & SOC. COUNCIL [ECOSOC] RES. 1996/31, CONSULTATIVE RELATIONSHIP BETWEEN THE UNITED NATIONS AND NON-GOVERNMENTAL ORGANIZATIONS (July 25, 1996), *available at* <http://www.un.org/documents/ecosoc/res/1996/eres1996-31.htm> (last visited Aug. 5, 2005).

¹³⁹ See CONFERENCE OF NON-GOVERNMENTAL ORGANIZATIONS, WHO WE ARE, *available at* <http://www.ngocongo.org/ngowhow/> (last visited Aug. 5, 2005). CONGO ostensibly does not take positions on substantive matters but does provide, through special and ad hoc NGO Committees, fora for discussion of substantive matters by its members and members of the UN Secretariat, UN delegations, and other experts. *Id.* For example, CONGO worked with the WSIS Executive Secretariat and the Tunisian hosts of the WSIS to reserve significant portions of the PREPCOM-1 conference in Tunisia for civil society meetings.

¹⁴⁰ WSIS Principles, *supra* note 130, at ¶ 25.

¹⁴¹ WSIS Principles, *supra* note 130, at ¶¶ 26, 28.

¹⁴² *Id.* at ¶ 10.

¹⁴³ WSIS Plan, *supra* note 130, at ¶ 27.

¹⁴⁴ *Id.*

¹⁴⁵ See DIGITAL SOLIDARITY FUND, FROM THE DIGITAL DIVIDE TO THE NEED FOR A WORLDWIDE SOLIDARITY MOVEMENT, *available at* <http://www.dsffsn.org/en/02-en.htm> (last visited Aug. 5, 2005).

¹⁴⁶ See DIGITAL SOLIDARITY FUND, MORE THAN ONE HUNDRED AND TWENTY CITIES COMMIT TO THE DIGITAL SOLIDARITY FUND, *available at* <http://www.dsffsn.org/en/15c-a04-en.htm#> (last checked July 17, 2005).

¹⁴⁷ See DIGITAL SOLIDARITY FUND, THE DIGITAL SOLIDARITY FUND AND THE “GENEVA PRINCIPLE”, *available at* <http://www.dsffsn.org/en/19-en.htm> (last visited Aug. 5, 2005).

¹⁴⁸ WSIS Principles, *supra* note 130, at ¶ 27.

¹⁴⁹ *Id.*

¹⁵⁰ WSIS Principles, *supra* note 130, at ¶ 38.

¹⁵¹ *Id.* at ¶ 39.

¹⁵² See *supra* Section IV.

¹⁵³ WSIS Principles, *supra* note 130, at ¶ 42.

¹⁵⁴ *Id.*

INTERNATIONAL AND NATIONAL SECURITY LAW

THE DREAM ACT: TAPPING AN OVERLOOKED POOL OF HOME-GROWN TALENT TO MEET MILITARY ENLISTMENT NEEDS

By MARGARET D. STOCK*

Participants at the third annual Marine Advanced Technology Education Center's Remotely Operated Vehicle (ROV) Competition were shocked when four illegal aliens from Mexico—part of an ill-funded high school team from a rundown Hispanic neighborhood in West Phoenix, Arizona—beat sophisticated competitors from the Massachusetts Institute of Technology (MIT) and several other U.S. colleges to win a national competition to build the best underwater robot.¹ Luis Aranda, Cristian Arcega, Lorenzo Santillan, and Oscar Vasquez—all of whom had been living in the United States illegally since they were children—won not only the overall award, but also the design award and the technical writing award. Judges, including one from the U.S. Navy's Office of Naval Research (ONR), were so impressed by the team's accomplishments that they created a special judge's recognition award for the four young men.

Winning this prestigious technical competition, however, could not help these talented high school students with a greater problem: Because of their lack of immigration documents, these young men are unlikely to benefit the United States with their technical abilities. Although they have been educated at taxpayer expense in American public secondary schools, none of these young men can attend a U.S. college or even legally get a job in the United States. In fact, despite his Junior ROTC experience and obvious smarts, when Oscar Vasquez tried to enlist in the U.S. military, he was told that his illegal alien status barred him from joining.²

Experts estimate that there are currently more than half a million young men and women in this same situation, and more than 65,000 more graduate each year from U.S. high schools.³ Under current U.S. immigration law, they have no means of legalizing their status. To allow America to benefit from the talents of those like Oscar Vasquez and his teammates, in 2003, Senator Orrin Hatch (R-UT) introduced the "Development, Relief, and Education Act for Alien Minors" ("the DREAM Act").⁴ The DREAM Act would legalize young undocumented aliens who have been present in the United States since childhood, graduated from a U.S. high school, and stayed out of trouble with the law. Although the DREAM Act failed to pass during the 108th Congress because of election year concerns, many of its sponsors continue to push the bill, and it will likely be re-introduced in a future legislative session. The concept has bipartisan support, and has attracted more than two hundred cosponsors from both sides of the political aisle.

Although opponents of the DREAM Act have argued that it is a "sugar-coated amnesty" rewarding those who have violated U.S. immigration laws, passage of the DREAM Act would be highly beneficial to the United States military.

The DREAM Act promises to enlarge dramatically the pool of highly qualified recruits for the US Armed Forces. In a time when several military services are experiencing difficulties recruiting eligible enlisted soldiers, passage of this bill could well solve the Armed Forces' enlisted recruiting woes, and provide a new source of foreign-language qualified soldiers. Because the DREAM Act requires no change to military rules for enlisting recruits and allows the military to tap into an overlooked pool of home-grown talent, the Department of Defense should support passage of the DREAM Act.

America's news media have recently reported the heartbreaking stories of potential DREAM Act beneficiaries. In addition to reports about the winners of the ROV contest, the media have reported on such illegal residents of the United States as Kamal Essaheb, a 24-year-old Fordham Law honors student from Morocco whose parents overstayed their visas when he was eleven;⁵ Alan Morales, a California high school honors student and varsity volleyball player who has been in the United States since he was ten months old;⁶ Marie Gonzalez, a 19-year-old Costa Rican resident of Missouri who came to the U.S. at the age of five and was recently named one of the top ten women of the year by *Latina* magazine;⁷ and Griselda Lopez Negrete, a 16-year-old Presidential Scholar from South Carolina who has been here since she was two.⁸ These are just a few of the hundreds of stories about potential DREAM Act beneficiaries reported in the media in the past few years.

According to the Pew Hispanic Center, more than 750,000 such young people are residing in the United States today, many of them brought here by parents or smugglers when they were infants or toddlers.⁹ Although the United States Supreme Court, in the case of *Plyler v. Doe*,¹⁰ said that illegal alien children present in the United States have a Constitutional right to attend American public schools until high school graduation, these children cannot expect to hold a job or go to college after they complete their taxpayer-funded education. Instead, if they are discovered by the Department of Homeland Security, DHS will deport them to their "home" country, even if it is a country they cannot remember and where they have no friends, family members, or support network.

Recognizing that it makes little sense to deport these American-educated children to countries where they have no memories or ties, Senator Hatch and others proposed the DREAM Act. To qualify for benefits under the DREAM Act, an alien must have come to the United States while under the age of fifteen (15), and must have lived here for at least five (5) years. A DREAM Act beneficiary must of "good moral character" and must have completed high school in the United

States.¹¹ Upon applying for benefits under the DREAM Act, an alien will be granted six years of “conditional lawful resident” status; during that time, the alien must (1) graduate from a two-year college; (2) complete at least two years towards a four-year college degree; or (3) serve honorably in the United States military for at least two years.¹² At the end of the six years, if the alien has continued to show “good moral character,” the alien will be granted permanent lawful resident status without conditions.¹³ Because attending college is a very expensive proposition, the third option—joining the U.S. Armed Forces—is a likely option for many of the affected young people, hundreds of whom have already demonstrated an interest in joining the U.S. military.

As discussed above, experts estimate that there are upwards of 750,000 young people in the United States today who may be eligible for benefits if the DREAM Act passes, and about 65,000 are added to the pool every year.¹⁴ They are part of the group of more than eight million undocumented or illegal aliens present in the United States today,¹⁵ of which at least 1.6 million are undocumented children.¹⁶ As young people who have just graduated from high school, DREAM Act beneficiaries are in the age cohort of people whom the Armed Forces seek to recruit.¹⁷

Potential DREAM Act beneficiaries are also likely to be a military recruiter’s dream candidates for enlistment; they are not “bottom of the barrel” recruits even if they have no legal status. They have lived in the United States for at least five (5) years, unlike new lawful permanent residents whom the military current enlists. They have no adult period of residence in a foreign country, which might make a background check difficult for security clearance purposes. They often speak both English and another language fluently. Many have participated in Junior ROTC in high school. They do not have a criminal record or other evidence of bad character. They have graduated from an American high school. If approved as DREAM Act beneficiaries, they will have passed rigorous criminal background and security checks from the Department of Homeland Security. They will have “conditional lawful residence,” a status that is recognized under current military recruiting regulations; thus, the military will not have to change its regulations or process their enlistments differently from other recruits. Finally, they will be motivated to serve the United States so as to be given a chance to stay here:

[They] include honor roll students, star athletes, talented artists, homecoming queens, and aspiring teachers, doctors, and U.S. soldiers. They are young people who have lived in the U.S. for most of their lives and desire only to call this country their home. Even though they were brought to the U.S. years ago as children, they face unique barriers to higher education, are unable to work legally in the United States, and must live in constant fear of detection by immigration authorities.¹⁸

The DREAM Act is a particularly attractive legislative option because several of the military services have experienced difficulty enlisting new soldiers in recent months. In March 2005, the Army reported missing its enlistment goals for the first time in five years, the Marine Corps reported similar troubles, and “five of the six military reserve components failed to meet their recruiting goals for the first four months of” FY2005.¹⁹ These recruiting shortfalls are expected to grow over the coming years, making it particularly important for the U.S. Armed Forces to consider all options to attract qualified recruits. If the DREAM Act passes, the Armed Forces will not need to resort to lowering enlistment standards—as has allegedly happened recently—to meet recruiting goals.²⁰

Interestingly, current laws regarding military enlistment do not prohibit the Armed Forces from enlisting even *illegal* aliens in wartime. Title 10, United States Code, section 3253 states, “*In time of peace*, no person may be accepted for original enlistment in the Army unless he is a citizen of the United States or has been lawfully admitted for permanent residence”²¹ The obvious inference from this statutory language is that qualified aliens of any kind can enlist in the Army in time of war. The Air Force is governed by a similar statute.²² There is no statute limiting enlistment in the Regular Navy and Marine Corps, but those services usually apply the same citizenship requirements as the Army and Air Force.

Congress has also made it clear in other statutes that it expects illegal aliens to serve in the military if necessary. Under the Selective Service law, all male aliens age eighteen (18) to twenty-six (26), including illegal aliens, who reside in the United States, are required to register for Selective Service and subject themselves to the draft, if one is instituted.²³

Finally, Congress long ago also passed another law, section 329 of the Immigration and Nationality Act,²⁴ which gives the President authority to proclaim when the nation is engaged in armed conflict such that any aliens who are serving honorably in the military can obtain their U.S. citizenship, regardless of their immigration status, if they are otherwise qualified. No declaration of war is necessary to invoke this authority. Presidents have long invoked this statute to bestow citizenship benefits on illegal aliens serving in the military in wartime, and President George W. Bush did so on July 3, 2002, when he proclaimed that all aliens who have served honorably in the U.S. Armed Forces after September 11, 2001 shall be eligible to apply for expedited U.S. citizenship, regardless of their immigration status.²⁵ His order covered illegal aliens, several of whom were subsequently naturalized.²⁶

In the Global War on Terrorism, however, military recruiters have only been enlisting illegal aliens who present false papers showing that they are citizens or lawful residents. The Department of Defense appears to be officially unaware that it has statutory authority to enlist all aliens who are qualified, regardless of their immigration status. Recruiters have been turning away even legal aliens who have been

granted asylum in the United States, accepting only those immigrants who have “lawful permanent residence.” It appears that there is a disconnect between the statutory authority given to the Department of Defense and the regulations of the Services, and military recruiters have been following their service regulations. Those regulations do not distinguish between wartime and peacetime. Typical is the Army regulation, AR 601-210, which fails to distinguish between wartime and peacetime, stating only that no one is allowed to enlist in the regular Army unless that person is a lawful permanent resident, a U.S. national, a U.S. citizen, or a citizen of Micronesia, Palau, or the Marshall Islands (the latter being covered by a special treaty that allows them to enlist if they wish, even in peacetime).²⁷ The other services, and the Reserve Components, apply similar rules. None of the U.S. Armed Forces make an exception for the current wartime situation, despite their statutory authority to do so, and thus all continue to ban all illegal aliens (and many legal ones) from enlisting, no matter how qualified those aliens are. As a result, more than half a million qualified young people in the United States are deemed “off limits” to military recruiters. Many of these potential recruits have been turned away by recruiters, despite scoring well above their American peers on military entrance tests.

Opponents of the DREAM Act have not specifically argued against the military benefit to legalizing young illegal aliens; instead, their opposition rests on the argument that granting conditional status to these teenagers would reward lawbreaking²⁸ and encourage more illegal immigration.²⁹ They argue that these young people should all be deported to their native countries. This alternative, however, has never been pursued on a large scale by U.S. immigration authorities, and a mass deportation of more than half a million children and teenagers is not a reasonable possibility.

Furthermore, the benefit to the United States from keeping these American-educated individuals and legalizing them is far greater than the benefit, if any, of deporting them all; their deportation hurts the United States by depriving it of a substantial U.S. educated cohort of young people. As U.S. Representative Chris Cannon (R-UT), sponsor of the House version of the DREAM Act, said, “The real tragic thing is, of course, that you have these children who had nothing to do with coming here and breaking the law in the first place and are some of our brightest students, and down the line they get sent back.”³⁰ Perhaps opponents of the DREAM Act would be more convinced of its merits if they realized that deporting these young people confers a massive benefit on their countries of birth while depriving the United States of their talents.

The DREAM Act offers a bipartisan “fix” that would allow military recruiters to enlist this highly qualified cohort of young people, and enactment of the DREAM Act would be a “win-win” scenario for the Department of Defense and the United States. Deporting these young people is not possible as a practical matter and deprives the U.S. of a valuable human asset that can be put to work in the Global

War on Terrorism. In a time when qualified recruits—particularly ones with foreign language skills and foreign cultural awareness—are in short supply, enforcing deportation laws against these young people makes no sense. Americans who care about our national security should encourage Congress to pass the DREAM Act.

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Footnotes

¹ Joshua Davis, *La Vida Robot*, WIRED, 13.04 (April 2005), available at http://www.wired.com/wired/archive/13.04/robot_pr.html.

² *Id.*

³ See *infra* note 9.

⁴ The Development, Relief, and Education for Alien Minors Act of 2003 (“DREAM Act”), S. 1545, 108th Cong. (2003). A similar bill, the Student Adjustment Act, was introduced in the House by Representative Chris Cannon (R-UT). H.R. 1684, 108th Cong. (2003).

⁵ Daniella Gerson, *Fordham Student Inspires Immigrants Backing Passage Of DREAM Act*, NY. SUN, July 14, 2005, at 4.

⁶ American Immigration Lawyers Association (AILA), *Issue Paper: DREAM Act—Student Adjustment For Deserving Children* (2005), available at <http://www.aila.org/content/default.aspx?bc=6796%7C6799%7C8383>.

⁷ Brian DeBose, *Alien Still Hopes For DREAM Act*, WASH. TIMES, July 5, 2005, at A10.

⁸ AILA, *supra* note 6.

⁹ JEFFREY PASSEL, PEW HISPANIC CENTER, UNAUTHORIZED MIGRANTS: NUMBERS AND CHARACTERISTICS; BACKGROUND BRIEFING PREPARED FOR TASK FORCE ON IMMIGRATION AND AMERICA’S FUTURE (2005).

¹⁰ 457 U.S. 202 (1982).

¹¹ S. 1545, 108th Cong. (2003).

¹² *Id.*

¹³ *Id.*

¹⁴ JEFFREY PASSEL, URBAN INSTITUTION, FURTHER DEMOGRAPHIC INFORMATION RELATING TO THE DREAM ACT (2003).

¹⁵ RUTH WASEM, CONG. RESEARCH SERV., UNAUTHORIZED ALIENS IN THE UNITED STATES: ESTIMATES SINCE 1986 (2004).

¹⁶ JEFFREY PASSEL, RANDY CAPPS, & MICHAEL FIX, URBAN INST., UNDOCUMENTED IMMIGRANTS: FACTS & FIGURES (2004).

¹⁷ ANITA HATTIANGADI, ALINE QUESTER, GARY LEE, DIANA LIEN, & IAN MACLEOD, CENTER FOR NAVAL ANALYSES, NON-CITIZENS IN TODAY'S MILITARY: FINAL REPORT, CRM D0011092.A2/FINAL (2005)(discussing characteristics of non-citizens of "recruitable age").

¹⁸ NATIONAL IMMIGRATION LAW CENTER, DREAM ACT: BASIC INFORMATION (February 2005), *available at* http://www.nilc.org/immlawpolicy/DREAM/DREAM_Basic_Info_0205.pdf.

¹⁹ Eric Schmitt, *Army Officials Voice Concern Over Shortfalls In Recruitment*, N.Y. TIMES, Mar. 4, 2005, at 16.

²⁰ Damien Cave, *Army Recruiters Say They Feel Pressure To Bend Rules*, N.Y. TIMES, May 3, 2005, at 23.

²¹ 10 U.S.C. §3253 (2005). Similar rules and laws govern enlistment in the Air Force, Navy, and Marine Corps, although the Navy and Marine Corps are not statutorily barred from enlisting all categories of aliens, even in time of peace. *See* DEP'T OF DEFENSE DIRECTIVE 1304.26, QUALIFICATION STANDARDS FOR ENLISTMENT, APPOINTMENT, & INDUCTION, & E1.2.2.1 (Dec. 21, 1993) ("To be eligible for enlistment in the Regular Army or Air Force, an individual must be an American citizen, or lawfully admitted to the United States for permanent residence (10 U.S.C., 3253 and 8253. . .). There is no equivalent statute limiting enlistment in the Regular Navy and Marine Corps, but they usually apply the same citizenship requirements as those required for the Army and Air Force."). Army Reserve enlistments are governed by 10 U.S.C. § 12102 (2003) ("no person may be enlisted as a Reserve unless—(1) he is a citizen of the United States or has been lawfully admitted to the United States for permanent residence under the Immigration and Nationality Act (8 U.S.C. 1101 *et seq.*); or (2) he has previously served in the armed forces or in the National Security Training Corps."). The National Guard has sometimes allowed aliens to enlist, despite their lack of lawful permanent resident status, and several states permit "able-bodied aliens" to enlist in the state militia.

²² 10 U.S.C. §8253 (2005).

²³ 50 U.S.C.S. Appx § 453 (2005). The Selective Service Act states (emphasis added):

(a) Except as otherwise provided in this title, it shall be the duty of every male citizen of the United States, and every other male person residing in the United States, who, on the day or days fixed for . . . registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined . . . The provisions of this section shall not be applicable to any alien lawfully admitted to the United States as a nonimmigrant under section 101(a)(15) of the Immigration and Nationality Act, as amended (66 Stat. 163; 8 U.S.C. 1101), for so long as he continues to maintain a lawful nonimmigrant status in the United States.

Clearly, this means that any illegal or undocumented male alien must register for the draft.

²⁴ Section 329 of the Immigration & Nationality Act [8 U.S.C. § 1440] states:

(a) Requirements. Any person who, while an alien or a noncitizen national of the United States, has served honorably in an active-duty status in the military, air, or naval forces of the United States. . . during any [] period

which the President by Executive order shall designate as a period in which Armed Forces of the United States are or were engaged in military operations involving armed conflict with a hostile foreign force, and who, if separated from such service, was separated under honorable conditions, may be naturalized as provided in this section if (1) at the time of enlistment, reenlistment, extension of enlistment, or induction such person shall have been in the United States, the Canal Zone, American Samoa, or Swains Island, or on board a public vessel owned or operated by the United States for noncommercial service, whether or not he has been lawfully admitted to the United States for permanent residence, or (2) at any time subsequent to enlistment or induction such person shall have been lawfully admitted to the United States for permanent residence. The executive department under which such person served shall determine whether persons have served honorably in an active-duty status, and whether separation from such service was under honorable conditions: Provided: however, That no person who is or has been separated from such service on account of alienage, or who was a conscientious objector who performed no military, air, or naval duty whatever or refused to wear the uniform, shall be regarded as having served honorably or having been separated under honorable conditions for the purposes of this section. . .

(b) Exceptions. A person filing an application under subsection (a) of this section shall comply in all other respects with the requirements of this title, except that— (1) he may be naturalized regardless of age, and notwithstanding the provisions of section 318 [8 U.S.C. § 1429] as they relate to deportability and the provisions of section 331 [8 U.S.C. § 1442]; (2) no period of residence or specified period of physical presence within the United States or any State or district of the Service in the United States shall be required; and (3) service in the military, air, or naval forces of the United States shall be proved by a duly authenticated certification from the executive department under which the applicant served or is serving, which shall state whether the applicant served honorably in active duty status. . . during any [] period which the President by Executive order shall designate as a period in which Armed Forces of the United States are or were engaged in military operations involving armed conflict with a hostile foreign force, and was separated from such service under honorable conditions.

(c) Revocation. Citizenship granted pursuant to this section may be revoked in accordance with section 340 of this title [8 U.S.C. § 1451] if at any time subsequent to naturalization the person is separated from the military, air, or naval forces under other than honorable conditions

²⁵ Exec. Or. No. 13,269, (July 3, 2002), 67 Fed.Reg. 45, 287 (July 8, 2002). The Executive Order states:

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 329 of the Immigration and Nationality Act 8 U.S.C. § 1440) (the 'Act'), and solely in order to provide expedited naturalization for aliens and noncitizen nationals serving in an active-duty status in the Armed Forces of the United States during the

period of the war against terrorists of global reach, it is hereby ordered as follows:

For the purpose of determining qualification for the exception from the usual requirements for naturalization, I designate as a period in which the Armed Forces of the United States were engaged in armed conflict with a hostile foreign force the period beginning on September 11, 2001. Such period will be deemed to terminate on a date designated by future Executive Order. Those persons serving honorably in active-duty status in the Armed Forces of the United States, during the period beginning on September 11, 2001, and terminating on the date to be so designated, are eligible for naturalization in accordance with the statutory exception to the naturalization requirements, as provided in section 329 of the Act [this section]. Nothing contained in this order is intended to affect, nor does it affect, any other power, right, or obligation of the United States, its agencies, officers, employees, or any other person under Federal law or the law of nations.

²⁶ Florangela Davila, *Army Says Illegal Immigrant Soldier Can Stay*, SEATTLE TIMES, October 3, 2003, at A1.

²⁷ Army Reg. 601-210, REGULAR ARMY & ARMY RESERVE ENLISTMENT PROGRAM, ¶2-4 (“Applicant is eligible for enlistment if any of the following apply: (1) Citizen of the United States. (2) Alien who has been lawfully admitted to the United States for permanent residence. (3) National of the United States. (4) Citizens. . . of the Federated States of Micronesia (FSM), Palau and the Republic of the Marshall Islands (RMI).”). The latter are permitted to enlist in the Army due to United States treaty obligations with their countries.).

²⁸ J. Mann, *Illegal Alien's D.R.E.A.M.—Patriot's Nightmare* (October 28, 2003), available at http://www.vdare.com/mann/dream_act.htm.

²⁹ FEDERATION FOR AMERICAN IMMIGRATION REFORM, THE “DREAM ACT”: HATCH-ING EXPENSIVE NEW AMNESTY FOR ILLEGAL ALIENS (October 2003), available at <http://www.fairus.org/news/News Print.cfm?ID=2194&c=34>.

³⁰ Brian DeBose, *Alien Still Hopes For DREAM Act*, WASH. TIMES, July 5, 2005, at A10.

LET OUR NATIONAL INTEREST GUIDE OUR IMMIGRATION POLICY

BY AUSTIN T. FRAGOMEN, LYNN SHOTWELL AND PATRICK SHEN*

As the debate over the President's immigrant guest worker proposal intensifies, there has been much rhetoric from all sides about "secure borders, open doors." A simplistic view of the debate depicts a bright-line divide between the "restrictionists" and the "pro-immigrants." This view, reinforced by electoral politics and extremist ideology on both sides of the debate, does our nation a grave disservice. Keeping foreigners out or letting them in should not be the goal of our immigration policy. Rather, U.S. immigration policy should be a means to achieving our overall national interest of security, prosperity, and growth.

Security of our homeland should be paramount. The United States should protect its borders vigilantly and enforce its immigration laws in the interior yet be sensitive to our economic interests. Americans are understandably frustrated with the illegal immigration problem and are concerned about security and terrorism. Consequently, the backlash against illegal immigration has made all immigrants, legal and illegal alike, the focus of criticism for all of our societal ills, including unemployment, crime, and even terrorism. Notwithstanding the emotional reaction, we cannot allow our zeal to get in the way of our common sense, and become a stumbling block on the road to achieving our national interest. Just as a blanket amnesty belies that common sense, a blanket anti-immigration policy can be equally irrational. Indeed, in the process of securing our borders, we cannot seclude our country from innovation, nor can we ignore our obvious economic and labor needs. Immigration restriction for restriction's sake does little to make our country safer, and handicaps the U.S. economy in the global competition for technological advancement.

An oft-forgotten group in the midst of the fiery debate between immigration advocates and restrictionists are the highly-educated foreign professionals. Many in this group hold advanced degrees from top U.S. universities; others are employed abroad by multinational corporations. Highly-educated foreign professionals are vital to our national interest. The skills they possess are critical to American employers facing a shortage of talent and operating in a global economy. The inability to access this talent pool means significant financial losses, delays or cancellation of key projects, and adverse impact upon the millions of U.S. workers that these companies collectively employ.

To understand the importance of highly-educated foreign professionals, one must first have a clear view of the role of personnel mobility in the global economy. The key to success of any business today, including American businesses, is to have the right talent in the right place at the right time.¹ The global nature of the economy has blurred national boundaries, allowing, or in some cases, forcing, companies to look beyond the talent pool in their respective home countries. Access to talent is a key component to corporate strategic planning, and the success of a company's operations within any given country will depend significantly on whether that country's political policies foster or impede mobility of personnel.²

There are many reasons why U.S. companies, universities and research institutions need access to highly-educated foreign professionals. These workers may come for varying lengths of time

and in different capacities. Some come as temporary assignees who stay for a relatively short duration. They perform a variety of functions ranging from meeting with clients or others in their organization to working on a project that may be part of a global contract, to starting up a new operation for the parent company. Think of global sales and marketing teams that must get together to launch a new product. Others come for a longer time as international transferees, including high-level managers and executives, as well as professionals with specialized knowledge. These are the Japanese automobile executives overseeing U.S. manufacturing facilities or international branches. Some represent the "best and brightest" in certain disciplines whose presence are crucial to the success of research or business projects. Imagine the researchers looking for the causes and cures of the bird flu. These professionals generally come on temporary visas but, in many instances, it is to the company's and the country's advantage to retain them on a permanent basis.³ Finally, a small but important number of foreign professionals fill the needs of U.S. companies when U.S. workers simply are unavailable. Often, these workers are graduates of U.S. universities, particularly in the science, technology, engineering and mathematics fields.

Despite the obvious need for foreign professionals, the door is increasingly closed to them. Obstacles include months-long visa processing delays, arbitrary quotas limiting the number of professionals that can come to work each year, layers of "red-tape" that drain an employer's resources, and a general "anti-immigration" attitude that makes foreign professionals and their families feel unwelcome. Sadly, these obstacles do nothing to protect the U.S. economy or American workers while driving research and development out of the country. Exacerbating the problem is that some policy makers lose sight of empirical data and unequivocal evidence because of the political rhetoric based on anecdotal incidents that prevent constructive dialogue and negotiation.

At no time in our nation's history has the access to talent been as limited as it is today. Most illustrative is the fact that the quota for H-1B visas (used to hire, among others, foreign graduates from U.S. universities) was exhausted on August 12, 2005.⁴ This means that companies must wait 14 months, until fiscal year 2007, to bring needed personnel to the U.S. In addition, there are years-long backlogs in our permanent or "green card" system. For example, Chinese and Indian nationals who are deemed to have "extraordinary ability" or "exceptional ability" experience an immigration backlog of anywhere from three to six years—and these are the Ph.D. scientists at the cutting-edge of research. Lesser-skilled but still desperately needed professionals face an even longer backlog.⁵ These backlogs are due to politically imposed numerical limits. There is nothing to suggest that these quotas are based on any economic principle. Even where a visa is available, there are months-long delays in processing an application and obtaining a visa interview, which result in significant losses to our businesses and research facilities. Our current immigration system is a tremendous impediment to our ability to compete worldwide.⁶

The reality for American employers is that our education system does not produce a sufficient number of professionals able to compete in today's economy. Until it does, we need foreign talent to keep American innovation moving forward. Some estimate that by 2010, 90% of all science and engineering Ph.D.s will come out of Asia.⁷ According to the National Science Foundation, in 2000, foreign-born scientists accounted for over 50% of U.S. engineers with a Ph.D., and 45% of our life scientists, physical scientists and math and computer scientists holding doctoral degrees.⁸ These percentages are only getting greater over time as our children pursue other degrees. While we must work to encourage U.S. youth to pursue these careers, our country simply cannot afford to stop the current influx of talent in the foreseeable future. Experts have warned that with fewer foreign science and engineering workers, fewer U.S. citizens with science degrees, and increased competition from abroad, "the U.S. [science and engineering] work force growth will slow considerably, potentially affecting the relative technological position of the U.S. economy."⁹

Our self-imposed limitations put America at a disadvantage. As a nation, we are educating some of the brightest scholars and researchers in the world, only to send them to our competitors because there are no visas available. Many companies have moved meetings, training and projects abroad to avoid visa hassles. The current situation also sends the world a dangerous message that foreign talent is no longer welcome here. The U.S. clearly enjoys an advantage in higher education, but we are losing even that. According to the Council of Graduate Schools, there was a decline of 28% in applications from international students to U.S. graduate school for the 2003-2004 school year, followed by another 5% decline in 2004-2005.¹⁰ According to a study by the Chemical and Engineering News, 71% of the university chemistry departments polled said that existing foreign students had difficulty reentering the country, and 74% reported that at least one foreign student who was accepted in 2003 was unable to attend school because of visa delay or denial.¹¹

For now, despite the obstacles to recruiting or retaining the necessary talent for American businesses, there remains one advantage that the United States still has over virtually all other countries—we are the greatest democracy on the face of the earth and people want to live here. Aside from purely economic considerations, most executives and managers want to stay here for the quality of life and the freedom. In addition to some of the finest research and educational institutions, we also have the most robust laws that protect American businesses. However, even the greatest country in the world has limits. If our immigration policies and practices continue to deter the recruitment or retention of the best the world can offer, the top talent will go elsewhere and we will find ourselves falling further behind.

Despite the overwhelming interest to leverage global mobility to our advantage, immigration restrictionists in our country, who may be motivated by a myriad of reasons from protectionism to xenophobia, have mounted a powerful and somewhat successful lobby against any form of immigration including immigration of the highly-educated. Common rhetoric is that companies are profit-driven and foreign professionals represent cheap labor.¹² The rhetoric does not reflect reality. First, the law requires the employer to pay an H-1B professional or a permanent resident worker 100% of the wage that is paid to a similarly situated American worker ("prevailing

wage"). In addition, there are additional expenses associated with hiring a foreign professional, including filing, advertising and legal fees that often run upwards of \$20,000. The cost, however, is not the greatest disincentive to hiring a foreign worker. The immigration process creates a significant administrative burden for the human resources departments, such as advertising and recruitment requirements that are not associated with hiring a U.S. worker. Moreover, there is substantial uncertainty when sponsoring a foreign national for permanent residency that leads to morale and retention issues. In sum, hiring a foreign worker is neither cheaper nor easier than hiring a U.S. worker, and employers seek foreign talent only when there is a legitimate need.

Another argument which immigration opponents favor is that foreign professionals displace Americans. They cite unemployment statistics among high technology workers as proof of that theory.¹³ This theory, however, assumes two false premises: First, all engineers are alike and their skills are fungible. This simply is not the case. The technology field contains as many sub-specialties as any other field. A computer programmer is no more qualified to lead a semi-conductor research and development project than a podiatrist is qualified to perform open-heart surgery. Some argue that sufficient time and money need to go into educating and training American workers to meet our needs. We, too, believe that our country needs to invest in future American workers. In fact, \$1,500 from each H-1B petition goes to that precise purpose.¹⁴ However, in the interim, American businesses as well as American workers depend on key projects to continue while we prepare the next generation of the American workforce. The second false premise is that American businesses should settle for a minimally qualified person when the best qualified is available. For the most part, American workers are the best qualified and hardest working. However, it is vital to have the *right* talent in the *right* place, and not have to settle for *any* talent at *any* place.

Counter-intuitively, opponents to immigration argue that the presence of foreign professionals facilitates the outsourcing of American jobs abroad. They say that foreign professionals come to the U.S., learn the requisite skills, and then take them back to their home countries.¹⁵ This theory is flawed as it misstates the nature of global operations. With the need to bring the right talent to the right place, if we make it difficult for companies to bring the right talent here, we in fact *hasten* outsourcing of jobs.

Finally, the U.S. is not alone in confronting the challenge of a shortage of talent. The United Kingdom, Canada, Australia, Japan and others also are competing for this limited pool of workers. Increasingly, U.S. educated foreign nationals are taking the knowledge they gained here to other countries, either because advancements in other countries present exciting career opportunities, or because of immigration policies that encourage the importation of talent. To ensure that the global mobility of talented professionals does not mean a one-way exit out of the United States, our government must work with the private sector to create an efficient system that facilitates the recruitment of the top talent, and encourages retention of businesses within the United States.

In light of the foregoing, we submit the following policy recommendations:

1.) We need to know that highly-educated professionals benefit the U.S. and that our policies should encourage their presence, whether temporary or permanent.

2.) We need a market-based approach to immigration. The level of admission of foreign professionals should depend on the needs of our economy and not on arbitrary quotas set by Congress. Holders of masters or doctoral degrees from U.S. institutions should not be subject to numerical limits at all. In fact, they should be welcomed with a direct path to permanent residence. The government should work with private industries to devise a sensible admission process that reflects economic realities.

3.) Border security and visa facilitation are not incompatible. There should be a greater reliance on technology to screen in people we want while keeping out those we do not. The government should work with the private sector to ease the visa processing for trusted business travelers, thus allowing the government to focus its finite resources on actual threats. This will enhance our border security without compromising our economic security.

4.) Finally, the government must be more effective in detecting fraud. Part of the efficiency comes from recognizing law-abiding employers and distinguishing them from unscrupulous ones. Companies with a solid track record for obeying the law and whose financial stability is not in doubt should be pre-certified to bring professionals to the U.S. in an expedited manner. Good actors should be rewarded with greater efficiency while the government concentrates on questionable applications.

Our immigration policy should be a part of our overall national strategy for security and competitiveness. Whether keeping people out or letting people in, immigration is a *means* to achieving our national interest, and not an *end* in and of itself. We must vigilantly protect our homeland, but at the same time recognize that our economic security and global competitiveness are also integral parts of our overall national security.

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Footnotes

¹ THE EXECUTIVE WORKING GROUP ON GLOBAL MOBILITY POLICIES, THE GLOBAL ECONOMY'S LAST BARRIER: CROSS-BORDER MOBILITY OF HIGHLY EDUCATED WORKERS, at 17 (Jan. 2002).

² *Id.* at 11-13.

³ *Id.* at 17-21.

⁴ Press Release, U.S. Citizenship and Immigration Services, U.S.C.I.S. Reaches H-1B Cap (Aug. 12, 2005).

⁵ U.S. DEPT. OF STATE, BUREAU OF CONSULAR AFFAIRS, VISA BULLETIN (Sept. 2005).

⁶ See, e.g., Jeffrey Natchtigal, *Access Denied: Are Tightening Security Measures Harming Science at Cal*, BERKELEY SCIENCE REVIEW, VOL. 4, NO. 1, at 19-23 (Spring, 2004).

⁷ Mervis, Jeffrey, *Perceptions and Realities of the Workplace*, SCIENCE, VOL 304, ISSUE 5675, 1285-85 (May 28, 2004).

⁸ THE NATIONAL SCIENCE BOARD, NATIONAL SCIENCE FOUNDATION, SCIENCE AND ENGINEERING INDICATORS-2004, at O-13, O-5 (2004).

⁹ PHYSICS TODAY, SCIENCE BOARD WARNS OF UNCERTAIN FUTURE FOR U.S. SCIENCE AND ENGINEERING LEADERSHIP (Jul. 2004).

¹⁰ HEATHER BROWN AND MARIA DOULIS, COUNCIL OF GRADUATE SCHOOLS, FINDINGS FROM 2005 CGS INTERNATIONAL GRADUATE ADMISSIONS SURVEY I.

¹¹ Victoria Gilman & William G. Schultz, *U.S. Schools Losing Foreign Talent*, CHEMICAL & ENGINEERING NEWS, VOL. 82, NO. 14, at 67-70 (Apr. 5, 2004).

¹² Jon E. Dougherty, *The immigrant 'cheap labor' myth* WORLDNETDAILY.COM (Friday, May 27, 2005), available at http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=4446 5.

¹³ See, e.g., LEON F. BOUVIER, CENTER FOR IMMIGRATION STUDIES, IMMIGRATION AND LOOSER LABOR MARKETS: UNEMPLOYMENT OUTLOOK IN MAJOR IMMIGRANT-RECEIVING AREAS (Dec. 1990).

¹⁴ Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, 110 Stat. 2809, 3353 (Dec. 8, 2004).

¹⁵ THE INSTITUTE OF ELECTRICAL AND ELECTRONICS ENGINEERS, OFFSHORE OUTSOURCING (Mar. 2004).

REDEEMING GITMO: THE U.S. CAN TAKE STEPS TO RISE ABOVE THE GUANTANAMO BAY CONTROVERSY

BY GLENN SULMASY*

This past summer I attended meetings on international humanitarian law in San Remo and Geneva that provided me the chance to meet with, debate and discuss various legal issues associated with the Global War on Terror (GWOT). Government officials from around the world, representatives from nongovernmental organizations (NGOs) like Human Rights Watch and ICRC, and international-law scholars reviewed and debated the myriad issues surrounding the current legal situations in the GWOT. As one might expect, there was sharp disagreement on many issues. However, there was unanimity on one issue. The U.S. must do something regarding the detainees at Guantanamo Bay (GITMO)—and do something now.

The new world (dis)order in which the U.S. functions as the sole superpower is terribly complex, and the situation is further exacerbated by the American discomfort in its role as an empire.¹ We appear uncertain how to “behave” among other nations. We consistently balance our strength and sovereignty while functioning within the international community, attempting to comply with international law. Gitmo offers the perfect opportunity for the United States to resolve her identity crisis and re-establish herself as a noble superpower. The GWOT is going to be a long-term effort. It is critical to maintain the support of the international community and the NGOs throughout this struggle.

Though the administration has performed exceedingly well in balancing myriad issues the last four years, some changes are necessary to improve our ability to conduct operations into the foreseeable future. Three crucial steps will help to regain the requisite national support and rally international consensus: 1) Article 5 tribunals must be held immediately for all detainees; 2) The U.S. must establish national-security-court apparatus not very different from Great Britain and France; 3) The U.S. must lead the effort in modifying Geneva to better handle the legal issues associated with the jihadists.

Article 5 Tribunals

First, we must admit the current situation in Guantanamo Bay, at the very least, appears unjust. Five hundred detainees with no hearing for over four years seems unfair to our international partners—and has become a breeding ground for misinformation and propaganda by al Qaeda and jihadist supporters.² We should provide these people, as I was reminded by every person I met with this summer, with Article 5 Tribunals to determine whether they should be afforded Prisoner of War (POW) status. The tribunal system is provided for in the Geneva Conventions.³ It is an established way of ascertaining the status of those captured. These “tribunals” are not criminal trials nor are they “military tribunals or commissions” in the sense of military law jurisprudence. They are merely hearings that are used on the “battlefield” as an objective means of determining status. To date, the United States has used record reviews by judge advocates to make this determination of the captured jihadists. This closed, paper “hearing” is simply not acceptable to our international partners and colleagues.⁴ With very little effort and few resources, Article 5 Tribunals can provide a hearing to the jihadists and thereby, at the minimum, afford the

appearance of process. In reality, it IS due process and one that can inject universal, and as importantly Western, ideals into these procedures. Some conservatives have asserted the jihadists should be accorded no rights. They argue (and correctly) after all, these same people, as a matter of doctrine, flout the laws of war. Summary executions, torture, and attacking civilians is the written code of al Qaeda and other international terrorists.⁵ Again, Art. 5 tribunals simply inject minimal process into an extraordinarily difficult, and new, war of the 21st century. Utilizing this mechanism is one of the three key initiatives the United States needs to employ in order to keep international cynicism of our motives and efforts to a minimum. We have refused to give the detainees this option even though these are quick “hearings” by design and could be accomplished with relative alacrity and few resources. Most, if not all, will not be given POW status. However, this appearance of due process is a critical issue for our international partners.

National Security Courts

The military commissions, as much as they should have worked (and are constitutional and comply with international law),⁶ have not been successful. Although the case most often cited to support the use of commissions, *Ex Parte Quirin*,⁷ is on point, the current use of the commissions has been bogged down in procedural problems, evidentiary concerns, and four years without a prosecution (which was clearly never intended).⁸ The commissions were adopted by the President to appropriately prosecute al Qaeda just two months after the attacks of September 11th.⁹ One of the key justifications for the employment of commissions was that this was, *de jure* and *de facto*, a “war.”¹⁰ The United States was now dealing with unlawful belligerents, and this would be the best, most rapid means to adjudicate the actions by the enemies once captured. Indeed, one of the main reasons we have a separate military justice system is the rapidity in which prosecutions can occur within the military.¹¹ Because of the unique nature and training of the armed forces, a separate system was and continues to be required. Similarly, in warfare, there is a need for rapid justice against the illegal belligerents. Thus, at first glance, it appears logical and rational to employ these commissions against al Qaeda.

The use of military commissions was intended to provide the best possible, and most rapid means of trying the jihadists. For example, in the *Quirin* case, the German saboteurs were captured, tried by military commission, had habeas petitions heard by the Supreme Court, were convicted and executed in under fifty days.¹² Currently, we have waited four years for a trial. Although Secretary Rumsfeld recently announced that several commissions hearings will begin in the immediate future,¹³ a long term established mechanism is clearly needed to rapidly adjudicate the remaining 450 detainees, not to mention the inevitable future cases. France, Great Britain, Israel, and others have special courts in place to specifically try terrorists. These nations, like the United States, recognize these are not ordinary cases and need to be handled differently than standard criminal prosecutions. Terrorists are different than both criminals and warriors. They are a unique blend of both. Although we have, and continue to, justifiably characterize the battle with international terror as a war,¹⁴ these unique unlawful belligerents

can best be prosecuted by a separate, unique national security court system. The national-security court would function as a hybrid of the military commissions and our federal court system—a decreased expectation of rights at trial but still much more than is currently afforded to the detainees at Guantanamo. The courts would be presided over by a recognized law of armed-conflict experts appointed by the president, and if convicted, the terrorist would be sent to military brigs. The U.S. must establish national-security courts to handle these cases expeditiously and resolve the ambiguity and international cynicism surrounding Gitmo. The GWOT will be part of our lives for a generation; these courts will help to prosecute fairly those accused of engaging in international terror.

Modify Geneva

The asymmetrical war we are fighting against terror will continue to dominate geo-political debate in the West. The conflict of the 21st century will likely be fought by this generation's children and grandchildren. While establishing national-security courts domestically, internationally the United States must lead the call for modifications to the Geneva Conventions.¹⁵ Drafted in 1949, they were never intended to be the legal basis to prosecute detainees in the unique environment of the GWOT. They were drafted during the age of the nation state, and hence, al Qaeda and other jihadists relish their ambiguous status as either "warrior" or civilian. My colleagues all seem to agree there is a "hole" in the current laws of war and that we are trying to push a "round peg into a square hole." The United States should call for a commission to analyze, provide guidance, and forge international consensus on how best to categorize these illegal belligerents.

Conclusion

The United States, uncomfortable in its role as the sole superpower in a dynamic world, has an opportunity to re-establish itself as the "shining city on the hill." This is a new war in a new era: we are all trying to figure out how best to proceed. Let us take Guantanamo Bay, a public-relations problem, and turn it around to demonstrate American and Western ideals. The past summer in Europe has affirmed, in my mind, that the international community does want us to lead, and needs us to lead—and we need their willing support in order to win this war. Implementing Article 5 Tribunals, creating a national security court apparatus, and leading the call to modify the Geneva Conventions to best meet the current threats of the wars of the 21st century and beyond will assist us in beating al Qaeda and the other jihadists. If nothing else, it will certainly help us to win in the "court of international public opinion."

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Footnotes

¹ Michael Ignatieff, *The American Empire; the American burden*, NY TIMES MAG., Jan 5, 2002, at 22.

² Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L.REV. 675 (Dec. 2004).

³ Geneva Convention Relative to the Treatment of Prisoners of War of Aug 12, 1949 (article 5) provides: "... Shall any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."

⁴ DoD personnel, normally Judge advocates with extensive legal training, have performed these record reviews in both Gitmo and at continental U.S. military bases to date.

⁵ See, Arthur H. Garrison, *The War on Terrorism on the Judicial Front, Part II: The Courts Strike Back*, 27 AM. J. TRIAL ADVOC. 473, 513 (2004).

⁶ See generally, Glenn Sulmasy, "Send Moussaoui to court, A Military Court," FOXNEWS.COM, July 27, 2005.

⁷ *Ex parte Quirin*, 317 U.S. 1 (1942).

⁸ The desire to fit existing military law into a wartime situation was intended to provide "some rights" into the detainee situation during a unique time of war. The intention was to avoid long delays in prosecutions and to implement what was thought to be the appropriate process within both domestic and, at least in the past 50 years, international law.

⁹ See, Military order of November 13, 2001: Detention Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918 (2002).

¹⁰ See generally, Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (authorizing use of force against those responsible for the Sept 11th terrorist attacks), S.C. 1368, U.N. Res. 1368, U.N. SCOR, 56th Sess., 4370 mtg., U.N. Doc. S/RES/1368 (2001), and See, President George W. Bush, State of the Union Address, (Jan 39, 2002), available at <http://www.whitehouse.gov/news/releases/2002/01/2002012911.html>.

¹¹ Historically, American military law scholars agree one of the key reasons to employ military law instead of the existing federal court system is the unique society in which the military operates and the need for rapid justice in order be able to focus on fighting the war.

¹² See, *supra* note 7.

¹³ See, Josh White, *Military Trials for Detainees to Resume; Four Cases to Be Heard Immediately*, WASH POST, July 19, 2005.

¹⁴ See, *supra* note 11.

¹⁵ See, Glenn M. Sulmasy, *The Law of Armed Conflict in the Global War on Terror: International Lawyers Fighting the last War*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 309, (2005).

LABOR AND EMPLOYMENT LAW

THE FIDUCIARY-BENEFICIARY EXCEPTION TO THE ATTORNEY-CLIENT PRIVILEGE AS APPLIED TO THE DUTY OF FAIR REPRESENTATION OWED TO UNION NONMEMBERS

By JAMES J. PLUNKETT*

I. Introduction

The current labor law in the United States allows unions in non-Right to Work states to compel payments from nonmembers as a condition of employment.¹ Although the duty of fair representation requires unions to establish procedures to ensure that these compelled payments are not used improperly, nonmembers must often turn to the courts to enforce their rights. Complicated legal procedures, court rules, and technicalities can make this a daunting proposition. However, two recent cases have made it easier for nonmembers to hold unions accountable for compulsory unionism abuses. That is because these cases have demonstrated that the attorney-client privilege does not apply to communications between a union's officers and its in-house counsel that concern the union's duty of fair representation owed to nonmembers forced to pay union fees as a condition of employment.

II. The Attorney-Client Privilege

The attorney-client privilege has long been recognized in the United States. It is intended to promote the public's interest in justice by encouraging candid disclosures between an attorney and his client. Indeed, in *Hunt v. Blackburn*,² the Supreme Court determined that the attorney-client privilege was "founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure."³ Nearly 100 years later in *Upjohn Co. v. United States*,⁴ the Court reasoned that the purpose of the privilege was "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client."⁵

The Federal Rules of Evidence do not have a specific rule of privilege, but instead instruct federal courts to apply "principles of the common law...in the light of reason and experience," or, in diversity cases, the rule of the state which "supplies the rule of decision."⁶ Thus, as alluded to above, the courts have been left with the task of developing and shaping the law of privileges with regard to confidential communications, including the attorney-client privilege.⁷ Accordingly, most courts have adopted the following principles of the attorney-client privilege as formulated by Wigmore:

- (1) Where legal advice of any kind is sought, (2)

from a professional legal advisor in his or her capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his or her insistence permanently protected, (7) from disclosure by the client or by the legal advisor, (8) except if the protection is waived.⁸

Furthermore, the attorney-client privilege has been described as a "two way street."⁹ That is, not only does it protect communications made by a client to his or her lawyer, but it also protects the lawyer's communications made in response to those inquiries.¹⁰ Lastly, the party claiming the privilege has the burden of establishing the attorney-client relationship and the privileged nature of the communications.¹¹

III. Exceptions to the Attorney-Client Privilege

A. The Crime-Fraud Exception

Although the attorney-client privilege may be the "most sacred of all legally recognized privileges," it is not without its exceptions.¹² In certain cases, the privilege will be superseded by other public policy interests that are deemed more important. For example, when communications between a client and his or her attorney concern a continuing or future crime or fraud, the privilege cannot be invoked.¹³ This is generally referred to as the crime-fraud exception.¹⁴

B. The Fiduciary-Beneficiary Exception

1. The Evolvement of the Standard to its Application in the ERISA Context

Another exception to the attorney-client privilege that is almost as old as the privilege itself is the fiduciary-beneficiary exception.¹⁵ This exception is derived from the common law of trusts and is applied to situations in which an attorney's advice is provided to assist a fiduciary in carrying out his obligations to a beneficiary.¹⁶ Under the exception, communications between an attorney and a trustee regarding the administration of the trust are not privileged and are therefore discoverable by the beneficiaries in a suit against the trustee.

In the trust context, the fiduciary-beneficiary exception has two rationales.¹⁷ First, some courts have held that the exception is rooted in the trustee's duty to provide the beneficiaries with information regarding the administration of the plan or trust.¹⁸ Indeed, the Restatement (Third) of Trusts § 82 (Tentative Draft No. 4, 2005), states that a "[t]rustee has a duty promptly to respond to the request of any beneficiary for information concerning the trust and its administration, and to permit beneficiaries on a reasonable basis to inspect trust documents, records, and property

holdings.” Under this rationale, communications between a fiduciary and the attorney would be considered “information” that the fiduciary would be obligated to provide to the beneficiaries.

Second, other courts have held that the exception is not really an “exception” at all, because the trustee is not the real client when it comes to advice concerning the plan or trust.¹⁹ Indeed, courts have reasoned that the privilege should not apply in such a situation because the real client is not actually the fiduciary, but rather the beneficiary—the person to whom the fiduciary owes a duty.²⁰

Not surprisingly, the fiduciary-beneficiary exception to the attorney-client privilege has been applied most frequently in actions arising under the Employee Retirement Income Security Act (ERISA).²¹ This is because ERISA, the federal law that sets standards for private sector health and pension plans, was founded largely on common law trust principles. Referring specifically to the fiduciary duties outlined in ERISA, the Supreme Court has stated that they “draw much of their content from the common law of trusts, the law that governed most benefit plans before ERISA’s enactment.”²² Moreover, the statute explicitly enumerates the duties of an ERISA fiduciary.²³ Therefore, because ERISA was derived from the common law of trusts, and because it sets forth specific duties of a fiduciary, ERISA litigation has become a logical forum in which to extend the application of the common law fiduciary-beneficiary exception to the attorney-client privilege.²⁴

2. The Exception Does Not Apply When The Advice Sought by the Fiduciary Relates to His Personal Protection or Liability

In its application to ERISA litigation, the fiduciary-beneficiary exception applies to instances in which an attorney’s advice is sought regarding administration of the trust or plan. However, what if a trustee is sued by the beneficiaries for mismanagement of the trust and subsequently seeks the advice of an attorney in order to defend himself? Should these communications be discoverable by the plan beneficiaries? In such a case, the fiduciary-beneficiary exception would not apply.²⁵

The Restatement (Second) of Trusts § 173, Comment b (1959), states that a trustee need not disclose “information acquired . . . at his own expense and for his own protection. Thus, he is privileged to refrain from communicating to the beneficiary opinions of counsel obtained by him at his own expense and for his own protection.” When a plan fiduciary retains counsel in order to defend himself from suit by the plan beneficiaries, the exception would not apply, and the communications would be privileged.²⁶ Of course, distinguishing between legal advice that is being used to carry out the fiduciary’s obligations to the beneficiary, which is discoverable, and legal advice that is used for the fiduciary’s own personal reasons, which is not discoverable, can be a confusing undertaking.

In *Mett*, the Ninth Circuit dealt with this very issue.

The defendants in *Mett* ran a retail art gallery and were trustees of their employees’ pension benefit plans. When the art gallery ran into some economic difficulties, defendants withdrew \$1.6 million from the benefit plans and were convicted of embezzlement. On appeal, the defendants argued that two memoranda sent to them by their then-counsel should not have been admitted into evidence because they were privileged communications.

The first memorandum “explained the nature of the legal advice that was being provided: You have asked our advice regarding the criminal and civil sanctions which may [sic] applicable to the following facts.”²⁷ Furthermore, the first memorandum “detail[ed] the potential civil and criminal exposure the defendants might face in light of the withdrawals.”²⁸ The second memorandum in question “further detail[ed] the civil and criminal penalties associated with transactions by ERISA and related tax laws.”²⁹

The court reasoned that both memoranda clearly addressed the defendants’ potential civil and criminal liabilities in relation to their withdrawal of money from the pension funds, and neither memorandum contained advice on a matter of plan administration.³⁰ Accordingly, the court ruled that the fiduciary-beneficiary exception did not apply, and that both memoranda should have been excluded as privileged.³¹

Thus, as the court pointed out in *Mett*, there are distinct limitations to the fiduciary-beneficiary exception to the attorney-client privilege. “On the one hand, where . . . [a] trustee seeks an attorney’s advice on a matter of plan administration and where the advice clearly does not implicate the trustee in any personal capacity, the trustee cannot invoke the attorney-client privilege against the plan beneficiaries. On the other hand, where a plan fiduciary retains counsel in order to defend herself against the plan beneficiaries (or the government acting in their stead), the attorney-client privilege remains intact.”³² This is the ERISA standard of the fiduciary-beneficiary exception to the attorney-client privilege.

IV. Application of The Fiduciary-Beneficiary Exception to Labor Law

The fiduciary-beneficiary exception to the attorney-client privilege has been applied to several other fiduciary relationships, not just the relationship that exists between trustee and beneficiary.³³ Indeed, the exception has been applied in several cases in which union members sought production of communications between union officials and union attorneys.³⁴ The following section describes another way that the fiduciary-beneficiary exception to the attorney-client privilege has recently been applied to labor law. Specifically, the section details the exception to the privilege in the context of a union’s duty of fair representation toward nonmembers under a so-called “union security” clause in a collective bargaining agreement.

A. “Union Security” Agreements

The National Labor Relations Act (NLRA)³⁵ authorizes

employers and unions to enter into agreements requiring employees in the bargaining unit to acquire and maintain “membership” in the union as a condition of employment.³⁶ The NLRA covers most employees working in the private sector.³⁷ Many states have enacted laws which authorize unions and state or local governmental employers to include provisions in their collective bargaining agreements requiring all employees to either join or financially support the union or which make such a requirement mandatory in all public sector bargaining units.³⁸

The Supreme Court has determined that the “membership” requirement under the NLRA is “whittled down to its financial core,” and the most that can be required of private sector employees is the “payment of fees and dues.”³⁹ Moreover, the Court has limited that “financial core” to “only those fees and dues necessary to ‘performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.’”⁴⁰

Stated otherwise, the “financial core” objecting nonmembers may lawfully be forced to pay in the private sector does not include “union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment.”⁴¹ Similarly, although nonmember public employees can be required to subsidize a union’s “collective-bargaining activities,” a nonmember public employee cannot constitutionally be forced to “contribute to the support of an ideological cause he may oppose as a condition of holding a job.”⁴²

Thus, even under so-called “union security” agreements, both private and public sector employees can choose to be a nonmember of the union, pay less than full dues, and still retain their employment. The fee that a nonmember pays to a union under a “union security” provision is often called an “agency fee” or a “financial core fee.”

Compelled union payments implicate the First Amendment rights of public employees.⁴³ Forced union fees also impact the rights of private employees to be represented fairly.⁴⁴ Therefore, the courts and federal and state agencies have determined that unions must provide nonmembers certain procedures to ensure that any agency fee that they are forced to pay is only used for representational expenses. In other words, the exclusive bargaining representative must establish procedures to make certain that the fees collected from objecting nonmembers are not used for ideological, political or other non-representational activities.⁴⁵

For example, in the public sector, the Supreme Court has set forth the procedures that a union must follow in order to collect an agency fee from a nonmember. According to the Court in *Hudson*, the union must provide nonmembers with audited financial information about how the agency fee was calculated, as well as information on how to challenge the union’s calculation of the fee before an independent arbitrator or other “impartial decisionmaker.”⁴⁶ Moreover, if a

nonmember employee challenges the union’s calculation, the union must place the contested amount of the fee in escrow pending a decision by the impartial decisionmaker.⁴⁷

Similarly, in the private sector, “when or before a union seeks to obligate an employee to pay fees and dues under a union-security clause,” the union must, at a minimum, notify the employee “that he has the right to be or remain a nonmember” and, as such, object to and obtain a reduction in fees for “activities not germane to the union’s duties as bargaining agent.” If an employee then objects, the union must inform the objector “of the percentage of the reduction,” the basis for the union’s calculation, and the right to challenge its figures.⁴⁸ This information is required so that nonmembers can make a reasoned decision about whether to challenge the union’s calculation of their required fee amount.⁴⁹

B. The Duty of Fair Representation

The procedures that a union must provide to a nonmember as outlined in *Hudson* and its progeny flow from a union’s duty of fair representation.⁵⁰ This duty is a judicially-created standard that requires a union “to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.”⁵¹ The duty of fair representation is breached when a union’s actions towards the employees it represents are “arbitrary, discriminatory, or in bad faith.”⁵²

This duty of fair representation requires the union to fairly represent all employees in the bargaining unit—member and non-member alike.⁵³ Part of a union’s duty of fair representation is to provide nonmembers with adequate notice and procedures concerning any representation fee that they might have to pay under a compulsory union fee agreement.⁵⁴

The Supreme Court has held that the “duty of fair representation is akin to the duty owed by other fiduciaries to their beneficiaries.”⁵⁵ The Court has compared this duty to the duty that a corporate officer owes the company’s shareholders.⁵⁶ More importantly, the Court has also compared this duty to the duty that a trustee owes to the trust beneficiaries.⁵⁷

We have seen how the fiduciary-beneficiary exception to the attorney-client privilege developed from the common law of trusts to apply to ERISA litigation. Analogizing further, because the duty of fair representation is “akin to the duty owed by other fiduciaries to their beneficiaries,”⁵⁸ it is only logical that the fiduciary-beneficiary exception as set forth in ERISA cases applies to labor law cases in which the union’s fiduciary duties are at issue. As will be discussed below, plaintiffs in two recent cases convinced courts to apply the ERISA standard of the fiduciary-beneficiary exception to situations involving advice given by a union’s in-house counsel concerning the union’s representation of nonmembers.

V. Expansion of the Fiduciary-Beneficiary Exception in the *Wessel* and *Harrington* Cases

A. The *Wessel* Case

The plaintiffs in *Wessel v. City of Albuquerque*,⁵⁹ who were represented by attorneys from the National Right to Work Legal Defense Foundation, were nonmembers employed by the City of Albuquerque, New Mexico. Plaintiffs filed suit against the city and Local 624 of the American Federation of State, County, and Municipal Employees (AFSCME). Their complaint alleged deficiencies in the process by which Local 624 collected “fair share” fees from the plaintiffs. The plaintiffs claimed that these deficiencies violated their rights under the First Amendment.

In July 1999, New Mexico AFSCME Council 18, acting as agent for Local 624, sent nonmember employees a notice which stated that the fair share fee would be 75% of union dues. Just one month later, the city began deducting 75% of dues from the wages of all nonmembers, and remitted these to Local 624. The plaintiffs’ suit alleged that Local 624 and Council 18 knew or should have known that the chargeable portion should have only been 50.08% of union dues. They further alleged that the subsequent seizure of 75% of dues from their wages coupled with inadequate notice of the fees’ basis violated their constitutional rights. Council 18 sent out a revised notice in May, 2000.

During discovery, through a subpoena *duces tecum* issued in the United States District Court for the District of Columbia, plaintiffs sought production of documents that contained advice given by AFSCME International’s in-house counsel regarding the administration of Local 624’s fair share collection procedure. Specifically, the documents in question concerned the administration of the revised notice sent to nonmember employees. AFSCME refused to produce these documents, claiming that they contained confidential communications protected by the attorney-client privilege. Upon AFSCME’s refusal to produce the documents, the plaintiffs moved to compel production of the documents.⁶⁰

The plaintiffs argued that even if the documents in question did contain privileged communications, they were discoverable because they fell within the fiduciary-beneficiary exception to the attorney-client privilege.⁶¹ The plaintiffs claimed that AFSCME owed a fiduciary duty to all city employees to provide them with adequate financial disclosure concerning their fee payments. Plaintiffs argued that this duty was similar to the duty owed by other fiduciaries to their beneficiaries.⁶²

In comparing AFSCME’s fiduciary duty to that of a trustee, the plaintiffs urged the court to apply the ERISA standard set forth in *United States v. Mett*.⁶³ The *Mett* standard, described in detail *supra* pp. 5-6, draws a distinction between communications between a trustee and in-house counsel that relate to administration of the trust, and communications that relate to the trustee’s own personal liability.⁶⁴ The former fall within the fiduciary-beneficiary exception and are therefore discoverable, while the later are

privileged and therefore not discoverable.⁶⁵

Although AFSCME did not dispute the application of the fiduciary-beneficiary exception in the labor law context, it did dispute its applicability to the immediate case.⁶⁶ In particular, AFSCME claimed that the exception to the privilege should not apply because the plaintiffs represented only a small minority of the “beneficiaries” and their interests were adverse to the majority.⁶⁷ In support of this proposition, AFSCME cited cases in which the attorney-client privilege was not abrogated because the courts determined that the plaintiffs consisted of only a small minority of the union members whose interest was adverse to the majority of the members. One such court had ruled that allowing minority employees to circumvent the attorney-client privilege “would result in the union’s virtual paralysis of decision-making.”⁶⁸

In response, plaintiffs reasoned that AFSCME’s argument was inapplicable, because the fiduciary duty in question applied only to nonmembers. That is, members do not have a right to receive the financial information required by *Hudson*.⁶⁹ Furthermore, unlike the cases cited by the defendants, which involved plaintiffs who were only a small segment of the bargaining unit, the *Wessel* plaintiffs represented a putative class of all nonmembers in Local 624’s bargaining unit who all had a common interest in being fully informed of their objection rights.⁷⁰

The district court agreed with the plaintiffs.⁷¹ In applying the fiduciary-beneficiary exception to the attorney-client privilege, the district court followed the standard set forth in *Mett*.⁷² That is, the district court determined that AFSCME and its affiliates were not seeking advice regarding their own civil or criminal liabilities, but rather, “they were seeking advice on how to correct an error in the original notice, which should be considered an administrative function.”⁷³ Because the information sought by plaintiffs concerned advice relating to the administration of Local 624’s fair share plan, which was undertaken out of the union’s fiduciary duty to nonmembers, the fiduciary-beneficiary exception applied. The district court therefore ordered AFSCME to produce the documents.⁷⁴

B. The *Harrington* Case

Harrington is a companion case to *Wessel*, and featured virtually the same fact scenario.⁷⁵ The nonmember plaintiffs in *Harrington* were also represented by attorneys from the National Right to Work Legal Defense Foundation. However, the issue in *Harrington* was whether matters which occurred after the filing of *Wessel* could be discoverable.⁷⁶

In *Harrington*, plaintiffs deposed AFSCME’s in-house counsel and asked him a series of questions regarding “the basis for, the preparation of, and the delay in the distribution of the revised ‘fair share’ notice” and “as to the preparation of future notices.”⁷⁷ The attorney refused to answer these questions, claiming that the attorney-client privilege and the work product doctrine covered the information sought by plaintiffs because everything that happened after the *Wessel*

suit was filed was done in defending the litigation.⁷⁸ Plaintiffs responded by filing a motion to compel AFSCME's in-house counsel to provide the testimony sought.

The magistrate judge overseeing discovery ruled that the fact that *Wessel* had been filed did not relieve AFSCME of performing its fiduciary duties to the plaintiffs.⁷⁹ Indeed, "[i]f there was an error in the first notice," the defendants' fiduciary obligation to issue accurate financial information to nonmembers included "a duty to issue a correction." The plaintiffs were not seeking information about the handling of the litigation. Therefore, applying *Mett*, the Magistrate held that activities surrounding the performance of the union's duty to issue the revised and future notices were discoverable under the fiduciary-beneficiary exception and granted the plaintiffs' motion to compel testimony.⁸⁰

Defendant unions then filed objections to the Magistrate Judge's Order. They contended that the exception to the privilege did not apply, because the attorney's knowledge concerning the questions at issue "was generated solely by [his] activities in providing legal advice in the defense of the . . . litigation."⁸¹ However, the court found that the attorney's knowledge concerning issuance of "a legally adequate fair share notice," which was all the plaintiffs sought, "was derived prior to and distinct from any activity designed either to protect the union from litigation or defend the union in" either lawsuit.⁸²

Moreover, the court reasoned that the unions' obligations to issue a corrected notice and adequate future notices "existed entirely independent of the Plaintiffs' lawsuits." The "union will not be permitted to refuse to answer questions about its failure to meet its constitutionally required fiduciary responsibilities simply because the beneficiaries of that fiduciary relationship were forced to result [sic] to litigation to enforce it."⁸³ The court therefore overruled the unions' objections and ordered the witness to provide the requested testimony.⁸⁴

VI. Conclusion

The decisions in *Wessel* and *Harrington* described above have established that the fiduciary-beneficiary exception to the attorney-client privilege applies to communications between union officials and their in-house counsel concerning the union's fiduciary duty toward nonmembers who are forced to pay union fees as a condition of employment. As a result, unions can no longer dodge their fiduciary obligations to nonmember employees by claiming the attorney-client privilege. Indeed, because these precedents command fairness and open disclosure with regard to unions' fiduciary obligations toward nonmembers from whom they compel payment of fees, they will no doubt prove useful to those employees who must resort to the courts to enforce their rights under forced unionism provisions.

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Footnotes

¹ The following states have Right to Work Laws that prohibit agreements requiring such payments: Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Iowa, Kansas, Louisiana, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia and Wyoming.

² 128 U.S. 464 (1888).

³ *Id.* at 470.

⁴ 449 U.S. 383 (1981).

⁵ *Id.* at 389.

⁶ FED. R. EVID. 501.

⁷ See *Upjohn*, 449 U.S. at 389 (citing 8 J. WIGMORE, EVIDENCE § 2290 (McNaughton rev. 1961)).

⁸ See, e.g., *United States v. Martin*, 278 F.3d 988, 999 (9th Cir. 2002); *United States v. Int'l Bhd. of Teamsters*, 119 F.3d 210, 214 (2d Cir. 1997); *United States v. White*, 950 F.2d 426, 430 (7th Cir. 1991). Another variation of the attorney-client privilege that is often cited was first enunciated in *United States v. United Shoe Machinery Corp.*, 89 F.Supp. 357 (D. Mass. 1950). In *United Shoe*, the court held that the privilege applied only if:

(1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of the court or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

Id. at 358-59.

⁹ See *United States v. Bauer*, 132 F.3d 504, 507-508 (9th Cir. 1997).

¹⁰ See *id.* (citing *United States v. Chen*, 99 F.3d 1495, 1501 (9th Cir. 1996)).

¹¹ See *id.* at 509.

¹² *Bauer*, 132 F.3d at 510.

¹³ See *In re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032, 1038 (2d Cir. 1984) ("It is well-established that communications that otherwise would be protected by the attorney-client privilege or the attorney work product privilege are not protected if they relate to client communications in furtherance of contemplated or ongoing criminal or fraudulent conduct.").

¹⁴ See, e.g., *Clark v. United States*, 289 U.S. 1, 15 (1933).

¹⁵ See *Riggs Nat'l. Bank of Washington, D.C. v. Zimmer*, 355 A.2d

709, 712 (Del. Ch. 1976) (citing *Talbot v. Mansfield*, 62 Eng. Rep. 728 (Ch. 1865)).

¹⁶ See *id.* at 712.

¹⁷ See *United States v. Mett*, 178 F.3d 1058, 1063 (9th Cir. 1999).

¹⁸ See *id.*; *Becher v. Long Is. Lighting Co. (In re Long Island Lighting Co.)*, 129 F.3d 268, 271-72 (2d Cir. 1997).

¹⁹ See *Mett*, 178 F.3d 1063; *U.S. v. Evans*, 796 F.2d 264, 266 (9th Cir. 1986), (quoting *Washington-Baltimore Newspaper Guild, Local 35 v. Washington Star Co.*, 543 F.Supp. 906, 908-910 (D.D.C. 1982)).

²⁰ See *Riggs*, 355 A.2d at 713-714.

²¹ See 29 U.S.C. § 1001 *et seq.* Before its application in ERISA cases, the fiduciary-beneficiary exception was most notably applied to shareholder litigation. See *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970). In *Garner*, the privilege issue arose when plaintiff shareholders sought deposition testimony from the corporation's president, who had previously been the corporation's in-house counsel, concerning advice offered by him in that capacity. Defendant corporation objected, claiming the attorney-client privilege. On appeal, the Fifth Circuit established a "good cause" rule, stating that the attorney-client privilege should be "subject to the right of the stockholders to show cause why it should not be invoked in the particular instance." *Id.* at 1103-1104. However, the "good cause" standard set forth in *Garner* does not apply to ERISA litigation. See *infra* notes 34 and 72.

²² *Varity v. Howe*, 516 U.S. 489, 496 (1996).

²³ See 29 U.S.C. § 1104. Among other things, this section requires an ERISA fiduciary to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries", and to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."

²⁴ See generally, *In re Long Island Lighting Co.*, 129 F.3d 268 (2d Cir. 1997); *Washington-Baltimore Newspaper Guild v. Washington Star Co.*, 543 F.Supp. 906 (D.D.C. 1982); *Riggs Nat'l. Bank of Washington, D.C. v. Zimmer*, 355 A.2d 709 (Del. Ch. 1976).

²⁵ See *Mett*, 178 F.3d at 1064.

²⁶ *Id.*

²⁷ *Id.* at 1062 (alteration in original).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 1064-66. For a case in which the fiduciary-beneficiary exception *did* apply, and thus allowed communications to be discoverable, see *Fischel v. Equitable Life Assurance*, 191 F.R.D. 606, 610 (N.D. Cal. 2000) (fiduciary-beneficiary exception applied to documents reviewed by inside counsel that concerned changes in health care plan benefits to beneficiaries).

³² See *Mett*, 178 F.3d at 1064.

³³ For other situations in which the exception applies, see *In re Sunrise Sec. Litig.*, 130 F.R.D. 560 (E.D. Pa. 1989) (law firm with conflicting fiduciary duties to itself and client); *Quintel Corp., N.V. v. Citibank, N.A.*, 567 F.Supp. 1357 (S.D.N.Y. 1983) (bank acting as fiduciary for purchaser in land acquisition transaction).

³⁴ See, e.g., *Arcuri v. Trump Taj Mahal Assocs.*, 154 F.R.D. 97 (D.N.J. 1994); *Nellis v. Air Line Pilots Ass'n*, 144 F.R.D. 68 (E.D.Va. 1992); *Aguinaga v. John Morrell & Co.*, 112 F.R.D. 671 (D.Kan. 1986). These cases applied the "good cause" standard set forth in *Garner*, rather than the ERISA standard as described in *Mett*. Unlike the *Garner* standard, which applied to shareholder litigation, the ERISA fiduciary standard does not require the beneficiaries to show "good cause." See *Henry v. Champlain Enters., Inc.*, 212 F.R.D. 73, 85 (N.D.N.Y. 2003); *Washington-Baltimore Newspaper Guild v. Washington Star Co.*, 543 F. Supp. 906, 909 n. 5 (D.D.C. 1982).

³⁵ 29 U.S.C. §§ 151-169.

³⁶ 29 U.S.C. § 158(a)(3).

³⁷ The NLRA does not cover federal, state or local government employees, agricultural employees, railway or airline employees (these employees are covered by the Railway Labor Act (RLA), 45 U.S.C. §§ 151 *et seq.*), independent contractors and supervisors.

³⁸ E.g., *California*, CAL. GOV'T CODE § 3502.5; *Washington*, WASH. REV. CODE § 41.56.122; *Illinois*, 5 ILL. COMP. STAT. 315/6.

³⁹ *NLRB v. General Motors Corp.*, 372 U.S. 734, 742 (1963).

⁴⁰ *Communications Workers v. Beck*, 487 U.S. 735, 762-63 (1988) (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 448 (1984) (similarly limiting compulsory dues under the RLA)).

⁴¹ *Beck*, 487 U.S. at 745.

⁴² *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209, 235-36 (1977).

⁴³ *Id.* at 222.

⁴⁴ See *Beck*, 487 U.S. at 743-44.

⁴⁵ See, e.g., *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986) (public sector); *Abrams v. Communications Workers*, 59 F.3d 1373, 1379 n.7 (D.C. Cir. 1995) (NLRA); *Crawford v. Air Line Pilots Ass'n*, 992 F.2d 1295, 1301 (4th Cir. 1993)(RLA).

⁴⁶ 475 U.S. at 306-08.

⁴⁷ *Id.* at 310.

⁴⁸ *California Saw & Knife Works*, 320 N.L.R.B. 224, 233 (1995), *enf'd* 133 F.3d 1012 (7th Cir. 1998); *but see Penrod v. NLRB*, 203 F.3d 41, 47-48 (D.C. Cir. 2000) (*all* "new employees and financial core payors . . . must be told the percentage of union dues that would be chargeable were they to become *Beck* objectors").

⁴⁹ See *Penrod*, 203 F.3d at 45-46; *Abrams*, 59 F.3d at 1379-80.

⁵⁰ *Penrod*, 203 F.3d at 45; *Abrams*, 59 F.3d at 1379 n.7. In the public sector, a union's duty to provide nonmembers with adequate financial disclosure also flows from the First Amendment. See *Hudson*, 475 U.S. at 306.

⁵¹ *Vaca v. Sipes*, 386 U.S. 171, 177 (1967) (citing *Humphrey v.*

Moore, 375 U.S. 335, 342 (1964)).

⁵² *Vaca*, 386 U.S. at 190. (Depending on the circumstances, the duty of fair representation is enforceable in federal court, state court, and various federal and state labor agencies.).

⁵³ *Abood*, 431 U.S. at 221; *see* *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 44 (1998); *see also* *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 202 (1944) (“the organization chosen to represent a craft is to represent all its members, the majority as well as the minority, and it is to act for and not against those whom it represents.”).

⁵⁴ *See Penrod*, 203 F.3d at 45; *Abrams*, 59 F.3d at 1379-80; *Beck v. Communications Workers*, 776 F.2d 1187, 1203 (1985) (2-1 decision), *aff’d en banc*, 800 F.2d 1280 (4th Cir. 1986) (6-4 decision), *aff’d on other grounds*, 487 U.S. 735 (1988).

⁵⁵ *Air Line Pilots Ass’n v. O’Neill*, 499 U.S. 65, 74 (1991).

⁵⁶ *Id.* at 75.

⁵⁷ *Id.* at 74; *Teamsters v. Terry*, 494 U.S. 558, 567-68 (1990); *see also* *NLRB v. Hotel Employees Local 568 (Philadelphia Sheraton)*, 320 F.2d 254 (3d Cir. 1963) (union enforcement of “union security” provisions gives rise to “a fiduciary duty that the union deal fairly with employees.”).

⁵⁸ *O’Neill*, 499 U.S. at 74.

⁵⁹ 299 F.3d 1186 (10th Cir. 2002). Proceedings on remand in *Wessel* are reported at 327 F. Supp. 2d 1332 (D.N.M. 2004).

⁶⁰ *See Wessel v. City of Albuquerque*, 48 Fed. R. Serv. 3d 349, 2000 WL 1803818 (D.D.C. 2000) (Kay, Mag. J.). Although the lawsuit was filed in the United States District Court for the District of New Mexico, the subpoena was issued in the District of Columbia, because that is where AFSCME International’s headquarters are located.

⁶¹ *Id.*, 2000 WL 1803818, at *6.

⁶² *Id.*

⁶³ 178 F.3d 1058 (9th Cir. 1999).

⁶⁴ *See Id.* at 1064.

⁶⁵ *Id.*

⁶⁶ *See Wessel*, 2000 WL 1803818, at *6.

⁶⁷ *Id.*

⁶⁸ *Arcuri v. Trump Taj Mahal Assocs.*, 154 F.R.D. 97, 109 (D.N.J. 1994). AFSCME also cited *Cox v. Administrator U.S. Steel & Carnegie Pension Fund*, 17 F.3d 1386, 1415 (11th Cir. 1994), and *Ward v. Succession of Freeman*, 854 F.2d 780, 786 (5th Cir. 1988).

⁶⁹ *See Kidwell v. Transportation Communications Int’l Union*, 946 F.2d 283, 291-302 (4th Cir. 1991).

⁷⁰ *See* 2000 WL 1803818, at *6.

⁷¹ *See id.*, at *7.

⁷² Although the court discussed *Garner*, *see supra* note 21, and its “good cause” standard for application of the fiduciary-beneficiary

exception, the court decided the case under the ERISA fiduciary standard detailed in *Mett. Compare* 2000 WL 1803818, at *4 *with id.* at *7.

⁷³ *See* 2000 WL 1803818, at *7.

⁷⁴ *Id.*

⁷⁵ *See Harrington v. City of Albuquerque*, 2003 WL 21525073 (2003) (Schneider, Mag. J.), objections overruled, 174 L.R.R.M. (BNA) 3362, 2004 WL 1149494 (D.N.M. 2004). *See also* *Harrington v. City of Albuquerque*, 222 F.R.D. 505 (class certified), *summary judgment granted in part, denied in part*, 329 F. Supp. 1237 (D.N.M. 2004).

⁷⁶ *See* 2003 WL 21525073 at *1.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at *1-*2.

⁸¹ 2004 WL 1149494, at *2.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at *3.

LITIGATION

GRABLE'S QUIET REVOLUTION: THE REVIVAL OF SUBSTANTIAL FEDERAL QUESTION JURISDICTION

By BRIAN P. BROOKS AND SARAH A. GOLDFRANK*

Supreme Court observers uttered nary a peep on June 13, 2005 when the Court handed down its unanimous decision in *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*¹ But *Grable*—the Supreme Court's first decision on the boundaries of substantial federal question (SFQ) jurisdiction since the 1986 case of *Merrell Dow Pharmaceuticals, Inc. v. Thompson*²—opened the door to the federal courthouse for claims that *Merrell Dow* implied was shut (or only cracked open). *Grable* should revitalize the debate on the proper scope of SFQ jurisdiction, a species of federal-question jurisdiction applicable in certain cases in which the plaintiff has not affirmatively alleged a federal cause of action, but nonetheless seeks relief that requires the resolution of substantial, disputed questions of federal law.

The SFQ doctrine is best understood against a historical backdrop. Some of the earliest Supreme Court decisions interpreting the scope of federal judicial power explain that the exercise of federal question jurisdiction is appropriate whenever interpretation of the Constitution or a federal statute is necessary for the correct decision of a case, even if the cause of action itself is not created by federal law. Moreover, the legislative history of the Judiciary Act of 1875, the precursor to 28 U.S.C. § 1331, confirms that Congress originally intended to extend original federal jurisdiction to those cases that turn on the construction of a federal statute law or the Constitution, and early Supreme Court cases interpreting the Act gave it this relatively expansive meaning. The trend toward a narrower interpretation of federal question jurisdiction—a trend beginning with Justice Holmes's opinion in *American Well Works Co. v. Layne & Bowler Co.*³ and culminating with Justice Stevens's 5-4 opinion in *Merrell Dow*—represents a break with the early understanding of the statutory jurisdictional grant. Now, with *Grable*, the court appears to be returning to its roots.

In *Cohens v. Virginia*, Chief Justice Marshall stated that a case arises under the Constitution or federal law whenever the “correct decision depends on the construction of either.”⁴ *Cohens* further explained that:

The jurisdiction of the Court, then, being extended by the letter of the constitution to all cases arising under it, or under the laws of the United States, it follows that those who would withdraw any case of this description from that jurisdiction, must sustain the exemption they claim on the spirit and true meaning of the constitution, which spirit and true meaning must be apparent as to overrule the words which its framers have employed.⁵

The precise question presented in *Cohens* was whether the Supreme Court had appellate jurisdiction over a state court conviction where the defendant claimed protection of a federal lottery statute. Although the decision focused on appellate jurisdiction rather than on subject matter jurisdiction, the Court expounded on the province of federal courts more generally. The Court clarified that:

[T]he jurisdiction of the Courts of the Union was expressly extended to all cases arising under that constitution and those laws. If the constitution or laws may be violated by proceedings instituted by a State against its own citizens, and if that violation may be such as essentially to affect the constitution and the laws, such as to arrest the progress of government in its constitutional course, why should these cases be exemption from that provision which expressly extends the judicial power of the Union to *all* cases arising under the constitution and laws?⁶

Cohens, in short, supports the view that the Constitution's grant of judicial power to cases arising under the laws of the United States was understood expansively by early jurists.

Martin v. Hunter's Lessee also reflects the expansive view of federal-question jurisdiction embraced by the early Supreme Court.⁷ *Martin* was an action brought in Virginia state court to eject a tenant from land that had been devised to the plaintiff in the will of Lord Fairfax. While the plaintiff's cause of action was created by the state law of property and of wills and estates, his ability to recover on that cause of action required a determination of the validity of federal treaties and statutes. The Virginia Court of Appeals decided the case, which was then appealed to and reversed by the Supreme Court of the United States. On remand, the Virginia state court refused to recognize the Supreme Court's order on the ground that the Supreme Court lacked jurisdiction over the case. The Supreme Court rejected this view in *Martin*, holding both that Congress could not withhold from the Supreme Court any of the subject matter jurisdiction created by Article III of the Constitution, and that the Supreme Court necessarily had appellate jurisdiction to decide an appeal from a state court so long as the appeal fell within the Supreme Court's subject matter jurisdiction. In explaining this expansive view of federal jurisdiction, the *Martin* Court was concerned with the uniform interpretation of federal laws: “the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states.”⁸

While *Martin* technically involved the jurisdiction of the Supreme Court, the Supreme Court extended its broad view of subject matter jurisdiction to the lower federal courts in *Osborn v. Bank of the United States*.⁹ The question presented in *Osborn* was whether the Bank of United States, a federal entity, had the right to sue Osborn, the state auditor of Ohio, in federal court.¹⁰ The Court in *Osborn* concluded that federal jurisdiction existed for reasons that resonate still today with defendants. Said the Court: “[W]hen a question to which the judicial power of the Union is extended by the constitution, *forms an ingredient of the original cause*, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, *although other questions of fact or law may be involved in it*.”¹¹ Thus *Osborn* is consistent with the understanding that federal-question jurisdiction extends to all cases necessitating a construction of federal law, including cases where the underlying legal right the plaintiff seeks to vindicate is actually created by state law:

If it be sufficient foundation for jurisdiction, that the title or right set up by the party, may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction, provided that facts necessary to support the action be made out, then all the other questions must be decided as incidental to this, which gives that jurisdiction. Those other questions cannot arrest the proceedings. Under this construction, the judicial power of the Union extends effectively and beneficially to that most important class of cases, which depend on the character of the case.¹²

Although the First Congress was silent on the federal courts’ original jurisdiction over cases “arising under” the Constitution,¹³ the legislative history of the Judiciary Act of 1875 reveals Congress’s intent to extend federal subject-matter jurisdiction to cases where a substantial federal question exists.¹⁴ The Act bestowed upon any party to “any suit of a civil nature, at law or in equity, now pending or hereafter brought in any State court where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States” the right to “remove said suit into the circuit court of the United States for the proper district.”¹⁵ The Senate debates confirm that Congress anticipated granting the lower federal courts the judicial powers intended by Article III:

Mr. Carpenter. . . The Constitution says that certain judicial powers shall be conferred upon the United States. The Supreme Court of the United States in an opinion delivered by Judge Story—I do not recollect now in what celebrated case it was, whether *Cohens vs. Virginia* or some of those famous cases—said that it is the duty of the Congress of the United States to vest all the judicial power of the Union in some Federal Court, and if they may withhold a part of it they

may withhold all of it and defeat the Constitution by refusing or simply omitting to carry its provisions into execution. . . This bill gives precisely the power which the Constitution confers—nothing more, nothing less. . . [I]t seems to me that when Congress ought to do what the Supreme Court said more than forty years ago it was the duty to do, vest the power which the Constitution confers in some court of original jurisdiction.¹⁶

Following the passage of the Judiciary Act of 1875, the Supreme Court continued to apply a broad interpretation of federal-question jurisdiction that reflected the view that the statute implemented jurisdiction to the full extent permitted in Article III of the Constitution. In *Railroad Co. v. Mississippi*, for example, the Court explained that the underlying dispute arose under the laws of the United States because the plaintiff claimed that a Congressional Act protected it from the very actions that the State was alleged to have undertaken.¹⁷ Mississippi had sought a writ of mandamus in state court requiring the company to remove a stationary bridge it had erected across the Pearl River (on the line between Louisiana and Mississippi). The company removed the case to federal court on the ground that federal jurisdiction existed because a federal law authorized the company to build and maintain the bridge. The Court found that jurisdiction was proper because the suit “present[ed] a real and substantial dispute or controversy which depends altogether upon the construction and effect of an act of Congress.”¹⁸ This original view of federal-question jurisdiction generally persisted at least into the 1920s.¹⁹

The high-water mark of the “substantial federal question” doctrine, of course, was *Smith v. Kansas City Title & Trust Co.*, where the Court reaffirmed its pronouncement in *Osborn* that a case arises under federal law or the Constitution when “the title or right set up by the party, may be defeated by one construction of the Constitution or law of the United States, and sustained by the opposite construction.”²⁰ In *Smith*, a shareholder sought to enjoin the company from investing corporate funds into farm loan bonds issued by Federal Land Banks or Joint-Stock Land Banks on the ground that the issuance of the bonds was “beyond the constitutional power of Congress” and thus invalid.²¹ The Court held that the federal district court properly exercised federal jurisdiction because it was “apparent that the controversy concerns the constitutional validity of an act of Congress which is directly drawn into question.”²²

The modern trend toward a narrower interpretation of federal-question jurisdiction represents a break with the early understanding of the statutory jurisdictional grant. Indeed, in the “substantial federal question” decision that immediately preceded *Merrell Dow*, Justice Brennan candidly recognized that the legislative history of the federal-question statute suggests that Congress “meant to confer the whole power which the Constitution conferred”; nonetheless, he noted that the Supreme Court in a string of more recent decisions

has held that “Article III arising under jurisdiction is broader than federal question jurisdiction under [28 U.S.C.] § 1331.”²³

Grable, however, takes us back to the future. As an initial matter, *Grable* held that the original debate over SFQ jurisdiction—between the view of Justice Holmes in *American Well Works* and the view of Justice Day in *Smith*—is permanently resolved in favor of the *Smith* approach. Writing for the Court in *American Well Works* and then dissenting in *Smith*, Justice Holmes had urged that SFQ jurisdiction be limited to cases in which federal law created the cause of action asserted in the complaint, and not be extended to cases in which a cause of action created by state law required the resolution of predicate federal questions. As the *Grable* Court stated, “*Merrell Dow*, then, did not toss out, but specifically retained the contextual enquiry that had been *Smith*’s hallmark for 60 years. At the end of *Merrell Dow*, Justice Holmes was still dissenting.”²⁴

Moreover, *Grable* cautions against such a narrow reading of *Merrell Dow*. The *Grable* Court recognized that there is “some broad language in *Merrell Dow* . . . that could support” a narrow approach to SFQ jurisdiction, including imposition of a private-right-of-action requirement or similar formal prerequisites.²⁵ “But,” the Court stressed, “an opinion is to be read as a whole, and *Merrell Dow* cannot be read whole as overturning decades of precedent, as it would have done by effectively adopting the Holmes dissent in *Smith*” and limiting the SFQ doctrine to cases in which federal law either creates the causes of action asserted on the face of the complaint, or at least provides a cause of action analogous to that sought in the relevant state-law claim asserted by the plaintiff.²⁶ Said the Court:

In the first place, *Merrell Dow* disclaimed the adoption of any bright-line rule, as when the Court reiterated that “in exploring the outer reaches of § 1331, determinations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system.” 478 U.S., at 810. The opinion included a lengthy footnote explaining that questions of jurisdiction over state-law claims require “careful judgments,” *id.*, 478 U.S. at 814, about the “nature of the federal interest at stake,” *id.*, 478 U.S. at 814, n. 12, (emphasis deleted). And as a final indication that it did not mean to make a federal right of action mandatory, it expressly approved the exercise of jurisdiction sustained in *Smith*, despite the want of any federal cause of action available to *Smith*’s shareholder plaintiff. 478 U.S., at 814, n. 12.²⁷

Grable suggests a case-by-case approach to determining which federal interests are sufficiently concrete and important to merit the exercise of SFQ jurisdiction consistent with background federalism concerns in which considerations such the existence of a private federal right of action and similar considerations are relevant, but not

dispositive. And while the *Grable* Court granted *certiorari* to resolve a split as to whether the existence of a private right of action is necessary in order for a particular federal law to serve as the basis for SFQ jurisdiction, other questions (which kinds of federal statutory and regulatory schemes are sufficient to create a substantial federal question, whether a case may be removed where a specific element of a specific state-law claim must turn on federal law for a substantial federal question to be presented, and others) remain to be addressed by the Court. Nonetheless, *Grable* (and its unanimous narrowing of *Merrell Dow*) suggests a new and more vigorous direction in jurisdictional doctrine.

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Footnotes

¹ 125 S. Ct. 2363 (2005).

² 478 U.S. 804 (1986).

³ 241 U.S. 257 (1916).

⁴ 19 U.S. (6 Wheat.) 264, 379 (1821).

⁵ *Id.* at 379-80.

⁶ *Id.* at 391-92 (emphasis in original).

⁷ *See* 14 U.S. (1 Wheat.) 304 (U.S. 1816) (Story, J.).

⁸ *Martin*, 14 U.S. at 348.

⁹ *See* 22 U.S. (9 Wheat.) 738 (1824) (Marshall, C.J.).

¹⁰ *See id.* at 816-817; *see also* *United States v. Planter’s Bank of Georgia*, 22 U.S. (9 Wheat) 904, 905 (U.S. 1824) (upholding federal jurisdiction where Bank of United States brought a claim against a state bank, and stating that federal jurisdiction was “fully considered by the Court in the case of *Osborne v. The Bank of the United States*, and it is unnecessary to repeat the reasoning used in that case”).

¹¹ *Id.* at 823 (emphasis added).

¹² *Osborn*, 22 U.S. 9 Wheat.. at 822.

¹³ The first judiciary act anticipated only the Supreme Court’s appellate jurisdiction of “arising under” cases. The act states that the Supreme Court shall have appellate jurisdiction over a final judgment from the highest court in a state “in which a decision in the suite could be had, where is drawn into question...the construction of any clause of the constitution...or statute...and the decision is against the title, right, privilege or exemption specially set up or claimed by either party under such clause of the said constitution, treaty, statute or commission.” Law of September 24, 1789, ch. XX, § 25. Despite Congress’s failure to make an express grant of original “arising under” jurisdiction in the lower federal courts in the first judiciary act, as described *supra*, the earliest Supreme Court decisions explained that the grant of this

jurisdiction was found within the text of the Constitution.

¹⁴ “The statute’s [28 U.S.C. § 1331] ‘arising under’ language tracks similar language in art. III, § 2 of the Constitution, which has been construed as permitted Congress to extend federal jurisdiction to any case of which federal law potentially ‘forms an ingredient.’ *see Osborn v. Bank of the United States*, 9 Wheat. 738, 823, 6 L.Ed. 204 (1824), and its limited legislative history suggests that the 44th Congress may have meant to ‘confer the whole power which the Constitution conferred,’ 2 CONG.REC. 4986 (1874) (remarks of Sen. Carpenter).” *Franchise Tax Bd. v. Laborers Vacation Trust*, 463 U.S. 1, 8 n.8 (U.S. 1983).

¹⁵ Judiciary Act of 1875, ch. 137, §2, 18 Stat. 470 (1875) (current version at 28 U.S.C. § 1331).

¹⁶ 2 CONG.REC. 4986-4987 (1874).

¹⁷ *See* 102 U.S. 135, 139-140 (U.S. 1880) (Harlan, J.).

¹⁸ *Id.* at 140.

¹⁹ *See Ames v. Kansas*, 111 U.S. 449, 462 (U.S. 1884) (Waite, C.J.) (finding federal jurisdiction because “[t]he right set up by the company, and by the directors as well, will be defeated by one construction of these acts and sustained by the opposite construction.”); *Hopkins v. Walker*, 244 U.S. 486, 489 (U.S. 1917) (Van Devanter, J.) (reversing the district court’s dismissal of a claim for lack of jurisdiction because “it is plain that a controversy respecting the construction and effect of the [U.S.] mining laws is involved and is sufficiently real and substantial to bring the case within the jurisdiction of the district court.”); *cf. Shulthis v. McDougal*, 225 U.S. 561 (U.S. 1912) (finding federal jurisdiction improper because in actions to quiet title, allegations of competing claims are not properly part of the complaint); *Shoshone Mining Co. v. Rutter*, 177 U.S. 505, 508 (U.S. 1900) (federal jurisdiction denied in mining claim, since “in a given case the right of possession may not involve any question under the Constitution or laws of the United States, but simply a determination of local rules and customs, or state statutes, or even only a mere matter of fact”).

²⁰ 255 U.S. 180, 199 (U.S. 1921) (Day, J.) (quoting *Osborn*, 9 Wheat. at 822).

²¹ *See Smith*, 255 U.S. at 195.

²² *Id.* at 201-202.

²³ *Franchise Tax Bd. v. Laborers Vacation Trust*, 463 U.S. 1, 8 n.8 (U.S. 1983) (quoting *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 494 (U.S. 1983) (Burger, C.J.)).

²⁴ *Grable*, 125 S. Ct. 2363 (2005) at *19-20.

²⁵ *Grable* at *18.

²⁶ *Id.*

²⁷ *Id.* at *19.

CALIFORNIA SUPREME COURT BOTH LIMITS AND EXTENDS PUNITIVE DAMAGES

BY DON WILLENBURG AND RAYMOND J. TITTMANN*

The California Supreme Court has decided a pair of punitive damage cases, *Simon v. Sao Paolo U.S. Holding Co. Inc.*, 2005 DJDAR 7091 (June 16, 2005) and *Johnson v. Ford Motor Co.*, 2005 DJDAR 7101 (June 16, 2005), that are that court's first decisions to apply the United States Supreme Court's landmark *State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). Like that decision, these California Supreme Court decisions provide ammunition for attorneys to argue for and against limitations on punitive damages. The court held that the proper ratio between punitive awards and compensatory awards may be based only on harms actually resulting or likely to result from the defendant's conduct—thus lowering permissible punitive awards. The court also held that the punitive “multiplier” might be higher based on the wealth of the defendant and whether the harm to the plaintiff was an “isolated incident” or a “repeated corporate practice.”

In *Campbell*, the United States Supreme Court held that due process requires that punitive damages be limited to a “reasonable and proportionate” award pursuant to three “guideposts”: “(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.”¹ The court recommended punitive damages in an amount “at or near” the compensatory damages in the case before it, and punitive awards that exceeded the “single-digit multiple” of the compensatory award, “to a significant degree,” would be constitutionally suspect.² “If, in *BMW*, the high court threw a lasso around the problem of what it had previously identified as ‘punitive damage awards’ ‘run wild,’ in *State Farm* it tightened the noose considerably.”³

The first of the California Supreme Court decisions to apply *Campbell*, *Simon*, addressed and perhaps moved several of the pre-existing battle-lines in the ongoing war over punitive damages. Three points stand out.

First, *Simon* held that a punitive award must be based on the harm that the defendant's conduct actually caused or was likely to cause, and not on the potential harm. The plaintiff Simon attempted to purchase a building from the defendant San Paolo. San Paolo's representatives made various fraudulent misrepresentations about negotiating exclusively and sold the building to someone else. Simon recovered the \$5,000 spent in reliance on San Paolo's false promises. However, Simon also sought to recover with his consequential damages the “potential harm” of \$400,000 (the difference between his appraised value of the property and what he was to pay for it). Simon lost his contract claim because the parties had not entered into an enforceable agreement to sell him the building. Consequently, Simon could not count the

\$400,000 loss resulting from the failed contract among his consequential damages.

The court contrasted Simon's position with *Neal v. Farmers Ins. Exchange*, 21 Cal.3d 910 (1978), in which a statute barred recovery of damages that were actually caused. There, plaintiff died before judgment, precluding her estate's recovery for the substantial emotional distress she had suffered. The eventual “disparity between the relatively small compensatory damages award and the significant award of punitive damages did not require nullification” of the punitive award.⁴ In *Simon*, on the other hand, the court found that defendant had not caused any “actual harm” to plaintiff other than reflected in the compensatory award. The misrepresentations caused only the \$5,000 spent in reliance, so that was the proper amount against which the punitive award must be measured.

But *Simon* also permitted consideration of damages that are “reasonably likely” to result from, or “a goal” of, “the tortfeasor's conduct,” even if they did not actually occur.⁵ The distinction, arguably *dicta*, between damages that are merely “potential” and damages that are “reasonably likely” will no doubt be the subject of future legal skirmishes.

Second, *Simon* reduced a \$1.7 million punitive damage award, and criticized the 340:1 ratio as a “breathtaking multiplier.” The Court of Appeal had accepted Simon's claim to the \$400,000 and thus found the \$1.7 million award an acceptable 4:1 ratio. The punitive damages were reduced to \$50,000. But *Simon* also held that “the presumption of unconstitutionality applies only to awards exceeding the single-digit level ‘to a significant degree’.”⁶ Plaintiffs will cite this statement in *Simon* to urge approval of punitive damage ratios exceeding single digits, though the 10:1 ratio approved in *Simon* only barely exceeded single digits.

Third, *Simon* held that a defendant's wealth may sometimes be considered in determining an appropriate ratio. *Campbell* held that deterrence is a permissible consideration (538 U.S. at 416), and *Simon* recognized that wealth can be relevant to the deterrent effect of a punitive award. “In some cases, the defendant's financial condition may combine with high reprehensibility and a low compensatory damage award to justify an extraordinary ratio between compensatory and punitive damages.” Nevertheless, *Simon* did not permit consideration of the defendant's wealth in this case: “But when, as in the present case, the reprehensibility of the defendant's conduct is relatively low, the state's interest in punishing it and deterring its repetition is correspondingly slight.”⁷ The lines drawn by *Simon* on each one of these points leave plenty of open territory for future cases.

In *Johnson*, plaintiffs won just under \$18,000 in compensatory damages where Ford had concealed the repair

and “lemon return” history of a used car. The jury awarded \$10 million in punitive damages upon plaintiffs’ presentation of evidence that Ford had a corporate practice of engaging in this kind of fraud, representing disgorgement of profits from California consumers victimized by the same practices. The court of appeal reduced punitives to \$53,435, about three times the compensatory damages, on the rationale that Ford could constitutionally be punished only for its fraud on plaintiffs—“the conduct that injured the present plaintiffs” and not for other acts or defendant’s “overall course of conduct.”

The Supreme Court agreed that \$10 million was too high (both as a constitutional matter and under disgorgement law), but remanded because the court of appeal’s focus was too narrow. On remand, the court of appeal was directed to consider that Ford’s fraud was more reprehensible because it was part of a “repeated corporate practice rather than an isolated incident,” and that “the scale and profitability of Ford’s repeated conduct reflects on its reprehensibility.” The Supreme Court explained that “a defendant [that] has repeatedly engaged in profitable but wrongful conducts tends to show that ‘strong medicine is required’ to deter the conduct’s further repetition.”⁸ *Johnson* contrasted this with the wrongdoing that the United States Supreme Court found irrelevant in *Campbell*, because the *Campbell* conduct involved “bad acts” that were not like those that harmed the *Campbell* plaintiffs. Plaintiffs will likely cite *Johnson* in an attempt to justify wide-ranging discovery of national corporate practices, in search of finding some similar conduct from which to argue that the defendant needs a similar dose of “strong medicine.”

Johnson also gave a victory to defendants. While repeated conduct “remains relevant” to analyzing reprehensibility, *Johnson* does not “approve plaintiffs’ aggregate disgorgement theory of punitive damages.” Such a theory would potentially “overpunish” defendants by using the same conduct in multiple cases, effectively punishing defendants many times for the same conduct. It would result in “disproportionate” awards to each plaintiff as well. The plaintiffs in *Johnson*, for example, had recovered profits allegedly obtained by Ford on thousands of transactions without any evidence that Ford had actually committed the same wrongdoing on each transaction. Defendants may cite this aspect of the holding to limit discovery to evidence that the specific conduct at issue was part of an ongoing and repeated pattern, but not to estimate or award the profits obtained from any such practice.

Johnson did not expand *Simon*’s discussion of wealth of a defendant as a permissible consideration in determining an appropriate punitive damage award, but impliedly agrees by identifying the “profitability” of wrongful conduct as a permissible consideration. *Johnson* remanded with directions to the lower court to consider increasing the size of a punitive award based on profitability, and so, along with *Simon*, keeps open the possibility of large awards in future cases.

While each side may claim victory in the various battles waged in *Simon* and *Johnson*, the war wages on.

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Footnotes

¹ 538 U.S. at 418 (citing *BMW of North America, Inc. v. Gore* 517 U.S. 560, 575 (1996) (reversing \$2 million punitive award on a \$4,000 compensatory verdict).

² 538 U.S. at 425.

³ *Simon*, 2005 DJDAR at 7096.

⁴ *Simon*, 2005 DJDAR at 7094.

⁵ *Simon*, 2005 DJDAR at 7095.

⁶ *Simon*, 2005 DJDAR at 7096 n.7.

⁷ *Simon*, 2005 DJDAR at 7098.

⁸ *Johnson*, 2005 DJDAR at 7105.

PROFESSIONAL RESPONSIBILITY

LETTERS TO SENATOR ARLEN SPECTER, CHAIRMAN, U.S. SENATE JUDICIARY COMMITTEE

BY RONALD D. ROTUNDA*, THOMAS D. MORGAN* AND STEPHEN GILLERS, DAVID LUBAN & STEVEN LUBET*

In Slate magazine, August 17, 2005, Professors Stephen Gillers, David Luban, and Steven Lubet published an article entitled "Improper Advances: Talking Dream Jobs With the Judge Out of Court." The article argued that Judge John Roberts violated a federal statute by failing to recuse himself from Hamdan v. Rumsfeld when he began interviewing for a Supreme Court seat while the case was pending. Judge Roberts met with Attorney-General Alberto Gonzales on April 1, six days before the oral argument in Hamdan. He met twice in May with top White House officials, and had several subsequent interviews before Hamdan was decided on July 15. At the time of the first interviews, Justice Sandra Day O'Connor had not yet announced her retirement, but Chief Justice Rehnquist's illness made it possible that a seat would open on the Court. The purpose of the statute, which requires recusal when a judge's "impartiality might reasonably be questioned," is the important one of maintaining public confidence in the courts – and prior cases have held that judges must recuse when they interview with litigants or lawyers in their cases for future jobs. Gillers, Luban, and Lubet acknowledge that "Roberts did not have to sit out every case involving the government, no matter how routine, while he was being interviewed for the Supreme Court position." But Hamdan was "the polar opposite of routine": President Bush was a defendant, and the case—concerning the legality of military commissions and the applicability of the Geneva Conventions to suspected Al Qaeda members—was extremely important to the Administration. Judge Roberts cast a decisive vote on a crucial Geneva Conventions issue. Gillers, Luban, and Lubet called on him to recuse himself retroactively from Hamdan.

In August, 2005, Senator Arlen Specter, Chairman, U.S. Senate Judiciary Committee, asked Professors Ronald D. Rotunda and Thomas D. Morgan to write opinion letters concerning Judge John J. Roberts' role in the case of Hamdan v. Rumsfeld. Those letters are reprinted below, followed by a response from Professors Gillers, Luban and Lubet.

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22 August 2005

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Re: PROPRIETY OF JUDGE ROBERTS' FAILURE TO RECUSE HIMSELF *SUA SPONTE*

Dear Chairman Specter:

Introduction

You have asked me about the propriety of Judge John Roberts' failure to recuse himself in the case of *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005). Judge Roberts was a member of the three-judge panel that decided this case, although he wrote no opinion.¹ Judge Randolph, speaking for the court, wrote the opinion, holding that the President's designation of a military commission to try an enemy combatant alleged to have fought for al-Qaeda does not violate the separation of powers doctrine; the Geneva Convention of 1949 does not give an enemy combatant any right to enforce its provisions in a federal court; and even if the Geneva Convention were enforceable in court, no rights of any enemy combatant are violated when a military commission tries the combatant.

Last month, Professor Stephen Gillers, who teaches legal ethics at New York University, opined that he "saw no

problem” with the fact that President Bush met with Judge Roberts about the vacancy in the U.S. Supreme Court on July 15, “the same day the D.C. court ruled 3-0 in Bush’s favor in *Hamdan*.” However, “Gillers told *Newsday* yesterday [August 17] he changed his mind after Roberts disclosed the White House interviews in his Senate questionnaire Aug. 2.”² The significant difference, Gillers said, is that Roberts said that Attorney General Alberto Gonzales spoke to him on April 1, six days before oral arguments in the *Hamdan* case, instead of a few days after.

Professor Gillers and two other professors now argue³ that Judge Roberts violated a federal statute ethics rules because he should have disqualified himself from participating in the *Hamdan* case when it turned out that the Attorney General met with him on April 1, six days before oral argument. This change in dates, the argument goes, created the “appearance of impropriety.” The conversation that the Attorney General had with Judge Roberts about a possible upcoming vacancy, is a conversation that the Attorney General had with other people too, because we know that the President interviewed other candidates and did not make his final decision as to whom to appoint until shortly before (a day or two before) he announced the nomination on July 19th. The vacancy did not even occur until July 1st.

Oddly enough, this change in dates that Professor Gillers claimed caused him to change his mind occurred only because counsel for *Hamdan*, on March 1, asked for a delay in the oral argument.⁴ But for that delay, which they requested and the court granted on March 2, the interview with the Attorney General would have occurred about a month *after* oral argument instead of six days *before* oral argument.

This change in the dates, Professor Gillers and others now argue, created “an appearance of impropriety” that required Judge Roberts to recuse himself, *sua sponte* (i.e., on his own motion, because no party has asked for his recusal). You have asked me to evaluate this issue.

“Impartiality Might Reasonably Be Questioned”

Before turning to the specific facts of this case, we should first look at 28 U.S.C. § 455. Subsection (b) lists a host of specific situations that require the recusal of a federal judge. No one, including Professor Gillers, et al., suggests that Judge Roberts has violated any provision of §455(b). Instead, the concern relates to §455(a), which is a catch-all provision that provides:

“Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might *reasonably* be questioned.”

In addition to the language found in the federal statute, Professor Gillers also uses another test, *even more vague*, the “requirement of an *appearance* of impartiality.”⁵ One must be very cautious in relying on vague standards such as “appearance of impropriety,” because they easily lend themselves to ad hoc and ex post facto analysis. Any allegation that a judge violated the ethics rules is a very serious matter, for it attacks his integrity and bona fides.

The statutory test, “impartiality might *reasonably* be questioned,” is the law and we must follow it, but we also must not read the language overly broadly, for the ABA, the commentators, and the cases advise otherwise.

For example, consider the ABA MODEL RULES OF PROFESSIONAL CONDUCT. This model law governs lawyers (not judges), but its cautions are still relevant. The ethics rules, in the past, used the “appearance of impropriety” standard (which Gillers adopts), but no longer. The ABA has called it “question-begging,”⁶ and rejected it in 1983. Even before that date, the ABA warned, if the “appearance of impropriety” language had been made a disciplinary rule, “it is likely that the determination of whether particular conduct violated the rule would have degenerated . . . into a determination on an instinctive, or even *ad hominem* basis.”⁷ Commentators, such as Professor Geoffrey C. Hazard, Jr., the reporter for the original ABA Model Rules, referred to the old “appearance of impropriety” standard as “garbage.”⁸ The Second Circuit generally advised, over a quarter of a century ago:

“When dealing with ethical principles . . . we cannot paint with broad strokes. The lines are fine and must be so marked. [T]he conclusion in a particular case can be reached only after painstaking analysis of the facts and the precise application of precedent.” *Fund of Funds, Ltd. v. Arthur Andersen & Co.*, 567 F.2d 225, 227 (2d Cir. 1977).⁹

The Restatement of the Law Governing Lawyers, Third (A.L.I. 2000), has also cautioned us not to read too much into vague phrases like “appearance of impropriety”:

“[T]he breadth [of vague, ‘catch-all’ provisions] provisions creates the risk that a charge using only such

language would fail to give fair warning of the nature of the charges to a lawyer respondent and that *subjective and idiosyncratic considerations* could influence a hearing panel or reviewing court in resolving a charge based only on it. That is particularly true of the ‘appearance of impropriety’ principle (stated generally as a canon in the 1969 ABA Model Code of Professional Responsibility but purposefully omitted as a standard for discipline from the 1983 ABA Model Rules of Professional Conduct). *Tribunals accordingly should be circumspect in avoiding overbroad readings or resorting to standards other than those fairly encompassed within an applicable lawyer code.*” §5, Comment C (emphasis added; internal citation omitted).

While Professor Gillers and his colleagues embrace the “appearance of impropriety” standard, 28 U.S.C. § 455(a) does not. Instead, it requires the judge to disqualify himself in any proceeding where his “impartiality might *reasonably* be questioned.” Hence, I will analyze that the factual scenario in light of that standard.

When we apply that standard, it is appropriate to bear in mind that it must be used with care. The statute asks us to look at the perspective of a “reasonable” observer. We should not prohibit conduct “that might appear improper to an uninformed observer or even an interested party.”¹⁰

In short, the ABA, various commentators, the courts, and the American Law Institute have all advised us not to read language like the “appearance of impropriety” too broadly. We sometimes think, loosely, that ethics is good and that therefore more is better than less. But “more” is not better if the “more” exacts higher costs, measured in terms of vague rules that impose unnecessary disqualifications. That levies costs on the judicial system and the litigants, which we all must consider when determining whether “impartiality might *reasonably* be questioned.” Hence, we must consider the issue from the perspective of a reasonable, objective lawyer fully informed of the facts.

The Chronology Regarding Judge Roberts’s Eventual Nomination

Let us summarize the major events that led to Professor Gillers changing his mind so that he now accuses Judge Roberts of engaging in unethical conduct.

12/1/2004: The D.C. Circuit announces the panel that will hear the *Hamdan* appeal. Judge Roberts is part of that panel.

12/11/2004: *National Journal* lists Judge Roberts as the first of a short list of 10 for a vacancy, “based on conversations with former White House officials and others.” (This example from the press is just one of many and it is used for illustrative purposes only.)

3/8/2005: The original date scheduled for oral argument in *Hamdan*.

4/1/2005: Roberts meets with Attorney General Gonzales.

4/7/2005: Argument in *Hamdan*. Under usual D.C. Circuit practice, each of the judges would cast his initial votes at the conference that day, following oral argument, but any judge is free to change his vote until after the draft opinion circulates and is finally approved.

5/3/2005: Roberts meets with the Vice President and White House officials.

5/23/2005: Roberts meets with the White House counsel and her deputy.

7/1/2005: Justice O’Connor announces her retirement, which creates the first vacancy in the U.S. Supreme Court since President Clinton appointed Justice Breyer in 1994.

7/8/2005: Roberts speaks, by phone from England, with the deputy White House counsel.

7/15/2005: The D.C. Circuit releases the *Hamdan* opinion. Under usual D.C. Circuit practice, the opinion would have been approved by the panel members and circulated to the full D.C. Circuit days or weeks before.

7/15/2005: Roberts interviews with the President.

7/19/2005: The President offers Roberts the job and announces the nomination.

The Proposed Gillers Rule That Would Disqualify Judge Roberts

The reason why ethics codes include “catch-all” provisions is “to cover a wide array” of offensive conduct and to prevent “attempted technical manipulation of a rule stated more narrowly.”¹¹ If this conduct—although unforeseen by the drafters of 28 U.S.C. § 455(a)—really is a technical manipulation of a rule, or if the conduct is so offensive that a specific rule should prohibit it, it should not be difficult to draft that rule. In other words, if the statutory standard of “*impartiality might reasonably be questioned*” really required Judge Roberts’ recusal in the circumstances of this case, we should be able to draft a workable rule to cover this type of conduct.

Professor Gillers, et al. argue that Roberts violated the federal statute, § 455(a), in not recusing himself, *sua sponte*. For convenience, let us call this rule the proposed Gillers Rule. How would that rule read? Recall that Professor Gillers, et al., argue that Judge Roberts should have withdrawn from further participation in the case because he had a conversation with the Attorney General to talk about a possible opening on the U.S. Supreme Court that would occur at some point in the future, and this meeting (as well as others) occurred shortly before the date of the delayed oral argument in *Hamdan*. The Government was a party to the case and, as Gillers says, that case was “hotly contested.”¹²

Hence, the hypothetical Gillers Rule would require a judge who learns that he is being considered for an appointment to the U.S. Supreme Court to recuse himself from cases where the Government represents one side and that case is, in Gillers’ words, “hotly contested.”

However, all litigation is “hotly contested,” by definition. Parties do not involve themselves in time-consuming and expensive litigation, appeal the case, and then contest the case “mildly,” or “half-heartedly.” No case is ever “coldly contested.” Just as a light switch is either on or off, the parties contest a case either hotly or not at all.

Hence our hypothetical Gillers Rule would provide that a judge who learns that he is being considered for an appointment to the U.S. Supreme Court must recuse himself from cases where the Government represents one side. If that were the rule, it would apply to a host of cases for each federal judge who is being considered for a position to the U.S. Supreme Court—a position that did not yet exist because Justice O’Connor did not announce her retirement until July 1, 2005.

Recall that the news widely reported that *ten* candidates, including Roberts, were being considered for a possible seat on the Court in early December, 2004. So, the Gillers Rule would have to provide that when a judge is being considered for an appointment to the U.S. Supreme Court, even though there is yet no opening, he or she must recuse himself or herself in every case where the Government is on one side. The Government might be the “United States,” as in a typical criminal case, or an agency, like the Department of the Treasury, or Department of Energy, or the NLRB, or the FCC, etc.

It is not unusual for a case to be *sub judice* (under consideration, before the judge) for six months to a year. Each judge being considered will be exposed to scores of cases or more where the Government is a party. Consider, for example, when President Clinton considered Judge Stephen Breyer but then nominated Judge Ruth Bader Ginsburg to the U.S. Supreme Court. Justice Byron White announced his resignation in March, 1993. President Clinton announced his nomination of Judge Ginsburg almost three months later, on June 14, 1993. During this short time period, when there was an actual vacancy on the Court and not merely speculation about a future vacancy, she participated in nearly 50 civil cases involving the U.S. Government or one of its agencies—including the Department of Defense or Department of the Army—and more than 25 additional criminal cases where the United States was a party. As far as we can tell from the records, in none of them did she recuse herself because the media reported that she was being considered for elevation to the U.S. Supreme Court.

The President, at that time, also interviewed Judge Breyer of the First Circuit. The President did not choose Judge Breyer until the following year. During that entire period of time—well over a year—Judge Breyer did not recuse himself from any case involving the U.S. Government even though he had had conversations with the Administration about his possible elevation to the U.S. Supreme Court.¹³ In no case during a period over a year did he recuse himself after he was interviewed for the Supreme Court. In none did he recuse himself because the President told him that he was being considered for the Supreme Court. In none did he recuse himself because the President had nominated him to the Supreme Court. In none did any litigant move to disqualify him because he was being considered for the Supreme Court.

The news reports said that at least ten judges, including Judge Roberts, were on the short list in December of 2004. When Roberts had a conversation with the Attorney General in early April of 2005 (before there was any opening on the Court), it is common knowledge that he was not the only judge being considered for possible elevation to the Supreme

Court. Even the day before (and the morning of) the final announcement on July 19, news reports told us who they thought the nominee would be, and the various names that were published were hardly limited to Roberts. The Gillers Rule would have to apply to all of these judges and require them to *sua sponte* recuse themselves from cases where the United States or one of its agencies or officials was a party.

This proposed Gillers Rule on disqualification would have to apply to ten or more judges during the time period before there is actually any opening on the Supreme Court but when the White House and Department of Justice are likely to be considering prospective candidates; this new Gillers Rule would also have to apply to the three or four final candidates for the time period just before the President makes his final choice. People on the longer list may not know that they are missing from the short list, so a half dozen candidates may think they are in the final four. If the average number of cases per judge is 40, then (for the time period when the President is considering about 10 candidates), we have 400 cases where judges will have to recuse themselves, even if oral argument has already occurred. Even if we limit the Gillers Rule to the final four, we are still talking about 160 cases. Of course, my assumption that the average number of cases is 40 is on the low side.

Whether the number is 40 or 70 or more, under the Gillers Rule, even if the case had been *sub judice* for six to 10 months, the judge must withdraw and the parties may have to reargue their case before a new panel. Both parties, after all, are entitled to a three-judge panel, but one or more of these judges would be required to recuse themselves under the proposed Gillers Rule.

I have been assuming that the issue involved appointment to the U.S. Supreme Court, but that need not be the case. It might involve the appointment of a Supreme Court Justice to another position. For example, there came a time when Justice Arthur Goldberg became U.N. Ambassador Goldberg. Oddly enough, he did not withdraw from Supreme Court cases involving the U.S. Government during the time period when he was being considered for the position until the time the President narrowed his choice and then finally made that choice public.

The Gillers Rule would also have to apply when the judge moves from the federal trial court to the Court of Appeals. Or the judge might move from the state courts to the federal district court or U.S. Court of Appeals. Or, a lower court federal judge might leave the bench and accept a federal position outside the judicial branch. Judges have left the bench to become Director of the FBI, or to become head of another agency, like the Department of Education. The Secretary of the Department of Homeland Security was a federal judge this time last year. These are the cases we know about, where the Government actually offered the position to a particular federal judge. There have to be other cases where the President or his designee talked with a federal judge about a possible position that would eventually occur in the future but did not eventually make an official offer. The Gillers Rule would apply to all of these cases.

I can find no evidence that any of these prospective judicial nominees (Supreme Court to UN Ambassador; federal judge to Cabinet Secretary; state court judge or federal trial judge to federal appellate judge) recused themselves in the cases I have described. If we consider all judges who have had *discussions* with an administration official about a position that is not even available yet (recall that Judge Roberts's first discussion with an administration official occurred *before* there was any Supreme Court opening), even more people will be covered by the Gillers Rule.

The President and the Attorney General are not the only people who interview potential judicial nominees. U.S. Senators interview candidates for possible judgeships. In some states there are "Judicial Selection Panels" who interview candidates for federal judgeships, particularly federal district judgeships. Some states have created Judicial Selection Panels to recommend qualified candidates for openings on the state courts.

Members of these panels include laypeople and lawyers, and both of these groups, especially lawyers, have cases in state or federal court. If the Gillers Rule becomes the law, so that the persons whom these panels interview must recuse themselves from any case, then the number of judges who must recuse themselves increases tremendously. The reason for that is because the lawyers on these judicial selection panels have cases before state and federal judges all the time, and these lawyers will be interviewing state and federal judges who are interested in being nominated to the federal bench.

One might argue that the proposed Gillers Rule is so important and the appearance of impropriety is so significant that it does not matter that many judges will have to recuse themselves because it is the right thing to do. However, if a judge must recuse himself, that gives a great deal of power to officials in the Administration and the members of the Judicial Selection Panels. Roberts did not meet the President until late in the process, on July 15, just four days before he was offered the position. He met with the Attorney General on April 1. Under the proposed hypothetical Gillers Rule, the President, or the Attorney General, or any of their agents, could require Roberts or any other judge to recuse himself from

a decision simply by discussing with the prospective nominee a possible position on the Supreme Court, or at the United Nations, or at the FBI, Homeland Security, etc.

The proposed Gillers Rule, if it became the law, would give Administration officials tremendous power to manipulate who is on the panel of a case by forcing the recusal of one or more of the judges simply by considering them for a position that is not yet open but will open eventually. Our hypothetical Gillers Rule, which is promoted as protecting the litigants opposing the government, is really a rule that undercuts litigants' rights by giving Government officials a power to force recusal at very low cost to itself.

The power that this new Gillers Rule would bestow may not be limited to government officials. Any person on the Judicial Selection Panels might have a similar power. A panel member can invite a state judge or federal trial judge to be interviewed for a position on the federal district court or federal court of appeals. When the interviewee learns that a member of the panel has a case before him or is appearing before him, he will have to recuse himself. Members of the panel can become creative and launder their invitations, so that Panel Member #1, with no case before the prospective nominee, will invite the prospective nominee, who will learn, at the interview, that he has a case before Panel Member #2. The people who engage in such conduct are unscrupulous, but we know that lawyers already manipulate the rules to affect the judges who hear their cases,¹⁴ and they are not always caught.

The Case Law

Over the last several years, there have to be hundreds of times where judges would have had to recuse themselves from cases where the Government was a party because the judge had had a conversation with an administration official about a new position. As mentioned above, Judge Breyer's discussions that led to his elevation to the U.S. Supreme Court had to implicate a year's worth of cases. We should expect to find a lot of case law on the subject. Instead we find a paucity of cases, literally less than a handful. Gillers discusses some of them. They all make careful distinctions. Let us turn to them now.

The case that seems most on point is one that Gillers, et al. does not cite. It is *Baker v. City of Detroit*, 458 F.Supp. 374 (D. Mich.1978). The judge refused to recuse himself from a reverse discrimination case against defendants, including Mayor Young of Detroit. The plaintiffs, who sought disqualification under 28 U.S.C. § 455(a), complained of bias because Mayor Young was chairing the judicial selection committee that forwarded the judge's name to President Carter for elevation to the Court of Appeals.¹⁵ This case was before the judge when he was a trial judge and while Mayor Young was urging President Carter to appoint him to a higher court; he kept this case, even after he was elevated to the Sixth Circuit.¹⁶ Under the proposed Gillers Rule for recusal, this judge would be violating the federal statute. The court, however, denied the disqualification motion.

The Gillers article starts by relying on an opinion by Justice Stevens, *Liljeberg v. Health Services Acquisition Corp.* 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988), where the Court (5 to 4) upheld a lower court decision disqualifying the trial judge in a bench trial. Gillers uses that case to establish what he calls the "appearance of impropriety" standard. The facts, however, simply do not relate to the present situation.¹⁷

The second case Gillers cites is *Pepsico, Inc. v. McMillen*, 764 F.2d 458 (7th Cir. 1985). He describes that case in language that parallels language I use to describe the case in one of my books. He says that the Seventh Circuit:

"ordered the recusal of a federal judge who, planning to leave the bench, had hired a 'headhunter' to approach law firms in the city. By mistake—and, in fact, contrary to the judge's instructions—the headhunter contacted two opposing firms in a case then pending before the judge. One firm rejected the overture outright. The other was negative but not quite as definitive."¹⁸

The *Pepsico* case, on its facts, is simply different from the facts involving Judge Roberts. While the judge in *Pepsico* did not know that the headhunter had contacted the two law firms, the law firms believed that the headhunter was acting on the judge's behalf. From their perspective, the judge before whom they were trying a case was asking each of them for a job. The two firms were asked to bid to see who gave the judge the best job offer—how big should the partnership draw be; how extensive should the fringe benefits be? Negotiating for an adjustable salary with the two private parties appearing before you is different than accepting, or agreeing to be considered for, a Supreme Court appointment. There is no negotiation for that job; the salary is fixed. Moreover, the Seventh Circuit was concerned that the judge *initiated* (through the headhunter) the contacts:

"The dignity and independence of the judiciary are diminished when the judge comes before the lawyers in the

case in the role of a suppliant for employment.” 764 F.2d at 461.¹⁹

Judge Roberts did not apply for a job; he did not negotiate the terms of employment; he did not initiate a meeting; he was no suppliant; he simply accepted the invitation of the Attorney General to meet to discuss a possible Supreme Court vacancy. Recall that Gillers had no problem with the Attorney General meeting with Judge Roberts after the oral argument; one fails to see why the situation is 180 degrees different because the meeting occurred before oral argument.²⁰

One can, of course, argue that the case should be read more broadly, and Gillers does that. But he should have noted that the case on which he relies instructs us to the contrary: “Our holding is narrow,” the court warned, because “[w]e deal with an unusual case,” and the court was unwilling to make any pronouncements that applied to other factual scenarios. 764 F.2d at 461.

The third case, which cites *Pepsico*, is one on which Gillers places special emphasis, *Scott v. United States*, 559 A.2d 745 (D.C. 1989). Here is the way that Gillers, et al. summarize this case:

“In the fall and winter of 1984, a criminal-trial judge in the District of Columbia was discussing a managerial position with the Department of Justice while the local U.S. attorney’s office—which is part of the department—was prosecuting an intent-to-kill case before him. Following the conviction and sentence, the judge was offered the department job and accepted. On appeal, the United States conceded that the judge had acted improperly by presiding at the trial during the employment negotiations. It argued, however, that the conviction should not be overturned. The appeals court disagreed. Relying on [*Pepsico*], as well as the rules of judicial ethics, the court vacated the conviction even though the defendant did not ‘claim that his trial was unfair or that the [the judge] was actually biased against him.’ The court was ‘persuaded that an objective observer might have difficulty understanding that [the judge] did not. . . realize . . . that others might question his impartiality.’”²¹

One might consider *Scott* to be based on different facts, because the judge there was taking a position in the Department of Justice. The judge was not moving from a position as judge to another position as judge; instead, he was joining the prosecutors and becoming a lawyer in the “Executive Office for United States Attorneys.” He would, in fact, be supervising some of the Government lawyers who were appearing before him.

There is another problem with Gillers’ reliance on the *Scott* case: there is an important discrepancy between his characterization of that case and what it says:

“By December 23, 1984, when he had decided to accept the position in the Executive Office for United States Attorneys, the judge had a duty to recuse himself from Scott’s case. These facts present ‘precisely the kind of appearance of impropriety’ that Canon 3(C)(1) is designed to prevent.” *Scott v. United States*, 559 A.2d 745, 755 (D.C.1989) (emphasis added).

Scott does not support Gillers’ argument; it *undermines* it. And it also undermines the proposed Gillers Rule. What *Scott* says, at most, is that Judge Roberts had no obligation to withdraw from a case where the Government is a party *before he was offered and decided to accept the position*. That date could not be before the vacancy existed; in fact, it could not be before July 15, when he meets the President for the first time. By that time, the *Hamdan* case had already been decided.

Conclusion

Past practice of other judges who have accepted or considered appointment for other offices, including past practice of Judge Roberts’ predecessors on the D.C. Circuit, demonstrates that he did not violate 28 U.S.C. § 455(a). If we were to interpret this statute broadly, contrary to the advice of the American Bar Association, the American Law Institute, and the case law—if we were, in effect, to change the historical practice and adopt the Gillers Rule—we would create a new set of problems. In particular, we would be giving members of the Administration the power to manipulate who sits on panels simply by considering one or more judges for other positions.

Instead, in my opinion, we should follow the advice of *Scott v. United States*, 559 A.2d 745 (D.C. 1989), the case on which Gillers purports to rely. *Scott* says, at most, that a recusal obligation arose only after the judge “*had decided to accept the position* in the Executive Office for United States Attorneys.” In Judge Roberts’ situation, by the time he was offered another judicial position, the *Hamdan* case had been decided.

Sincerely,

Ronald D. Rotunda

* Ronald D. Rotunda is the *George Mason University Foundation Professor of Law* at George Mason University School of Law, where he teaches Legal Ethics and Constitutional Law. He returned to teaching in early June of 2005, after being on leave for a year as Special Counsel to the General Counsel of the Department of Defense. He is the author (with Professor Thomas Morgan) of the most widely used course book on legal ethics, *Problems and Materials on Professional Responsibility* (Foundation Press, 8th ed. 2003) and is the author of a leading course book on constitutional law, *Modern Constitutional Law* (West Publishing Co., 7th ed. 2003). He is also the author (with Professor John Dzienkowski) of *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility* (ABA-West Group, St. Paul, Minnesota, 2nd ed., 2002) (jointly published by the ABA and West Group, a division of Thompson Publishing). He is also the author of several other books and more than 200 articles in various law reviews, journals, newspapers, and books in this country and in Europe. These books and reviews have been cited more than 1000 times by state and federal courts at every level, from trial courts to the U.S. Supreme Court. In 2000, a lengthy study that the University of Chicago Press published, which sought to determine the influence, productivity, and reputations of law professors over the last several decades, listed Professor Rotunda as the 17th highest in the nation. The 2002-2003 New Educational Quality Ranking of U.S. Law Schools (EQR) ranks Professor Rotunda as the eleventh most cited of all law faculty in the United States.

Footnotes

¹ Judge Williams, the third member, filed a concurring opinion.

² Tom Brune, *Roberts Meeting “Illegal”: Legal Ethicists Say White House Interview Jeopardized Judge’s Impartiality in a Case on Military Tribunals*, *NEWSDAY*, Aug. 18, 2005, at <http://www.newsday.com/news/nationworld/nation/ny-us cort184388315aug18,0,5829402.story>.

“*The White House broke the law* when it interviewed D.C. Circuit Judge John G. Roberts last spring for the Supreme Court as he heard a challenge to the president’s military tribunals, three legal ethicists said yesterday.” *Id.* (emphasis added).

³ Stephen Gillers, David J. Luban, and Steven Lubet, *Improper Advances: Talking Dream Jobs with the Judge out of Court*, *SLATE* (Wednesday, Aug. 17, 2005), <http://slate.msn.com/id/2124603/?nav=tap3>.

⁴ Order, *Hamdan v. Rumsfeld*, No. 04-5393 (D.C. Cir. 2005); Motion to Postpone Oral Argument, *Hamdan v. Rumsfeld*, No. 04-5393 (D.C. Cir. filed Mar. 1, 2005). Professor Luban is a faculty colleague of one of Hamdan’s lawyers, Neal K. Katyal, who was the lawyer who requested the delay in oral argument.

⁵ <http://slate.msn.com/id/2124603/?nav=tap3> (emphasis added).

⁶ ABA MODEL RULES, RULE 1.9, Comment 5 (pre-2002 version), *reprinted in* MORGAN & ROTUNDA, 2005 SELECTED NATIONAL STANDARDS ON PROFESSIONAL RESPONSIBILITY 193 (Foundation Press 2005). The 2002 revisions to the ABA Model Rules eliminated this language as no longer necessary.

⁷ ABA FORMAL OPINION 342 (1975), *discussed in* RONALD D. ROTUNDA, PROFESSIONAL RESPONSIBILITY 2 (West Pub. Co., Black Letter Series, 7th ed. 2004).

⁸ ABA/BNA LAWYERS MANUAL ON PROFESSIONAL CONDUCT, 13 CURRENT REPORTS 31-32 (Feb. 19, 1997).

⁹ Quoting *United States v. Standard Oil Co.*, 136 F.Supp. 345, 367 (S.D.N.Y.1955), and citing *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751, 753 (2d Cir. 1975). This case is no judicial orphan. *See also, e.g., In re Powell*, 533 N.E.2d 831 (Ill.1988), *cert. denied*, 491 U.S. 907, 109 S.Ct. 3191, 105 L.Ed.2d 699 (1989), holding that the canon on avoiding even the appearance of impropriety is

not an independent basis to impose discipline on a lawyer. *Fred Weber, Inc. v. Shell Oil Co.*, 566 F.2d 602, 609 (8th Cir.1977) (court refuses to disqualify under “appearance of impropriety” standard that existed in the legal ethics rules as the time because the “appearance of impropriety” is an “eye of the beholder” standard that gives us no way to determine what “a member of the public, or of the bar” would consider improper); *Woods v. Covington County Bank*, 537 F.2d 804, 813 (5th Cir.1976) (“It does not follow. . .that an attorney’s conduct must be governed by [appearance of impropriety] standards which can be imputed only to the most cynical members of the public.”); *Board of Education v. Nyquist*, 590 F.2d 1241, 1246-47 (2d Cir.1979) (“appearance of impropriety is simply too slender a reed on which to rest a disqualification order except in the rarest cases”); *Sherrod v. Berry*, 589 F.Supp. 433 (N.D.Ill.1984) (no disqualification based on mere appearance of impropriety).

¹⁰ RESTATEMENT OF THE LAW GOVERNING LAWYERS, THIRD, § 121, Comment *c(iv)*(2000). The Restatement is speaking about lawyers’ ethical violations but the principle applies to § 455(a) because that statute focuses on what is “reasonable” to the judge; its perspective is a person trained in the law, not a layperson who cynically assumes the worst. See also *Baker v. City of Detroit*, 458 F.Supp. 374, 376 (D. Mich.1978)(Keith, C. J., sitting by designation):

“Section 455 was designed to substitute the *objective reasonable factual basis* or reasonable person test in determining disqualification for the subjective test employed prior to the 1974 amendment of Section 455. The issue committed to *sound judicial discretion*, therefore, is whether a reasonable person would infer, from all the circumstances, that the judge’s impartiality is subject to question.” (emphasis added)(internal citation omitted)).

See also, *Simonson v. General Motors Corp.*, 425 F.Supp. 574 (E.D.Pa.1976), noting that there is an obligation *not to recuse* without valid reasons because of the burden that recusals place on colleagues.

¹¹ RESTATEMENT, THIRD, § 5, Comment *c*.(2000).

¹² Gillers admits that it is not enough that the Government is a party. This case, Gillers tells, is special:

“Roberts did not have to sit out every case involving the government, no matter how routine, while he was being interviewed for the Supreme Court position. The government litigates too many cases for that to make any sense. But Hamdan was not merely suing the government. He was suing the president, who had authorized the military commissions and who had personally designated Hamdan for a commission trial, explaining that ‘there is reason to believe that [Hamdan] was. . .involved in terrorism.’” Available at <http://slate.msn.com/id/2124603/?nav=tab3>.

¹³ A new opening on the Court was certainly expected. Justice Blackmun had announced in June, 1992: “I am 83 years old. I cannot remain on this Court forever.” *Planned Parenthood v. Casey*, 505 U.S. 833, 943 (1992)(Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting).

¹⁴ *Robinson v. Boeing Co.*, 79 F.3d 1053, 1055–56 (11th Cir.1996), which discusses the district court’s suspicion “that in this district the choice of lawyers may sometimes be motivated by a desire to disqualify the trial judge to whom the case has been randomly assigned.” See also, *Grievance Administrator v. Fried*, 456 Mich. 234, 570 N.W.2d 262 (Mich.1997). Two judges in a county had close relatives who practiced there. If a client wanted his case to be reassigned from one judge to the other, local lawyers advised the clients to hire the relevant relative as co-counsel to force the recusal of the judge. The Attorney Disciplinary Board dismissed the charges against the lawyers but the Michigan Supreme Court reversed and remanded for further proceedings. The Supreme Court held a lawyer is subject to discipline if that lawyer participates as co-counsel in a suit for the *sole* purpose of recusing a judge because of the lawyer’s familial relationship with that judge.

¹⁵ The judge explained:

“The pertinent allegations of plaintiffs’ motion to disqualify are as follows: that Mayor Young and I are friends, that *Mayor Young served as a member of the selection committee which submitted my name*, along with four other nominees, to the President as candidates for appointment to the United States Court of Appeals for the Sixth Circuit, and that Mayor Young was one of several dignitaries who, in his official capacity as Mayor of the City of Detroit, made welcoming remarks to guests and judges of the Court of Appeals for the Sixth Circuit and the United States District Court for the Eastern District of Michigan at my swearing-in ceremony to the Sixth Circuit. From these facts, plaintiffs allege that extra-judicial contact between myself and Mayor Young during the pendency of this litigation is likely and thus creates an appearance of impropriety.” 458 F. Supp. at 375-76 (emphasis added).

¹⁶ See http://www.ca6.uscourts.gov/internet/court_of_appeals/courtappeals_judges.htm. The date of the Judge’s commission was October 21, 1977. The case was filed at some point prior to February of 1977, when the plaintiffs filed an amended complaint, a point the judge makes in another of his series of opinions on this case. *Baker v. City of Detroit*, 483 F.Supp. 919, 922 (D. Mich. 1979), *affirmed sub nom*, *Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir. 1983), *on rehearing*, *Bratton v. City of Detroit*, 712 F.2d 222 (6th Cir. 1983), *cert. denied*, *Bratton v. City of Detroit*, 464 U.S. 1040, 104 S.Ct. 703, 79 L.Ed.2d 168 (1984).

¹⁷ After a bench trial about who owned a hospital corporation, the loser learned that the trial judge was a trustee of Loyola University. During the time the case was pending, the ultimate winner, Liljeberg, was negotiating with Loyola to buy some land for a hospital and prevailing in the litigation was central to Liljeberg’s ability to buy Loyola’s land. The judge had ruled for Liljeberg, which thereby benefitted Loyola. Health

Services thus moved to vacate the judgment, alleging that the trial judge should have disqualified himself. At a hearing to determine what the trial judge knew, he testified that he knew about the land dealings before the case was filed, but that he had forgotten all about them during the pendency of the matter. He learned again of Loyola's interest after his decision, but before the expiration of the 10 days in which the loser could move for a new trial. Even then, the judge did not recuse himself or tell the parties what he knew. The Court of Appeals reversed the judgement in favor of Liljeberg in the underlying case and the Supreme Court affirmed. While the trial judge could not have disqualified himself over something about which he was unaware, he was "called upon to rectify an oversight and to take the steps necessary to maintain public confidence in the impartiality of the judiciary."

¹⁸ "*Pepsico, Inc. v. McMillen*, 764 F.2d 458 (7th Cir.1985), involved a judge who had become eligible to take senior status. He contacted a 'headhunter' who agreed to contact Chicago firms to see if any would want the judge to become affiliated with them. Inadvertently, and contrary to the judge's instructions, the headhunter contacted firms representing both the plaintiff and defendant in a pending antitrust case. Neither expressed an interest in hiring the judge, although the plaintiff's firm left the matter a bit more open than did the other. The judge did not go to work for either firm. Defendants sought a writ of mandamus to disqualify the judge. The Court of Appeals was careful to stress that there was no intentional impropriety committed in the case, but it ordered the judge recused to avoid any 'appearance of partiality' in the matter before him." THOMAS D. MORGAN & RONALD D. ROTUNDA, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY 273 (Foundation Press, 8th ed. 2003).

¹⁹ Other cases make this same point: the judge sought a job from each of the law firms appearing before him. As Judge José A. Cabranes said in *McCann v. Communications Design Corp.* 775 F.Supp. 1535, 1544 (D. Conn. 1991) (in the course of refusing to read that case broadly and refusing to motion to disqualify): "Pepsico, as plaintiff himself points out, involved the direct approach of a 'headhunter' seeking to find employment for the judge to the law firms appearing before him."

²⁰ Tom Brune, *Roberts Meeting "Illegal:" Legal Ethicists Say White House Interview Jeopardized Judge's Impartiality in a Case on Military Tribunals*, NEWSDAY, Aug. 18, 2005, at <http://www.newsday.com/news/nationworld/nation/ny-us cort184388315aug18,0,5829402.story>.

²¹ <http://slate.msn.com/id/2124603/?nav=tap3>.

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August 18, 2005

Hon. Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

A recent story in the Washington Post suggested that it might have been improper for Judge John Roberts to participate on the D.C. Circuit panel that decided the recent case of *Hamdan v. Rumsfeld*. The *Post* story relied heavily on a short article written by three professors, Stephen Gillers, David Luban and Steven Lubet, and published on the internet in *slate.com*.

I write to provide perspective on the issues raised by these articles and to make clear that Judge Roberts' participation on the panel was proper. To briefly suggest my background to draw such a conclusion, I have taught and written in the field of legal and judicial ethics for over thirty years. The law school text that I co-author has long been the most widely used in the country, and it covers judicial ethics in considerable detail.

There are several points on which all observers would agree. First, 28 U.S.C. § 455 requires Judge Roberts or any other federal judge to disqualify himself “in any proceeding in which his impartiality might reasonably be questioned.” The key term, of course, is “reasonably.” Anyone could assert that a given judge was not impartial. Indeed, a litigant might be expected to do so whenever he or she preferred to have someone else hear their case. Thus, the statute does not allow litigants (or reporters or professors) to draw a personal conclusion about the judge’s impartiality; the conclusion must be “reasonable” to a hypothetical outside observer.

Second, saying as some cases do, that judges must avoid even “the appearance of impropriety” adds nothing to the analysis. Unless the “appearance” is required to be found reasonable by the same hypothetical outside observer, the system would become one of peremptory challenges of judges. That is not the system we have, nor would it be one that guarantees the judicial authority and independence on which justice ultimately depends.

Third, there is no dispute that judges may not hear cases in which they would receive a personal financial benefit if they were to decide for one party over another. The first case cited (albeit not by name) by Professors Gillers, Luban & Lubet was *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988). It simply decided that a judge had a personal interest conflict and could not decide a case that would financially benefit a university on whose Board of Trustees the judge sat. In short, the case says nothing relevant to Judge Roberts’ conduct.

Fourth, a judge may not hear a case argued by a private firm or government office with which the judge is negotiating for employment. The reason again is obvious. That was the fact situation in the remaining two cases cited by Professors Gillers, Luban & Lubet in their *slate.com* article. The cases break no new ground and provide no new insights relevant to this discussion.

Critics of Judge Roberts suggest, however, that his “interviews” with the Attorney General and with members of the White House staff were analogous to private job interviews. That is simply not the case. A judge’s promotion within the federal system has not been—and should not be—seen as analogous to exploration of job prospects outside of the judiciary.

Except for the Chief Justice, every federal judge is at least in principle a potential candidate for promotion to a higher status in the judiciary. One might argue that no district judge should ever be promoted to a court of appeals, and no court of appeals judge should be elevated to the Supreme Court, but long ago, we recognized that such an approach would deny the nation’s highest courts the talents of some of our most experienced and able judges. One need only imagine the chaos it would cause if we were to say that no federal judge could hear a case involving the federal government because he or she might be tempted to try to please the people thinking about the judge’s next role in the federal judiciary. Nothing in § 455 requires us to say that it would be “reasonable” to assume such temptation. We properly assume that judges decide cases on their merits and see their reputation for so doing as their basis for promotion, if any.

To be fair to the critics, they argue that a judge’s situation might be different once actual “interviews” begin for the new position. The problem with that, of course, is that interviews are only a step beyond reading the judge’s decisions in a file, interviewing observers of the judge’s work, and the like. That kind of thing goes on all the time, including in the media. Further, all accounts suggest that several judges were being “interviewed” and that for most of the period of the interviews, there was not even a Supreme Court opening to fill. Assuming, as even Professors Gillers, Luban & Lubet do, that no improper pressure or discussion took place in the interviews themselves, it is hard to see that physically meeting with White House staff transforms what is inevitable and proper in the judicial selection process into something more suspect.

Again, even Professors Gillers, Luban & Lubet ultimately concede that Judge Roberts should not have had to withdraw from all cases brought by the government as the logic of their criticism would seem to suggest. They argue instead that the *Hamdan* was special. It was “important” to the Administration and therefore required special caution.

I respectfully suggest that an “importance” standard for disqualification could not provide sufficient guidance for the administration of the federal courts. Every case is important, at least to the parties. Furthermore, while some cases have greater media interest than others, and some are watched more closely by one interest group or another, every case before the D.C. Circuit that involves the federal government is there because high level Justice Department officials have concluded that the appeal is worth filing or resisting.

Saying that some cases are important and others are not ultimately reveals more about the speaker’s priorities than it does about the intrinsic significance of the case. Indeed, earlier this year, the Supreme Court decided *United*

States v. Booker and *United States v. Fanfan* involving the Sentencing Guidelines. Few decisions have had more impact on the operation of federal courts in recent years, yet it was widely reported that Professor Gillers opined to Justice Breyer—correctly in my view—that he need not recuse himself even though his own work product as a former member of the Sentencing Commission arguably was indirectly at issue. Importance of the case was not the controlling issue for Professor Gillers then, and it is simply not a standard now that can clearly guide a judge as to which cases require disqualification and which do not.

Indeed, the critics of Judge Roberts’ remaining a part of the *Hamdan* panel overlook the fact that judges of the D.C. Circuit are assigned to the cases that they hear on a random basis. That randomness is part of the integrity of the court’s process and it guarantees that no panel can be “stacked” with judges favorable to one litigant or another. Weakening the standard for a reasonable appearance of impropriety, and making recusal turn on which litigants can place news stories accusing judges with of a lack of ethics would adversely affect the just outcomes of cases more than almost any other thing that might come out of the hearings on Judge Roberts’ confirmation.

In short, in my opinion, no reasonable observer can “reasonably question” the propriety of Judge Roberts’ conduct in hearing the *Hamdan* case. He clearly did not violate 28 U.S.C. § 455. Indeed, he did what we should hope judges will do; he did his job. He participated in the decision of a case randomly assigned to him. We should honor him, not criticize him, for doing so.

Respectfully,

Thomas D. Morgan
George Washington University Law School

* Thomas D. Morgan is the *Oppenheim Professor of Antitrust & Trade Regulation Law* at George Washington University Law School. Professor Morgan teaches antitrust law and professional responsibility. An author of articles and widely-used casebooks in both subjects, he also writes about administrative law, economic regulation, and legal education. A lecturer and consultant to law firms on questions of professional ethics and lawyer malpractice, Professor Morgan was selected by the American Law Institute as one of three professors to prepare its new Restatement of the Law Governing Lawyers, and by the American Bar Association as one of three professors to draft revisions to its Model Rules of Professional Conduct.

Stephen Gillers
New York University
School of Law

David Luban
Georgetown University
Law Center; Stanford Law School

Steven Lubet
Northwestern
University School of Law

September 6, 2005

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
711 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Specter:

We are writing in response to letters sent to you by Professors Thomas Morgan and Ronald Rotunda. In these letters, the professors disagree with our view (offered in a *Slate* magazine article) that Judge John Roberts should have recused himself in *Hamdan v. Rumsfeld*. We have great respect for Professors Morgan and Rotunda and recognize their eminence and expertise in legal ethics. But after carefully studying their arguments, we conclude that they fail to deal accurately with the precedents we cited in our *Slate* article. In addition, other authorities, which space constraints did not allow us to discuss in *Slate*, further support the conclusion we reached there. We have seen no authority that contradicts that conclusion.

We believe that the Senate should have a complete and accurate understanding of these issues, and for that reason we explain why the contrary views of Professors Morgan and Rotunda are wrong. In short, Judge Roberts should have recused himself in *Hamdan* without being asked to do so; failing which, he should have given Mr. Hamdan's lawyers the opportunity formally to seek his recusal if so advised or to waive their right to do so. We are *not* commenting on Judge Roberts's fitness to be Chief Justice of the Supreme Court. As we said in *Slate*, we do not doubt Judge Roberts's integrity.¹ Nor do we question his judicial temperament or legal abilities.

Our concern may be stated quite simply. Judge Roberts was interviewing for a Supreme Court seat with top White House officials, including Attorney General Alberto Gonzales, during the pendency of a case in which President Bush is a defendant. The Attorney General's Department is representing him and the other government defendants. Judge Roberts did not disclose these interviews until after *Hamdan* was decided and he had been nominated to the Court. This unusual state of affairs means that his impartiality in *Hamdan* might reasonably be questioned. When a judge's impartiality might reasonably be questioned, federal law requires the judge to recuse himself—even if *in fact* the judge is completely impartial. As the Supreme Court and lower federal courts have repeatedly said, this law, 28 U.S.C. § 455(a), serves the important purpose of maintaining public confidence in the fairness of our courts. As we will show, case law and judicial ethics opinions uniformly support our analysis.

Professors Morgan and Rotunda offer three main objections to our reasoning. First, they object that a rule requiring judges being considered for promotion to recuse themselves from important cases involving the government would disqualify far too many judges in far too many cases. Second, they disagree that legal authority supports our position. Third, they believe that we have substituted a vague charge of "appearance of impropriety" for the actual standard in the law. As we now explain, none of their objections correctly represents what the law requires.

Section 455(a) reads: "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." This broadly-worded standard does not spell out when a judge's impartiality might reasonably be questioned. Like all "reasonableness" standards in the law, it requires a fact-specific, case by case inquiry. This is the law Congress passed long ago. It applies to all federal judges. It has been construed in hundreds of cases in light of the facts of those cases, sometimes resulting in recusal. Those cases give content to the congressional standard.

Instead of addressing this statute directly, Professor Rotunda recharacterizes its test. He finds fault with something he labels the "Gillers Rule," which he describes this way: "a judge who learns that he is being considered for an appointment to the U.S. Supreme Court [must] recuse himself from cases where the Government represents one side, and that case is, in Gillers' words, 'hotly contested'" (Rotunda letter, p. 7). But nothing resembling this rule, or any other proposed rule, appears in our article. For good reason: the task is not to concoct rules but to apply Section 455(a) as Congress wrote it.

It is, after all, the standard that Congress adopted and the President signed into law. Rather than reading some hypothetical “rule” into the standard, we far prefer the traditional, fact-specific approach of the common law. This has been the approach of the federal courts. Our conclusion, drawing on cases interpreting this standard, discussed below, was that Judge Roberts’s impartiality might reasonably be questioned because of specific and highly unusual facts:

(1) Judge Roberts’s first interviewer was Attorney General Gonzales, who had personally drafted a widely-publicized memo to the President advising him of the inapplicability of the Geneva Conventions to suspected Al Qaeda members.² As it happens, the inapplicability of the Geneva Conventions to suspected Al Qaeda members is one of the issues *Hamdan* decided—with Judge Roberts casting a deciding vote for the position that Mr. Gonzales recommended to the President. Judge Roberts met with Mr. Gonzales just six days before the oral argument in *Hamdan*. When he heard the arguments, therefore, Judge Roberts had just been reminded that a possible Supreme Court appointment might hinge on Mr. Gonzales’s assessment of him. The likelihood of a vacancy on the Court was widely regarded as great at that time because of the late Chief Justice Rehnquist’s ultimately fatal illness. We reiterate that we are not accusing Judge Roberts of bias. Our point is only that, in the words of the law, “his impartiality might reasonably be questioned.”

(2) As Attorney General, Mr. Gonzales heads the Department of Justice, and it was Department of Justice lawyers who defended the *Hamdan* case. This places Judge Roberts in the posture of discussing a possible Supreme Court appointment with the head lawyer of the “firm” (the Department of Justice) litigating a case before him—a head lawyer who previously gave his legal opinion to the president on a central issue in the case.

(3) Contrary to Professors Morgan and Rotunda, *Hamdan* was not merely a case that was “‘important’ to the Administration” or “‘hotly contested” (Morgan letter, p. 2; Rotunda letter, p. 7). President Bush was a named defendant in *Hamdan*. Nor was the President a named defendant only as a formality. President Bush created the military commissions at issue in *Hamdan* by executive order. On February 7, 2002 he personally declared in writing that the Geneva Conventions do not apply to alleged Al Qaeda members. And President Bush declared in writing that there is reason to believe that Mr. Hamdan is an Al Qaeda member engaged in terrorism, who therefore qualifies for trial before a military tribunal. In other words, the President is a defendant in the case because of official actions that he himself took—not because of mere formalities.

(4) Although President Bush did not interview Judge Roberts for the Supreme Court vacancy until some hours after the *Hamdan* decision came down, the numerous interviews prior to the decision were with the President’s top aides and advisors, including Vice President Cheney, Chief of Staff Andrew H. Card, Jr., Vice President Cheney’s Chief of Staff I. Lewis Libby, White House Counsel Harriet Miers, and Deputy Chief of Staff Karl Rove.

Taken together, these facts show that Judge Roberts was interviewing with top aides of a defendant in a case before his court, including the chief lawyer responsible for defending that case, when the defendant had the sole power to nominate him to the Supreme Court. Furthermore, in this situation both the defendant and the lawyer have a real involvement in the issues of the case, not merely a nominal involvement; and the defendant is focused on the appointment to a greater extent than other judicial appointments. Even if every White House official who interviewed Judge Roberts carefully avoided the topics in the *Hamdan* case, with no hint of an improper suggestion to the judge about how the case should come out, the pressure on the judge not to disappoint or frustrate the President and his advisors is inherent in the situation itself. Any reasonable person would question whether a judge, even with the best will in the world, can impartially consider arguments that, if accepted, would frustrate and disappoint the person who holds the judge’s promotion to the Supreme Court in his hands. The law requires recusal because the public does not expect judges to have superhuman abilities to ignore their own aspirations.

Contrary to Professor Rotunda, recusal is the result uniformly endorsed by the legal authorities. In our article, we described two leading cases in which judges were forced to recuse themselves because they had discussed possible future employment with the parties or lawyers while cases were pending. These decisions (which we did not identify by name in the article) are *Pepsico, Inc. v. McMillen*, 764 F.2d 458 (7th Cir. 1985) and *Scott v. United States*, 559 A.2d 745 (D.C. 1989). In the first, Judge Richard A. Posner held that a judge who wished to leave the bench and return to private practice was forced to recuse himself from a case after his headhunter, contrary to the judge’s instructions, contacted law firms litigating the case. In the second, a criminal conviction was thrown out because during the trial the judge was discussing a job with the Department of Justice, which was prosecuting the case. The Department of Justice conceded that these negotiations violated judicial ethics rules. According to Professor Morgan, these cases “break no new ground and provide no new insights relevant to this discussion.” (Morgan letter, p. 2.) However, that is precisely the point: far from breaking new ground, these cases squarely represent the state of the law.

Professor Rotunda points to language in *Scott* that says, “By December 23, 1984, *when he had decided to accept the position* in the Executive Office for United States Attorneys, the judge had a duty to recuse himself. . . .” *Scott*, 559 A.2d at 755 (Professor Rotunda’s emphasis). Professor Rotunda believes that this means the judge had no duty to recuse himself until he had decided to accept the job—and, by analogy, Judge Roberts had no duty to recuse himself until he had been offered, and decided to accept, the Supreme Court nomination. However, this is a badly mistaken reading of *Scott*, which explicitly says that the violation of the recusal standard occurred “when the trial judge who is presiding at the prosecution by the United States Department of Justice through the United States Attorney’s Office is actively negotiating for employment with the Department’s Executive Office for United States Attorneys.” *Scott*, 559 A.2d at 750. Indeed, the court’s holding in *Scott* reiterates this conclusion: “we hold that Judge Murphy violated Canon 3(C)(1) when he presided at Scott’s trial *while he was actively seeking employment* with the Executive Office for United States Attorneys.” *Scott*, 559 A.2d at 750 (our emphasis).³

Additional authorities reach the same conclusions. In *In re Continental Airlines Corp.*, 901 F.2d 1259, 1262-63 (5th Cir. 1990), the Fifth Circuit Court of Appeals found that a judge should have retroactively recused himself and vacated two rulings when he thereafter accepted a job with a law firm representing one party in the case—even though he had no knowledge of the job prospect when he issued the rulings. A second panel reconsidering the case reached the identical conclusion. *In re Continental Airlines Corp.*, 981 F.2d 1450, 1462 (5th Cir. 1993). And Advisory Opinion 84 of the U.S. Judicial Conference’s Committee on Codes of Conduct (1990; reviewed 1998) states that whenever a judge discusses future employment with a law firm, “no matter how preliminary or tentative the exploration may be, the judge should recuse on any matter in which the firm appears. Absent such recusal, a judge’s impartiality might reasonably be questioned.” The Opinion adds: “The principles discussed would apply by analogy to other potential employers.”⁴

Professor Morgan responds that “[a] judge’s promotion within the federal system has not been—and should not be—seen as analogous to exploration of job prospects outside of the judiciary” (Morgan letter, p. 2). But the Committee on Codes of Conduct disagrees. The Committee’s Advisory Opinion 97 (1999) discusses the reappointment of magistrate judges. Magistrates are reviewed for reappointment by a selection panel. The Committee writes:

An incumbent seeking reappointment obviously has a substantial interest in receiving a favorable recommendation from the panel and is well aware that his or her past service as a magistrate judge is being carefully reviewed and scrutinized. Therefore, in the opinion of the Committee, during the period of time that the panel is evaluating the incumbent and considering what recommendation to make concerning reappointment, a perception would be created in reasonable minds that the magistrate judge’s ability to carry out judicial responsibilities with impartiality is impaired in any case involving an attorney or a party who is a member of the panel. Therefore, under Canon 3C(1) the magistrate judge is required to recuse in such a case.

Clearly, a circuit judge being considered for a Supreme Court appointment is equally “aware that his or her past service as a judge is being carefully reviewed and scrutinized.” And so, by the reasoning of this opinion, the circuit judge is required to recuse in any case involving an attorney or party who is directly involved in the process of selecting the Supreme Court nominee. The Committee reached the same result in an informal Advisory Opinion issued in 1992. It concerns a judge on the U.S. Military Court of Appeals, nearing the end of her 15-year-term, who sought recommendation by the Department of Defense for reappointment. The Committee on Codes of Conduct found that the judge was required to recuse herself from a high-profile case in which the Defense Department was a party.⁵ If mere reappointment to the judiciary raises reasonable questions about impartiality, promotion to the Supreme Court obviously does as well.

Against the unanimous weight of these opinions and decisions, Professor Rotunda cites “[t]he case that seems most on point” in his view, *Baker v. City of Detroit*, 458 F.Supp. 374 (D. Mich. 1978), in which a judge declined to recuse himself from a case. However, *Baker* concerns an entirely different issue: personal friendship between a judge and a litigant. In the words of the judge in *Baker*, “The crux of plaintiffs’ claim is that this Court. . . should recuse itself from presiding at the trial of this case because of the friendship between myself and Coleman A. Young, Mayor of the City of Detroit and a nominal party to this action.” 458 F.Supp. at 375. One basis of the friendship (not the only one he mentions) is that Mayor Young had been a member of a panel that recommended Judge Keith for promotion to circuit judge. But at the time of the recusal ruling, that recommendation had already been made, and indeed Judge Keith had already been appointed Circuit Judge. Thus, in the relevant time period, Mayor Young no longer had any role to play in Judge Keith’s promotion. *Baker* therefore has nothing at all to do with the question of whether a judge must recuse himself when a litigant is in a position to appoint him to a job he very much wants.

Finally, we wish to comment briefly on Professors Morgan and Rotunda’s objection to the “appearance of impropriety” standard, which they believe adds nothing, is too vague and misstates Section 455(a). We find this criticism puzzling, because our article never used the phrase “appearance of impropriety,” except once in a direct quote from a Supreme Court

opinion. We did use the phrase “appearance of impartiality,” which is far less vague than the all-purpose word “impropriety,” and which has appeared in scores of federal court cases discussing Section 455(a). Section 455(a) speaks of proceedings in which a judge’s “impartiality might reasonably be questioned”—in other words, proceedings that might *appear* to a reasonable person to violate impartiality, whether or not they actually do. As one distinguished court writes, “we join our sister circuits in concluding that an appearance of bias or prejudice sufficient to permit the average citizen reasonably to question a judge’s impartiality is all that must be demonstrated to compel recusal under section 455.” *United States v. Heldt*, 668 F.2d 1238, 1271 (D.C. Cir. 1981). With all due respect, Professors Morgan and Rotunda are engaged in semantic quibbling over the word “appearance.” Nothing in our reasoning depends on the phraseology. Our conclusions depend only on Section 455(a), the facts of the case, and the authorities we cite. Professor Rotunda argues at great length that the ABA and other rule-writers have rejected “appearance of impropriety” standards. But Professor Rotunda’s scholarly demonstration is entirely beside the point, because it pertains only to rules governing practicing lawyers, not judges. Canon 2 of the ABA’s Code of Judicial Conduct, like the Code of Conduct for United States Judges, continues to state that “A judge shall avoid impropriety *and the appearance of impropriety* in all of the judge’s activities” (emphasis added).

In conclusion, we find that Professors Morgan and Rotunda have not adequately conveyed the remarkable consensus among distinguished authorities that a judge being interviewed for a desirable job must recuse himself from cases involving the interviewers, whether they are parties or lawyers (or, as specified in Canon 3D of the Code of Conduct for United States Judges, obtain written permission to remain in the case from all parties, after disclosure on the record of the basis for disqualification). Nor have they focused on the specific facts that place Judge Roberts’s situation, from April through mid-July, squarely within the ambit of the federal law requiring him to disqualify himself. We hope this letter is of use to you and your Committee.

Yours very truly,

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Footnotes

¹ Stephen Gillers, David J. Luban, and Steven Lubet, *Improper Advances: Talking Dream Jobs With the Judge Out of Court*, SLATE.COM (August 17, 2005), available at <http://www.slate.com/id/2124603/>. (We wrote: “We believe he [Judge Roberts] is a man of integrity who voted as he thought the law required.” We also wrote: “We do not cite these events to raise questions about Roberts’ fitness for the Supreme Court.”).

² Memorandum from Alberto Gonzales, to the President (Draft) (Decision Re: Application of the Geneva Convention on Prisoners of War to the Conflict With Al Qaeda and the Taliban) (January 25, 2002).

³ Canon 3(C)(1) is the recusal rule in the ABA’s Code of Judicial Conduct, which the court notes is substantially similar to Section 455(a). *Scott*, 559 A.2d at 749, note 8. It was subsequently adopted in the official Code of Conduct for United States Judges. See <http://www.uscourts.gov/guide/vol2/ch1.html#3>.

⁴ The Committee’s Advisory Opinions are available at <http://www.uscourts.gov/guide/advisoryopinions.htm>.

⁵ The opinion is published in 5 MILITARY JUSTICE GAZETTE (January 1993), in MILITARY JUSTICE GAZETTE: THE FIRST TEN YEARS 1-2 (National Institute of Military Justice 2001).

RELIGIOUS LIBERTIES

NOTHING TO STAND ON: “OFFENDED OBSERVERS” AND THE TEN COMMANDMENTS

BY JORDAN LORENCE AND ALLISON JONES*

I. Introduction

The Supreme Court could end many Establishment Clause disputes by enforcing Article III standing requirements on those bringing the lawsuits, who many times have no more stake in the issues than being “offended observers.” Those who oppose governmental acknowledgement of religion virtually ignore standing requirements imposed by the Constitution as pesky obstacles that only distract them from reaching the more interesting Establishment Clause issues. Yet, no federal court should reach the substantive issues unless the parties clearly have standing. For example, the Supreme Court could have resolved the two Ten Commandments cases¹ by ruling that all of the “offended observers” who brought the lawsuits lacked standing to come into federal court in the first place. In both instances the plaintiffs did not present an Article III “case” or “controversy”² according to the Court’s standing requirements³—they alleged indignation and nothing more.

Note how weak the plaintiffs’ standing is in these cases. In the Kentucky case, the American Civil Liberties Union filed suit on its own behalf and on behalf of its anonymous members in Kentucky who go to the courthouse to “transact civic business” such as obtaining licenses, paying taxes and registering to vote.⁴ While at the courthouse, they “have occasion to view” the Ten Commandments display and, since they “perceive” it as an unconstitutional establishment of religion, they are “offended.”⁵ In the Texas case, a lawyer with an expired license brought suit because he would routinely walk past a Ten Commandments monument (surrounded by sixteen other nonreligious monuments) on his way to the state law library, and seeing it offended him, he testified, “in that he is not religious.”⁶

This is pretty wispy stuff, yet, in its decisions, the Court never questioned whether these “offended observers” had standing to bring their suits in the first place.⁷ Such oversights provide a loophole for every village secularist to charge into court with the ACLU and challenge governmental acknowledgements of religion, no matter how passive or benign.⁸ These delicate plaintiffs with eggshell sensitivities—who claim deep offense at the acknowledgement of any beliefs that conflict with their own—then seek court orders censoring the religious message, as a type of “heckler’s veto.”⁹ Of course, the government does have real obligations imposed by the Establishment Clause, but these should be enforced in federal court in lawsuits brought by actual plaintiffs suffering real, concrete harm. Not enforcing standing requirements allows lawsuits with dubious constitutional validity to clutter the federal courts. Article III standing requirements should be enforced in Establishment Clause cases just as they are in all other areas of the law.¹⁰

II. “Concrete Harm” Provides Firm Footing for Plaintiffs

To have standing under Article III, a plaintiff must have suffered a “concrete and particularized” injury as the result of an actual or imminent invasion of a legally protected interest.¹¹ This requirement is generally strict: Even in environmental lawsuits, where the harm is naturally more dispersed, plaintiffs still must demonstrate a direct and particularized injury to their unique interest.¹² Second, there must be a causal connection between the injury suffered and the challenged action of the defendant.¹³ And third, it must be likely that the injury will be redressed by a favorable judicial decision.¹⁴

These Article III standing requirements apply with equal force to Establishment Clause claims.¹⁵ In *Valley Forge Christian College v. Americans United for Separation of Church and State*, the Court rejected the idea that the Establishment Clause confers to citizens a personal constitutional right to a government that does not establish religion.¹⁶ The Court also rejected a more lax standing threshold for Establishment Clause claims based either on the notion that these claims are of superior importance or that violations of the Establishment Clause typically will not cause sufficient injury to confer standing under “traditional” standing requirements.¹⁷ Indeed, the Court asserted that the “assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.”¹⁸ Perhaps most pertinent to the recent Ten Commandments challenges, the Court held that a psychological consequence produced by observation of conduct with which one disagrees is not a personal injury sufficient to confer standing under Article III, even if it is phrased in constitutional terms.¹⁹ The federal courts are not a “vehicle for the vindication of the value interest of concerned bystanders.”²⁰

The Supreme Court awoke to the need to enforce standing requirements in Establishment Clause cases in *Elk Grove Unified School District v. Newdow*, ruling that Mr. Newdow lacked standing to challenge the phrase “under God” in the Pledge of Allegiance recited by his daughter every day at school.²¹ Only his daughter, as the person subjected to allegedly unwelcome state-sponsored religious exercise,²² or her legal custodial parent would have standing to challenge the practice. Mr. Newdow’s offense that his daughter was directed to recite the pledge daily was not sufficient injury to grant standing.²³

III. Jurisdictional Quagmire

The circuit courts, however, are not following *Elk Grove*²⁴ and *Valley Forge*,²⁵ and the Supreme Court has only added to the problem by ignoring standing in the recent Ten Commandments cases. Some circuits have held that direct contact with an offensive display is a sufficient injury to

confer standing,²⁶ while others have indicated that standing requires something more than contact.²⁷ In the “offensive contact” jurisdictions, the courts have effectively adopted a non-existent Establishment Clause exception of “proximate standing;” plaintiffs need not suffer actual injury because merely being *near* the alleged establishment is enough to grant Article III standing.²⁸ Such “nearby” standing is no better exemplified than in the Court’s Ten Commandments decisions, where each plaintiff’s “injury” consisted solely of having occasion to pass by the “offensive” display.²⁹ This relaxed standard flies in the face of *Valley Forge*’s holding that there is no “sliding scale” of standing.³⁰

Also, no standing exists, generally, for “enhanced” offended observers, who have changed their behavior to avoid the disagreeable message. These plaintiffs’ self-imposed cost, which can be even a tiny detour attributable to the “offense,” merely “validates the existence of genuine distress” for courts that grant standing to these “enhanced” offended observers.³¹ They then declare this supposedly heightened degree of offense (which is still just offense and not injury) sufficient for standing.

The plaintiffs in these cases do no more than allege the endorsement buzzwords: that the display in question makes them feel like “outsiders” who are not “full members of the political community.”³² Incredibly, courts treat the alleged feelings as proof of injury enough for standing, despite the fact that no government action has altered anyone’s political standing, full participation in citizenship, or inclusion in the community.³³ “No one loses the right to vote, the freedom to speak, or any other state or federal right if he or she does not happen to share the religious ideas that such practices appear to approve.”³⁴

These courts erroneously rely on *School District of Abington Township v. Schempp*³⁵ in their decisions, attempting to stretch a parallel between a law that required school children to begin their day with Bible reading and prayer and passing by a passive display of a religious text or symbol in the public arena.³⁶ But the Supreme Court has already rejected this far-fetched comparison: “The plaintiffs in *Schempp* had standing, not because their complaint rested on the Establishment Clause . . . but because impressionable schoolchildren were subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them.”³⁷ In other words, courts should be careful not to conflate the threshold standing question with the ultimate substantive question, as the circuits have been doing in the offended observer cases.

For example, Michael Newdow had no standing to challenge the reciting of prayers at the President’s Inauguration in January 2005 merely because he wanted to attend the event, but a Secret Service agent who is an atheist and is ordered to guard the President during that event would have standing to challenge the prayers. The Secret Service agent would have concrete harm for standing purposes; Michael Newdow as a mere attendee would not. Although

the Secret Service agent would have standing to bring his challenge, he should lose his substantive Establishment Clause claim challenging the constitutionality of the prayers in light of such cases such as *Marsh v. Chambers*, which upheld the practice of chaplains praying before state legislative sessions.³⁸

The plaintiff’s standing can only rest on a concrete injury—whether a government action does or does not violate the Establishment Clause is a separate question that is only reached once standing has been satisfied.³⁹ Even if a court ignores the Article III problem, *Schempp* is still not an appropriate comparison. *Schempp* had a concrete injury because the law required that suggestible, captive schoolchildren be led in daily religious exercises;⁴⁰ an adult choosing to walk past a passive Ten Commandments display is not required, coerced, or even encouraged to read the display, much less agree with its tenets.

Some federal judges have sounded the alarm against the lax standards of standing for “offended observer” plaintiffs bringing Establishment Clause cases. Judge Guy of the Sixth Circuit has been disturbed that courts would recognize the so-called “injury” suffered by offended observers.⁴¹ Judge Easterbrook of the Seventh Circuit has addressed this issue at some length.⁴² He points out that *Valley Forge* requires courts to distinguish between injured and ideological plaintiffs, despite the line of circuit court decisions that have attempted to reduce *Valley Forge* to a “hollow shell.”⁴³ He further notes:

If because no one is injured there is no controversy, then the Constitution demands that the court dismiss the suit. There is no exception for subjects that as a result cannot be raised at all . . . If there is no case, then there is no occasion for deciding a constitutional question, and we should not mourn or struggle against this allocation of governmental powers.⁴⁴

The First Circuit recently followed this reasoning (that is, followed the law) and dismissed an offended observer’s suit concerning a city’s holiday display policy, holding that “although [the plaintiff was] offended by the Policy, she has sustained no injury in fact.”⁴⁵

Other areas of constitutional law do not allow plaintiffs with this sort of weak standing to file lawsuits in federal court. For example, when the government compels citizens to express its own political message, offended individuals are exempted from the exercise; the message is not itself declared unconstitutional because someone disagrees with it.⁴⁶ Although constitutional protections may exist for those compelled to express state-sponsored ideas, no protection exists on offensiveness grounds for those who merely observe the governmental expression in question.⁴⁷ When parents have religious objections to the content of their child’s school curriculum, the courts have held that mere offensive exposure to ideas that are contrary to one’s religious beliefs

is not actionable.⁴⁸ A parent's recourse is to the political process of the school board, just as the political system is the proper place for offended observers of the Ten Commandments to take their complaints.

Consider also current equal protection doctrine: Racial minorities who feel stigmatized by government action but have suffered no concrete harm in addition to the psychological affront have no standing to bring a constitutional claim.⁴⁹ For example, parents who sued to enforce the government's non-discrimination policy regarding tax exemption for private schools on the basis that illegal government complicity in discrimination stigmatized them were denied standing because they did not indicate that their children had ever or would ever apply to a private school.⁵⁰ The Court recognized that the stigmatizing injury caused by racial discrimination is "one of the most serious consequences of discriminatory government action"⁵¹ and the government was quite possibly not obeying or enforcing the law. But the Supreme Court denied standing even to those worthy plaintiffs because only persons suffering particularized harm have standing to challenge discriminatory governmental actions in such cases.⁵² The gravity of the substantive issue in these cases was not allowed to affect the threshold question of whether the plaintiffs had standing, and it should be no different in "offended observer" cases.

Outside of the Establishment Clause arena, "offended observers" have no standing to challenge the government's messages.⁵³ Governmental messages to support the war in Iraq or to stop smoking or to "buy savings bonds," etc. may be deeply offensive to many people, but they do not give standing for offended observers to bring lawsuits to censor the message. Memorials dedicated to the Unknown Child, which offend abortion advocates, survive court challenges.⁵⁴ Also, the Maryland State House exhibits a statue of Chief Justice Roger Taney, author of the *Dred Scott* decision, and that display certainly has the potential to seriously offend an onlooker, especially an African-American citizen of Maryland. Such an individual, although legitimately aggrieved, would have no legal recourse to remove the statue, and neither should a person who passes a Ten Commandments monument on public property. Lack of a judicial remedy does not silence these citizens, however: both can assert their views by appealing to the political process in a variety of ways.⁵⁵ "When the government expresses views in public debates, all are as free as they were before; that these views may offend some and persuade others is a political rather than a constitutional problem."⁵⁶

In the same way, the Ten Commandments do not cause observers concrete injury, no matter how much they dislike or disagree with the display. And without concrete injury, Article III cannot be satisfied⁵⁷—the Constitution refuses to give every concerned bystander a free pass into court.⁵⁸ Certainly, all speech has potential to offend, but insult without injury is not enough to create a case or controversy.⁵⁹

IV. Establishment Clause Quicksand

Allowing "offended observers" to file Establishment Clause challenges violates the principle upheld in the heckler's veto cases,⁶⁰ that speech should not be restricted based on a hostile reaction from the listeners. This principle applies to religious speech as well, with the Court refusing to use Establishment Clause jurisprudence as a "modified heckler's veto."⁶¹ While the government is not a private speaker, the analogy is still apt, as Justice O'Connor has noted: "Nearly any government action could be overturned as a violation of the Establishment Clause if a 'heckler's veto' sufficed to show that its message was one of endorsement."⁶²

Despite being aware of the danger, this is precisely what the courts have done by giving "offended observers" standing. Once these hecklers are allowed in court, their opinions override those of the rest of the population, including our duly elected representatives in the government.⁶³ Granting anti-religious observers veto power to drive all religious references from the public square replaces a "sense of proportion and fit with uncompromising rigidity at a costly price to the values of the First Amendment."⁶⁴

One of these First Amendment values, indeed its "bedrock," is that the expression of an idea cannot be prohibited solely because it may offend.⁶⁵ The First Amendment fully expects that citizens will confront disagreeable ideas and that a robust democracy will refuse to insulate its citizens from views that they disagree with or even find inflammatory.⁶⁶ For example, in the free speech case *Texas v. Johnson*, the Court held that a statute prohibiting the desecration of the American flag was unconstitutional because protecting onlookers from psychic harm did not rise to a level of compelling state interest.⁶⁷ In fact, the Court concluded that the Constitution *prevents* the state from protecting individuals from offense in such situations.⁶⁸ This line of reasoning is inconsistent⁶⁹ with the contention from modern Establishment Clause jurisprudence that the Constitution protects observers from a feeling of alienation created by observing something with which they disagree.⁷⁰ While the speech clause cases minimize the importance of protecting citizens from offense, current religion clause jurisprudence "suggests that the protection of persons from offense may rise to a constitutional requirement."⁷¹ As a result, the heckler's veto is alive and well in Establishment Clause jurisprudence.

V. Conclusion

While Article III's standing requirements, as explicated by the Court through the years, provide firm footing for injured plaintiffs, modern Establishment Clause jurisprudence has turned a blind eye to these requirements and headed into the jurisdictional quagmire of "offended observers." The *McCreary County* and *Van Orden* Ten Commandments cases fall into that category of cases where actual injury, and therefore standing to bring suit, is conspicuously absent. The plaintiffs alleged only offense, therefore their cases should have been dismissed for lack of standing instead of adding two more contradictory holdings to modern religion

clause jurisprudence. If the courts continue to manufacture their own footing for standing in “offended observer” cases, the meaning, protections, and liberties of the Establishment Clause will soon disappear into the quicksand.

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Footnotes

¹ *McCreary County v. ACLU*, 125 S. Ct. 2722 (2005); *Van Orden v. Perry*, 125 S. Ct. 2854 (2005).

² U.S. CONST. art. III, § 2, cl. 1.

³ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

⁴ Complaint ¶ 15, *ACLU v. McCreary County*, 96 F. Supp. 2d 679 (E.D. Ky. 2000) (Case No. 99-507); Complaint ¶ 15, *ACLU v. Pulaski County*, 96 F. Supp. 2d 691 (E.D. Ky. 2000) (Case No. 99-509).

⁵ *Id.* at ¶ 19.

⁶ *Van Orden v. Perry*, No. A-01-CA-833-H, 2002 WL 32737462, at *2 (W.D. Tex. Oct. 2, 2002).

⁷ *McCreary County v. ACLU*, 125 S. Ct. 2722 (2005); *Van Orden v. Perry*, 125 S. Ct. 2854 (2005) (However, three of the Justices have previously questioned whether mere exposure to a religious display or symbol that offends one’s beliefs is sufficient to confer standing.); *City of Edmond v. Robinson*, 517 U.S. 1201 (1996) (Rehnquist, C.J., with whom Scalia, J. and Thomas, J. join, dissenting from denial of cert.).

⁸ Recall, for example, atheist Michael Newdow’s lawsuit to prevent pastors from praying at President Bush’s inauguration. *Newdow v. Bush*, 89 Fed. Appx. 624 (2004).

⁹ *Elk Grove United Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2321 (2004) (O’Connor, J., concurring).

¹⁰ See *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (holding that the standing requirements are the same and not lessened in Establishment Clause cases).

¹¹ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

¹² See, e.g., *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 183 (2000) (stating that plaintiffs allege injury in fact when they demonstrate that they uniquely are persons for whom the aesthetic and recreational values of the affected area will be lessened by the challenged activity, as opposed to citizens with a general interest in a clean environment); *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 888 (1990) (“general averments” and “conclusory allegations” are inadequate when there is no showing that particular acres out of thousands were affected by the challenged activity).

¹³ *Lujan*, 504 U.S. at 560.

¹⁴ *Id.* at 561.

¹⁵ *Valley Forge Christian Coll. v. Ams. United for Separation of*

Church & State, Inc., 454 U.S. 464, 472 (1982).

¹⁶ *Id.* at 483.

¹⁷ *Id.* at 488.

¹⁸ *Id.* at 489 (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 166, 227 (1974)).

¹⁹ *Id.* at 485–86.

²⁰ *Id.* at 473 (quoting *United States v. Students Challenging Regulatory Agency Procedure*, 412 U.S. 669, 687 (1973)).

²¹ *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2311 (2004).

²² *Valley Forge*, 454 U.S. at 487 n.22 (discussing *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963)).

²³ *Elk Grove*, 124 S. Ct. at 2311-12.

²⁴ Chief Justice Rehnquist stated that the majority used standing in that case as a way to avoid reaching the merits of the constitutional claim about the Pledge of Allegiance. See *id.* at 28 (Rehnquist, C.J., concurring). Whatever the motives of the justices in the majority, Michael Newdow, as the noncustodial parent, did have serious standing problems with his lawsuit challenging the content of his daughter’s education that he did not control and direct. The Supreme Court could have used standing to resolve the Ten Commandments cases as well.

²⁵ David Harvey, *It’s Time to Make Non-Economic or Citizen Standing Take A Seat in “Religious Display” Cases*, 40 DUQ. L. REV. 313, 320–21 (2002) (courts now assume standing when a complaint is grounded in the Establishment Clause rather than basing it on any palpable injury suffered by the plaintiff).

²⁶ See, e.g., *Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000), cert. denied, 532 U.S. 1058 (2001); *Suhre v. Haywood County*, 131 F.3d 1083 (4th Cir. 1997); *Washegesic v. Bloomington Pub. Sch.*, 33 F.3d 679 (6th Cir. 1994); *Foremaster v. City of St. George*, 882 F.2d 1485 (10th Cir. 1989).

²⁷ See, e.g., *ACLU-NJ v. Township of Wall*, 246 F.3d 258 (3d Cir. 2001); *Ellis v. City of La Mesa*, 990 F.2d 1518 (9th Cir. 1993), cert. denied, 512 U.S. 1220 (1994); *Sullivan v. Syracuse Housing Auth.*, 962 F.2d 1101 (2d Cir. 1992); *Fordyce v. Frohnmayer*, 763 F. Supp. 654 (D.C. Cir. 1991).

²⁸ Lawrence Gene Sager, *State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959, 969–70 (1985).

²⁹ *Van Orden v. Perry*, No. A-01-CA-833-H, 2002 WL 32737462, at *2 (W.D. Tex. Oct. 2, 2002); Complaint ¶ 19, *ACLU v. McCreary County*, 96 F. Supp. 2d 679 (E.D. Ky. 2000) (Case No. 99-507); Complaint ¶ 19, *ACLU v. Pulaski County*, 96 F. Supp. 2d 691 (E.D. Ky. 2000) (Case No. 99-509).

³⁰ *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982) (Moreover, some courts have adopted a separate Establishment Clause standing doctrine that directly contradicts *Valley Forge*.) See *Suhre v. Haywood County*, 131 F.3d 1083 (1997) (holding that Establishment Clause plaintiffs do not bear the same heavy burden to prove standing). They claim to have a license to lower the bar because “the concept of injury for standing

purposes is particularly elusive in Establishment Clause cases.” Saladin v. Milledgeville, 812 F.2d 687, 691 (1987).

³¹ Harris v. City of Zion, 927 F.2d 1401, 1406 (1991).

³² Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring).

³³ Brief of Amici Curiae Conservative Legal Defense and Educ. Fund et al. at 23–24, McCreary County v. ACLU, 125 S.Ct. 2722 (2005).

³⁴ Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusion: Establishment Neutrality and the “No Endorsement” Test*, 86 MICH. L. REV. 266, 307 (1987).

³⁵ Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963).

³⁶ See, e.g., Suhre v. Haywood County, 131 F.3d 1083, 1086 (1997) (erroneously stating that contact with religious symbolism was the injury sufficient for standing in Schempp).

³⁷ Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 487 n.22 (1982).

³⁸ 463 U.S. 783 (1983).

³⁹ Valley Forge at 489. (“case and controversies” are not merely convenient vehicles for correcting constitutional errors that may be dispensed with when they become obstacles to that endeavor—such a philosophy does not become any more palatable when the underlying merits concern the Establishment Clause).

⁴⁰ Sch. Dist. of Abington Township, 374 U.S. at 205–208.

⁴¹ Washegesic v. Bloomington Pub. Sch., 33 F.3d 679, 684–685 (6th Cir. 1994) (Guy, J., concurring).

⁴² Books v. Elkhart County, 401 F.3d 857 (7th Cir. 2005) (Easterbrook, J. dissenting); Harris, 927 F.2d 1401 (7th Cir. 1991) (Easterbrook, J., dissenting).

⁴³ Books, 401 F.3d at 871 (Easterbrook, J., dissenting).

⁴⁴ Harris, 927 F.2d at 1422 (Easterbrook, J., dissenting).

⁴⁵ Osediacz v. City of Cranston, No. 04-2673, 2005 WL 1575628, at *6 (1st Cir. July 6, 2005).

⁴⁶ See Wooley v. Maynard, 430 U.S. 705 (1977) (Jehovah’s Witness could not be forced to display state’s “Live Free or Die” motto on his license plate, but the Court did not prevent the state from displaying that or other disagreeable messages); W.Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (allowing objecting students to opt out of the mandatory flag salute, but the Court did not require that the salute be terminated).

⁴⁷ William P. Marshall, *The Concept of Offensiveness in Establishment and Free Exercise Jurisprudence*, 66 IND. L.J. 351, 359 (1991).

⁴⁸ Fleischfresser v. Directors of Sch. Dist. 200, 15 F.3d 680 (7th Cir. 1994); Mozart v. Hawkins County Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987); Grove v. Mead Sch. Dist. No. 354, 753 F.2d 1528 (9th Cir. 1984).

⁴⁹ E. Gregory Wallace, *When Government Speaks Religiously*, 21 FLA. ST. U.L. REV. 1183, 1222 (1994).

⁵⁰ Allen v. Wright, 468 U.S. 737, 746 (1984).

⁵¹ *Id.* at 755.

⁵² *Id.*; see also Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (holding that plaintiff had no standing to challenge a club’s racially discriminatory membership policies because he had never applied for membership and was denied service as a guest only).

⁵³ See Wallace, *supra* note 50, at 1222.

⁵⁴ See generally Fausto v. Diamond, 589 F. Supp. 451 (D.R.I. 1984) (holding the display, maintenance, and preservation of a memorial to the Unknown Child does not violate the Establishment Clause).

⁵⁵ Brief of Amici Curiae Focus on the Family at 26, Van Orden v. Perry, 125 S. Ct. 2854 (2005).

⁵⁶ Am. Jewish Congress v. City of Chicago, 827 F.2d 210, 133 (Easterbrook, J., dissenting).

⁵⁷ The Court has not wavered from Valley Forge’s “irreducible minimum” for standing in the two decades since that decision. See Vermont Agency of Natural Resources v. United States *ex rel.* Stevens, 529 U.S. 765, 771 (2000) (the three standing requirements are “an essential and unchanging part of Article III’s case-or-controversy requirement” and “a key factor in dividing the power of government between the courts and the two political branches.”).

⁵⁸ The Court has emphasized the fundamental importance of the standing requirements to the entire framework of our constitutional form of government. See *id.*; Steel Co. v. Citizens for a Better Env’t, 523 U.S. 83, 101 (1998) (“constitutional elements of jurisdiction are an essential ingredient of separation and equilibrium of powers”); Lujan v. Defenders of Wildlife, 504 U.S. 555, 559–60 (1992) (“the Constitution’s central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts.”); Whitmore v. Arkansas, 495 U.S. 149, 155 (1990) (standing inquiry “serves to identify those disputes which are appropriately resolved through the judicial process”).

⁵⁹ Am. Jewish Congress, 827 F.2d at 134 (Easterbrook, J., dissenting).

⁶⁰ See, e.g., Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992).

⁶¹ Good News Club v. Milford Cent. Sch., 533 U.S. 98, 119 (2001).

⁶² Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. at 2321 (2004) (O’Connor, J., concurring).

⁶³ This may be because the endorsement test itself is a function of perceptions and feelings, Wallace, *supra* note 50, at 1221 (“Since the purpose of the endorsement inquiry is to protect the sensibilities of nonadherents, establishment is formulated as a function of personal perceptions or feelings rather than as an abuse of government power.”), or because observers are not held to an appropriate reasonableness standard, Elk Grove, 124 S. Ct. at 2322 (O’Connor, J., concurring) (“[T]he reasonable observer must be deemed aware of the history of the conduct in question, and must understand its place in our Nation’s cultural landscape.”); Ams. United for Separation of Church & State v. City of Grand Rapids, 980 F.2d 1538, 1553 (6th Cir. 1992) (“The reasonable observer does not look upon religion with a jaundiced eye, and religious speech need not yield to those who do . . . We [recognize] a new threat to religious speech in the concept of the ‘Ignoramus’s Veto.’ The Ignoramus’s Veto lies in the hands of those determined to

see an endorsement of religion, even though a reasonable person, and any minimally informed person, knows that no endorsement is intended, or conveyed”). Certainly, this reasonable person would be aware of the history of our Nation’s laws and its religious heritage and would recognize that these, not a legal preference for a religious sect, are represented in a display of the Ten Commandments.

⁶⁴ Van Orden v. Perry, 351 F.3d 173, 182 (5th Cir. 2003), *aff’d*, 125 S.Ct. 2854 (2005).

⁶⁵ Texas v. Johnson, 491 U.S. 397, 414 (1989).

⁶⁶ *Elk Grove*, 124 S.Ct. at 2327 (O’Connor, J., concurring).

⁶⁷ *Johnson*, 491 U.S. at 408–10.

⁶⁸ *Id.*

⁶⁹ This inconsistency is not accounted for by the identity of the speaker; that is, it does not matter that in one case the speaker is a private individual and in the other the speaker is the government. As has been demonstrated above, the government may speak in countless offensive messages or take sides in numerous debates, all without rising to the level of unconstitutionality.

⁷⁰ See *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring) (endorsement test is concerned that nonadherents may feel like “outsiders”).

⁷¹ William P. Marshall, *The Concept of Offensiveness in Establishment and Free Exercise Jurisprudence*, 66 IND. L.J. 351, 376 (1991).

“AND WHAT DO YOU SAY I AM?”: THE MEANING OF THE KENTUCKY DISPLAY

By GERARD V. BRADLEY*

In *McCreary County v. ACLU*, a bare majority of the Supreme Court affirmed that secularism is still the overriding principle of church-state law. Their “touchstone” was the “principle” which “mandates governmental neutrality between...religion and nonreligion.” But that’s actually not quite it. “Neutrality” between something and its absence—such as “religion” and “nonreligion”—would be (if it is imaginable at all) at least *some* of the thing. “Neutrality” between, say, a desert climate and a tropical climate would be someplace like Northern Indiana: rains here quite a bit but nothing like it does in the Amazon.

If “neutrality” means anything here it would seem to mean: middle, or compromise, half-way. But that is definitely *not* the Court’s deal on religion. It is still Richard Neuhaus’s infamous Naked Public Square—secularism or the *absence* of religion. The Court’s principle is really “nonreligion” as “neutrality between religion and irreligion.”

The *McCreary* Court also fiddled—to no good end—with the “purpose” part of the nine-lived *Lemon* test. Now, both of these moves are significant in themselves. Each swings free from the facts of *McCreary* and of Decalogue displays of all sort. They are Establishment Clause tools for all seasons. But their portable and lasting importance is uncertain, because Justice O’Connor was part of the majority.

Almost everything else *McCreary* said was bogged down in the convoluted facts of the case. To simplify: There were three successive displays, each with its own legislative history sounding in patriotic piety: ‘America had and has something very important to do with religion, and by God we are going to say so.’ The Court concluded that county authorities were trying to get as much religion into public space as the Court’s inane precedents would permit. (“Inane” is my word, not the Court’s.). Probably so. But the *McCreary* majority said that was unconstitutional.

Constitutional litigation over Decalogue displays is thus far from over. The conflicting holdings in *McCreary* and *Van Orden*, O’Connor’s retirement, the fact-specific decision in *McCreary* all portend renewed efforts to get some evidence of the Decalogue’s influence upon our law and culture into public space. For that reason, and because the array of documents examined in *McCreary* is found already in many other locales, it is worth clarifying one more confusion in the Court’s opinion: what the display is about.

The Court did not seem to know. The majority wrote of the display as “odd,” “baffling,” and “perplexing.” A “reasonable observer” would “throw up his hands”: What does it all mean? What is truly perplexing, though, is the Justices’ perplexity, for the answer stares them in the face every workday.

Let’s say that a “reasonable observer” is someone who

works at the Supreme Court, or anyone at all who has visited the chamber in which oral argument in *McCreary* was heard. The frieze above depicts eighteen individuals presented to the viewer as constituents of a class, as a multi-member set. These figures—Hammurabi, Confucius, Justinian, Moses, Muhammad, and the rest—are a diverse lot, hailing from vastly different cultures and historical eras, possessed of different worldviews. What are they doing together in the frieze? What is the set-defining characteristic? They are all male, deceased, influential. But the reasonable viewer does not conclude that the frieze is simply about powerful dead men. At least three of the figures—Moses, Confucius, and Muhammad—are great religious figures. Most, however, are not. So the reasonable viewer does not take the set’s defining characteristic to be religion. A reasonable observer who knows a little history sees before long that the frieze depicts a set of great human *Lawgivers*.

Consider now a reasonable observer of the Kentucky displays. Our observer sees eleven equal size frames containing a total of nine documents. All nine are presented in the same manner. None is held out to the eye as primary, special, separate. Any reasonable observer would conclude—as does anyone who views the Supreme Court frieze—that the individual specimens are members of a set.

What is *this* set’s principle of unity? Many were produced by recognized political authority. But the Star Spangled Banner was not. Neither was the Decalogue. The Mayflower Compact and the Declaration of Independence were not, either: They are manifestos by people on the cusp of political organization. Some of the “political” documents are scarcely more than prayers—the Kentucky Constitution Preamble and the National Motto are two examples. Two—the Decalogue and the Magna Carta—are foreign imports. The Mayflower Compact has a foot on two shores, composed by English settlers anchored off the Massachusetts coast.

What do the individual members of *this* set have in common? Neither Lady Justice nor the Bill of Rights includes an explicit reference to God. All the others do, and the First Amendment refers to “religion.” Both Lady Justice and the Bill of Rights make sense, moreover, in light of background convictions about equal human dignity, unconditional human rights, and limited government instituted *for* the people. These convictions suggest, if they do not imply, an objective moral order: Rights do not depend upon power or prestige or upon some majority’s (or powerful minority’s) shifting view of what is advantageous to them. Human dignity and human rights have sources beyond the willing and wishes of people.

The God spoken of by the Kentucky documents is transcendent and intelligent, a greater-than-human source of meaning and value. The documents as a whole show that their human authors considered themselves dependent upon this God’s continuing care. This care for humans according

to a divine plan is most often called Providence, and the documents reflect heartfelt recognition of it, e.g., “In God We Trust.” Many of the texts—the Preamble, the Mayflower Compact, the first part of the Decalogue—make clear that humans owe God thanks, prayer, homage.

A reasonable observer sees that the Kentucky displays contain a great deal of divergent detail, much that is time- and place-bound, many complaints about particular temporal rulers, contingent political plans and the like. The reasonable observer’s eye sees as well much that is grander, more exalted, even timeless. This observer’s eye fixes upon the pervading common themes: God, and God’s direction of and care for human persons. The documents are also pervaded by law, *nomos*, what is right to do, small and large: What is the morally sound way for government to treat people? How do people joined together in political community properly treat each other? What does justice require? How do we show respect for all humankind? What has God said to help us answer these important questions?

The reasonable observer sees that a unifying theme of the Kentucky display is the objective moral law as the effect or deliverance of God—ethical monotheism. The reasonable observer sees, too, that the documents evince a particular ethical monotheism, and its specific influence upon a particular nation: the United States of America. The reasonable observer concludes that the documents’ unifying theme is that biblical ethical monotheism has shaped our basic law and our political tradition.

The Kentucky displays are really one frame of the Supreme Court frieze, brought into very sharp focus. They depict how *one* of history’s great Lawgivers—Moses—shaped *our* country, its laws and political institutions. And just in case, viewers of the courthouse displays read that it is about “Foundations of American Law and Government.”

The Supreme Court’s witness in favor of this theme is not limited to its own interior artwork. The Court fifty-eight years ago stamped Madison’s *Memorial and Remonstrance* as the Magna Carta of religious liberty in America. Appended in its entirety to *Everson v. Board of Education*,¹ and excerpted many times since by members of this Court, Madison’s ode to freedom declares: “It can be truly said, therefore, that today, as in the beginning, our national life reflects a religious people who, in the words of Madison, are ‘earnestly praying, as . . . in duty bound, that the Supreme Lawgiver of the Universe . . . guide them into every measure which may be worthy of his (blessing . . .).”²

This is the message of the Kentucky documents: the American people, a religious nation, acknowledge that their actions as a people are guided by the Supreme Lawgiver, and they—that is, *we*—give thanks.

Many times since *Everson* was decided in 1947 has the Court affirmed Madison’s central point. Just five years later, in *Zorach v. Clauson*, the Court gave unqualified approval to

the proposition that “[w]e are a religious people whose institutions presupposes a Supreme Being.”³ The Court in *Schempp* later affirmed and elaborated upon this recognition, saying that the “fact that the Founding Fathers believed devotedly that there was a God and the unalienable rights of man were rooted in Him is *clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself*.”⁴ The *Schempp* Court said that “their”—that is, the Founders’—writings “evidence” those convictions. The question that *Schempp* poses about this case is whether the Declaration of Independence “evidence[s]” beliefs about the divine ground of inalienable rights, not what the Declaration expressly recites.

Schempp referred to two of the documents on display in Kentucky—the Mayflower Compact and that part of the Constitution known as the Bill of Rights. But this was no exhaustive list. The Court listed those two documents instead as members of a huge set of writings: those “from the Mayflower Compact”—written in 1620—“to the Constitution itself”—written from 1789 to 1791.⁵ In between those temporal poles lies the Declaration of Independence. In it our founders declared: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness.”⁶

The counties asserted throughout the litigation that the Ten Commandments supply the “moral background” of the Declaration of Independence, a claim from which they retreated in the Supreme Court.⁷ The majority was nonetheless puzzled: What could these two documents have in common, since one is about “divine imperatives,” and the other says that public authority derives from the “consent of the governed?”⁸

The Supreme Court majority did not strain to find an answer. In truth, however, the Decalogue provides potent evidence of human equality and the ground for inalienable human rights, too. The moral duties of the Second Table of the Decalogue are objective; that is, they are categorical and universal. It is simply wrong for anyone to murder, steal, bear false witness. These duties logically entail a class of beneficiaries who are thereby vouchsafed unconditional (“inalienable”) human rights. Everyone has a right not to be murdered, not to be lied to, not to be a victim of theft, no matter who would do the killing or stealing or lying, and no matter what reason they offer for doing it.

The Supreme Court (and the Sixth Circuit, too, for that matter) missed the whole point of Jefferson’s appeal to the “Laws of Nature and of Nature’s God.”⁹ The point was precisely that there is a higher moral law—and a Supreme Lawgiver—to which even the monarch of the world’s most powerful country must bow. In case the earthly king refuses, God’s creatures could justifiably resist oppression by appeal to that same transcendent morality.

In truth and as Lincoln suggested, the Declaration of

Independence is the “frame” into which the Framers placed the United States Constitution. John Quincy Adams—whom the Sixth Circuit cited as Jefferson’s collaborator on the Declaration¹⁰—said that the Constitution “was the complement to the Declaration of Independence; founded upon the same principles, carrying them out into practical execution, and forming with it, one entire system of national government.”¹¹ Adams also stated that “[t]he Declaration of Independence and the Constitution of the United States[] are parts of one consistent whole, founded upon one and the same theory of government.”¹²

The Kentucky displays include our national Bill of Rights presumably because it is our country’s highest political expression of the concepts found in the Declaration of Independence: government bound to respect the equal inalienable rights of human persons. The Mayflower Compact also manifests ethical monotheism that, for the Pilgrims, meant primarily the Ten Commandments. The Compact was written “In the name of God” and “in the presence of God.”¹³ The colonists covenanted together to establish “a civil body politic for our better ordering and preservation.”¹⁴ The Magna Carta expresses the idea that the rights of man are inalienable and are God-given. Blackstone describes the declaration of rights and liberties in the Magna Carta as conforming to the natural liberties of all individuals that were endowed by God at creation and are vested by the immutable law of nature. It is easy to see here, too, that the Ten Commandments help us to make sense of what the Englishmen of the thirteenth century were saying.

Our National Motto—“In God We Trust”—succinctly expresses the ethical monotheism woven throughout the other documents. As the Court stated in *Lynch v. Donnelly*, the National Motto is part of the “unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789.”¹⁵ The National Motto not only presupposes but also expresses America’s devotion to a unitary God who acts according to a divine creative plan, for the benefit of all humankind. The Kentucky displays include the Star Spangled Banner. The National Motto is derived from the line in the anthem that states, “And this be our motto, ‘in God is our trust.’”

Lady Justice symbolizes our fair and unprejudiced system of justice and the ideals that it embodies. These ideals include the notion that men are equal in dignity and thus deserving of equal justice. In our heritage, these notions of human dignity and equality owe very much to our belief in a transcendent Creator God who has made known His will for us, through revelation and by endowing us with reason sufficient to discern important moral truths: persons with reason.

Our precious rights and liberties—political, civil, religious—are rooted in God’s law. So states the Preamble to the Kentucky Constitution in terms redolent of Madison’s great *Memorial and Remonstrance*: “We the People of Kentucky [are] grateful to Almighty God for the civil, political

and religious liberties we enjoy.”¹⁶ Almost every other state constitution recognizes in its Preamble a Supreme Being; only three could be said to lack any approving invocation or reference to God.

The nine documents manifest, in varying but mutually reinforcing ways, the influence of a “Lawgiver” God upon our thinking and practices concerning human rights and limited government. The historical fact is indisputable: Biblical ethical monotheism is that influence. No one suggests that Confucius and Muhammad played any meaningful role in our founding period. They did not. But the God who delivered the two tablets to Moses certainly did. To the extent—if any—that the Court’s precedents suggest that the Establishment Clause requires government to pretend otherwise, so much the worse for those precedents.

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Footnotes

¹ 330 U.S. 1, 63–72 (1947) (appx. to Rutledge, J., dissenting).

² *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 213 (1963).

³ 343 U.S. 306, 313 (1952).

⁴ *Schempp*, 374 U.S. at 212–13.

⁵ *Id.*

⁶ THE DECLARATION OF INDEPENDENCE para.2 (U.S. 1776).

⁷ *McCeary County v. ACLU*, 125 S. Ct. 2722, 2741 n. 21 (2005).

⁸ *Id.* at 2741

⁹ THE DECLARATION OF INDEPENDENCE para.1 (U.S. 1776).

¹⁰ *Id.* at 452 n.5.

¹¹ Daniel L. Driesbach, *In Search of a Christian Commonwealth: An Examination of the Selected Nineteenth-Century Commentaries on References to God and the Christian Religion in the United States Constitution*, 48 BAYLOR L. REV. 927, 970 (1996) (quoting John Quincy Adams, *The Jubilee of the Constitution*, Address before New York Historical Society (April 30, 1939), *reprinted in* 6 J. CHRISTIAN JURISPRUDENCE 2, 5 (1986)).

¹² *Id.*

¹³ THE MAYFLOWER COMPACT para. 1-2 (U.S. 1620).

¹⁴ *Id.* at para. 2.

¹⁵ 465 U.S. 668, 674 (1984).

¹⁶ KY. CONST. pmbl.

TELECOMMUNICATIONS

A PROPOSAL FOR A NEW DIGITAL AGE COMMUNICATIONS ACT

By RANDOLPH J. MAY AND JAMES B. SPETA*

Technological and marketplace developments have forced a re-thinking of the premises of communications regulation. Advances in transmission technologies, in computerized switching, and in the creation of digital content have fundamentally altered the communications and information services marketplace. Innovative digital services and applications, coupled with high-speed broadband delivery networks, are radically changing the frontier of whole industries and markets by enabling new competitors to enter the marketplace. Most importantly, this combination of new technologies and increased marketplace competition across almost all communications markets means individuals and businesses have access to more communications and information services than ever before.

Convergence and Competition Undermine the Existing Regulatory Regime

The rapid digitalization of transmission and content into the language of 1s and 0s has had two long-anticipated but now increasingly acknowledged effects. Communications services such as voice telephony, for example, long associated with only one or two transmission technologies, now are provided over many. In addition to traditional wire-line transmissions, much voice traffic is now carried on wire-line systems, and a growing amount is carried using the Voice-over-Internet Protocol (VoIP) over the Internet. With their increased bandwidth, newly-installed broadband platforms can provide the full range of communications services, from voice, to data, to video.

Moreover, digitalization is creating increased competition among service providers previously limited to offering single services. Thus, those providers previously known as “cable television” companies are providing voice services to residential customers; those previously known as “telephone companies” are deploying fiber to provide their own “triple play” of voice, video, and high-speed data services. And satellite providers, cell phone companies, and other new entrants are providing increasing competition in many traditionally concentrated markets, while potential new entrants, such as wide-area wireless and power companies, lurk on the sidelines as future competitors. In other words, the long-predicted era of convergence and competition has arrived.¹

Convergence and competition challenge the fundamental underpinnings of the existing regime of communications regulation. The Communications Act of 1934 and its predecessors were principally concerned about control of monopoly power in an era in which, in most markets, only a single provider offered service. The Telecommunications Act of 1996² acknowledged the existence of competition in many markets, and it lifted legal barriers to the entry of new

players in telecommunications markets. But the 1996 Act, itself only an amendment to the 1934 Act, had as a principal focus controlling the then-existing monopoly power in local telecommunications markets while implementing new means of introducing competition into those markets.³

And under both laws—and thus the law as it stands today—specific regulatory treatment is based on the techno-functional characteristics of the services those providers are offering. The current regime is often referred to as a “silo” or “smokestack” regime because a distinct set of regulations with a distinct set of regulatory consequences attach to a service once it is classified under one or another of the statute’s service definitions, for example, “telecommunications service,” “information service,” or “cable service.” These statutory definitions are mutually exclusive and are based upon techno-functional constructs are anachronisms in a digital world.⁴

Consider, for example, the definitions of “telecommunications” and “information service” that are at the forefront of today’s most hotly contested regulatory battles. “Telecommunications” is defined as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information sent and received.”⁵ An “information service” is “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications. . . but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.”⁶ These definitions are nothing if not grounded firmly in techno-functional constructions: transmitting information among points “specified by the user,” “without a change in form or content,” “generating,” “storing,” “processing,” “retrieving,” “transforming” information, and so on.

Think about the meaning of the words at the core of those definitions. What does it mean to say “transforming” information, or transmitting information “without change in the form or content” of the information. When you and I exchange instant messages, and I key-in the letter in one font size and, as a result of your terminal settings or mine, or your ISP’s or mine, you receive the letter in another size or in another color, has there been a change in form or content of the information, or a transformation of the information? This is the stuff of debate by digital-age philosophers, which is why the existing definitions necessarily lead to regulatory classification determinations that seem grounded more in metaphysical distinctions than in sound policy rationales.⁷

Sound policy would dictate that services that are comparable from a consumer's perspective and that compete against one other in the marketplace be regulated comparably. But that is not the case under the current law and regulations. For example, for several years, broadband service provided by cable operators was classified as an unregulated "information service," while the telephone companies' comparable broadband service remained classified as a "telecommunications service" subject to public utility-type rate regulation and nondiscriminatory access requirements.⁸ Similarly, certain Internet telephony services are classified as "information services," thus exempting providers of these services from making payments to the universal service fund that subsidizes low-income subscribers and those living in high-cost areas. Providers of traditional analog voice services are required to contribute a percentage of their revenues to support universal service programs. These differences arising from regulatory classification are consequential. Inevitably they lead to attempts to engage in regulatory arbitrage and political gaming of the system. A tweak of a bell here or whistle there might change the regulatory classification of an offering without really altering the market position of the service provider.

A New Market-Oriented Regulatory Paradigm

The development of competition eliminates the need for laws designed to limit monopoly power, and, in particular, laws that presume—as both the telephony and cable television titles of the current Communications Act largely do—that the providers of certain kinds of services have dominant market power.⁹ The 1934 Act set as its goal making available "to all the people of the United States . . . a rapid, efficient, Nation-wide, and world wide wire and radio communications service,"¹⁰ and the importance of communications services to the functioning of our democracy and our nation's economy cannot be denied. But most essential goods and services in this country are effectively and efficiently provided by competitive markets, and there is no reason why, except in fairly rare circumstances, this cannot be true in communications markets. And, in any event, convergence enabled by digital age technologies has rendered the current regulatory scheme obsolete.

Recognizing these developments, many have called for a rewrite of the Communications Act, and bills are beginning to be introduced in Congress that would make substantial changes in existing law.¹¹ What we propose here is the adoption of a new regulatory framework that might be part of a new Digital Age Communications Act.¹² Under our model framework, regulation would be based, almost exclusively, on competition law principles drawn from antitrust law and economics. Regulation would respond to instances of abuse of market power that are more than transitory in nature, and it would address such instances of abuse as they occur. The regulator would act principally through adjudication, responding as antitrust authorities do, to correct abuses as they occur, largely eliminating the existing elaborate web of rules and regulations that has grown up under the

existing statute and minimizing the promulgation of new rules in the future.

The new framework borrows heavily from the Federal Trade Commission Act. With respect to competition issues, the Federal Trade Commission acts principally under the antitrust laws. Thus, at the outset, the new communications act would declare that it is the policy of the United States that the FCC's "decisions should be based on jurisprudential principles grounded in market-oriented competition analysis such as those commonly employed by the Federal Trade Commission and the United States Department of Justice in enforcing the Federal Trade Commission Act and the antitrust laws of the United States." It also would declare that it is the policy of the United States that "economic regulation of communications markets should be presumed unnecessary absent circumstances that demonstrate the existence of a threat of abuse of market power that poses a substantial and non-transitory risk to consumer welfare." In effect, the presumption in favor of regulation that operates throughout many parts of the current act would be replaced by a presumption in favor of relying, whenever possible, on competition to protect consumers.

Like the FTC, the FCC would be authorized to prevent "unfair methods of competition." In addition to the clear declarations of policy presuming a less regulatory, market-oriented regime, the new statute would define "unfair competition" in a way that firmly ties the lawfulness of the agency's actions to competition-based analysis that focuses on consumer welfare, and not the welfare of competitors. The meaning of "unfair competition" is tied to an established body of jurisprudence emphasizing rigorous economic analysis in connection with market determinations. Unlike the current act, the FCC would not be empowered to base its decisions on vague standards such as the "public interest" or "just and reasonable" practices.

With respect to interconnection of competing networks, the FCC's authority would not be tied quite as strictly to antitrust jurisprudential principles as it would be for all other actions, even though it would be circumscribed much more than it is under the current statute. The new regulatory framework would permit the FCC to order the interconnection of communications networks in situations in which markets are not adequately providing interconnection and in which the denial of interconnection would substantially harm consumer welfare.

The justification for a somewhat more relaxed, but still market-oriented, standard for the agency's interconnection authority is two-fold. First, although communications markets increasingly are becoming competitive, in some access markets competition is likely to be among a relatively small number of facilities-based providers. This, coupled with the network effects that inhere in communications markets, means that the strategic denial of interconnection may be a rational competitive strategy—and that private benefits from the denial of interconnection may not align with total social

welfare. Second, the economic and non-economic benefits of an integrated communications network, for commerce, for education, for individual fulfillment, and for facilitating the free exchange of ideas in our democracy, are very important. Authorizing the FCC to require interconnection under the limited circumstances when markets are not adequately providing interconnection and when consumer welfare will be harmed absent such interconnection should be sufficient to preserve the integrity of communications networks without imposing a heavy-handed regulatory structure covering all aspects of these increasingly dynamic markets.

Our proposed model deviates from a pure antitrust model most significantly by retaining a sector-specific regulator, although it is an agency with a much more circumscribed regulatory mandate. The FCC is retained both to promote uniformity in increasingly national communications markets and to develop a body of expertise necessary to supervise interconnection or other competition matters in communications markets. A sector-specific regulator has several advantages over reliance on traditional antitrust jurisdiction. The common law process of antitrust depends upon the development of facts on a case-by-case basis, through the adversary process. As Justice Stephen Breyer has noted, “[c]ourts have difficulty investigating underlying circumstances—particularly changes in circumstances—because they depend upon a record, produced through an adversarial process, for their information.”¹³ And enforcement under a pure antitrust regime requires time to produce a uniform rule, incorporating proceedings in both trial and appellate courts, perhaps in multiple jurisdictions.

Importantly, the Supreme Court has recently expressed doubt that antitrust law and generalist antitrust courts are able to resolve the sorts of disputes most likely to occur in the new broadband markets. In *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, the Court noted that in telecommunications markets remedies for refusal to grant access to networks or facilities “will ordinarily require continuing supervision of a highly detailed decree,” and that “an antitrust court is unlikely to be an effective day-to-day enforcer of these detailed sharing obligations.”¹⁴

Of course, the Federal Trade Commission itself has nationwide adjudicatory jurisdiction, which promotes uniformity, and the FTC has investigatory authority as well as adjudicatory authority that may be used to develop relevant expertise. We recognize that eliminating sector-specific regulation, discontinuing the FCC entirely, and giving the FTC express jurisdiction over communications markets would emphasize much more starkly the break with FCC regulation that has rested broadly on the “public interest” standard. This FCC-elimination option might also decrease public choice concerns, as an agency with more general jurisdiction like the FTC would shift to other concerns if telecommunications markets presented no particular competition problems. A sector-specific regulator might be induced to continue regulating a sector to preserve its own mission.

Despite these concerns, we recommend maintaining sectoral regulation under some form of specialized agency like the FCC. Consideration of regulatory issues relating to communications markets can benefit from the presence of a specialized body of technologists and economists. Richard Posner’s conclusion that antitrust doctrine is supple enough to accommodate the new economy¹⁵ was tempered by his concern that traditional antitrust institutions are not so supple.¹⁶ Thus, one of his recommendations was the development of additional, specialized expertise in government.¹⁷ In any event, and importantly, we anticipate that the substantive limitations imposed on FCC actions and the requirement for market-oriented economics-based analysis will ensure that the agency stays within the banks of a narrow stream of regulation. The significant limits on generic rulemaking actions and the preference for adjudication discussed below also should help constrain the agency’s natural regulatory impulse.

A Preference for Adjudication Over Rulemaking

An important feature of our proposal for a new regulatory framework is that it contemplates that much more of the FCC’s regulatory activity would be carried out through adjudication than through *ex ante* rulemaking. An FTC-like antitrust model based upon an unfair competition standard, coupled with some strictures on generic rulemaking, presumes that the Commission generally will act through adjudication, addressing unfair competition problems on a case-by-case basis *ex post*. To prevent undue delay, there can be a time limit for deciding cases.

Primary reliance on adjudication means questions are presented to the Commission in a narrower, fact-based fashion. When the agency proceeds more often through focused adjudications, new competitors do not confront an extensive web of regulations that limits their entry. And the business options of existing market participants are not unnecessarily limited, or even inadvertently inhibited, by overly vague and overly broad generic regulatory prohibitions that may—or may not—permit or prohibit particular business activity. Thus, *ex post* adjudication is superior to the kind of overly broad, open-ended *ex ante* rulemaking proceedings that sometimes have lingered at the Commission for quite extended periods, often years. More narrowly focused case-by-case adjudication should also reduce log rolling opportunities and compromises and trade-offs that inherently tend to ratchet up regulation in expansive rulemakings in which many issues are put in play simultaneously.¹⁸

So, under the new regulatory framework, the FCC, like the FTC, would have the authority to entertain and remedy complaints, including the power to award significant damages in appropriate cases. Indeed, the lack of adequate *ex post* remedial authority may be another reason the current FCC has tended to rely so heavily in favor of detailed *ex ante* prescriptive rules and regulatory conditions.

The FTC still retains rulemaking authority to define methods of unfair competition, and despite our preference for adjudication, we would continue to grant the FCC similar generic rulemaking authority. In light of the current increasingly competitive environment which shifts the presumption away from regulation, and the FCC's own not infrequent history of adopting overly broad and overly prescriptive regulations, we do, however, propose that new legislation impose additional limits on the Commission's existing rulemaking authority. The Commission would be authorized to make rules only when it finds by "clear and convincing evidence" that such rules are necessary. This higher evidentiary standard of proof directed to the Commission, which is not in the current statute, reinforces the preference for adjudication over rulemakings. It is also consistent with our desire to institutionalize more rigorous analysis into the agency's decisionmaking.

Additionally, under our proposal, before promulgating any regulation in a rulemaking proceeding, the commission would be required specifically to find that "marketplace competition is not sufficient adequately to protect consumer welfare" and that the injury to consumers is both "substantial" and "not avoidable by consumers themselves." Importantly, the Commission would also be directed to consider any effect that the rules themselves may have on competition.

Finally, the Commission's rulemaking authority would be further cabined by requiring the sunset of each rule five years after it is adopted. The Commission could renew a rule only if it makes an affirmative finding, after notice and comment proceedings, that current evidence makes a "clear and convincing" showing that the rule is necessary to protect consumers. This new sunset provision would help ensure that rules do not become stale in the face of changing technology and marketplace dynamics. In his seminal work on regulatory reform, Stephen Breyer called for the additional use of sunset provisions, but he worried that a legislature facing a sunset "may well simply reenact the old program automatically," without doing the serious work of considering its necessity.¹⁹ Our proposal would avoid that possibility by providing that FCC rules become void unless the Commission, in a new proceeding based on current evidence, finds that the rules continue to be necessary to protect consumer welfare.

Reform the Merger Review Process

Historically, dual review of mergers in communications markets by the FCC and the antitrust authorities has been the subject of substantial, powerful criticism.²⁰ Even though the FCC, in recent years may have assumed somewhat more the role of a follow-on reviewer, deferring more to the process undertaken by the antitrust authorities, the exercise by the commission of its "public interest" authority to approve license and authorization transfers nevertheless has meant that parties proposing mergers have been required to obtain approval in a separate regulatory proceeding in addition to the normal antitrust review. To a significant extent, the FCC has examined the same or similar competitive impact issues

as the ones examined by the Department of Justice or the Federal Trade Commission. With respect to the competitive impact assessment, this duplication of review has caused an unnecessary and wasteful expenditure of public and private resources. It also has created undue delays in the merger review process that are costly to the merger proponents.

Moreover, use of a regulatory standard as vague as the "public interest" standard is problematic in a merger review proceeding. In the past, the indeterminate nature of the standard has allowed the FCC, as part of the license transfer review process, great latitude to seek to impose conditions on the merger proponents entirely related to any competitive concerns uniquely posed by the transaction. Because the merger proponents cannot move forward to consummate the merger absent FCC approval of the license transfer, it is common for the parties to agree to "voluntary" conditions along the lines suggested by the agency's staff in off-the-record negotiations.

For example, when SBC merged with Ameritech in 1999, the companies eventually volunteered to abide by 30 separate regulatory conditions, not counting dozens more sub-conditions.²¹ Most, such as a condition requiring the merged entity to build-out broadband networks in low-income areas, went far beyond existing statutory or regulatory requirements. However salutary from a policy perspective these requirements might have been if imposed on an industry-wide basis in a generic rulemaking proceeding, it is another matter entirely to impose them in the context of a merger review.²²

By cabining substantially the FCC's authority over mergers, our proposed new regulatory framework would address both the unnecessarily wasteful duplication of resources by two government agencies and the often-unseemly practice of "regulation by condition." Review of potential impacts on marketplace competition under the Hart-Scott-Rodino Act would continue, with the Department of Justice or the Federal Trade Commission taking the lead. But the FCC's authority to review license or authorization transfers would be limited to ensuring that the transfer does not create any violation of the Communications Act or an FCC rule. Under this proposal, the FCC no longer would duplicate the competitive assessment review undertaken by the competition agencies charged with enforcing our antitrust laws, and it no longer would have authority to use the license transfer process to impose conditions that are not necessary to ensure compliance with the Communications Act or FCC regulations.

Conclusion

In sum, in light of the rapid advent of marketplace competition and the reality of service convergence spurred by technological advances, it is time for Congress to enact a new Digital Age Communications Act. The existing regulatory regime that classifies various services based on technological constructs is sorely outdated. It leads to disparate regulation of services that are comparable from the consumers'

perspective and which compete against each other in the marketplace. In this article, we offer a new market-oriented, technology-neutral regulatory paradigm that is suitable for the digital age. The shift away from agency action primarily based on vague standards such as the “public interest” and “just and reasonable” rates to action primarily based on an antitrust-like standard that compels the agency to engage in rigorous economic analysis, and away from predominant reliance on broad generic rulemakings in favor of more narrowly-focused case-by-case adjudications will result in sounder, less heavy-handed regulation.

We understand that any shift to a new regulatory paradigm, especially a shift as significant as the one proposed here, will involve some transitional and timing issues that must be resolved and which are not addressed here. In some instances, it may not be feasible or advisable to “flash cut” legacy regulation. We also understand there are other issues not treated here, such as adjustments in the existing federal-state jurisdictional relationship and reform of the existing system of universal service support subsidies, which necessarily must be part of any effort to achieve comprehensive reform of communications law and policy.

Finally, we appreciate that there are various other pro-competitive models for a new regulatory framework that might be considered in addition to, or as a complement to, the one offered here. For example, some have suggested an “IP migration” model whereby new broadband services that use the Internet Protocol should be subjected to minimal regulation, while legacy narrowband services, such as traditional voice telephony, remain subject to a greater degree of regulation. Such proposals that attempt to restrict regulation to legacy services have considerable merit as well, although we are concerned that any framework that continues to rely on technological distinctions for classification purposes, for example, based on whether they are “IP-enabled,”²³ may become outdated rather quickly. In any event, in our view, the principal elements of the new regulatory framework we have proposed here should be a key part of any such reform effort. If these elements are adopted, we are confident that Congress will have taken an important step in maintaining our nation’s leadership in the communications and information technology industries.

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Weisman. The article draws heavily on the Working Group’s paper, and the contributions of the members of the group to the paper are gratefully acknowledged. The views contained in this version should be attributed only to the authors.

Footnotes

¹ We do not use “long-predicted” lightly. For example, more than twenty years ago, Ithiel de Sola Pool, in his much discussed book, *Technologies of Freedom*, declared: “For the first three-quarters of the twentieth century the major means of communications were neatly partitioned from each other, both by technology and use. Now the picture is changing. Many of the neat separations between the different media no longer hold...The explanation for the current convergence between historically separated modes of communication lies in the habitability of digital electronics.” ITHIEL DE SOLA POOL, *TECHNOLOGIES OF FREEDOM* 26-27 (1983).

² Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996)(codified at various sections of 47 U.S.C.)(hereinafter sometimes referred to as “1996 Act” or the “Telecom Act of 1996”).

³ See James B. Speta, *Deregulating Telecommunications in Internet Time*, 61 WASH. & LEE L. REV. 1, 27-33 (2004).

⁴ See Randolph J. May, *Calling for Regulatory Overhaul, Bit by Bit*, CNETNews.com (Oct. 19, 2004), available at http://news.com.com/Calling+for+a+regulatory+overhaul%2C+bit+by+bit/2010-1028_3-5415778.html. (“What we need is a new market-oriented model, not a replacement based on another set of techno-functional definitions.”).

⁵ 47 U.S.C. § 153 (48).

⁶ 47 U.S.C. § 153 (41).

⁷ See Randolph J. May, *The Metaphysics of VoIP*, CNET NEWS.COM (Jan. 5, 2004), available at http://news.com.com/The+metaphysics+of+VoIP/2010-7352_3-5134896.html.

⁸ See National Cable & Telecommunications Ass’n v. Brand X Internet Services, 125 S. Ct. 2688 (2005) (The FCC recently has taken steps to reclassify the telephone companies’ broadband services as “information services,” apparently putting them on a regulatory par with cable broadband services.) See Press Release, FCC, FCC Eliminates Mandated Sharing Requirement on Incumbents’ Wireline Broadband Internet Access Services (August 5, 2005).

⁹ See James B. Speta, *A Common Carrier Approach to Internet Interconnection*, 54 FED. COMM. L.J. 225 (2005).

¹⁰ 47 U.S.C. § 151.

¹¹ See, for example, S. 1504, “Broadband Investment and Consumer Choice Act,” introduced July 27, 2005.

¹² We note again here, as we do above, that we are drawing heavily upon the work of The Progress and Freedom Foundation’s Regulatory Framework Working Group, which we co-chaired. The group full report is available at <http://www.pff.org/issues-pubs/other/050617regframework.pdf>.

¹³ STEPHEN BREYER, REGULATION AND DEREGULATION IN THE UNITED STATES: AIRLINES, TELECOMMUNICATIONS AND ANTITRUST, DEREGULATION OR RE-REGULATION 45 (Giandomenico Majone ed., 1990).

¹⁴ 540 U.S. 398, 415 (2004). For a discussion of the problem of antitrust courts setting access or interconnection prices, *see generally* Philip J. Weiser, *Goldwasser, The Telecom Act, and Reflections on Antitrust Remedies*, 55 ADMIN. L.J. 1519 (2003); James B. Speta, *Antitrust and Local Competition under the Telecommunications Act*, 71 ANTITRUST L.J. 99 (2003).

¹⁵ Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925, 925 (2001).

¹⁶ *Id.* at 925 (“The real problem lies on the institutional side: the enforcement agencies and the courts do not have adequate technical resources, and do not move fast enough, to cope effectively with a very complex business sector that changes very rapidly.”).

¹⁷ *Id.* at 940 (The Antitrust Division and the FTC should hire more computer scientists and engineers to better understand new economy antitrust problems).

¹⁸ *See* Randolph J. May, *New Rules for New Tech*, LEGAL TIMES, March 29, 2004, at 70.

¹⁹ STEPHEN BREYER, REGULATION AND ITS REFORM 365 (1982).

²⁰ *See generally* Donald J. Russell & Sherri Lynn Wolson, *Dual Antitrust Review of Telecommunications Mergers by the Department of Justice and the Federal Communications Commission*, 11 GEO. MASON L. REV. 143 (2002); Rachel E. Barkow & Peter W. Huber, *A Tale of Two Agencies: A Comparative Analysis of FCC and DOJ Review of Telecommunications Mergers*, 2000 U. CHI. L. FORUM 29.

²¹ Applications of Ameritech Corp. and SBC Comm. Inc. for Consent to Transfer Licenses and Lines, *Memorandum Opinion and Order*, 14 F.C.C.R. 14,712 (1999).

²² *See* Randolph J. May, *Telecom Merger Review-Reform the Process*, NATIONAL LAW JOURNAL, May 30, 2005, at 27.

²³ For a discussion of IP-enabled services, *see generally* Review of Regulatory Requirements for IP-Enabled Services, Notice of Proposed Rulemaking, 69 Fed. Reg. 16,193 (2004). The FCC said IP-enabled services “include, but are not limited to, voice over IP (VoIP) services, other communications capabilities utilizing the Internet Protocol, software-based applications that facilitate use of those services, and future services using IP expected to emerge in the market.” *Id.*

BOOK REVIEWS

CONSTITUTIONAL CHAOS: WHAT HAPPENS WHEN THE GOVERNMENT BREAKS ITS OWN LAWS

BY JUDGE ANDREW NAPOLITANO

REVIEWED BY MICHAEL C. CERNOVICH*

You can't always judge a book by its cover, but you can often judge a book by its dedication. Judge Andrew Napolitano, who is a Senior Judicial Analyst for the Fox Television Network, dedicates *Constitutional Chaos* to Sir Thomas More, who was "murdered by the government because he would not speak the words the King commanded."¹ Fans of *A Man for All Seasons* can see where this book is heading. Judge Napolitano then quotes former President Ronald Reagan's famous wit: "The nine most terrifying words in the English language are: 'I'm from the government and I'm here to help.'"²

Constitutional Chaos is full of examples where government officials, like Roper, would "cut down every law in [America]"³ to catch the Devil. The Reagan quote is also particularly apt, and shows a real incongruity in conservative thinking. Conservatives generally distrust the government, except when it's "here to help" by enacting and enforcing criminal laws. Why should skepticism of government power end at the text of criminal laws?

Napolitano's dedication serves as a unifying theme for his book. As St. Thomas More recognized, the government cannot punish every "bad man" without also destroying the rule of law that protects the innocent.⁴ And when the government offers to help, by criminalizing and regulating all human conduct, we should be terrified. Indeed, the book is filled with alarming examples of the government "helping."

Napolitano devotes several pages to former Attorney General Janet Reno's prosecution and conviction of several innocent men and women. While serving as Dade County State's Attorney, Janet Reno pioneered what would later be called the "Miami Method." In theory, the method was brilliant: task experienced rape prosecutors to form a unit specifically designed to target child molesters. Hire experts to speak with children in friendly settings, and videotape those sessions for trial. The execution of that method, however, was horrifying. Under Reno's execution of the Miami Method, psychologists and social workers would convince unharmed children that they had actually been molested, as Grant Snowden can attest.

Grant Snowden was too short to become a police officer. But after years of effort he was finally able to begin his dream career. He did well under pressure, and was soon highly decorated: in 1984 he was South Miami's Police Officer of the Year. Since public service rarely pays well, his wife ran a part-time day-care center from their home. The Snowdens were living well. Then, in 1985, one of Mrs. Snowden's day care attendees said that Grant Snowden touched her

inappropriately. That seemed improbable since at the time the abuse allegedly occurred, the girl wasn't at the Snowdens' home. Grant Snowden denied the charge and went to trial. Given the lack of any real evidence, he was acquitted.

Napolitano reports that Reno responded by turning the Miami Method into the Shotgun Approach. Reno retained Laurie Braga, someone lacking formal education in child psychology, to interview children who had stayed at the Snowdens. During the interviews, Braga would undress dolls, and convince children they had been molested. One child, after an interview, claimed that Snowden had urinated in her mouth. Still, there was no physical evidence that Snowden abused anyone.

This was because the children were never molested. After meeting with Braga, many children came out believing they had been sodomized with snakes, sticks, and swords. Their stories were unbelievable. But Reno, and prosecutors acting under her, put on expert testimony claiming that children never lie about molestation.⁵ Thus, even though the stories were incredible, the expert testimony buttressed the story. Because several children related stories, "something" horrible must have happened. Snowden was convicted after a second trial on related abuse charges.

After spending almost a dozen years in prison, a federal court granted Snowden's petition for a writ of *habeas corpus* and took the unusual step of allowing Snowden to remain free pending the government's appeal. The Eleventh Circuit Court of Appeals affirmed.⁶ Writing for the panel, Chief Judge James Larry Edmonson noted that, excluding the expert testimony, there was "very little evidence" of guilt.⁷ Indeed, the panel noted how unjust the case was, writing that: "Very rarely will a state evidentiary error rise to a federal constitutional error; but given the circumstances of the trial underlying this case, we conclude that allowing expert testimony to boost the credibility of the main witness against Snowden—considering the lack of other evidence of guilt—violated his right to due process by making his criminal trial fundamentally unfair."⁸ The Snowden travesty is not an "isolated incident." Sadly, the abuse of prosecutorial power is much more common than people generally believe.

Another practice the book focuses on is the violation of the federal witness bribery statute, which Napolitano claims occurs in courtrooms across the country. Under the federal witness bribery statute, 18 U.S.C. §201(C)(2), "[whoever] directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a

witness” has committed a felony. A thing of value has been broadly defined, and includes everything from money to conjugal visits.⁹ Yet prosecutors regularly pay witnesses money, and give them promises of leniency, in exchange for testimony.¹⁰

In one such case, *United States v. Singleton*,¹¹ the prosecutor promised a drug dealer-turned-witness leniency for his testimony. The defense sought to exclude the drug dealer’s testimony, arguing that it was obtained in violation of the federal witness bribery statute. The district court admitted the evidence, but was reversed by a three-judge panel of the Tenth Circuit Court of Appeals.¹² The panel’s analysis was straightforward. The statute did not make any exception for prosecutors. Thus, it would be for Congress, and not the courts, to exempt prosecutors from its protection.

Ten days later, the Tenth Circuit vacated the opinion and agreed to rehear it *en banc*. Later, in a conclusory opinion, a split *en banc* court ignored the distinction between principal and agent, writing that federal prosecutors are “the alter ego of the United States.” And as the alter ego of the United States, a prosecutor cannot be a “whoever.” Why did an activist court ignore the plain language of a statute to side with prosecutors? The court’s rationale can only be that of the tyrant—not law, but necessity.¹³

Of course, it may be that prosecutors should be allowed to grant promises of leniency in exchange for testimony. But it is a weak claim to say that the plain text of the statute does not apply to current prosecutorial practice. That is Napolitano’s point, and he reiterates it time and again in his book. Prosecutors are charged with enforcing the laws—all laws, even the ones that make their jobs harder. Instead, they are breaking the law to enforce it, and judges are too often complicit in this. Where a law is generally applicable, no one should get a free pass.

The book is short on citations to legal and scholarly sources. It’s a far cry from *The Founder’s Constitution*. Then again, the book is not intended as a treatise but as a wake-up call. It’s not a book of philosophy: it’s a book of anecdotes. But the anecdotes are calculated to turn the reader on to Judge Napolitano’s philosophy of individual freedom. Although the book emphasizes criminal law, other legal topics are addressed.

Prepare to be shocked. Prepare to be outraged. Prepare to disagree, for there is much to disagree with. But be prepared for Judge Napolitano’s courage and non-partisanship. Few people are brave enough to criticize both former Attorneys General Reno and John Ashcroft. But this judge does. In doing so, he shows that, to borrow from Robert Bolt: Judge Napolitano is a man for all administrations.

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American Lawyer Media and appears on the front page of Law.com.

Footnotes

¹ Judge Andrew P. Napolitano, *Dedication to CONSTITUTIONAL CHAOS: WHAT HAPPENS WHEN THE GOVERNMENT BREAKS ITS OWN LAWS* (Nelson Current 2004).

² *Id.*

³ ROBERT BOLT, *A MAN FOR ALL SEASONS* AT 66 (Vintage International 1990).

⁴ *Id.* at 66 (“Yes, I’d give the Devil benefit of law, for my own safety’s sake.”).

⁵ *Snowden v. Singletary*, 135 F.3d 732, 737 (11th Cir. 1998) (“The evidence at issue in this petition is testimony by an expert witness (Dr. Miranda) that 99.5% of children tell the truth and that the expert, in his own experience with children, had not personally encountered an instance where a child had invented a lie about abuse.”).

⁶ *Snowden v. Singletary*, 135 F.3d 732 (11th Cir. 1998).

⁷ *Id.* at 738.

⁸ *Id.* at 739.

⁹ *Salinas v. United States*, 522 U.S. 52 (1997) (interpreting the federal program bribery statute, 18 U.S.C. 666).

¹⁰ See U.S. DEPT. OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL at §2044 (“An aphorism sometimes used to sum up the distinction between a bribe and a gratuity is that a bribe says ‘please’ and a gratuity says ‘thank you.’”).

¹¹ *United States v. Singleton*, 165 F.3d 1297 (10th Cir. 1999).

¹² *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998), *vacated and reversed*, 165 F.3d 1297 (10th Cir. 1999).

¹³ The court’s conclusion comes down to this: bribing witnesses, even if unlawful, is necessary.

LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY, 2005-2006 EDITION

BY RONALD D. ROTUNDA AND JOHN S. DZIENKOWSKI

REVIEWED BY ANTHONY E. DAVIS*

This one volume work on legal ethics contains an excellent overview, discussion and explanation of the development—from their genesis through the latest modifications—of the American Bar Associations' Model Rules of Professional Conduct (the "Model Rules"). The authors have thoroughly and diligently explained, and placed in historical and contemporary context, the current text of the Model Rules.

Although the book is sub-titled "The Lawyer's Deskbook on Professional Responsibility," it is not—and is presumably not intended to be—a reference tool for use by the typical lawyer in his or her daily practice. Lawyers are principally regulated by the individual states, each of which adopts its own rules of legal ethics. To the best of this reviewer's knowledge, there is not a single state that has adopted the Model Rules in exactly the language propounded by the ABA. True, some come close, but most states make at least a few changes and some states have not (or at least, not yet) even adopted the Model Rules at all. This includes the two states with, respectively, the largest and second largest number of lawyers, California and New York; California has a unique system of statute-based regulation, and New York has its own version of the Model Code of Professional Responsibility. An example of a true "deskbook for lawyers"—necessarily focused on the *actual* rules of professional responsibility as adopted and applied in a particular state—is Professor Roy Simon's annually updated "Simon's New York Code of Professional Responsibility Annotated," which is an essential tool for New York lawyers.

That said, this book is a very handy reference for those practitioners who have need of detailed background information on the origin, policy framework and legislative intent of the drafters of the Model Rules. This is a growing population of lawyers, including academics who teach professional responsibility as well as practitioners in the rapidly expanding group of lawyers who represent and advise other lawyers, whether in the realms of professional discipline, partnership and business organization, or inter- and intra-law firm and partner disputes. An important and fast growing sub-set of that group are the in-house counsel at larger, and increasingly, mid-sized law firms.

The second way in which this book can serve as a "deskbook" lies in the book's thirteen appendices (making up almost a third of its nearly 2000 pages). These appendices include the subordinate model rules for the profession propounded by the ABA, such as the Model Rules for Fee Arbitration, for Mediation of Lawyer Client Disputes, the Standards for Imposing Lawyer Sanctions, and the Model

Rules for Lawyer Disciplinary Enforcement. A number of states have adopted at least some of these rules in some form, but most states have not. In the latter, larger group of states, these important subsidiary regulations may be a significant source of otherwise unavailable guidance.

Substantively, the book presents a fair-minded summary of the issues addressed in the Model Rules. By and large, it seems not to take sides in disputed territory (e.g., whether non-refundable retainers should be permissible; the relationship between the Model Rules and civil liability; and the nature and scope of the appropriate exceptions to the duty to preserve client confidences and secrets in Model Rule 1.6). Instead, the book focuses on the positions taken in the Model Rules on these topics and identifies the issues that are unresolved. In a few places, it was surprising to find that this new edition seemed to be behind the times. For instance, in referring to the American Law Institute's Restatement of the Law Governing Lawyers, the book acknowledges (page 24, Section 1-4(d)) that the Restatement was finalized in 2000, but the book still refers to the numbering in the final Official Draft (not the numbering used in the finalized Restatement itself). In an otherwise faultless summary of the ethical rules governing the use of "Email, Cordless Phones, Wireless Web Access and Similar Technology for Confidential and Secret Client Information" (pages 207 – 209, Section 1.6-2(c)), the authors unfortunately do not address the latest technology to arise in this area—namely, instant messaging, which presents some unique problems to lawyers and to those who manage the retention (and deletion) of the data the lawyers generate.

So, while not a "deskbook" of utility to most practicing lawyers, the book is a valuable reference tool to those who have need to delve deeper than the "black letter" rules of professional ethics in any given jurisdiction. The book will undoubtedly be helpful to anyone seeking to understand the policies that underlie the current version of the Model Rules, which are in many ways the normative ethical rules for the American legal profession, and the compromises those rules sometimes represent.

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