ENGAGE

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Book Reviews

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The Federalist Society takes seriously its responsibility as a non-partisan institution engaged in fostering a serious dialogue about legal issues in the public square. We publish original scholarship on timely and contentious issues in the legal or public policy world, in an effort to widen understanding of the facts and principles involved and to continue that dialogue. Positions taken on specific issues in publications, however, are those of the author, not reflective of an organization stance. ENGAGE presents articles, white papers, speeches, reprints and panels on a number of important issues, but these are contributions to larger ongoing conversations. We invite readers to submit opposing perspectives or views to be considered for publication, and to share their general responses, thoughts and criticisms by writing to us at info@fed-soc.org. Additionally, we happily consider letters to the editor.

ENGAGE

Vol. 8, Issue 1

Letter from the Editor . . .

ENGAGE, the journal of The Federalist Society for Law and Public Policy Studies, is a collaborative effort, involving the hard work and voluntary dedication of each of the organization's fifteen Practice Groups. These Groups hope to spark a higher level of debate and discussion than is all too often found in today's legal community. Through their programs, conferences and publications, they aim to contribute to the marketplace of ideas in a way that is collegial, measured, and insightful.

This issue is the first in our twenty-fifth anniversary year, which began at the November 2006 National Lawyers Convention. The transcripts from that event's many panels will be appearing on the organization's website in the coming months as an online edition of ENGAGE. Several have already been placed at various law reviews.

The following pages, as usual, feature articles discussing only the most pertinent issues in these fifteen areas of law and policy. Since talk of the coming presidential election has begun, we have reproduced here several white papers generated by our Free Speech & Election Law Practice Group this fall, dealing with ongoing points of debate in campaign finance reform and election law. In light of the recent policy changes to the "Thompson Memo," discussed by George J. Terwilliger III in the Corporations, Securities & Antitrust section, we have also reprinted the transcript from a panel on the issue of attorney-client privilege waivers in criminal investigations, also with Mr. Terwillger, and Mary Beth Buchanan, William B. Mateja and former Solicitor General Theodore B. Olson. Another common thread in this issue is the debate over presidential war powers. Margaret D. Stock reviews Judge Richard A. Posner's new title, and offers thoughts as to the thorny nature of the problem. Will Consovoy examines the latest work from John Yoo, one of the lead participants in the debate, whose service in the Administration also put him at the center of this controversy. Christopher Wray and Robert Hur's review of John Ashcroft's memoir, and the articles in the Federalism & Separation of Powers section on the State Secrets Privilege and NSA surveillance, also deal with this topic.

Upcoming issues of ENGAGE will continue to feature original articles, essays, book reviews, practice updates and transcripts of programs that are of interest to Federalist Society members. We hope you find these issues well-crafted and informative, and encourage members and others to offer their feedback.

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Administrative Law and Regulation

State-Level Protection for Good-Faith Pharmaceutical Manufacturers

*By Daniel Troy**

In 1996, the Michigan legislature enacted a common-sense proposition into law: drug-safety determinations should be made by the Food and Drug Administration (FDA), rather than by judges or juries hearing tort cases. This statute, Michigan Compiled Law § 600.2946(5) (the Michigan FDA Shield Law), provides that, with certain exceptions, drugs approved by FDA and in compliance with FDA requirements cannot be held to be "defective or unreasonably dangerous" in a state-law tort action. Nevertheless, misconceptions regarding the operation of the Michigan FDA Shield Law and the FDA drug-approval process have led some to attack this sensible and well-considered measure.[1]

The FDA drug-approval process is often misunderstood. FDA's decision to approve a new drug is qualitatively different from decisions made by many other consumer-protection agencies.[2] For example, when the Consumer Product Safety Commission sets minimum standards for lawnmowers or children's toys, manufacturers are generally permitted to exceed these minimum standards. They may do so either to produce ultra-safe products for consumers willing to pay for that additional safety or out of a business-driven desire to reduce the likelihood that the manufacturer could ultimately be held liable for product-related injuries. By contrast, when FDA approves a new drug, it intends to set not a minimum standard but an optimal standard: one that balances the risks associated with the drug against the competing risks associated with not having the drug available.[3]

This difference in regulatory approaches results from a fundamental distinction between pharmaceuticals and other manufactured products. The adverse effects associated with a given drug are almost inevitably not a result of cost-cutting or sloppy manufacturing: rather, they are the result of the drug's composition and are inseparable from the drug's beneficial effects.[4] Accordingly, FDA approval of a drug does not require a determination that the drug is safe in all circumstances. Indeed, such a requirement would prohibit the approval of the vast majority of drugs. Instead, FDA approval of a prescription drug constitutes a determination that, as a matter of public health policy, the drug is sufficiently beneficial to justify its widespread availability to prescribers, despite a (perhaps unavoidable) risk of harm to certain patients.

Unfortunately, the liability regime currently applicable in most states does not account for this aspect of the FDA regulatory process. Even when FDA has concluded that it is better to have a given drug on the market, despite its known adverse effects, state tort regimes often make it possible to recover large damage awards against the drug manufacturer. One notable exception is the state of Michigan. The solution adopted by the Michigan legislature is simple. Absent certain important exceptions, a drug "manufacturer or seller" will not be deemed to have sold a "defective or unreasonably dangerous" drug if: (1) FDA had approved the drug in question "for safety and efficacy"; and (2) "the drug and its labeling were in compliance with [FDA's] approval at the time the drug left the control of the manufacturer or seller."[5] Importantly, the Michigan FDA Shield Law protects only those pharmaceutical manufacturers who act in good faith. The law expressly does *not* apply to: (1) any drug "sold in the United States after the effective date of an [FDA order] to remove the drug from the market or to withdraw [FDA's] approval;"[6] (2) any defendant who intentionally withholds required information from FDA that would have, had it been submitted, resulted in the drug not being approved or FDA withdrawing approval;[7] or (3) any defendant who "makes an illegal payment" to a U.S. official "for the purposes of securing or maintaining approval of the drug."[8]

To avoid constitutional difficulties, the United States Court of Appeals for the Sixth Circuit has held that the fraud and bribery exceptions require an FDA finding that fraud or bribery has occurred.[9] Nonetheless, these exceptions remain important to the overall statutory scheme. A drug manufacturer who misleads FDA by withholding material information remains potentially liable for marketing a defective or unreasonably dangerous product. A manufacturer who ignores an FDA order to withdraw a drug or who bribes a federal official is similarly potentially liable. In other words, the statute provides protection only to drug manufacturers who act in good faith in their dealings with FDA, providing all information material to the agency's decision-making process. Manufacturers that FDA determines did not act in good faith in their dealings with the agency receive no protection from the Michigan FDA Shield Law.[10]

Part II, below, explains the comprehensive nature of FDA prescription drug regulation. The strict demands of this regulatory program explain why it is not appropriate to hold pharmaceutical manufacturers to state tort-law requirements that might be inconsistent with FDA determinations. Part III sets out four negative consequences of the pharmaceutical-liability regime currently effective in most states: (1) reduced investment in research; (2) reduced availability of drugs already proven to be effective; (3) higher drug prices; and (4) interference with rational prescribing. Part IV discusses one tactic of FDA that has reduced the negative consequences of the current pharmaceutical-liability regime. By becoming involved in select state-law products-liability actions, FDA has

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had some success in preventing state tort laws from frustrating federal regulatory efforts. FDA involvement in state-law cases is not an ideal solution, not least because each instance of such involvement involves the costly investment of substantial agency resources.[11] However, FDA's new Physician Labeling Rule[12] provides some hope that direct FDA involvement in state-law tort cases will become less necessary. The preamble to that rule makes an official statement of FDA's views on preemption easily available to courts hearing state-law tort cases. If courts give appropriate deference to this statement of FDA's considered judgment, FDA will not be forced to file briefs in individual cases.

However, given that some courts may fail to give sufficient deference to FDA's views, Part V suggests that state legislatures can play a valuable role in making FDA involvement in product liability lawsuits less necessary. By passing FDA shield laws based on the Michigan model, individual states can help to reduce the negative consequences of the current pharmaceutical-liability regime. In so doing, they would help to encourage the development of new drugs, preserve the availability of existing drugs, reduce upward pressure on drug prices, and assure rational prescribing. They would, thereby, serve the long-term health interests of their citizens.

II. Comprehensive Regulation of Prescription Drugs By FDA

Prescription drugs are regulated more heavily than almost any other consumer product.[13] The process of developing and obtaining approval to market a new drug is long and expensive. The process takes close to 15 years.[14] By 2003, it was estimated to cost an average of $897 million per drug.[15] The last phase of this process is regulatory approval. Under federal law, new drugs must obtain premarket approval from FDA to ensure that they are safe and effective,[16] and not misbranded.[17] FDA approval requires the submission of a New Drug Application,[18] which includes reports on investigations for safety and efficacy,[19] as well as "adequate tests…to show whether or not [the] drug is safe for use under the conditions prescribed, recommended, or suggested in the proposed labeling."[20]

FDA's determination whether to approve a drug is "based not on an abstract estimation of its safety and effectiveness, but rather on a comprehensive scientific evaluation of the product's risks and benefits under the conditions of use prescribed."[21] In making its decision, FDA considers both "complex clinical issues related to the use of the product in study populations" and "practical public health issues pertaining to the use of the product in day-to-day clinical practice."[22] Practical public health issues considered by FDA include "the nature of the disease or condition for which the product will be indicated, and the need for risk management measures to help assure in clinical practice that the product maintains its favorable benefit-risk balance."[23]

The evaluation of a drug's safety and effectiveness under federal law is inextricably intertwined with an assessment of its labeling.[24] An applicant seeking approval of a new drug must submit a proposed package insert to accompany the product.[25] FDA's regulations establish numerous and specific requirements for this labeling[26]—including requirements for the content and format of information on the drug's risks. This information must be scientifically substantiated and may not be false or misleading.[27] The applicant lawfully may not disseminate any package insert that substantively deviates from the FDA-approved version without first receiving agency approval.[28] False or misleading labeling misbrands the product, which is prohibited,[29] and is subject to a variety of penalties, including withdrawal of approval.[30]

State-law tort actions against companies who have complied with FDA requirements appear to be premised on the belief that drugs can be free of harmful effects. This notion fundamentally misunderstands the nature of pharmaceuticals as well as the FDA approval process. FDA long has recognized that "[t]here is no such thing as absolute safety in drugs. There are some drugs that are less liable to cause harmful reaction than others, but people die every year from drugs generally regarded as innocuous."[31]

The FDA approval process cannot, and does not, require that drugs be risk-free: "If the FDA were to demand absolute proof that no short-term or long-term health risks exist, no drug ever would reach the market."[32] It would be impossible to implement a drug approval process that sought to prevent all adverse reactions, and costly beyond measure to do so. FDA categorizes an adverse reaction as "rare[]" if it occurs in 1 in 1000 cases.[33] Yet even studies comprising 3000 patients are unable to identify "uncommon side effects, delayed effects, or consequences of long-term drug administration."[34] Indeed, "to detect the difference between an adverse reaction incidence rate of 1/5000 and 1/10,000, approximately 306,000 patients would have to be observed, which is far more than any study could achieve."[35] And to insist upon no adverse reactions as a result of the drug would cause immeasurable harm to public health: "To take the drastic step of forbidding marketing of a drug until all long-term consequences and interactions are identified through formal research would impose unacceptable costs in the form of untreated or inadequately treated illness."[36]

In short, FDA fully contemplates that the drugs it approves will carry some risk. "[S]afety does not mean zero risk."[37] FDA has long acknowledged that its role is to conduct a risk-benefit analysis to determine what risk is *reasonable*.[38] As another former Chief Counsel to FDA has explained, FDA "weighs the drug's therapeutic benefits against the potential risks of its use…. In short, the FDA effectively determines what risks physicians should be permitted to impose upon the patients they treat with therapeutic drugs."[39]

Despite this comprehensive and finely wrought regulatory regime, mass tort actions against pharmaceutical manufacturers are by now commonplace. Litigation against drug companies has been recognized as a growth industry for some time now.[40] Over one 13-year period, approximately 11,000 such cases were brought in federal court alone.[41] That trend appears to have continued unabated. Merck, the manufacturer of the painkiller Vioxx, withdrew that product from the market more than a year ago. As of February 2005, seventy putative class actions had already been filed, in addition to hundreds of individual suits.[42] Wyeth (formerly American

Home Products) has paid billions of dollars to litigate and settle claims stemming from voluntary withdrawal of the diet drug combination Fen-Phen—yet still faces lawsuits from more than 60,000 claimants who opted out of the class-action settlement.[43]

III. Negative Consequences of the Current Pharmaceutical-Liability Regime

Given the potential for enormous damage awards with any finding of liability, the current tort regime has created undesirable incentives in the pharmaceutical market. Four effects of these suits deserve special mention because they vividly illustrate the way the current liability environment is harming public health. First, this environment appears to stifle innovation in the pharmaceutical industry. Anticipated litigation costs have prevented drug manufacturers from investing in new product development. Specific areas of research (such as vaccines) have been particularly affected. Second, this environment has reduced the availability of drugs. Not only are fewer drugs being researched and created, but also existing beneficial drugs have been removed from the market because of crippling litigation. Third, the current liability environment plays a role in higher drug prices. To turn a profit on the production of any particular drug, the manufacturer must charge prices sufficiently high to cover not only the cost of developing and manufacturing the drug, but also the anticipated cost of future litigation. As the costs of even a successful mass-tort defense have reached astronomical levels,[44] this is a significant product-related expense that drug manufacturers must account for in their pricing decisions. Finally, the current system creates incentives for drug manufacturers to seek FDA approval of labeling that includes indiscriminate and prolix lists of risks, threatening the ability of prescribers to evaluate accurately the risk-benefit profile of a drug for a specific patient. Physicians may reasonably react to such labeling by simply declining to prescribe a drug that is, in fact, appropriate. Or, the physician may underestimate the drug's risks and prescribe it in circumstances in which its risks actually outweigh its benefits.

A. Roadblocks to Innovation

1. Reduced Total Investment in Research

The tort system is "having a profound negative impact on the development of new medical technologies."[45] "Innovative new products are not being developed or are being withheld from the market because of liability concerns or inability to obtain adequate insurance."[46] As Justice O'Connor recognized some fifteen years ago, "The threat of… enormous awards has a detrimental effect on the research and development of new products. Some manufacturers of prescription drugs, for example, have decided that it is better to avoid uncertain liability than to introduce a new pill or vaccine into the market."[47]

This unfortunate effect may reflect a rational response to today's irrational liability environment. The decision to research a new drug and to try to bring it to market involves a calculation of expected benefits and expected costs. Massive tort verdicts can dramatically skew the cost side of that equation. Expenditures on research and development increase when liability costs decrease.[48] And, where the level of risk is high, the risk of liability is inversely related to investment in research and development activity.[49]

2. Skewed Research Agenda

The current liability regime is a strong disincentive to the production of drugs intended for healthy patients. In such patients, any future disease or disability for which there is not a clear cause can potentially serve as grounds for a lawsuit against a drug manufacturer.[50] Healthy patients who fall into demographic groups likely to be viewed as sympathetic plaintiffs—such as young children[51] and pregnant women[52]—serve as an even stronger disincentive.

Excessive liability has especially pernicious effects on vaccines, a particularly perverse effect in light of those products' unquestioned public health benefits.[53] The reason for this effect is simple: "Products with less market potential are more vulnerable to a given degree of liability potential."[54] And, where vaccines are concerned, "[t]he profit per dose is low, and yet the perceived liability per dose is high."[55]

Thus, the Institute of Medicine has recognized that "apprehensions [about tort liability] act as a deterrent to vaccine production and thereby threaten the public's health."[56] Indeed, "[r]ising liability costs during the 1980s reduced the number of firms producing vaccines for five serious childhood diseases from thirteen in 1981 to three by the end of the decade."[57] Concerns about liability have slowed the progress of particular identifiable vaccines, including an AIDS vaccine.[58]

B. Decreased Availability of Investigational or Approved Drugs

In addition to discouraging initial product innovation, the current pharmaceutical-liability regime adversely affects patient access to beneficial pharmaceuticals by causing the discontinuation of clinical trials, and by forcing already-approved drugs and interested companies from the marketplace.[59]

The signal example of market withdrawal concerns Bendectin, a drug approved by FDA for preventing nausea during pregnancy. Starting in 1969, assertions that Bendectin could produce birth defects began to appear in scientific literature. Yet no sound scientific study ever demonstrated a causal relationship between the drug and birth defects, and FDA continued to affirm its safety. Nevertheless, nearly 1700 lawsuits were brought against the manufacturer. Although the company won most cases, in 1983 it withdrew the drug in the United States because its $18 million in annual legal costs and insurance had nearly overtaken its $20 million in annual sales.[60] Yet "[i]t is unlikely that any new drug will be developed to close this therapeutic gap,"[61]—all this despite the fact that, as FDA reaffirmed in 1999, Bendectin was *not* withdrawn for safety reasons.[62]

Given the particular vulnerability of vaccines to liability effects,[63] it is no surprise that tort liability has diminished the availability of this category of FDA-regulated products. Nearly all manufacturers of the diphtheria, pertussis, and tetanus (DPT) vaccine withdrew from the U.S. market due

to lawsuits alleging harmful side effects filed in the 1980s.[64] In 1987, the CDC announced that the sole manufacturer of a vaccine to prevent Japanese encephalitis would no longer supply the product in the United States because of product liability concerns.[65] And commentators discussing the shortage and then surplus of flu vaccine last winter have noted that there remain only two manufacturers licensed to sell the flu vaccine in the United States.[66]

C. Increased Drug Prices

The current liability environment makes drugs cost more than they otherwise would.[67] The mathematics involved are simple. The revenue a pharmaceutical manufacturer generates by selling a drug must be sufficient to cover not only the costs of research, development, and production, but also the future litigation expenses the manufacturer can reasonably expect to incur. The higher these anticipated future expenses, the higher the price the manufacturer must charge to avoid losing money by selling the drug in question. Efforts to generate a profit—a goal which managers of publicly-held companies have a fiduciary duty to pursue—require still-higher prices.

Empirical evidence appears to support this basic mathematical proposition. For example, between 1980 and 1989, most vaccines doubled or tripled in wholesale price—an increase of less than twice the rate of inflation.[68] However, two vaccines with a higher perceived liability potential increased in price at a much higher rate. The oral polio vaccine, which can in some cases cause polio, increased in price "by a factor of almost seven" during the same period.[69] The DPT vaccine increased in price even more dramatically, by a factor of more than forty, as "the pertussis component of this vaccine has long been suspected of carrying a small risk of very serious side effects."[70] The price of the diphtheria and tetanus (DT) vaccine, which is similar to the DPT vaccine but does not contain the pertussis component, increased by a factor of just over two during the same period.[71] In other words, vaccine prices seem to be related in some significant manner to perceived liability potential.

D. Interference with Rational Prescribing

Finally, the current pharmaceutical-liability regime interferes with the basic public-health goal of providing physicians with the information necessary to make rational prescribing decisions. The decision to prescribe a drug is rational when, on the basis of all information reasonably available to the prescribing physician, the benefits associated with the use of the drug outweigh, *for that particular patient*, the risks associated with the use of the drug.[72] In other words, a prescribing decision is not rational unless it is: (1) based on an accurate understanding of the risks and benefits of the drug at issue, considered in relation to other treatment possibilities, and (2) tailored to the unique circumstance of the individual patient.

The effects of the current pharmaceutical-liability regime on rational prescribing decisions must be considered in the context of basic limitations on human ability to consider and process information.[73] Particularly in a modern managed-care environment, practicing physicians are faced with numerous demands on their time and attention. Unless drug labeling makes accurate risk information easily comprehensible to the average physician, prescribing decisions are likely to be made on the basis of an inaccurate understanding of drug risks.

Thus, the current pharmaceutical-liability regime hinders rational prescribing efforts in two distinct ways. First, by creating an incentive for drug manufacturers to seek to include warnings relating to all possible risks, even those that are trivial or extremely rare, it results in the provision of *excessive* risk information that may discourage physicians from prescribing drugs in situation where a decision to prescribe would clearly be rational.[74] Second, by creating an incentive for manufacturers to seek to emphasize all risks equally, it results in the provision of *insufficient or misleading* risk information that may encourage physicians to prescribe a drug in situations where a decision to prescribe is not rational. Yet an effort by drug manufacturers to convince federal regulators to permit overly numerous warning and to emphasize all risks equally is a likely result of permitting state courts to impose liability on drug manufacturers who comply fully with federal regulations.[75]

Two recent federally-funded studies illustrate this point.[76] The FDA currently requires relatively strong suicide-related warnings in the labeling of certain antidepressants.[77] However, these recent studies give support to concerns that these warnings may be causing a failure to prescribe antidepressants to depressed individuals that in turn leads to an even greater risk of suicide. In particular, one of the studies found that for patients treated with newer antidepressant drugs (those included in a March 2004 FDA Public Health Advisory[78]), "risk [of suicide attempts] was highest in the month before starting treatment."[79] That risk was lower in each of the six months following initiation of treatment than in the month prior to initiation of treatment.[80] In other words, overly strong warnings about suicide-related risks may have the paradoxical effect of increasing suicides by preventing appropriate prescription of antidepressants to those who are genuinely in need of this type of medication. Although these studies did not control for any placebo effect, they suggest at the least a need for caution in issuing any warning about a potential drug side effect that is also a known symptom of the condition the drug is designed to treat.

IV. FDA Involvement in State-Law Cases: A Partial Solution

Were state and federal courts to defer sufficiently to FDA determinations of drug safety, the negative consequences of the current liability regime would be much less pronounced. Yet this has often not been the case. In recent years, FDA's legal authority and scientific expertise over drug labeling and advertising have been implicitly, although repeatedly, questioned in state and federal courts. In response, FDA has intervened in select cases where its authority and expertise may be undermined by state law. In the four cases discussed below, state law claims against drug manufacturers concerning the adequacy of labeling and advertising were allowed to proceed,

even though the requested relief, if awarded, would squarely conflict with specific prior determinations made by FDA. In each of these cases, an FDA Shield Law on the Michigan model might well have made FDA involvement unnecessary.

More recently, in the preamble to its long-awaited Physician Labeling Rule, FDA explicitly set forth its view that FDA approval of prescription drug labeling preempts most state-law tort claims based on alleged deficiencies in FDA-approved labeling. Nonetheless, it is unclear whether courts hearing state tort cases will give this language an appropriate degree of deference. At least until an authoritative ruling requires all courts in the United States to recognize the validity of FDA's exercise of preemptive authority over drug labeling, state-by-state legal reform will remain an important aspect of efforts to ensure a pharmaceutical-liability regime that serves the long-term health interests of all Americans.

E. Cases

3. Dowhal v. SmithKline Beecham Consumer Healthcare

In 1999, Paul Dowhal filed a citizen suit in the Superior Court of the State of California, San Francisco County, under the state's Safe Drinking Water and Toxic Enforcement Act (Proposition 65), against manufacturers, distributors, and retailers of over-the-counter nicotine replacement products.[81] California environmental protection authorities had listed nicotine as a developmental and reproductive toxicant.[82] Dowhal argued that the defendants were required to disseminate publicly—through labeling—a statement that the State of California had determined that these products cause birth defects or other reproductive harm.[83]

Specifically, Dowhal sought to require the defendants to label over-the-counter nicotine replacement products with the following statement: "Warning: This product contains a chemical known to the State of California to cause birth defects or other reproductive harm." Alternatively, the plaintiff sought an injunction requiring the following warning or a comparable one: "If pregnant or breast-feeding, ask a health professional before use. Nicotine, whether from smoking or medication, can harm your baby. First try to stop smoking without the patch."

A year after filing his complaint under Proposition 65, Dowhal submitted a citizen petition to FDA. That petition asked FDA to require manufacturers of nicotine replacement products to label their products with a warning like the "harm your baby" warning set forth above. After reviewing the pertinent scientific evidence, FDA rejected the proposal, including the information submitted with the petition. FDA determined that the requested warning was not scientifically supportable. FDA concluded, further, that the Proposition 65 warning could cause pregnant and nursing women to conclude, mistakenly, that using a nicotine replacement therapy product presents health risks that are as grave as those associated with smoking.

Indeed, FDA had prohibited manufacturers from labeling their products voluntarily with a Proposition 65 warning. In January 1997, FDA denied a request from one manufacturer of nicotine replacement products for permission to change the label for its product to add Proposition 65 warning language. The agency advised the manufacturer to use the FDA-approved labeling, which includes a statement encouraging pregnant and nursing women to seek professional advice before using nicotine replacement therapy. In March 2001, FDA confirmed in a letter to other manufacturers that using additional warning language to satisfy Proposition 65 could render their products misbranded under the Federal Food, Drug, and Cosmetic Act (FDCA).[84]

The Superior Court granted summary judgment to the defendants on the ground that Proposition 65 is impliedly preempted by the FDCA. Dowhal appealed to the California Court of Appeal. FDA submitted an *amicus curiae* brief supporting the defendants.[85] The agency's legal theory rested on the doctrine of conflict preemption: First, the labeling sought by Dowhal was preempted by the FDCA because it would be impossible for the defendants to comply with both Proposition 65 (as interpreted by the plaintiff) and with the FDCA (as applied by FDA). In essence, if the defendants were to adopt the warning language advocated by Dowhal, they would be in violation of the prohibition in the FDCA against selling misbranded drugs.[86] Second, application of Proposition 65 to nicotine replacement products in the manner advocated by Dowhal would pose an obstacle to the accomplishment of the full purposes and objectives of the FDCA.

The Court of Appeal reversed the Superior Court's decision in July 2002, finding that in the FDA Modernization Act (FDAMA), Congress intended to exempt Proposition 65 from preemption, and that this disposed of the defendants' preemption arguments.[87] The court refused to resolve whether, by complying with the FDCA and not including the warning language advocated by Dowhal, the defendants exposed themselves to Proposition 65 liability.[88]

In August 2002, the defendants petitioned the Supreme Court of California for review of the Court of Appeal's decision. FDA submitted a letter brief in support of the petition the following month.[89] In October 2002, the Supreme Court of California granted the petition.[90] In August 2004, that court reversed the decision of the Court of Appeal. Concluding that FDA had barred all possible warnings that would have complied with Proposition 65,[91] the Supreme Court of California applied the doctrine of conflict preemption to hold that Proposition 65 was preempted insofar as it conflicted with FDA requirements.[92]

In so deciding, the court explicitly clarified that it was immaterial to the question of preemption whether Dowhal's warning could in some sense be classified as truthful.[93] As the Supreme Court of California correctly explained, FDA's authority is not limited to prohibiting statements that are false.[94] The agency is also charged with prohibiting those statements which, though perhaps formally "true," would be misleading.[95] The Supreme Court of California found that FDA was well within its authority to conclude that the labeling of a nicotine replacement product must indicate that it is better for a pregnant woman to use a nicotine replacement product than to continue smoking.[96]

4. Motus v. Pfizer, Inc.

When FDA specifically considers and rejects language regarding the risk of a particular adverse event allegedly

associated with a prescription drug or class of drugs, courts applying state tort law should not allow failure-to-warn claims based on the absence of such language. Yet that is exactly what happened in a lawsuit filed in California against Pfizer Inc. The case involves ZOLOFT (sertraline HCl), a drug in the selective serotonin reuptake inhibitor (SSRI) class used to treat depression.

Pfizer submitted its original new drug application (NDA) for ZOLOFT in 1988. FDA evaluated all relevant scientific data and found no causal link between the drug and an increased risk of suicide. In 1990, FDA convened a meeting of the Psycho-pharmacological Drugs Advisory Committee (PDAC) to assess ZOLOFT.[97] The committee unanimously concluded that the drug was safe when used to treat depression.[98] The original labeling approved with the NDA for ZOLOFT on December 30, 1991, included precautionary language concerning the risk of suicide in depressed patients, but did not specifically warn that the drug increased suicidal ideation or the risk of suicide.[99] ZOLOFT later was approved for use in four other psychiatric disorders.

On three other occasions, FDA specifically considered and rejected claims that another SSRI causes suicide. In 1990 and 1991, FDA received two citizen petitions alleging a link between the SSRI PROZAC (fluoxetene) and suicide. One petition sought market withdrawal; the other asked FDA to require a "black box warning" in PROZAC's labeling concerning a putative link between the drug and suicide. FDA examined the data concerning the risk of suicide and other violent behavior and SSRIs, and rejected both petitions. In 1997, FDA declined to grant a third citizen petition requesting additional suicide warning language in the labeling for PROZAC.

FDA also obtained expert advice as to whether antidepressants generally increase patients' suicide risk. In 1991, FDA requested that the PDAC review the scientific evidence relating to the risk of suicide and the pharmacological treatment of depression. On September 20, 1991, the PDAC determined unanimously that the evidence did not indicate that use of any particular drug or class of drugs to treat depression heightens the risk of suicide. The advisory committee also heard remarks from the then-Director of FDA's Division of Neuropharmacological Drug Products concerning the risk that modifying the labeling could misleadingly overstate the risk of suicide and cause a reduction in the use of pharmacotherapy to treat depression.

In 2002, FDA conducted yet another internal review of scientific evidence regarding SSRIs and suicide.[100] The review revealed no difference in the risk of suicide between patients using SSRIs and patients on placebo.[101] However, after reviewing further studies the agency refined its position in late 2004 and early 2005.[102] FDA now warns that antidepressants, including Zoloft, "may increase suicidal thoughts and actions in about 1 out of 50 people 18 years or younger," and that "[s]everal recent publications report the possibility of an increased risk for suicidal behavior in adults who are treated with antidepressant medications."[103]

Despite FDA's position prior to October 2002, Pfizer has been a target of state law failure-to-warn claims based on the absence of additional warning language concerning suicide in the labeling for ZOLOFT. Notably, in November 1998, a candidate for the city council and failing businessman named Victor Motus visited his doctor, appearing depressed and frustrated.[104] His physician diagnosed moderate depression and prescribed ZOLOFT 25 mg for seven days, followed by 50 milligrams of ZOLOFT for fourteen days.[105] Six days after visiting his doctor, Motus committed suicide by shooting himself.[106] His wife sued Pfizer, claiming that, under California law, the company had acted negligently by failing to warn adequately in the package insert and marketing materials that ZOLOFT could cause suicide.[107]

The United States District Court for the Central District of California (to which the case had been removed on the ground of diversity) held that federal law did not preempt the plaintiff's state tort law claims.[108] In making this finding, the court relied on cases finding that FDA's regulation of labeling did not preempt all tort actions.[109] The court did not carefully analyze whether requiring the additional warning language sought by the plaintiff would conflict with FDA's conclusion that SSRIs do not heighten the risk of suicide.

FDA filed an *amicus curiae* brief in the United States Court of Appeals for the Ninth Circuit, contending that the plaintiff's state law claims could not stand.[110] The FDA-approved labeling for ZOLOFT discusses the risk of suicide that accompanies depression, but does not identify ZOLOFT as a potential cause of suicide. The labeling thus reflects FDA's specific finding that ZOLOFT does not cause suicide, contrary to the language that would be included in the labeling were the plaintiff to prevail.

In affirming the judgment of the district court, the Ninth Circuit explicitly declined to reach the district court's preemption holding.[111] Instead, the Ninth Circuit rested its conclusion on the prescribing doctor's failure to read Pfizer's warnings or rely on information provided by Pfizer's representatives in making his decision to prescribe ZOLOFT.[112] As the doctor would not have been aware of any warning Pfizer issued, Mrs. Motus could not prevail on a claim that the inadequacy of Pfizer's warnings caused her husband's death.

5. In re PAXIL Litigation

Where FDA has reviewed a particular prescription drug advertisement and determined that it is not false or misleading, state courts should not second-guess that judgment. For this reason, FDA decided it was necessary to file a statement of interest in a case involving PAXIL (paroxetine HCl), marketed by GlaxoSmithKline (GSK).

PAXIL was approved in 1992 for the treatment of depression. Like ZOLOFT, PAXIL is an SSRI. In reviewing the NDA for PAXIL, FDA found no clinical evidence of drug-seeking behavior associated with use of the drug. FDA concluded that PAXIL is not habit-forming, and did not require language in the approved labeling stating that PAXIL is associated with this risk. The approved labeling does, however, include language regarding discontinuation syndrome: it recommends that physicians gradually reduce dosages rather than abruptly halting use, and that physicians monitor patients discontinuing the drug for syndrome symptoms.

On five separate occasions in 2001 and 2002, DDMAC reviewed advertisements for PAXIL claiming that the product was "non-habit-forming." DDMAC concluded that this statement was not false or misleading because, as FDA previously had found in the NDA review, PAXIL does not induce drug-seeking behavior.[113] DDMAC suggested that GSK adjust the wording of one advertisement to state clearly that a doctor should be consulted before discontinuing PAXIL. DDMAC determined that this additional statement ensured that the advertisement adequately communicated to patients the appropriate information about discontinuation.

Notwithstanding DDMAC's review of and lack of objection to these precise advertisements, a federal district court judge applying California law in August 2002 granted plaintiffs' motion to enjoin GSK from running advertisements for PAXIL that included the "non-habit-forming" language.[114] The court suggested that whether a drug advertisement was false or misleading could be a different issue under state tort law than under the FDCA.[115]

FDA decided to participate in the case to preserve the agency's important role in regulating prescription drug advertising. With the court's agreement, FDA filed a brief in September 2002 in connection with GSK's Motion for Reconsideration of the preliminary injunction order.[116] FDA's brief contended that the court should have deferred to FDA's determination that the advertisements were not false or misleading.[117] The court later granted GSK's Motion for Reconsideration. It declined to enjoin the advertising on the ground that information submitted by FDA concerning DDMAC's review made the plaintiff less likely to succeed on the merits.[118] The court still could find that state law supports imposing requirements on advertising for PAXIL that are different from those applied by DDMAC.[119]

6. Kallas v. Pfizer, Inc.

More recently, FDA filed a brief in another ZOLOFT case, *Kallas v. Pfizer, Inc.*[120] In *Kallas*, the parents of a 15-year-old girl who committed suicide while taking ZOLOFT sued Pfizer, alleging in part that Pfizer should have warned of an *association* between ZOLOFT and suicide, even if Pfizer was not required to state that ZOLOFT *caused* suicide.[121] Pfizer filed a motion for summary judgment, and after hearing argument on that motion, the U.S. District Court requested that the government file a brief explaining the FDA's position on the case.

The FDA brief emphasized that at the time the young girl took ZOLOFT, Pfizer would not have been permitted to warn of an association between ZOLOFT and suicide.[122] FDA further noted that the agency's "accomplishment of its responsibilities would be disrupted and undermined if, driven in part by concerns about later state law tort liability, drug manufacturers were to engage in their own labeling determinations by adding warnings that, in FDA's judgment, were not based on reasonable scientific evidence of association or causation."[123] The court did not have the opportunity to rule on Pfizer's motion, as the parties settled the case shortly after FDA filed its brief.[124]

F. The Physician Labeling Rule

On January 18, 2006, FDA issued a major policy statement concerning the preemptive effect of its prescription drug labeling determinations on state-law liability. The statement occurs in the preamble accompanying the long-awaited final rule revising 21 C.F.R. §§ 201.56 and 201.57, which establish content and format requirements for prescription drug package inserts.[125] The language provides that FDA's decisions on labeling matters take precedence over conflicting state-law requirements, whether imposed through legislation, regulations, or product liability law.[126]

FDA had to address preemption in the preamble for legal reasons.[127] But FDA clearly also hopes that, by addressing the relationship of its labeling requirements to state law, the preamble language will reduce the need for the Agency to submit briefs in private lawsuits. The Agency has considered it increasingly necessary to submit such briefs over the past five years because of the growing tendency of product liability lawsuits to encroach upon the Agency's prerogatives. Although FDA's views on preemption are set forth with relative clarity in this important new document, it remains to be seen how much weight will be given the preamble language by courts hearing particular product liability and other state-law actions.

7. Background

On December 22, 2000, FDA published for comment in the Federal Register a proposed rule to amend the Agency's regulations standardizing the content and format of package inserts for prescription drugs (including biological products that are regulated as drugs).[128] The proposed rule would have revised current regulations, codified principally at 21 C.F.R. §§ 201.56 and 201.57, to simplify drug product labeling and reduce medication error risks. The proposed changes included, with respect to new and recently approved products:

- Requiring that the labeling include a "Highlights" section with the most important information relating to safety and effectiveness
- Requiring that the labeling include an index to prescribing information
- Reordering of the sections in labeling to make information easier for health care practitioners to access (e.g., by placing the indication information earlier in the labeling)
- Revising the content requirements for labeling
- Establishing minimum graphical requirements.

For older products, the proposed changes included:

- Requiring that certain types of statements currently appearing in labeling be removed if not sufficiently supported
- Eliminating certain unnecessary statements that are currently required to appear on prescription drug product labels
- Moving certain information currently required to be on the label into labeling

In the preamble accompanying the proposed rule, FDA specifically addressed and requested comment on product liability issues. For example, FDA explained that product liability was one of the reasons package inserts had become longer and more complex: "the use of labeling in product liability and medical malpractice lawsuits, together with increasing litigation costs, has caused manufacturers to become more cautious and include virtually all known adverse event information, regardless of its importance or its plausible relationship to the drug."[129] FDA also asked whether requiring manufacturers to include a "Highlights" section in labeling had "a significant effect on manufacturers' product liability concerns."[130] If it did, FDA asked how manufacturers' concerns could be adequately addressed.

FDA received numerous comments from the pharmaceutical industry regarding product liability issues. For that reason, and because Executive Order 13132[131] required the Agency to address the preemptive effect of the rule, FDA included a discussion of preemption of product liability claims in the preamble accompanying the final regulations. Although critics may contend that the preemption discussion amounts to a power grab by FDA, it is hard to see how FDA could have issued the rule without addressing preemption issues.[132] Moreover, this is certainly not the first time FDA has expressed preemptive intent in a preamble.[133]

The final rule itself is extremely regulatory and highly detailed, occupying 275 pages in its prepublication form. Although much of the proposed rule reached the final version intact, there are many important changes between the documents of which manufacturers should be aware. To assist in phasing in the changes, FDA included in the rule a staggered implementation schedule. The Agency also announced the availability of four labeling-related guidance documents: (1) a draft guidance on implementing the provisions of the final rule generally;[134] (2) a final version of the draft guidance on the adverse events section of labeling (originally issued in 2000)[135]; (3) a draft guidance addressing the other risk-related sections of labeling (warnings, including boxed warnings, precautions, and contraindications)[136]; (4) and a final version of the guidance on the clinical studies section (originally issued in 2001).[137]

8. Preemption Aspects of the Rule

The codified version of the final rule does not itself address preemption. However, the preamble does so in two distinct sections: FDA's responses to comments on the product liability implications of the new "Highlights" requirements,[138] and the discussion of Executive Order 13132.[139]

In the responses to comments section of the preamble, FDA included a discussion of the increasing prevalence of product liability lawsuits threatening the Agency's exclusive authority over the dissemination of risk information for prescription drugs.[140] The preamble describes previous instances in which FDA expressed its intention for its actions to have preemptive effect in preambles in rulemaking proceedings.[141] The preamble also describes the previous private lawsuits in which FDA submitted briefs addressing the relationship of federal and state law. In the most important language in this discussion, FDA expresses its intention that federal labeling requirements will preempt state-law actions according to well-established conflict and obstacle preemption principles, as follows:

> … FDA believes that at least the following claims would be preempted by its regulation of prescription drug labeling: (1) claims that a drug sponsor breached an obligation to warn by failing to put in Highlights or otherwise emphasize any information the substance of which appears anywhere in the labeling; (2) claims that a drug sponsor breached an obligation to warn by failing to include in an advertisement any information the substance of which appears anywhere in the labeling, in those cases where a drug's sponsor has used Highlights consistently with FDA draft guidance regarding the "brief summary" in direct-to-consumer advertising… ; (3) claims that a sponsor breached an obligation to warn by failing to include contraindications or warnings that are not supported by evidence that meets the standards set forth in this rule, including § 201.57(c)(5) (requiring that contraindications reflect ''[k]nown hazards and not theoretical possibilities") and (c)(7); (4) claims that a drug sponsor breached an obligation to warn by failing to include a statement in labeling or in advertising, the substance of which had been proposed to FDA for inclusion in labeling, if that statement was not required by FDA at the time plaintiff claims the sponsor had an obligation to warn (unless FDA has made a finding that the sponsor withheld material information relating to the proposed warning before plaintiff claims the sponsor had the obligation to warn); (5) claims that a drug sponsor breached an obligation to warn by failing to include in labeling or in advertising a statement the substance of which FDA has prohibited in labeling or advertising; and (6) claims that a drug's sponsor breached an obligation to plaintiff by making statements that FDA approved for inclusion in the drug's label (unless FDA has made a finding that the sponsor withheld material information relating to the statement). Preemption would include not only claims against manufacturers as described above, but also against health care practitioners for claims related to dissemination of risk information to patients beyond what is included in the labeling. (See, e.g., *Bowman v. Songer*, 820 P.2d 1110 (Col. 1991).)
>
> … FDA's regulation of drug labeling will not preempt all State law actions. The Supreme Court has held that certain State law requirements that parallel FDA requirements may not be preempted (*Medtronic, Inc. v. Lohr*, 518 U.S. 470, 495 (1996) (holding that the presence of a State law damages remedy for violations of FDA requirements does not impose an additional requirement upon medical device manufacturers but "merely provides another reason for manufacturers to comply with * * * federal law"); id. at 513 (O'Connor, J., concurring in part and dissenting in part); id)). *But see Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 352-53 (2001) (holding that ''fraud on the FDA" claims are preempted by Federal law); 21 U.S.C. 337(a) (restricting the act enforcement to suits by the United States); *In re Orthopedic Bone Screw Prods. Liability Litig.*, 159 F.3d 817, 824 (3d Cir. 1998) ("Congress has not created an express or implied private cause of action for violations of the FDCA or the MDA [Medical Device Amendments]").[142]

A comprehensive analysis of FDA's authority to regulate the risk information provided for prescription drugs also appears in the discussion of the Executive Order.[143]

Notably, although FDA disclaims authority to regulate medical practice, consistent with its well-established policy of noninterference in the practice of medicine, the preamble twice makes clear that FDA intends for its regulation of risk information for prescription drugs to shield health care practitioners from state-law claims.[144]

9. Effect of the Rule in Individual Cases

The preamble material on preemption should help to mitigate the negative consequences of the current pharmaceutical liability regime. The two discussions of preemption issues resemble a concise version of an FDA amicus curiae brief that defendants in failure-to-warn actions arising under state law can use to explain to a court (and, if necessary, to a jury) that FDA's regulation of warnings issued with respect to prescription drugs constitutes both a "floor" and a "ceiling."[145] Indeed, FDA specifically refutes the minimum standards theory of FDA regulation that has been a mainstay of plaintiffs' attorney argument against preemption in these cases.[146]

FDA also squarely rejects the myth that manufacturers are free to add or revise risk information without first obtaining FDA approval. Although the Agency has not revised the sNDA regulation, 21 C.F.R. § 314.70, it does make clear in the preamble that manufacturers generally consult with FDA and await specific authorization before supplementing risk information in labeling.[147] The Agency also twice points out that changes being effected (CBE) supplements may not be used under the final rule to make changes to the "Highlights" section.[148]

Questions are likely to arise concerning whether the position set forth by FDA in the preamble applies in existing cases or only prospectively. According to the preamble,"FDA believes that[,] under existing preemption principles, FDA approval of labeling under the act, whether it be in the old or new format, preempts conflicting or contrary State law."[149] By making clear that the discussion of preemption is a reflection of current principles under existing regulations, FDA makes clear its expectation that the preamble discussion will be invoked in pending cases. The cases that are going to be the clearest candidates for preemption are where the plaintiff asserts that a manufacturer was required as a matter of state law to provide risk information that FDA specifically considered and rejected, or where FDA's regulations clearly prohibit the dissemination of risk information that is allegedly compelled by state law. It is significant that the preamble uses the phase "at least,"[150] signaling that arguments from field preemption or based on theories of conflict/obstacle preemption not expressly set forth in the preamble are not foreclosed by FDA's articulation of specific categories of cases in which it intends for its regulations to have preemptive effect.

G. Discussion

FDA will likely continue to participate in product liability lawsuits[151] brought under state law as necessary to safeguard its considerable expertise in regulating the content of drug labeling and advertising.[152] Nonetheless, this is not a complete solution to the problems created by inappropriate pharmaceutical-liability rules, as FDA lacks the resources to use court submissions as a mechanism for defending its statutory mandate against all cases of state encroachment. The new Physician Labeling Rule is helpful, as it may reduce the need for FDA to file individual briefs, but there is a possibility FDA's preemption argument may not be accepted by some courts. Patients are well-served by state-level action to ameliorate the perverse incentives of the current liability regime.

V. State-Level Protection for Good-Faith Manufacturers: The Michigan Model

A number of states have recognized the need to provide some type of protection for manufacturers of FDA-approved drugs. Although Michigan's statute is the strongest, several other states provide some lesser degree of protection. For example, Arizona,[153] Ohio,[154] Oregon,[155] and Utah[156] each have some type of prohibition on punitive damages for FDA-approved drugs. In New Jersey, FDA approval creates a rebuttable presumption that a drug warning is adequate,[157] and in North Carolina it is explicitly listed as a factor to be considered in determining whether a manufacturer has acted reasonably.[158] Although each of these state laws helps to reduce the negative effects of the current liability environment, the more comprehensive Michigan statute would be the preferable model for state-by-state reform.

The Michigan statute is more effective at reducing the negative consequences of the current pharmaceutical-liability regime because it provides protection from compensatory as well as punitive damages.[159] Although punitive damages awards play a major role in increasing the severity of the undesirable incentives affecting the pharmaceutical industry, they are not the whole problem. Even without the possibility of punitive damages, mass tort claims would be exceedingly expensive to defend.

Although protection from both compensatory and punitive damages is no doubt troubling to those who make their living suing drug companies, it is entirely appropriate as a matter of public health policy. Recall that prescription drugs are substances that, at our current state of technological achievement, can be modified only in limited ways. [160] In most cases, the beneficial properties of a particular drug are simply not available without the possibility—or even the certainty—of some adverse effect.[161] FDA will approve an individual drug when the agency believes that the benefits of having the drug available to prescribers outweigh the adverse effects that substance may have in some patients.[162] Such an outcome is clearly desirable. To take a dramatic example, it is difficult to imagine that any serious person would suggest that the world would be better off without the oral polio vaccine, even though that vaccine is known to cause polio in some individuals who would not otherwise have been exposed to the disease.[163] Given the nature of the risk/benefit determination involved in FDA approval, it does not make sense to allow individual juries to hold drug manufacturers liable for adverse effects inherent in

a drug approved by FDA.

Despite the positive effects of the Michigan FDA Shield Law, opponents of the law are seizing on Vioxx-related publicity to mount an effort to roll back this important reform.[164] Michigan legislators should resist this short-sighted effort, and other states should realize that it is in their own citizens' long-term best interests to follow Michigan's lead. As discussed above, the consequences of the present liability regime (i.e., the one applicable in most states other than Michigan) are perverse.[165] In terms of innovation, the current regime deals patients a crippling double-blow. First, by providing disincentives to drug investment more generally, the current regime slows the overall pace at which new medicines are invented.[166] Second, the current regime encourages pharmaceutical companies to direct their scarce research dollars away from products intended for healthy patients.[167] This is the case no matter how socially desirable those products (in particular vaccines) may be. In terms of availability, the current regime has forced pharmaceutical companies to remove beneficial—and, according to FDA, entirely safe—drugs from the U.S. market because the excessive cost of defending those drugs from massive litigation efforts.[168] When no adequate substitute drug is available, such withdrawals can leave patients with no option to treat a particular condition despite the pharmaceutical industry's technical ability to provide treatment. As to price, simple math suggests that the more companies reasonably expect to pay in litigation costs for a particular drug, the more they will be forced to charge for that drug.[169] In regard to rational prescribing, the current regime dilutes the most important drug-related risks by creating an incentive to overemphasize less significant concerns.[170]

As a matter of public policy, the case for providing pharmaceutical companies marketing FDA-approved drugs with some protection from lawsuits is overwhelming. At the present time, state-level reform is an appropriate compliment to FDA efforts to clarify the scope of federal regulation. State legislatures should embrace this opportunity. Each state that passes an FDA shield law on the Michigan model reduces the strength of the perverse incentives currently affecting the pharmaceutical industry. The payoff is particularly high in states with large populations or significant research-based pharmaceutical industries. Were just a few large-population states to adopt an effective FDA shield law, the perverse incentives affecting the industry would be substantially reduced. In states with significant research-based pharmaceutical industries, the effect might be even more significant, (as such laws would apply any time choice-of-law rules dictated application of the law of the state where the product was produced). In particular, states that hope to attract or retain research-based pharmaceutical industries would be well-served to adopt an FDA shield law on the Michigan model.

Endnotes

1 *See, e.g.*, Dawson Bell, *Group calls for repeal of state drug liability law*, Detroit Free Press, April 12, 2005, *available at* 2005 WLNR 5675662; Patricia Anstett & Kim Norris, *Cover Story: A Michigan law stirs a national debate*, Detroit Free Press, March 1, 2005, *available at* http://www.freep.com; Patricia Anstett & Kim Norris, *Michigan Rezulin lawsuits tossed*, Detroit Free Press, February 25, 2005, *available at* 2005 WLNR 2890059.

2 *See, e.g.*, Leslie Richter, *Shielding drug firms isn't the state's job*, Lansing State J., Sept. 13, 2005, at 1 ("It doesn't make sense that drug companies are immune from responsibility when we hold auto makers, toy makers, and everyone else accountable for their products.") (op-ed by a plaintiff in a suit against Merck).

3 FDA, Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Products, 21 C.F.R. §§ 201, 314, 601 (2006) ("FDA, Physician Labeling Rule"), at 41-42 ("Another misunderstanding of the [FDCA] encouraged by State law actions is that FDA labeling requirements represent a minimum safety standard. . . . In fact, FDA interprets the act to establish both a 'floor' and a 'ceiling' . . . ."), *available at* http://www.fda.gov/bbs/topics/news/2005/NEW01272.html; *see also Geier v. American Honda Motor Co.*, 529 U.S. 861, 875-76, 868 (2000) (holding that statute intended to provide automobile manufacturers "with a range of choices among different passive restraint devices" was not simply a "minimum safety standard" and accordingly preempted state-law tort actions requiring additional passive restraints); Michael D. Green, *Statutory Compliance and Tort Liability: Examining the Strongest Case*, 30 U. Mich. J. L. Reform 461, 468-69 (1997).

4 *See, e.g.*, United States v. Rutherford, 442 U.S. 544, 555 (1979) ("[T]he Commissioner generally considers a drug safe when the expected therapeutic gain justifies the risk entailed by its use."); FDA, Proposed Recommendations to the Drug Enforcement Administration Regarding the Scheduling Status of Marihuana and Its Components and Notice of a Public Hearing, 47 Fed. Reg. 28141 (proposed June 29, 1982) ("Because no drug is ever completely safe, FDA considers "safe" to mean (in the context of a human drug) that the therapeutic benefits to be derived from the drug outweigh its known and potential risks under the conditions of use in the labeling."); FDA, Report to the FDA Commissioner from the Task Force on Risk Management, Managing the Risks from Medical Product Use (1999), *available at* http://www.fda.gov/oc/tfrm/riskmanagement.html ("A safe product is one that has reasonable risks, given the magnitude of the benefit expected and the alternatives available."); *see also* Michael D. Green & William B. Schultz, *Tort Law Deference to FDA Regulation of Medical Devices*, 88 Geo. L.J. 2119, 2129-30 (2000).

5 Mich. Comp. Laws Serv. § 600.2946(5).

6 *Id.* § 600.2946(5).

7 *Id.* § 600.2946(5)(a).

8 *Id.* § 600.2946(5)(b). The relevant section reads in full:

> (5) In a product liability action against a manufacturer or seller, a product that is a drug is not defective or unreasonably dangerous, and the manufacturer or seller is not liable, if the drug was approved for safety and efficacy by the United States food and drug administration, and the drug and its labeling were in compliance with the United States food and drug administration's approval at the time the drug left the control of the manufacturer or seller. However, this subsection does not apply to a drug that is sold in the United States after the effective date of an order of the United States food and drug administration to remove the drug from the market or to withdraw its approval. This subsection does not apply if the defendant at any time before the event that allegedly caused the injury does any of the following:
>
> (a) Intentionally withholds from or misrepresents to the United States food and drug administration information concerning the drug that is required to be submitted under the federal food, drug, and cosmetic act, chapter 675, 52 Stat. 1040, 21 USC. 301 to 321, 331 to 343-2, 344 to 346a, 347, 348 to 353, 355 to 360, 360b to 376, and 378 to 395, and the drug would not have been approved, or the United States food and drug administration would have withdrawn approval for the drug if the information were accurately submitted.
>
> (b) Makes an illegal payment to an official or employee of the United States food and drug administration for the purpose of securing or maintaining approval of the drug.

Id. § 600.2946(5).

9 Garcia v. Wyeth-Ayerst Labs., 385 F.3d 961, 966-67 (6th Cir. 2004). The Sixth Circuit's requirement of an FDA finding should help to ensure the effectiveness of the statutory scheme. Experience with the Vaccine Injury

Compensation Program ("VICP") suggests that loopholes in statutory protection for pharmaceutical manufacturers can lead to significant litigation costs for claims not specifically envisioned in the protective statute. In the case of the VICP, it has primarily involved plaintiffs' attempts to avoid the no-fault system of the VICP by arguing that their injuries were caused by Thimerosal, a preservative used in vaccines, rather than by the vaccine itself. *See, e.g.*, Michael L. Williams et al, Association of Trial Lawyers of America, 2 ATLA Convention Reference Materials 2681 (2002) (discussing different strategies lawyers representing Thimerosal plaintiffs have used in their efforts to "intentionally avoid[] the federal [compensation] program" in favor of "class actions and individual claims in state courts"); *cf.* Lars Noah, *Triage in the Nation's Medicine Cabinet: The Puzzling Scarcity of Vaccines and Other Drugs*, 54 S.C. L. Rev. 741, 761-62 (2003) ("[R]ecent litigation . . . has shaken some of the confidence that manufacturers have had about the extent of their protection from liability [under the VICP]."). The Sixth Circuit's requirement that FDA explicitly make a finding of fraud or bribery before suit is permitted may help prevent similarly abusive litigation under the Michigan FDA Shield Law.

10 Manufacturers who mislead FDA do so at their peril. One recent example is the criminal prosecution of Endovascular Technologies, Inc. ("ETV"), a subsidiary of Guidant Corporation. Rather than face trial in the Northern District of California, ETV "pled guilty . . . to ten felonies and agreed to pay $92.4 million to settle criminal and civil charges that it covered up thousands of incidents in which a medical device used to treat aneurysms in the aorta malfunctioned." Press Release, United States Attorney's Office, Northern District of California June 12, 2003), *available at* http://www.usdoj.gov/usao/can/press/html/2003_06_12_endovascular.html. This constituted "the second largest criminal and civil settlement in the history of the Northern District of California." *Id.*

11 As I have previously noted, *see* Daniel Troy, *FDA Involvement in Product Liability Lawsuits*, FDLI Update, Jan.-Feb. 2003, at 4-8, FDA participation in state-law products-liability cases plays some role in preserving agency resources that would otherwise be spent dealing with the confusion created by conflicting state and federal obligations. Nonetheless, each such involvement consumes agency resources that, absent state-law efforts to undermine FDA's authority over prescription drugs, could be spent on other activities.

12 *See supra* note 3.

13 Michael D. Green, *Safety as an Element of Pharmaceutical Quality: The Respective Roles of Regulation and Tort Law*, 42 St. Louis U. L.J. 163, 163 (1998).

14 Richard J. Findlay, *Originator Drug Development*, 54 Food & Drug L.J. 227, 227 (1999).

15 Press Release, Tufts Ctr. for the Study of Drug Dev., Total Cost to Develop a New Prescription Drug, Including Cost of Post-Approval Research, is $897 Million (May 13, 2003), *available at* http://csdd.tufts.edu/NewsEvents/NewsArticle.asp?newsid=29.

16 21 U.S.C. §§ 355(d), 393(b)(2)(B).

17 *Id.* § 331(a), (b).

18 *Id.* § 355(b).

19 *Id.* § 355(b)(1)(A).

20 *Id.* § 355(d).

21 FDA, Physician Labeling Rule, *supra* note 3, at 38-39.

22 *Id*. at 39.

23 *Id*.

24 *Id*. at 39, 171.

25 21 U.S.C. § 355(b)(1)(F).

26 21 C.F.R. § 201.56-57; *see also* FDA, Requirements on Content and Format of Labeling for Human Prescription Drugs and Biologics; Requirements for Prescription Drug Product Labels, 65 Fed. Reg. 81082 (proposed Dec. 22, 2000).

27 *See, e.g.*, 21 U.S.C. § 355(d)(7); 21 C.F.R. § 201.57(d) ("Known hazards and not theoretical possibilities shall be listed, e.g., if hypersensitivity to the drug has not been demonstrated, it should not be listed as a contraindication.").

28 21 C.F.R. § 314.70. Although courts and plaintiffs rely on § 314.70(c)(6)(iii)(A) to support their argument that a defendant manufacturer could have revised the risk information in its package insert without explicit permission from FDA, it is well-known that manufacturers seldom, if ever, add or revise risk information unilaterally, as two previous FDA chief counsels in addition to myself have observed. *See* Richard M. Cooper, *Drug Labeling and Products Liability: The Role of the Food and Drug Administration*, 41 Food & Drug L.J. 233, 238 (1986); Thomas Scarlett, *The Relationship Among Adverse Drug Reaction Reporting, Drug Labeling, Product Liability, and Federal Preemption*, 46 Food & Drug L.J. 31, 36 (1991). *See also* FDA, Physician Labeling Rule, *supra* note 3, at 40 ("[I]n practice, manufacturers typically consult with FDA prior to adding risk information to labeling.").

29 21 U.S.C. § 331(a), (b).

30 *See, e.g.*, *id.* §§ 332, 333(a), 334(a)

31 Hearings on Drug Safety Before the Subcomm. on Intergovernmental Relations of the House Comm. on Gov't Operations, 88th Cong., 2d Sess., pt. 1, at 147 (1964) (testimony of former FDA Commissioner George P. Larrick); see also *Restatement (Second) of Torts* § 402A cmt. k (1965) (recognizing that many drugs are often "unavoidably unsafe," even "for their intended and ordinary use") (emphasis omitted).

32 Steven R. Salbu, *The FDA and Public Access to New Drugs: Appropriate Levels of Scrutiny in the Wake of HIV, AIDS, and the Diet Drug Debacle*, 79 B.U. L. Rev. 93, 147 (1999).

33 21 C.F.R. § 201.57(g)(2).

34 Am. Med. Ass'n, *Reporting Adverse Drug and Medical Device Events: Report of the AMA's Council on Ethical and Judicial Affairs*, 49 Food & Drug L.J. 359, 359-60 (1994).

35 *Id.* at 360 (footnote omitted).

36 *Id.; accord* Inst. of Med., Vaccine Supply and Innovation 8 (1985) ("[T]here is no way totally to avoid injuries caused by current vaccines manufactured according to approved procedures and administered in accordance with recommended medical practices short of the total suspension of vaccine use, which is unacceptable because of the increased risk of morbidity and mortality.").

37 FDA, Managing the Risks from Medical Product Use, *supra* note 4.

38 *See United States* v. *Rutherford*, 442 U.S. 544, 555 (1979) ("[T]he Commissioner generally considers a drug safe when the expected therapeutic gain justifies the risk entailed by its use."); FDA, Managing the Risks from Medical Product Use, *supra* note 4, at 3 ("A safe product is one that has reasonable risks, given the magnitude of the benefit expected and the alternatives available.").

39 Richard A. Merrill, *Compensation for Prescription Drug Injuries*, 59 Va. L. Rev. 1, 9 (1973) (footnote omitted).

40 *See* Terence Dungworth, *Product Liability and the Business Sector* ix (RAND Inst. for Civil Justice 1988) ("no other defendants in any industry have experienced federal litigation growth comparable to that observed in asbestos or single-product pharmaceutical suits").

41 *Id.* at 38.

42 *See* Press Release, Merck & Co., *Merck Announces Voluntary Worldwide Withdrawal of VIOXX®* (Sept. 30, 2004), *available at* http://vioxx.com/vioxx/documents/english/vioxx_press_release.pdf; Susan Todd, *Vioxx Lawsuits To Be Rolled into One*, Newark Star-Ledger, Feb. 17, 2005; Robert Steyer, *Vioxx Lawsuits Swamp Merck*, The Street.com, Dec. 14, 2004, *available at* http://www.thestreet.com/_googlen/stocks/robertsteyer/10199047.html?cm_ven=GOOGLEN&cm_ cat=FREE&cm_ite=NA.

43 *See* Melissa Nann Burke, *Philadelphia Sees 10,000 Fen-Phen Cases in 2004*, Nat'l L.J. (July 20, 2005).

44 *See* W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 Stan. L. Rev. 547, 583-84 (2000) (noting that litigation costs led to withdrawal of Bendectin despite the fact the failure of any jury verdict against the manufacturer to be upheld on appeal).

45 American Med. Ass'n, Report of the Board of Trustees, Impact of Product Liability on the Development of New Medical Technologies 1 (1988).

46 *Id.*

47 Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part). Although the *Browning-Ferris* case specifically concerned punitive damages, the principles

set out in Justice O'Conner's dissent apply to liability more generally.

48 *See* Amy Finkelstein, *Health Policy and Technological Change: Evidence from the Vaccine Industry* (Nat'l Bureau of Econ. Research Working Paper No. 9460, 2003), *abstract available at* http://www.nber.org/papers/w9460. Finkelstein's research focused on the Vaccine Injury Compensation Fund (VICF), a no-fault product liability system paid for by excise taxes on certain childhood vaccines. That system took the place of tort remedies stemming from those vaccines, and applied a fixed payment schedule for claims. *See* 42 U.S.C. §§ 300aa-10 to -34; 42 C.F.R. § 100.3. This alternative to the tort system had the salutary effects of reducing risk by normalizing payments and reducing expected liability costs. The result was stark—institution of the Fund led to a statistically significant increase in new clinical trials. Finkelstein, *supra*, at 22-24.

49 Michael J. Moore & W. Kip Viscusi, *Product Liability Entering the Twenty-first Century: The U.S. Perspective* 25, 27 (2001).

50 *See, e.g.*, Bernard Wysocki, Jr., *Fearing Avian Flu, Bioterror, U.S. Scrambles to Fill Drug Gap*, Wall St. J., Nov. 9, 2005, at A1 ("Vaccine makers point to the heavy costs of litigating suits alleging a link between vaccines and autism. Despite scholarly studies that have found no link, some 350 lawsuits have been filed, costing $200 million, industry executives say. None has yet gone to trial.").

51 *See id.*

52 *See* Peter W. Huber, Liability: The Legal Revolution and Its Consequences 155 (1988) ("'Who in his right mind,' the president of a major pharmaceutical company asked in 1986, 'would work on a product today that would be used by pregnant women?'").

53 Am. Med. Ass'n, *supra* note 45, at 6-7.

54 Steven Garber, Product Liability and the Economics of Pharmaceuticals and Medical Devices 167 (1993).

55 John P. Wilson, *The Resolution of Legal Impediments to the Manufacture and Administration of an AIDS Vaccine*, 34 Santa Clara L. Rev. 495, 505 (1994); W. Kip Viscusi & Michael J. Moore, *Rationalizing the Relationship Between Product Liability and Innovation*, *in* Tort Law and the Public Interest: Competition, Innovation, and Consumer Welfare, 105, 111 (Peter H. Schuck ed., 1991); *see also* Scott Hensley and Bernard Wysocki Jr., *As Industry Profits Elsewhere, U.S. Lacks Vaccines, Antibiotics*, Wall St. J., Nov. 8, 2005, at A1 (noting that the $12 billion annual revenue produced by Lipitor, a single anticholesterol drug, is larger than the entire vaccine market); *id.* ("'The margins were so low that four of the last five years we were on the market, we lost money,' says Peter Paradiso, a Wyeth research executive, referring to his company's decision in 2002 to stop making flu vaccine.").

56 Inst. of Med., *supra* note 36, at 2 (1985).

57 Viscusi & Moore, *Rationalizing*, *supra* note 55, at 111.

58 *See* Jon Cohen, *Is Liability Slowing AIDS Vaccines?*, Science, Apr. 10, 1992. The development of contraceptives has similarly been slowed by liability concerns. Experiences like the forced withdrawal of Bendectin as the result of baseless tort suits (described *infra* Part III.B) have discouraged manufacturers from developing new products indicated for or associated with contraception and pregnancy. *See, e.g.*, Linda Johnson, *Wyeth Won't Resume Norplant Sales*, AP Online, July 26, 2002; Gina Kolata, *Will the Lawyers Kill Off Norplant?*, N.Y. Times, May 28, 1995; *see generally* Inst. of Med. & Nat'l Res. Council, Developing New Contraceptives: Obstacles and Opportunities 118-43 (Luigi Mastroianni, Jr. et al. eds., 1990).

59 *See, e.g.*, E. Patrick McGuire, The Impact of Product Liability 17 (The Conference Bd., Res. Rpt. No. 908, 1988) (quoting a drug manufacturer: "We have been forced to discontinue sale of therapeutically beneficial drugs because of excessive product liability costs.").

60 Marvin E. Jaffe, *Regulation, Litigation. and Innovation in the Pharmaceutical Industry: An Equation for Safety*, *in* Product Liability and Innovation: Managing Risk in an Uncertain Environment 120, 126 (Janet R. Hunziker & Trevor O. Jonas eds., 1994). As a result, it was reported in 1994 that "treatment for severe nausea during pregnancy now accounts for nearly $40 million of the nation's annual hospital bill." *Id.* at 126.

61 *Id.*

62 *See* FDA, Determination That Bendectin Was Not Withdrawn From Sale for Reasons of Safety or Effectiveness, 64 Fed. Reg. 43190 (Aug. 9, 1999); *see also* Louis Lasagna, *The Chilling Effect of Product Liability on New Drug Development*, *in* The Liability Maze: The Impact of Liability Law on Safety and Innovation 334, 337-41 (Peter W. Huber & Robert E. Litan eds., 1991) (discussing the withdrawal of Bendectin).

63 *See supra* Part III.A & n.48.

64 Lasagna, *supra*, at 341-45; see also *supra* Part III.A.

65 Lasagna, *supra*, at 344.

66 *See, e.g.*, Anthony S. Fauci, *A Risky Business*, Wash. Times, Nov. 30, 2004, at A17 (column by the Director of the National Institute of Allergy and Infectious Diseases at the National Institutes of Health).

67 *See, e.g.*, Richard L. Manning, *Changing Rules in Tort Law and the Market for Childhood Vaccines*, 37 J. L. & Econ. 247, 273 (1994) [hereinafter Manning, *Childhood Vaccines*] (noting the "dramatic" effect of liability costs on vaccine prices); Richard L. Manning, *Products Liability and Prescription Drug Prices in Canada and the United States*, 40 J. L. & Economics 203, 234 (1997) [hereinafter Manning, *Canada and the United States* (analyzing the effect of differing liability regimes on prescription-drug prices in Canada and the United States); Garber, *supra* note 54, at 122 (1993) (concluding that a high perceived liability potential results in "substantially higher" product prices).

68 Manning, *Childhood Vaccines*, at 257; Federal Reserve Bank of Minneapolis, *Consumer Price Index, 1913-*, http://minneapolisfed.org/Research/data/us/calc/hist1913.cfm (last visited Mar. 8, 2006) (listing annual inflation rates based on the Consumer Price Index); Gina Kolata, *Litigation Causes Huge Price Increase in Childhood Vaccines*, Science, June 13, 1986.

69 Manning, *Childhood Vaccines*, at 254-55, 257.

70 *Id.* at 257.

71 *Id.* at 254-55, 257-60.

72 *See* FDA, Managing the Risks of Medical Product Use, *supra* note 4 ("[A]fter FDA evaluates the risks and benefits for the population, the prescriber is central to managing risks and benefits for the individual."); FDA, *supra* note 26, at 81105 ("Under the proposed rule, the highlights section would emphasize the drug information that physicians report is the most important for decisionmaking. . . . Consequently, this proposed rule would improve the ability of physicians to select the most safe and effective pharmaceutical treatments for their patients and to administer those treatments in the most safe and effective manner."); *cf.* 65 Fed. Reg. 59192 ("Regardless of the root causes for the current paucity of information, rational prescribing for the pregnant patient must attempt to ensure that she will have the greatest likelihood of clinical benefit from a medication in exchange for the safest or least exposure of her developing baby."); Robert Temple, *Legal Implications of the Package Insert*, 58 Medical Clinics of North America 1151, 1151 (1974) ("The preceding papers have emphasized what clinicians have long recognized: not all patients respond to a drug in the same way. Therefore it should be apparent that physicians must always individualize drug therapy.").

73 *See* FDA, Physician Labeling Rule, *supra* note 3, at 27-28.

74 *Id.* at 42-43 ("FDA has previously found that labeling that includes theoretical hazards not well-grounded in scientific evidence can cause meaningful risk information to 'lose its significance' . . . . Overwarning, just like underwarning, can similarly have a negative effect on patient safety and public health. . . . Similarly, State-law attempts to impose additional warnings can lead to labeling that does not accurately portray a product's risks, thereby potentially discouraging safe and effective use of approved products or encouraging inappropriate use and undermining the objectives of the act.") (citing FDA, Prescription Drug Advertising; Content and Format for Labeling for Human Prescription Drugs, 44 Fed. Reg. 37434, 37447 (June 26, 1979)); *see also* Lars Noah, *The Imperative to Warn: Disentangling the "Right to Know" from the "Need to Know" About Consumer Product Hazards*, 11 Yale J. on Reg. 293, 374-91 (1994).

75 FDA, Physician Labeling Rule, *supra* note 3, at 43 (noting FDA concern that the current pharmaceutical-liability regime "could encourage manufacturers to propose 'defensive labeling' to avoid State liability, which, if implemented, could result in scientifically unsubstantiated warnings and underutilization of beneficial treatments.").

76 *See* Madhukar H. Trivedi et al., *Evaluation of Outcomes with Citalopram for Depression Using Measurement-Based Care in STAR*D Implications for Clinical Practice*, 163 Am. J. Psychiatry 28 (2006); Gregory E. Simon et al., *Suicide Risk During Antidepressant Treatment*, 163 Am. J. Psychiatry 41 (2006); *see also* Rob Stein & Marc Kaufman, *Depression Drugs Safe, Beneficial, Studies Say*, Wash. Post, Jan. 1, 2006, at A01; Alex Berenson, *Antidepressants*

Seem to Cut Suicide Risk in Teenagers and Adults, Study Says, N.Y. Times, Jan. 1, 2006, at 15.

77 *See infra* Parts IV.A.2, IV.A.4.

78 FDA, Public Health Advisory: Worsening Depression and Suicidality in Patients Being Treated With Antidepressant (March 22, 2004), *available at http://www.fda.gov/cder/drug/antidepressants/AntidepressanstPHA.htm*.

79 Gregory E. Simon et al., *Suicide Risk During Antidepressant Treatment*, 163 Am. J. Psychiatry 44 (2006).

80 *Id.* at 44-45 & Fig. 6; *see also Berenson, supra* note 76 (noting that the Simon study "found that patients were significantly more likely to attempt or commit suicide in the month before they began drug therapy than in the six months after starting it.")

81 Dowhal v. SmithKline Beecham Consumer Healthcare, A094460, 2002 Cal. App. LEXIS 4384, at ***2 n.1 (Cal. Ct. App. July 12, 2002) (reversing trial court decision granting summary judgment for defendants on preemption grounds), *review granted*, 56 P.3d 1027 (Cal. 2002) (en banc), *judgment reversed*, 88 P.3d 1 (Cal. 2004).

82 2002 Cal. App. LEXIS 4384, at ***3 (citing Cal. Code Regs. tit. § 12000(c)).

83 *Id*. at ***5.

84 *Id*. at ***9.

85 Amicus Curiae Brief of the United States of America in Support of Defendants/Respondents SmithKline Beecham Consumer Healthcare LP, *et al*., Dowhal v. SmithKline Beecham, Case No. A094460 (Cal. Ct. App. filed Mar. 22, 2002)

86 *Id*. at 13.

87 2002 Cal. App. LEXIS 4384, at ***16-17 (citing 21 U.S.C. § 379r).

88 *Id*. at ***29-30.

89 Letter from Robert D. McCallum, Jr., Ass't Attorney General, *et al*., to Frederick K. Ohlrich, Supreme Court Clerk/Administrator, Dowhal v. SmithKline Beecham Consumer Healthcare LP, *et al*. (S. Ct. No. S-109306) (filed Sept. 12, 2002).

90 *Dowhal*, 56 P.3d 1027 (Cal. 2002).

91 Dowhal v. SmithKline Beecham Consumer Healthcare, 88 P.3d 1, 11-12 (Cal. 2004).

92 *Id*. at 11.

93 *Id*. at 12.

94 *Id*.

95 *Id*.

96 *Id*. at 14-15.

97 Motus v. Pfizer, Inc., 127 F. Supp. 2d 1085, 1088 (C.D. Cal. 2000) [hereinafter *Motus I*], *summary judgment granted*, Motus v. Pfizer, Inc., 196 F. Supp. 2d 984, 986 (C.D. Cal. 2001) [*hereinafter Motus II*], *appeal docketed*, Motus v. Pfizer, Inc., Case Nos. 02-55372 & 02-55498 (9th Cir. Mar. 12, 2002).

98 *Motus I*, 127 F. Supp. 2d at 1088. The facts of FDA's review of the NDA for ZOLOFT, and its consideration of the need for suicide warnings in the labeling of SSRIs as a class, are recounted *id*. at 1089-90.

99 The "Precautions" section of the proposed labeling, which FDA instructed Pfizer to use "verbatim," included the following statement:

> *Suicide*—The possibility of a suicide attempt is inherent in depression and may persist until significant remission occurs. Close supervision of high risk patients should accompany initial drug therapy. Prescriptions for Zoloft (sertraline) should be written for the smallest quantity of capsules consistent with good patient management, in order to reduce the risk of overdose.

Id. at 1088.

100 Amicus Brief for the United States in Support of the Defendant-Appellee and Cross-Appellant, and in Favor of Reversal of the District Court's Order Denying Partial Summary Judgment to Defendant-Appellee and Cross-Appellant, Motus v. Pfizer, Inc., Case Nos. 02-55372 & 02-55498, at 22 (9th Cir. filed Sept. 3, 2002) (citation omitted).

101 *Id*.

102 Amicus Brief for the United States, Kallas v. Pfizer, Inc., No. 2:04-cv-998 (D. Utah filed Sept. 15, 2005).

103 *FDA Alert: Suicidal Thoughts or Actions in Children and Adults*, July 2005, http://www.fda.gov/cder/drug/infopage/sertraline/default.htm.

104 *Motus II*, 196 F. Supp. 2d at 986.

105 *Id*.

106 *Id*. at 987.

107 *Id*. at 984.

108 *Motus I*, 127 F. Supp. 2d at 1087.

109 *Id*. at 1092.

110 Amicus Brief, *supra* note 100.

111 *Motus v. Pfizer, Inc.*, 358 F.3d 659, 660 (9th Cir. 2004) [*hereinafter Motus III*].

112 *Motus III*, 358 F.3d at 660.

113 The discontinuation symptoms associated with PAXIL and other drugs (e.g., beta-blockers and steroids) are distinct from the drug-seeking behavior that is associated with habit-forming drugs, such as narcotics. FDA, therefore, traditionally has limited use of the phrase "habit-forming" to drugs that induce such behavior.

114 Memorandum of Decision re: Preliminary Injunction, *In re* PAXIL Litigation, Case No. CV 01-07937 MRP (C.D. Cal. filed Aug. 16, 2002) [hereinafter PAXIL Injunction], at 10. The injunction never took effect. *See id.*; Minutes of Status Conference, *In re* PAXIL Litigation, Case No. CV 01-07937 MRP (C.D. Cal. filed Aug. 22, 2002); Minutes in Chambers, *In re* PAXIL Litigation, Case No. CV 01-07937 MRP (C.D. Cal. filed Oct. 9, 2002).

115 PAXIL Injunction, at 6.

116 Brief of the United States of America, *In re* PAXIL Litigation, Case No. CV 01-07937 MRP (CWx) (C.D. Cal. filed Sept. 4, 2002).

117 *Id*. at 8-9.

118 Memorandum of Decision re: Motion for Reconsideration of Order Granting Preliminary Injunction, *In re* PAXIL Litigation, Case No. CV 01-07937 MRP (C.D. Cal. filed Oct. 18, 2002).

119 *Id*.

120 Amicus Brief for the United States, Kallas v. Pfizer, Inc., No. 2:04-cv-998 (D. Utah filed Sept. 25, 2005).

121 Order Requesting Government to Submit Amicus Brief, Kallas v. Pfizer, Inc., No. 2:04-cv-998 (D. Utah filed June 30, 2005).

122 Amicus Brief for the United States, Kallas v. Pfizer, Inc., No. 2:04-cv-998 (D. Utah filed Sept. 15, 2005), at 34-36.

123 *Id.* at 37.

124 *See* Notice of Settlement, Kallas v. Pfizer, Inc., No. 2:04-cv-998 (D. Utah filed Oct. 13, 2005); Order of Dismissal with Prejudice, Kallas v. Pfizer, Inc., No. 2:04-cv-998 (D. Utah filed Oct. 24, 2005).

125 FDA, Physician Labeling Rule, *supra* note 3, at 37-47, 169-76.

126 *Id*. at 38.

127 *Id*. at 169-76.

128 FDA, *supra* note 26 (proposed Dec. 22, 2000).

129 65 Fed. Reg. at 81083.

130 *Id*. at 81086.

131 Exec. Order No. 13132, 64 Fed. Reg. 43255 (Aug. 4, 1999).

132 *See, e.g.*, FDA, Physician Labeling Rule, *supra* note 3, at 24, 37 (noting manufacturer concern that the requirement of a highlights section, universally supported by health care providers, would make manufacturers more vulnerable to products liability claims).

133 *See, e.g.*, *id*. at 43-44.

134 FDA, Guidance for Industry: Labeling for Human Prescription Drug and Biological Products—Implementing the New Content and Format Requirements (2006) (Draft Guidance), *available at* http://www.fda.gov/OHRMS/DOCKETS/98fr/05d-0011-gdl0001.pdf.

135 FDA, Guidance for Industry: Adverse Reactions Section of Labeling for Human Prescription Drug and Biological Products—Content and Format (2006), *available at* http://www.fda.gov/OHRMS/DOCKETS/98fr/01d-0269-gdl0002.pdf.

136 FDA, Guidance for Industry: Warnings and Precautions, Contraindications, and Boxed Warning Sections of Labeling for Human Prescription Drug and Biological Products—Content and Format (2006) (Draft Guidance), *available at* http://www.fda.gov/OHRMS/DOCKETS/98fr/05d-0011-gdl0002.pdf.

137 FDA, Guidance for Industry: Clinical Studies Section of Labeling for Human Prescription Drug and Biological Products—Content and Format (2006), *available at* http://www.fda.gov/OHRMS/DOCKETS/98fr/00d-1306-gdl0002.pdf.

138 FDA, Physician Labeling Rule, *supra* note 3, at 37-47.

139 *Id*. at 169-76.

140 *Id*. at 40-43.

141 *Id*. at 43-44.

142 *Id*. at 45-47 (emphasis added).

143 *Id*. at 169-76.

144 *Id*. at 46-47, 175.

145 *See id*. at 42.

146 *Id*. at 41.

147 *See id*. at 40.

148 *See id*. at 32, 40.

149 *Id*. at 38.

150 *Id*. at 45.

151 *See id*. at 38 (noting that amicus briefs filed by the Department of Justice on behalf of FDA "represent[] the government's long standing views on preemption, with a particular emphasis on how that doctrine applies to State laws that would require labeling that conflicts with or is contrary to FDA-approved labeling").

152 *Id*. at 43 ("State law actions also threaten FDA's statutorily prescribed role as the expert Federal agency responsible for evaluating and regulating drugs.").

153 Ariz. Rev. Stat. Ann. § 12-701 (2005) (drug manufacturers who comply fully with FDA regulations not liable for punitive or exemplary damages except on a showing of that the manufacturer withheld material information from or misrepresented material information to FDA), *held preempted in part by Kobar ex. rel Kobar v. Novartis*, 378 F. Supp. 2d 1166, 1174-75 (D. Ariz. 2005) (holding that the portion of the Arizona statute permitting punitive damages against a drug company on a showing of fraud on FDA was preempted by the agency's statutory authority to punish fraud).

154 Ohio Rev. Code Ann. § 2307.80(C) (drug manufacturers who comply fully with FDA regulations not liable for punitive or exemplary damages except on a showing that the manufacturer withheld material information from or misrepresented material information to FDA); *but see Garcia v. Wyeth-Ayerst Labs.*, 385 F.3d 961, 966-67 (6th Cir. 2004) (holding that the fraud and bribery exceptions to the Michigan FDA Shield Law require finding by FDA that fraud or bribery has occurred).

155 Or. Rev. Stat. § 30.927 (2003) (drug manufacturers who comply fully with FDA regulations not liable for punitive damages except on a showing that the manufacturer withheld material information from or misrepresented material information to either FDA or the prescribing physician). It does not appear that any Oregon court has considered whether any part of § 30.927(2) is preempted by the FDCA.

156 Utah Code § 78-18-2 (2005) (drug manufacturers who comply fully with FDA regulations not liable for punitive damages except on a showing that the manufacturer withheld material information from or misrepresented material information to FDA). It does not appear that any Utah court has considered whether any part of § 78-18-2(2) is preempted by the FDCA.

157 N.J. Code § 2A:58C-4 (2005) (product manufacturers not liable for failure-to-warn damages when a product contains an adequate warning or instruction; rebuttable presumption that warning or instruction on FDA-approved drug is adequate).

158 N.C. Gen. Stat. § 99B-6(b)(4) (2005) (extent to which the manufacturer of an FDA-approved drug complied with "any applicable government or private standard" is a factor to be considered in determining whether the manufacturer could be held to have acted unreasonably in designing the drug).

159 *See supra* Part I.

160 *See supra* Part I.

161 *See supra* Part I.

162 *See supra* Part I.

163 *See* Center for Disease Control and Prevention, *Polio Vaccine: What You Need To Know*, at 1 (Jan. 1, 2000), *available at* http://www.cdc.gov/nip/publications/VIS/vis-IPV.pdf (noting that the oral polio vaccine causes polio in approximately one in 2.4 million people who receive it). The polio shot does not carry a risk of causing polio, but is less effective as a public health measure in areas where polio is prevalent. *Id.*

164 *See, e.g.,* Bell, *supra* note 1; Anstett & Norris, *A Michigan law stirs a national debate*, *supra* note 1; Anstett & Norris, *Michigan Rezulin lawsuits tossed*, *supra* note 1.

165 *See supra* Part III.

166 *See supra* Part III.A.1.

167 *See supra* Part III.A.2.

Manufacturers Immunity: The FDA Compliance Defense

*Lars Noah & Michael Greve**

Lars Noah: Thank you for inviting me to participate. I have been intrigued by these issues since writing a seminar paper on this as a student in law school. And they really do continue to attract my attention. I am going to spend my limited time today trying to flesh out some of the more technical issues, if you will, having to do with the interplay between the Michigan statute and federal preemption arguments, because they are terribly important in terms of how those two avenues are going to operate in practice.

I should also say this puts me in a ticklish position. My scholarly publications are generally aligned with the views that Daniel Troy expresses [*see* Author Note in preceding article], but I think it is only fair that I should play Devil's advocate today. As a law professor, I am apt to ask hypothetical questions; so let me start with this one. Imagine the FDA concludes that a drug manufacturer headquartered in the state of Michigan had withheld some material information. To make it even starker, let us assume that the Agency actually succeeds in bringing some sort of enforcement action, criminal charges, if you will, against a company. The question is: Could a person injured by that drug—and we will assume that the FDA would not have approved the drug had it been aware of the information withheld by the company—could an injured victim bring a product liability suit against the company?

Let me answer my own question—it is a trick question. The first part is: it all depends on where the lost suit is filed. If it is filed in any other state than Michigan, I dare say that the choice of law analysis would not respect the Michigan compliance statute as a defense. If filed in Michigan—and there is some case law for this proposition—choice of law defaults to forum, and the state has an interest by virtue of its legislative enactment in this case. So, the statute would, in fact, apply.

But there is another trick to this question. There is a clear exception—in fact, two exceptions—in the Michigan compliance statute, as there are exceptions in comparable state statutes that prevent punitive damage actions against drug companies in a few other states, for either fraud or bribery. In a case called *Garcia v. Wyeth Ayerst*, a couple of years ago, involving withdrawing the drug Duract, the U.S. Court of Appeals for the Sixth Circuit concluded that the fraud exception was impliedly preempted by virtue of a 2001 decision by the Supreme Court in *Buckman*. Not only that, it was severable and therefore removed from operation from the Michigan statute.

The punch line is that the plaintiff would not be able to successfully sue because the Michigan compliance statute remains in place, minus the fraud exception. And by the way, this is not entirely a hypothetical question. There are instances in which important information has been withheld from the Agency during the approval process. In fact, Dexfenfluramine—the drug at issue in the Michigan litigation I think, where the state supreme court rejected a constitutional challenge on impermissible delegation grounds to this statute—there were strong suspicions that there had been some undisclosed adverse effects reported in Europe before approval in this country that could have made a difference in the FDA's decision. But those issues now become inconsequential, for purposes of operation of the Michigan Shield Statute. The same thing is true of the bribery exception, which appears to be a dead letter—(again not entirely hypothetical, although you have to go back to the generic drug scandal in the FDA many years ago for an example).

Now, understand, this broad reading of the Supreme Court's directive in *Buckman*, calling for an implied preemption of fraud on the FDA claims, is hardly required. In fact, there are some real serious flaws in the Court's analysis in *Buckman*, as I have written. And the decision to sever itself, I think, is somewhat controversial. There is narrow construction that would have saved the statute from running afoul of the Court's preemption directive, but lower courts have in fact read *Buckman* for all it is worth. And so, let me pose another hypothetical. There is no finding now where a plaintiff, in allegation of fraud or bribery against the Agency (not that they matter anymore), argues that the manufacturer failed to comply with FDA requirements.

Just to make it even more concrete and starker, let us assume that the Agency itself thought there was some sort of failure of compliance or other regulatory infraction by the company. Would the Michigan Shield Statute shield the company from a lawsuit in such a case? You would think so—otherwise, why would it be a called a compliance statute? But there is at least a strong argument to be made that the same analysis that bars fraud and bribery claims in tort litigation involving FDA regulated products would also bar negligence or defectiveness per se claims against these very same products.

I will hasten to add that no lower court has yet decided that *Buckman* reaches that far. In fact, there was an interesting case here in the Western District of Michigan federal court involving claims against BioPort, the anthrax vaccine manufacturer, where the court declined to dismiss by virtue of operation of the Michigan statute because there were a variety of questions of fact about whether the company was in fact in compliance.

But put aside the possibility that negligence or defectiveness per se claims might face preemption. Let us just say that a drug company need not fear tort liability, at least in the state of Michigan, in cases of fraud or bribery. What will motivate a drug company to act responsibly in such cases? Are FDA sanctions alone enough to keep the industry honest? Will we trade what Dan refers to, and I have referred to previously, as 'defensive labeling' for what you might call 'offensive labeling'? As Dan noted, and I tend to agree, Merck probably overreacted with Vioxx in terms of withdrawing the product from the market. But that very argument suggests that the post-approval dynamics would differ if there were not a threat of tort liability in place. And that might operate for better or for worse.

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How quickly would a company seek FDA approval of a Black Box warning instead? How long would that go on until both the industry and the Agency realized that the warnings were not doing the trick? I mean, this has happened time and again where the regulatory response is slow and moderate. Perhaps it is the right response. But when that does not work, the issue becomes more dramatic. So, instead of a compliance statute or a patchwork of such state statutes, I would say that the onus is on Congress to design sensible tort limitations for products that are deemed essential. In fact, it has done so in a couple of instances—twenty years ago in the National Childhood Vaccine Injury Act, which Dan mentioned, for example; ten years ago, in the Biomaterials Access Assurance Act, which Dan did not mention. In point of fact, all of those cases have been sent to the claims court, because federal judges and state judges have realized that such claims are in fact covered by the Act and excluded from tort litigation. And notice, by doing it this way instead of relying on different states to adopt compliance defenses, we have the benefit both of uniformity and of the opportunity to close this loophole that implied preemption under *Buckman* has created with regard to fraud or bribery exceptions.

But there is no reason to think the Congress is eager to get into this fight. The courts can find implied federal preemption on grounds of actual conflict or frustration of purpose. A few have done so recently, sometimes on the strength of FDA input, provided through amicus briefs. In fact, preemption of this sort may operate in a more refined way in the Michigan compliance statute, which bars all tort (though not other claims) once a drug is approved and in compliance, whether or not the FDA has focused on the particular risk at issue and whether or not you have a conflict between the operation of state common law and federal requirements.

The decisions that Dan highlights, though, like the *Dowhal* case from California, are not traditional tort claims involving requests for monetary damages. Indeed, *Dowhal* would not be affected by a statute like the one in Michigan. And the others, like the SSRI cases, are, at least as the courts explain them, peculiar cases because the issue was not just a one-time FDA approval of a product and rejection of a stronger label warning about suicide. In most cases it was the repeated, very public and very clear FDA review of that question that persuaded at least a few courts that a jury really had nothing to add.

A simple approval decision, however—those focused more clearly on risks and benefits of a particular product—passes through a much less public and, you might say, less accountable process. Indeed, here I think the Michigan legislature may have had too simplistic a view of the FDA's processes. Approval, compliance, and withdrawal are not static, dramatic, distinct, regulatory stages. There is more of a spectrum. Initial product approval is just one point in the ongoing learning process of the Agency and the medical community. With compliance, it is often hard to tell; often it is accomplished by indirection. There is a lot of negotiation going on, with several regulatory agencies. Withdrawal: the FDA almost never actually withdraws the drug. That is left to the nominally voluntary decisions made by the industry, whereas the Michigan statute assumes that the withdrawal process is something distinct, coming from FDA headquarters.

Let me illustrate. Dan mentioned that there were six enumerated examples of the preamble. Several things strike me as curious about that. First: only one of the six is squarely within the scope of the FDA's rule revising format and content of prescription drug labeling. One of the others is curious because it says that where companies comply with a non-final, non-binding draft guidance document, they should not have to fear tort liability. Now if you tell that to a federal or state judge, they would be scratching their heads, quite appropriately, trying to figure out how that is a measure of compliance and where there is any sort of conflict with federal purposes. Even the one example he provided where there is clear content and format directives from the Agency does not always point in the direction of preemption. For example, there was much discussion in this rulemaking process about the appropriate minimal font size: eight-point, six-point, ten-point, etc. The FDA finally announced a minimum of six to eight, depending on the type of labeling. But that does not set a ceiling; that is explicitly a floor. Now it is unlikely that the plaintiff would be able to base a case solely on a lack of visibility argument, suggesting that a drug company should have used a certain size font, as some others in the industry have done, but it would be hard to say whether there is any conflict that might fit with the minimum federal font size requirement and also allow a jury to conclude that a larger font size may in fact have been the reasonable thing to do.

My last, and most serious, objection to the FDA's recently published implied preemption analysis—apart from the argument that it is largely dicta, a failure to engage in express administrative preemption—is that it misses on legal analysis. It entirely ignores a critical U.S. Supreme Court decision issued just nine months earlier in a case called *Bates v. Dow AgroSciences*. That involved FIFRA and the operations of the EPA. Plaintiffs' lawyers have announced that it signals the death knell of implied preemption in tort claims. It is not that strong, but it is fair to say that implied preemption arguments in the tort arena are going to be much harder to pursue under this regime. If *Bates* suggests something broader, as it seems to, about the way conflict preemption should operate in these sorts of cases, the Court makes it sound like, unless there is an unmistakable and direct conflict between not just a jury verdict but a common law duty—(and it uses a very high level of generality in defining that duty)—and the federal obligation to find either in statute or in regulation (but not otherwise) the mere possibility that an occasional jury verdict holding the manufacturer of a product who appears to be in compliance with federal requirements, a verdict against such a manufacturer the Court thinks is not a sufficient threat to uniformity to displace state tort law. If the Court is serious about that—and it is hard to tell because these preemption decisions are constantly going back and forth—that could put a real damper on implied preemption of tort claims, and it is never even decided in the FDA's implied preemption analysis in its preamble.

Michael Greve: I was asked to give an over-flight version of today's topic, and this naturally implies statesmanlike, judicious presentation. Those of you that know me know that is not possible: contentiousness is my only mode of discourse.

The entire preemption debate, involving both the FDA and other important agencies in Washington, is overlaid with issues of federalism. On the one hand, the corporate community says, "Yes, federalism is fine, but sooner or later it runs up against the needs of capitalists, economy, and then states' rights and all the rest of it has to stop." On the other hand, the trial lawyers and the state attorneys general say, "Look, our tort system, the operation of the tort system, in addition to centralized legal regimes, is a valuable form of state experimentation and error correction."

Whatever the general argument is for sustaining a state-based private liability system in addition to federal regulation, it cannot be defended on federalist grounds. If you value federalism, you have to favor preemption and all of its forms at the FDA, and in many other contexts. Experimentation is just dandy. State experimentation is great. All this is fine so long as states experiment, as Justice Brandeis said, without risk to the rest of the country. That is the end of an oft-quoted phrase that is often omitted. What the Justice meant was, the costs and benefits of state experimentation have to fall on the state's own citizens. If that could be done, if corporations could price the litigation risk in accordance with state boundaries, experimentation would be easy to support.

Instead, you can have, for example, two Vioxxes. There would be the New Jersey Vioxx, with a picture on the side that says, "If you got a problem, you've got a lawyer. And even if you don't have a problem, you still have a lawyer." And then the Michigan Vioxx. It has a picture of Dan Troy and next to it the words: "Trust me." And it costs what the New Jersey Vioxx costs. Better yet, you could ship both products throughout the country and let people make their own decision about the risks they are willing to bear and the price they are willing to pay for all of these good things—deterrence, insurance, compensation—at the front and that way, we would have at least their ex ante judgment, which is the only judgment that counts.

Of course, the world does not work this way. As in the case of drugs, you cannot modify the product. You can roll the cross-border arbitrage that drugs will make it from one state into another, one way or the other, and then under our fabulous source of law rules, you are stuck with whatever forum the plaintiffs attorneys may choose. And so, at the end of the day the litigation risk from the separate states aggregates and is priced into the product, across the country. Which means that the costs for consumers, shareholders, and workers will accrue everywhere in unknown proportion. It means that the states who want less liability and the benefits thereof—including lower prices—can no longer have their choice. Whatever effect Michigan's liability shield has on the price of drugs will be redistributed nationwide, and so therefore only a very small chunk of the benefits will accrue in Michigan. And it seems to me, especially if you insist on state integrity, you have to allow states to experiment with their own rules, but not allow them to experiment on each other. You need a rule of nonaggression, and the means to enforce it.

I use the term "aggression" advisedly because it was Alexander Hamilton's term. He was talking about New York's import tax, not the Food and Drug Administration; but the economic analysis is just about the same. New York, at the time of the Founding, had an import tax; a portion of which fell on citizens in Connecticut and New Jersey, both states lacking a deep-sea port. Hamilton said, "Look, this import tax is illegitimate. New York could say (what the states now say), that this tax is needed to pay and provide for the health and welfare of our citizens." In fact, New York said just that. Nonetheless, the tax was exploitative, Hamilton thought, because at the end of the day its incidence in Connecticut and New Jersey was intolerable to the citizens of those states. And a rule that has that effect, Hamilton argued, is neither welfare-enhancing nor stable. The State right to that form of aggression is like comparable to saying, "Our mutual welfare and our rights would be benefited by my right to stick my fist in your face;" and, therefore, the only solution to this problem, Hamilton thought, would be to monopolize the decision-making process. The federal government—which under the Constitution obviously has a monopoly over tariffs, import duties, and so forth with respect to foreign trade—is not any smarter. We do not monopolize these decisions because we think the feds are automatically smarter. We have decision-making processes that respect the states—all states, not just those with deep sea ports or trigger-happy juries.

That brings me to my second point: the error correction and safety-valve function. It is, of course, true that the FDA can make mistakes. But the crucial recognition is that it can err on both sides: on the side of excessive caution and on the side of excessive risk-taking. There are ample reasons to believe that this FDA, for at least the last several decades, for political reasons, is excessively cautious, and lots of empirical evidence to back that up. What is the tort system doing, then, in addition to FDA? I think the only serious argument for the tort system has to be that it provides a more adequate deterrence level; because if you want compensation or assurance, no economist I know of would provide that sort of thing through the tort system. The system that chews up 50-60% of transaction costs is not a very good insurance system and not a very good compensation mechanism, except for the consumers. The glitch in the tort system, however, is that it can operate and correct FDA errors only in one direction. It cannot correct FDA errors on the side of excessive caution. And so what are left with, under present circumstances, is tort law systematically increasing systemic error in only one direction. And that is exacerbated by the fact that, given the realities of the pharmaceutical markets, automatically the strictest tort rules in the country dominate the entire, nationwide market.

I am not speaking to the fact that you could have redundant systems, redundant tort and regulatory systems that could work optimally together better than regulation or torts alone. Maybe you can. But the only premise on which the current coordination mechanisms make any sense of all is: more regulations, *ipso facto* better regulations.

There are, in fact, serious law professors who believe that. Erwin Chemerinsky is one of them. "More regulation is *ipso facto* better regulation" is what the trial bar and the

National Association of Attorneys General mean when they say state regulation and state experimentation. Because when Michigan experiments with a tort shield law that drives you "to the floor" of FDA standards, the trial lawyers do not scream, "Hallelujah! Let's hear it for state experimentation." They say, "It's an outrageous infringement on states rights!"—even though the state did it itself. It seems to me the only backstop in a system like this is preemption, and that is the critical argument for it. It is the only backstop to an otherwise out-of-control, one-dimensional process. Without comprehensive implied preemption—and I unfortunately agreed with the *Dow v. Bates* analysis; though I disagreed with the decision for that reason—without implied preemption, you freeze a pro-regulatory bias into the institutional structure.

That brings me to my last, final point. Once you think through the economics of the stuff, it is actually very hard to see when Michigan or any other state will opt out of the "More liability is *ipso facto* better liability" race. What companies in Michigan would get out of the shield laws, as I understand them, is a little more protection against in-state consumer class actions. That is worth something. It's quite probably worth a lot to them. (Ask what it would be worth to them not to have a consumer class action in this state of New Jersey where they can get into federal court because they are headquartered here.) But, by and large, those types of actions are too small a part of the overall litigation risk to really influence corporate location decisions.

So that brings us back to the question: Why are states, occasionally at least, reforming in the right direction? I think the answer—and this is pure speculation—is that the total local wealth effect from the tort system is too small to be worth the very, very large risk to states' reputations. There are many, many states now that have enacted meaningful tort reforms, both in pharmaceuticals and in other areas, and it is most likely, to me, that they care about their reputation as regards being a favorable business climate. That is at least one reason for both.

Civil Rights

An End, or Prelude, to Further Litigation in the Reparations Movement?

*By Douglas G. Smith**

For decades there have been efforts to obtain reparations for the descendants of those held in slavery in the United States. At bottom, the argument for reparations is premised on notions of fundamental fairness: descendants of slaves should be compensated for work their ancestors performed under compulsion. Advocates of reparations note that there have been payments to other groups for past wrongs, such as compensation paid to Japanese-Americans interned during World War II, arguing that it is only fitting that similar measures be taken to compensate the descendants of slaves.

The arguments on the other side, however, are likewise based on such principles. Critics of the reparations movement question why those who had no hand in the institution of slavery and did not directly benefit from it should be forced to pay compensation to those who were never slaves themselves. They question why recent immigrants, for example, should be forced to bear the burden of compensating the descendants of individuals who were held in bondage long before they arrived in this country. And some argue that reparations have already been paid in the form of affirmative action and other programs that have benefited African-Americans; thus any debt owed to descendants of slaves has been paid in full. Finally, they note that there are problems inherent in determining who should receive the benefits of such reparations, and that the entire concept of reparations can be racially divisive.[1]

Such debates have played out in the political arena, accompanied by proposals for legislation that would implement steps ranging from studying the effects of slavery to providing direct monetary compensation to the descendants of slaves.[2] These efforts have thus far failed to bear fruit. While local authorities have taken steps to expose the alleged involvement of corporate America in the slave trade through ordinances requiring companies to disclose any such ties, on the national level there has been no political consensus to award reparations to the descendants of slaves.

Having failed to achieve their goals in the political arena, the advocates of reparations have turned to the courts to seek compensation from companies they allege to have benefited from slavery. Indeed, the proponents of reparations themselves often see such suits as an extension of the overall effort to obtain a political resolution of the reparations issue. However, these lawsuits have run into bedrock principles of law that have been evoked to establish that such claims are not appropriately resolved in the courts.

A recent decision issued by the United States District Court for the Northern District of Illinois, *In re African-American Slave Descendants Litigation*, represents the latest chapter in the reparations debate.[3] Beginning in 2002, plaintiffs claiming to be descendants of slaves filed several lawsuits in federal and state court seeking compensation from a variety of corporations they maintained had benefited from the institution of slavery. Plaintiffs named as defendants, for example, various financial companies whose predecessors had allegedly made loans to slave traders or slave owners and collected customs duties on ships engaged in the slave trade. Similarly, they sued various railroads whose predecessors allegedly used slave labor to construct or run their rail lines. Finally, they named insurance entities whose predecessors had allegedly insured ships utilized in the Trans-Atlantic slave trade or underwritten insurance policies for slaves.

Not only did plaintiffs claim that these companies unjustly benefited from slavery, but they also alleged that the conduct of their predecessors contributed to various current social inequities. For example, plaintiffs cited disparities in the poverty rate between African-Americans and whites, disparities in life expectancies, disparities in incarceration and application of the death penalty, disparities in income and education, and disparities in the likelihood of having a father at home as continuing effects of the institution of slavery for which the corporate defendants were directly responsible.[4]

In late 2002, the Judicial Panel on Multidistrict Litigation consolidated these cases before Judge Charles Norgle for coordinated pretrial proceedings. Plaintiffs filed a consolidated complaint asserting various legal theories, ranging from conspiracy, unjust enrichment and civil rights violations to consumer fraud and intentional and negligent infliction of emotional distress. The defendant corporations immediately moved to dismiss these claims on a variety of legal grounds.

From the very beginning, the political nature of the case was evident. The lawsuit received significant public and media attention. Local activists "mobiliz[ed] African Americans to fill local courtrooms during hearings in the case," and held multiple press conferences at the courthouse, arguing that the lawsuit was "the most important case ever."[5]

In discussing the case, plaintiffs and their representatives made clear their political objectives. Plaintiffs' counsel recognized that their case was inconsistent with established precedent, and would be dismissed. They attributed this to the view that the judge "was always expected to 'maintain the status quo,'"[6] and asserted that legal change could be wrought by continuing to file lawsuits.[7] As plaintiffs' counsel told the press, "legal and political battles must go hand in hand."[8]

Accordingly, reparations advocates stated that, "[t]his issue is much bigger than the court," that "[t]he bigger issue is the mass mobilization of the communities around the demands for reparations," and that "[c]ourt is a tactic employed to help widen the support necessary in order to reach a common goal."[9] Supporters of the lawsuit thus explicitly tied it to efforts to enact a "congressional bill to study reparations" and "a grass-roots mass-mobilization that will culminate at the 10th Anniversary

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of the Million Man March."[10] As one legal commentator observed, "'[t]he litigation, by bringing public attention to the reparation issue, can create pressure and momentum for a legislative solution, like we saw with the tobacco cases and other mass-tort suits.'"[11]

Consistent with the political nature of the case was the proponents' attempts to influence and then discredit the chief decision-maker, Judge Norgle. Plaintiffs, for example, sought to recuse Judge Norgle on the ground that (among other things) he had stated during his confirmation proceedings twenty years earlier that judges should exercise restraint and not exceed their constitutional powers.

When Judge Norgle ultimately dismissed their lawsuit, plaintiffs' supporters publicly "denounced [his] ruling as the product of the 'conservative right-wing judicial, political, decision-making." Indeed, plaintiffs' counsel alleged that the Judicial Panel on Multidistrict Litigation had purposefully "hand picked… one of the most conservative judges they could find to hear this case."[12] Supporters of the lawsuit asserted that "'Judge Norgle is just a liar, he is exercising his political ideology. … His eyes are the eyes of a racist."[13] They claimed that his ruling was "'a very good illustration of the injustice we have suffered for more than 400 years, the total disregard for the humanity of anyone.'"[14] And they asserted that Judge Norgle dismissed their claims because he was simply an "'arrogant, racist, white judge.'"[15] In sum, when the court failed to rule in their favor, the supporters of the lawsuit sought to try their case in the court of public opinion by de-legitimizing the proceedings—even though they seemed to acknowledge that their case was inconsistent with established legal precedent.

Judge Norgle had given the plaintiffs several opportunities to prove their claims, granting multiple extensions and allowing plaintiffs leave to file a second amended complaint after initially dismissing their claims without prejudice. In the end, the court determined that no amendment could cure their complaint, which flew in the face of "numerous well-settled legal principles."[16]

At bottom, the court held, the lawsuit was a political dispute best resolved within the representative branches of government. As the court observed, the suit was part and parcel of "a present and ongoing social and political movement for slave reparations in America."[17] Such disputes, the court found, are more properly resolved by the representative branches: "The specific problem with bringing this issue before a court is that courts are equipped for, and charged with the responsibility of, 'dealing with claims by well-identified victims against well-identified wrongdoers.'"[18] That was far from the case with respect to plaintiffs' claims, which sought recovery for historical wrongs that occurred over a century ago. Indeed, courts have routinely dismissed similar reparations claims.[19]

In analyzing the plaintiffs' complaint, the court concluded that several established legal doctrines bar such claims. First, the plaintiffs lacked standing to bring suit. The Supreme Court has made clear that satisfying Article III's "Case" or "Controversy" requirement is a fundamental prerequisite to bringing suit in the federal courts. This requirement "limit[s] the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process."[20] In addition, it ensures that the judiciary "will not intrude into areas committed to the other branches of government."[21]

To demonstrate standing to bring suit, a litigant must "establish that he has a 'personal stake' in the alleged dispute, and that the alleged injury suffered is particularized as to him."[22] The court observed that this requirement is a "bedrock principle in our system of law" that simply cannot be met in a suit asserting "generalized grievances."[23] "Without the doctrine of standing, 'the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions.'"[24]

The court held that these fundamental requirements of justiciability are simply not met in the reparations context. The plaintiffs seek damages for harms to other individuals that occurred more than a century ago. They simply do no have the "particularized" interest in the outcome of the litigation sufficient to confer standing. Moreover, the relationship between the defendants and the alleged harm is tenuous at best. The defendants did not create the institution of slavery. Nor are the "benefits" they allegedly received from slavery particularly apparent. Many of the defendants were merely alleged to have engaged in business with other individuals who were engaged in the slave trade or who owned slaves. The requisite causal nexus between the defendants' actions and the alleged harm is therefore absent. Rather, even if such alleged injuries could be the basis for a suit, plaintiffs could not allege that the defendants as opposed to third parties not before the court actually caused the injuries for which they seek recovery.

Plaintiffs attempted to avoid these arguments in a number of ways. They asserted, for example, that certain plaintiffs were actually enslaved themselves during the twentieth century. Not only were these claims highly questionable, but these plaintiffs could not allege that the particular corporate defendants they had sued actually had anything to do with their alleged enslavement. Similarly, plaintiffs claimed that the defendants had somehow "misled" them by failing to disclose their links to slavery and that such alleged misrepresentations were actionable under various state consumer protection laws. But they did not allege how these claimed misrepresentations actually injured them. The court concluded that these arguments were without merit: "To recognize Plaintiffs' standing in this case 'would transform the federal courts into no more than a vehicle for the vindication of the value interests of concerned bystanders.'"[25]

Second, the court held that the suit was prohibited by the political question doctrine articulated in *Baker v. Carr*.[26] Under this doctrine, questions that are more appropriately addressed by the representative branches of government are non-justiciable. While plaintiffs argued that the doctrine had no applicability because they were bringing claims as private individuals, the court observed that the case law recognized no such distinction. Indeed, the court observed, the doctrine was routinely applied to bar such claims.[27] Thus, for example, claims for reparations brought by private litigants against corporate defendants for their role in Nazi war crimes have been rejected as non-justiciable under the political question doctrine.[28] The

distinction plaintiffs advocated is simply inconsistent with established precedent, and indeed would eviscerate the political question doctrine.

In holding that the political question doctrine barred plaintiffs' claims, the court reasoned that judicial resolution of such questions would invade the powers of the Executive and the Legislature. In particular, the court noted, the representative branches had already considered the appropriate remedies for former slaves during the Civil War and Reconstruction periods. Instead of authorizing reparations, these elected branches chose to establish programs run by the Freedman's Bureau to assist newly freed slaves, enact civil rights legislation such as the Civil Rights Acts of 1866, 1870, 1871 and 1875, and amend the Constitution by enacting the Thirteenth, Fourteenth and Fifteenth Amendments, abolishing slavery and guaranteeing certain fundamental rights, including the right to vote, to all citizens equally. All of these efforts were designed to "ensure the liberty of the newly freed slaves and benefit them generally."[29] The court observed that proposals to study reparations continue to be introduced in Congress. Yet, the Legislature has made a conscious decision that such remedies would be inappropriate. Accordingly, any action by the Judiciary would by necessity impermissibly intrude on the policy choices made by the representative branches.

Third, the court held that the various counts in plaintiffs' complaint simply did not state a viable cause of action. One of the primary reasons plaintiffs' allegations were legally insufficient was that they did not identify any acts by the defendants that resulted in actual profiting from slavery. Plaintiffs therefore failed to establish the causal nexus between their alleged injuries (or those of their ancestors) and the defendants' conduct. The court found that "[p]laintiffs seek to hold Defendants liable for an entire era of history simply because their alleged predecessors were purportedly doing business in nineteenth century America."[30] The failure to make a connection between the defendants' conduct and the alleged injury independently warranted dismissal of the plaintiffs' complaint.

Finally, the court held that plaintiffs' claims were barred by the statute of limitations. As the court observed, the prohibition on bringing stale claims "can be traced back to early Roman law" and is a fundamental feature of our legal system.[31] It serves important policy goals of ensuring the accuracy of judicial results and giving potential defendants certainty that they will not be held liable for conduct that occurred in the distant past. These principles apply with particular force in the reparations context where plaintiffs seek to recover for conduct that occurred over a century ago.

Given that their claims were plainly time-barred, plaintiffs attempted to argue that they should be excused from complying with the statute of limitations based on several theories. Plaintiffs argued, for example, that slaves were not aware of the defendants' role in the wrongs done to them and therefore could not have brought suit for reparations at an earlier time. But, as the court observed, slaves certainly were on notice of the fact of their injury. Indeed, the record demonstrates that in the early twentieth century, former slaves actually brought claims for reparations.[32]

The court likewise rejected plaintiffs' assertion that there was a continuing violation that would allow plaintiffs to avoid the statute of limitations. While plaintiffs alleged that they continued to suffer the adverse effects of slavery, the court observed that this constituted a "continuing injury" from events that occurred long ago, rather than a "continuing violation."[33] Accordingly, there simply were no new and recent wrongful acts that could provide a basis for a claim that was not time-barred.

Finally, the court rejected plaintiffs' claim that the defendants should be equitably estopped from invoking the statute of limitations because they allegedly "concealed" evidence of their involvement with slavery, which would have put plaintiffs on notice of their claims. Again, the court observed, plaintiffs' injury was not concealed. The alleged injury was apparent early on. Accordingly, the requirements for equitable estoppel were plainly unmet.

On appeal, the district court's broad ruling was largely affirmed. The Seventh Circuit focused primarily on plaintiffs' lack of standing. It agreed with the district court that "[i]t would be impossible by the methods of litigation to connect the defendants' alleged misconduct with the financial and emotional harm that the plaintiffs claim to have suffered as a result of that conduct."[34] Rather, there was "a fatal disconnect between the victims and the plaintiffs" given that "the wrong to the ancestor is not a wrong to the descendants."[35] For those who brought claims on behalf of the estates of former slaves, the court ruled that even if such plaintiffs had standing to sue because they purported to represent the actual victims of slavery, their claims were barred by the statute of limitations. The only claims that the court allowed to proceed were claims brought pursuant to state fraud and consumer protection laws on the theory that plaintiffs would not have bought defendants' products if they had known of their involvement with slavery. Even here, however, the court did not opine "on the merits of the consumer protection claims," but merely sent them back to the district court for further proceedings.[36]

Despite its recognition of the "generally acknowledged horrors of the institution of slavery," the district court's decision represents a powerful illustration that our legal system does not provide a remedy for every wrong.[37] While the court recognized that the institution of slavery was profoundly immoral, that fact alone did not provide a basis for a legal action. Indeed, the court recognized, "slavery seems to have been a part of human history since the 'dawn of civilization.'"[38] It was "an established legal institution" in the United States that had the official sanction of the federal and state governments and was only abolished through constitutional amendment.[39]

Moreover, the court observed, there are equitable considerations on both sides of this question that make it unclear that reparations would be an appropriate remedy for these historical wrongs. The country paid a heavy price to finally eradicate the evils of slavery. "Generations of Americans were burdened with paying the social, political, and financial costs of [the] horrific [Civil] War" that ended slavery and established "citizenship and equality under the law" for those who had suffered under this oppression.[40] Thus, the court concluded: "The sensitive ear has heard. . . the historic apologies in words

and deeds from persons of good will for the evils of slavery."[41]

Advocates of reparations are likely to be undeterred by decisions such as *African-American Slave Descendants.* Indeed, while the case was pending, another class action lawsuit was filed seeking reparations from, among others, President Bush, several foreign nations, and Pope John Paul II.[42]

Endnotes

1 *See* Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 Colum. L. Rev. 689, 702 (2003).

2 *See, e.g.,* H.R. 3745, 101st Cong. (1989); H.R. 40, 108th Cong. (2003); H.R. 40, 107th Cong. (2001).

3 375 F. Supp. 2d 721 (N.D. Ill. 2005).

4 *See* Pl. Second Am. Cmplt. ¶ 41 & n.1.

5 Moushumi Anand & Robert Mentzer, *Federal Judges Hears Arguments in Reparations Case*, Chi. Defender 2 (Sept. 28, 2006); Mick Dumke, *Power To His People*, Chicago Rep. 8 (Dec. 1, 2003).

6 Rudolph Bush, *Slavery Suit Is Dismissed for 2nd Time: Federal Judge Denies Bid For Reparations*, Chi. Trib. 1 (July 7, 2005). *See also* Editorial, *Reparations Debate Advances to More Appropriate Venue*, Chi. Sun-Times 43 (Jan. 28, 2004) ("'No one was under any illusion on how the judge would rule,' said former Attorney General Roland Burris in his capacity as adviser to reparations lawyers.").

7 For example, Diane Sammons, one of the plaintiffs' attorneys "point[ed] out that Japanese-American reparations supporters suffered several courtroom defeats before the U.S. government authorized a $20,000 tax-free payment to every surviving Japanese American interned in camps during World War II." Curtis Lawrence, *Ghosts of Slavery Haunt Court Fight: Judge to Decide Fate of Class Action Reparations Suit*, Chi. Sun-Times 7 (Jan. 25, 2004). Accordingly, even before Judge Norgle ruled, reparations advocates stated that "even if the lawsuit being heard by Norgle is dismissed, more are likely to follow." *Id.*

8 Rudolph Bush, *Slavery Suit Is Dismissed for 2nd Time: Federal Judge Denies Bid For Reparations*, Chi. Trib. 1 (July 7, 2005).

9 *Defendants to Argue for Dismissal of Reparations Lawsuits*, Chi. Defender 2 (Jan. 26, 2004).

10 Natasha Korecki & Fran Spielman, *Judge Says No To Reparations: Tosses Suit Against Firms Over Slavery, But "Fight Will Continue,"* Chi. Sun-Times 8 (July 7, 2005) (quoting Conrad Worrill, Chairman of the National Black United Front).

11 Rinker Buck, *Federal Judge in Chicago Dismisses Slavery Reparations Lawsuit*, Hartford Courant (Jan. 27, 2004).

12 Demetrius Patterson, *Plaintiffs Representing Descendants of Enslaved African Americans File Appeal on Dismissed Reparations Lawsuit*, Chi. Defender 3 (Apr. 21, 2006). On appeal, plaintiffs also sought to recuse the panel because they suspected that an African-American judge had recused herself, resulting in an "all-white, three-judge panel." *See* Natasha Korecki, *Court Hears Appeal of Reparations Suit: African-American Judge Recuses Self From Panel*, Chi. Sun-Times 16 (Sept. 28, 2006); Jeff Coen, *New Day in Court for Reparations: Plaintiffs Appeal Ruling in Suit Seeking Pay for Slaves' Descendants*, Chi. Trib. 1 (Sept. 28, 2006).

13 Natasha Korecki & Fran Spielman, "*Judge Says No To Reparations: Tosses Suit Against Firms Over Slavery, But "Fight Will Continue*," Chi. Sun-Times 8 (July 7, 2005) (quoting Conrad Worrill, Chairman of the National Black United Front).

14 Matt O'Connor, "*Judge Drops Suit Seeking Reparations: Slave Descendants Vow to Appeal*," Chi. Tribune 1 (Jan. 27, 2004) (quoting plaintiff Hannah Hurdle-Toomey).

15 Curtis Lawrence, *Judge Rejects Slavery Reparations Lawsuit: Says Lack of Link to Firms, Passage of Time Don't Back Case*, Chi. Sun-Times 6 (Jan. 27, 2004).

16 *In re African-American Slave Descendants Litig.*, 375 F. Supp. 2d at 780.

17 *Id.* at 731.

18 *Id.* at 735 (quoting Alfred L. Brophy, "*Some Conceptual and Legal Problems in Reparations for Slavery*," 58 N.Y.U. Ann. Surv. Am. L. 497, 499 (2003)).

19 *See, e.g.,* Cato v. United States, 70 F.3d 1103 (9th Cir. 1995) (slavery reparations claim against the federal government); Kelberine v. Societe Internationale, 363 F.2d 989 (D.C. Cir. 1966) (World War II reparations claims); *In re Nazi Era Cases Against German Defendants Litig.*, 129 F. Supp. 2d 370 (D.N.J. 2001) (same); Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424 (D.N.J. 1999) (same); Burger-Fischer v. Degussa AG, 65 F. Supp. 2d 248 (D.N.J. 1999) (same); *but see In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139 (E.D.N.Y. 2000) (approving class action settlement for Holocaust victims).

20 Flast v. Cohen, 392 U.S. 83, 95 (1968).

21 *Id.*

22 Raines v. Byrd, 521 U.S. 811, 819 (1997).

23 *In re African-American Slave Descendants Litig.*, 375 F. Supp. 2d at 744-45 (quoting Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 12 (2004)).

24 *Id.* at 745 (quoting *Elk Grove*, 542 U.S. at 12).

25 *Id.* at 748 (citing Allen v. Wright, 468 U.S. 737, 756 (1984)) (internal quotations omitted).

26 369 U.S. 186, 210 (1962).

27 *In re African-American Slave Descendants Litig.*, 375 F. Supp. 2d at 756 (citing United States v. Munoz-Flores, 495 U.S. 385, 394 (1990)).

28 *See Kelberine*, 363 F.2d at 995; *In re Nazi Era Cases Against German Defendants Litig.*, 129 F. Supp. 2d at 375 (D.N.J. 2001).

29 *In re African-American Slave Descendants Litig.*, 375 F. Supp. 2d at 758-59.

30 *Id.* at 767.

31 *Id.* at 770.

32 *Id.* at 775 (citing Johnson v. McAdoo, 45 App. D.C. 440 (1916)).

33 *Id.* at 776-77.

34 *In re African-American Slave Descendants Litig.*, -- F.3d --, 2006 WL 3615027, at *4 (7th Cir. Dec. 13, 2006).

35 *Id.*

36 *Id.* at *8

37 *In re African-American Slave Descendants Litig.*, 375 F. Supp. 2d at 726.

38 *Id.* at 727.

39 *Id.* at 728 (citing U.S. Const. Art. I, § 9, cl. 1 and The Fugitive Slave Act, ch. 60, § 6, 9 Stat. 462 (1850)).

40 *Id.* at 780.

41 *Id.* at 781.

42 Curtis Lawrence, "*Reparations Backer Sues Bush, Pope: Class-Action Lawsuit Demands Accounting of Profits From Slavery*," Chi. Sun-Times 7 (Jan. 8, 2004).

The Michigan Civil Rights Initiative & the Future of Racial Preferences

*By Roger Clegg & Terence J. Pell**

On November 7, 2006, the people of Michigan voted by an overwhelming 58-42% margin in favor of Proposal 2, the Michigan Civil Rights Initiative (MCRI), which bans state discrimination and preference on the basis of race, ethnicity, and sex in employment, contracting, and education programs. Ward Connerly—who, along with Jennifer Gratz, led the campaign for the passage of Proposal 2—announced the following month that he would begin an exploratory process for a "Super Tuesday for Equality" in November 2008, identifying nine states for which anti-preference ballot initiatives would be explored: Arizona, Colorado, Missouri, Nebraska, Nevada, Ohio, Oregon, South Dakota, and Wyoming.

This, then, is a good time to take stock of the lessons to be learned from MCRI and the impact it will likely have. This essay is divided into three parts: (1) a discussion of the immediate and obvious lessons and impact of the passage of MCRI itself; (2) a narrative of the appalling reaction of the University of Michigan, in particular, to MCRI's passage and what that might presage; and (3) some concluding thoughts on why, the University's reaction to the contrary notwithstanding, there is really no principled alternative, in 2007, to the abolition of government preferences based on race, ethnicity, and sex.

Immediate Lessons and Impact

The first and perhaps most obvious lesson to be drawn from the Michigan vote is that preferences of this sort are very unpopular: banned by a 58% majority of the popular vote, in a blue state, in a Democratic year, with opponents vastly outspending the supporters (by estimates that varied from 3-to-1 to 5-to-1). Voters approved the amendment over the well-publicized objections of the corporate establishment, the political establishment (Democrat and Republican alike), the media establishment, the civil rights establishment, the labor unions, and even the clergy. Voter sentiment in Michigan is similar to sentiment elsewhere. Indeed, the ban in Michigan follows that of identical bans—also by decisive margins—in two other blue states (California and Washington) in two other Democratic years (1996 and 1998).

The political significance of the vote is twofold. First, it makes it likely that if Connerly gets similar referenda on the ballot in other states, they will pass handily. Second, the support for anti-preference ballot initiatives does not depend on the support of either the major political parties, which, for different reasons, generally oppose or, at least, are reluctant to support Connerly's efforts.

The legal significance of the vote is also twofold. First, the Supreme Court does, to an extent, follow the election returns. Those justices who worry about establishment disapproval if they strike down racial preferences may be reassured if the public at least has provided them some political cover. Second, as more and more universities stop using racial admission preferences, it becomes harder and harder for the remaining schools to insist that one simply cannot run a decent university without them. Consider: The University of California public system of higher education—probably the nation's best—has not used preferences for ten years now. Washington's public universities have not used them since 1998. Florida abandoned its system of preferences in 1999. Texas used no preferences between 1996 and 2004. The University of Georgia, too, went without preferences for a time, in the early 2000s. And now add another highly regarded state system—Michigan's—to the mix. Though minority enrollment has dropped at a handful of schools in these states, overall the record is good. Hundreds of public colleges and universities have learned how to enroll academically competitive, diverse classes without the use of racial preferences. "How essential, then, can preferences be?" the Supreme Court will eventually have to ask.

Moreover, it has become increasingly clear that schools are not adhering to the limited use of race outlined by the Supreme Court most recently in *Grutter v. Bollinger* and *Gratz v. Bollinger*. Though the Court insisted that schools examine race alongside many other factors that might contribute to diversity, evidence that surfaced during the campaign for MCRI showed that race had become an even bigger factor in admissions to the University of Michigan than before. Three weeks prior to the vote in Michigan, the Center for Equal Opportunity released three studies that documented the extent to which racial and ethnic preferences were being used by the University of Michigan in its undergraduate, law school, and medical school admissions. The studies were based on data supplied by the University itself, pursuant to freedom of information requests filed by the Center and the Michigan Association of Scholars. Severe discrimination, favoring black applicants over white and Asian applicants, was found at all three schools, in all four years for which data were received (1999, 2003, 2004, and 2005, the most recent year for which data were available). Hispanics were also favored, but less so. Frequently whites were given preferences over Asians, although to a still smaller extent. Especially noteworthy, race and ethnicity were more heavily weighted in undergraduate admissions in the most recent admissions than in the system declared unconstitutional by the Supreme Court in 2003.

Thus, in the most recent year for which data were available (2005), the median black admittee's SAT score was 1160, versus 1260 for Hispanics, 1350 for whites, and 1400 for Asians. High-school GPAs were 3.4 for the median black, 3.6 for Hispanics, 3.8 for Asians, and 3.9 for whites. In the four years analyzed, the University of Michigan rejected over 8,000 Hispanics, Asians, and whites who had higher SAT or ACT scores and GPAs than the median black admittee—including nearly 2700 students in 2005 alone. The black-to-white odds ratio for 2005 was 70 to 1 among students taking the SAT, and 63 to 1 for students taking the ACT. (To put this in perspective, the odds ratio for non-smokers versus smokers dying from

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lung cancer is 14 to 1.) In terms of probability of admissions in 2005, black and Hispanic students with a 1240 SAT and a 3.2 high school GPA, for instance, had a 9 out of 10 chance of admissions, while whites and Asians in this group had only a 1 out of 10 chance.[1]

Clearly, the University of Michigan has made only token changes to its admissions system in response to *Grutter* and *Gratz*. If true in other states, this fact will increase the number and likelihood of success among further legal challenges. The perception that courts are unwilling to rein in such unlawful use of race standards has seemed only to harden public favor for ballot initiatives.

Litigation in the Aftermath of Proposal 2

Michigan Governor Jennifer Granholm and University of Michigan President Mary Sue Coleman are both staunch supporters of racial preferences. In two successful campaigns for governor, Granholm made a point of her support for every manner of race-conscious engineering. Coleman, for her part, was hired by University of Michigan regents during the final years of defense before the Supreme Court over University policies. It is not unreasonable to suppose that she was hired in part on the basis of her commitment to furthering those policies.

Both Granholm and Coleman looked for ways to minimize the effect of MCRI once it passed. In a speech on the steps of the University's "Diag" the day following passage, Coleman said, "[Proposal 2] is an experiment that we cannot, and will not, allow to take seed here at Michigan." She vowed to immediately seek a one-year delay of the amendment, and promised a full-scale legal assault in the longer term on the amendment "as it pertains to higher education."

In fact, there was a legal vehicle for challenging Proposal 2 already in place, one tailored by a well-known advocacy group called "Coalition to Defend Affirmative Action By Any Means Necessary" (more popularly known by its acronym, "BAMN"). BAMN filed a federal lawsuit broadly challenging MCRI on Equal Protection and First Amendment grounds. The suit named as defendants Governor Granholm, the three major Michigan state universities, and various other state entities and officials.

With forty-five days till MCRI became law, Coleman had to work fast. She got the presidents of the two other Michigan universities to join her in filing a cross-claim against the Governor, asking the court to enjoin the Governor from enforcing the terms of Proposal 2 with respect to college admissions during the current admissions cycle. By way of rationale, she proclaimed herself uncertain about the new requirements of the Amendment, and said it would be unfair to guess. In her legal analysis, she asserted that the term "preference" was only meant to ban "irrational" preferences and not preferential policies carefully crafted to achieve the benefits of diversity. But prior to the passage of Proposal 2, Coleman had repeatedly stated that the Amendment would mean an end to race-conscious admissions policies, and explained her vigorous campaign against it on this understanding.

It could have been fairly straightforward for the University to eliminate race from its admissions system. Already 80% of its applicants were evaluated without regard to race. The Amendment only required the University do the same with respect to the remaining 20%. The University touts its ability to evaluate all aspects of an applicant's file, including non-academic contributions to "diversity;" so, eliminating race still left the University plenty of ground on which to make evaluations.

After filing cross-claim against the Governor, Coleman's lawyers worked to persuade all parties to agree to a stipulated settlement of the claim. Days later, the executive branch of the state—including the Governor, the Attorney General, and presidents of the three major public universities, together with BAMN—went before U.S. District Judge David M. Lawson with a unanimous request to give their settlement the force of a federal court order. Judge Lawson issued an order immediately, barring anyone from enforcing Proposal 2 against the universities (including private litigants) until July 1, 2007.

Lawson issued his order despite having several pending motions to intervene from individuals and groups opposed to the delay before him—including one from Eric Russell, who was just then applying to the University of Michigan Law School. Judge Lawson signed the order, stating that the interests of the public were adequately represented by their elected officials—meaning Granholm, Cox, Coleman, and two other university presidents. With the exception of Cox, all had declared their intention to do whatever it took to undermine Proposal 2. Lawson's authority to suspend the state constitutional provision depended on a prior determination that the Amendment violated federal law. But the judge never took up the question. With the pro bono help of partner Charles J. Cooper of the Washington law firm of Cooper & Kirk, PLLC, Russell filed an emergency appeal to the U.S. Court of Appeals for the Sixth Circuit. and it was left to a three-judge appeals panel to consider whether a state amendment banning the use of racial preferences somehow violated federal law.

With a sweeping, fast decision, the panel declared that the citizens of the states may at any time decide to do away with racial preferences. The panel's decision, authored by Jeffery Sutton, will smooth the way for state ballot initiatives now being planned for other states. It makes clear that neither state schools nor racial minorities have a federal right to racial preferences. The point is an important one. Opponents of statewide bans against racial preferences have long argued that prohibiting the use of racial preferences across-the-board violates the Equal Protection Clause of the Fourteenth Amendment because it imposes special burdens on the ability of minority individuals to lobby for racial preferences. On this view, racial preferences are just like any kind of favored legislative treatment, and it is unfair to single out race-based favoritism for special procedural burdens, especially an absolute ban. But the Fourteenth Amendment generally forbids racial distinctions of any kind in state law. This was the Ninth Circuit's reason for rejecting the idea that a California ban on racial preferences somehow violated the Fourteenth Amendment in 1997. As Judge Diarmuid O'Scannlain put it, "The Fourteenth Amendment, lest we lose sight of the forest for the trees, does not require what it barely permits."

The panel's decision adopted O'Scannlain's analysis, and noted that the Supreme Court itself only recently suggested that

states were free to ban racial preferences in its 2003 decisions involving the University of Michigan. In *Grutter v. Bollinger*, the Court explicitly directed schools to look to California, Florida, and Washington State, where racial preferences in admissions were (and are still) prohibited by state law.[2] As a general matter, states are free to provide "more" equal protection than the 14th Amendment happens to require. The panel concluded, "In the end, a law eliminating presumptively invalid racial classifications is not itself a presumptively invalid racial classification."

Coleman's advanced a second argument, one based on the First Amendment. They claiming that, following *Grutter*, schools like the University of Michigan have a federal right to racial preferences to achieve the educational benefits of diversity. According to their argument, the Court's rationale in recognizing a "diversity" interest relied on the First Amendment interest colleges have in making such academic decisions as to whom to admit and what to teach. So, the three Michigan universities argued that, even if a statewide ban on race preferences did not violate the constitutional rights of minority individuals, it at least violated the right of state universities to assemble racially diverse classes. The Sixth Circuit panel dispensed with this argument, as well, holding that a First Amendment *interest* (assembling diverse classrooms) is not the same as a First Amendment *right* (trumping a citizen ballot initiative). The court noted that the citizens of Michigan possess First Amendment rights against the state, not the other way around.

Citizen ballot initiatives in California and Washington have not faced the sort of systematic, across-the-board executive branch resistance that MCRI has thus far received. Governors in both states have held that it is the oath of office to faithfully enforce the law, whether or not they happen to agree with it. Perhaps because the University of Michigan has been so closely identified with the political fight to preserve racial preferences, officials in Michigan feel more confident in their position. But official barriers may well crumble, now that the Sixth Circuit has decisively ruled against the possible federal challenges to Proposal 2.

Perhaps the fact that the University of Michigan has been so closely identified with the political fight to preserve racial preferences explains why officials in that state felt more confident in defying the law. And perhaps official obstruction in Michigan will crumble now that the Sixth Circuit has decisively ruled against the possible federal challenges to Proposal 2. In either event, the overheated character of the official reaction to date only points to the increasingly weak case for racial preferences, a subject we take up in the concluding section of this essay.

The Racial-Preference End Game

Last year, Detroit mayor Kwame Kilpatrick raised eyebrows when he proclaimed, George Wallace-style, "Affirmative action today, affirmative action tomorrow, affirmative action forever!" He was, of course, explaining his opposition to the Michigan Civil Rights Initiative. That declaration may have been an extreme example, but, still, one wonders what the vision of people like Mayor Kilpatrick is with respect to American race relations and, more specifically, what their exit strategy is for racial preferences. It is clearly more muddled and pessimistic than their opponents'.

There is obvious irony in this. Once upon a time, Martin Luther King, Jr., wrote a book titled *Why We Can't Wait*. In those days, it was liberals who were in a hurry when it came to ending discrimination, who wanted to end all the naysaying nonsense and enact their vision forthwith, without delay. Now the roles of left and right are reversed. Now it is conservatives—and, indeed, most Americans—whose vision on race relations is more likely to be simple and clear. Discrimination, both public and private, is a bad thing. Laws against it should be enforced. Individuals are of course free to embrace their ethnic identity—and wear "Kiss Me I'm Irish" or "Black Is Beautiful" buttons (or maybe both, for Mayor Kilpatrick)—but that identity should have only de minimis social relevance and absolutely no legal consequences.

Social programs for the disadvantaged should be means-tested but color-blind. If you are poor and need a scholarship, for instance, it does not matter whether your poverty is somehow traceable to the fact that an ancestor came over on a slaveship, rather than via a leaky boat in the South China Sea, or by swimming the Rio Grande—or even if your poverty is a result of the fact that you were born in a dying West Virginia coal town. The fact that African Americans were once enslaved and, after that, subjected to Jim Crow laws, is neither denied nor minimized, but two wrongs do not make a right. America is not the same country is was in 1865 or even 1965, and the time—at long last—to end racial preferences of all kinds has come. Right now.

But what does the Left want? For at least some of them, it is not clear that they share most Americans' distrust of racial classifications and desire to minimize racial identity and identity politics. One senses that the "celebration of diversity" requires, first of all, individuals to embrace a color-based or national-origin-based view of self and the world. One has to wear that "Kiss Me I'm Irish" or "Black Is Beautiful" button prominently, and all year around. It is not that other people will not forget your ethnicity; it is that you do not want them to, your own self.

To be sure, that is not true of all liberals. But there does seem to be much more agreement among them that racial preferences need to remain in place. They need to remain in place until… well, when exactly? "Forever"? We are very skeptical that the proponents of racial preferences have given much thought to an exit strategy. We say this for three reasons.

First, it is the nature of preferences and the bureaucracies they create that, the longer they are in place, the harder it is to dismantle them.

Second, the number of groups eligible for the preferences keeps expanding. First African Americans. But then Native Americans and Latinos. Then women. Then Asians. Doubtless other non-European ethnic groups—e.g., Arab Americans, who are now frequently and ironically discriminated against by "affirmative action"—are not far behind. The multiplication of eligible groups makes it more and more likely that…

… Third, the day will never come when all the different "racial disparities" used to justify preferences will all come to an end. What is more, the presence of racial preferences

often makes it harder to end racial disparities. After all, those preferences undermine the self-reliance and sense of personal responsibility which—more so even than ending still-existing discrimination—is the real necessity today for the continued advancement of, especially, African Americans.

Those of us who oppose racial preferences know that racial disparities still exist, and we join all Americans in wishing that they did not. But our vision of how to accomplish this task is more realistic. We should, first and foremost, ensure that the laws against racial discrimination are vigorously enforced. We are confident that this can be done and that doing so will make a difference—that members of all racial and ethnic groups can meet the rigors of competition. The proponents of preferences seem not to share this confidence. In all events, increasingly no one can doubt the harms and unintended consequences of the continued use of racial double standards in all aspects of American life. Regardless what else one thinks must be done, everyone ought to agree that the time for ending racial preferences has come.

The first obligation of government is to do no harm. Americans have made enormous progress in the last generation toward a multiracial, multiethnic society in which the dream that we be judged by the content of our character and not the color of our skin is not just a dream, but a reality. Younger Americans, in particular, seem less and less to be motivated by, or even to notice, race; bigotry is, quite literally, dying out. Now is not the time—if it ever was—to further institutionalize racial preferences and all the resentment and stigmatization that goes with them.

An increasingly multi-racial and multi-ethnic America will have difficulty surviving in the twenty-first century it it does not act now to end a system of state-imposed racial and ethnic preferences. For in such a society, it will become increasingly rancorous to determine which groups are to be preferred and which ones discriminated against, and to define and police membership in the various groups.

Endnotes

1 Studies posted on the Center for Equal Opportunity's website: www.ceousa.org.

2 539 U.S. 306 (2003), at 342.

Corporations, Securities & Antitrust

Testing the Waters of Sarbanes-Oxley Whistleblower Claims

*By J. Gregory Grisham & James H. Stock, Jr.**

It has been nearly five years since Congress, in the aftermath of several corporate scandals, including Enron and WorldCom, passed the Corporate and Criminal Fraud Accountability Act of 2002, better known as the "Sarbanes-Oxley Act" or "SOX" for short.[1] Among the many civil and criminal provisions of SOX is a whistleblower provision, Section 806(a), codified at 18 U.S.C. §1514A, that seeks to protect employees from retaliatory employment actions in certain specified circumstances.[2] Questions remain whether Section 1514A provides sufficient protection for corporate whistleblowers who attempt to fall within its coverage and whether it is fair to corporate employers charged with retaliation under the Act. This article will examine Section 1514A, the regulations relating thereto that have been promulgated by the United States Department of Labor (DOL), and the experience of litigants in Occupational Safety & Health Administration (OSHA) investigations and whistleblower actions before administrative law judges (ALJs) and the federal courts.[3]

Section 1514A

Section 1514A protects employees who provide information, cause information to be provided or assist in an investigation "regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348 [of Title 18], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders."[4] In addition, for the employee to be protected by the statute, the information pertaining to the violation must be provided to one of the following: "(a) a Federal regulatory or law enforcement agency; (b) any Member of Congress or any committee of Congress; or (c) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct)."[5] An employee is also protected in filing, causing "to be filed, testifying, participat[ing] in or assist[ing] in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348 [18 USCS §1341, 1343, 1344, or 1348], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders."[6] An employer for purposes of Section 1514A is a company "with a class of securities registered under Section 12 of the Securities and Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company."[7] Under Section 1514A, an employer may not "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee.[8]

An employee who believes that he was subjected to retaliation, in violation of SOX, must file an administrative complaint with the Secretary of Labor within ninety days after the violation occurs.[9] If a final decision is not issued by the Secretary of Labor within 180 days of the filing of the complaint, jurisdiction may transfer to the federal district court and the complainant may then bring his claim before the federal court for a de-novo review, provided that "there is no showing that there has been delay due to the bad faith of the complainant.[10]

29 CFR Part 1980

The Secretary of Labor has issued final rules regarding the handling of discrimination complaints under Section 1514A.[11] The complainant should file a complaint with the Area Director of OSHA, in the area where the complainant lives or was employed, but a complaint may be filed with any OSHA official or employee.[12] To avoid a dismissal of the complaint, the complainant is required to make a prima facie showing that "protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint."[13] Even if a prima facie case is established by the complainant, an investigation can be avoided if the employer "demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected behavior or conduct."[14] Where the employer does not make the required showing to rebut the prima facie case, an investigation is conducted and the Assistant Secretary of Labor is required to issue written findings, within sixty days of the filing of the complaint, as to whether or not there is reasonable cause to believe that the employer has discriminated against the complainant in violation of the Act.[15] A reasonable cause finding will be accompanied by a preliminary order of "make whole" relief.[16] The parties have the right to file objections within thirty days and to request a hearing before an ALJ.[17] The regulations require the ALJ to conduct a de novo hearing, where the formal rules of evidence will not apply, and to issue a written decision containing appropriate findings, conclusions and an order pertaining to remedies.[18] The ALJ cannot make a determination that a violation has occurred unless the complainant demonstrates that the protected conduct was a contributing factor in the unfavorable personnel action alleged in the complaint.[19]

The ALJ may not order relief where the employer demonstrates, by clear and convincing evidence, that it would have taken the same adverse personnel action in the absence

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of any protected behavior.[20] A party that wishes to appeal an ALJ decision must file a written petition for review with the Administrative Review Board ("the Board") within ten business days of the decision of the ALJ; otherwise, the ALJ's ruling becomes the final order of the Secretary.[21] The ALJ's order will also become the final order of the Secretary unless the Board, within thirty days of the filing of the request for review, issues an order notifying the parties that the Board has accepted the case for review.[22] If the Board accepts the case for review, the Board reviews the factual determinations of the ALJ under a "substantial evidence" standard of review.[23] If it concludes that a violation has occurred, the Board will issue an order directing the employer to make the complainant whole; if it concludes otherwise, an order will be issued denying the complaint.[24] A party adversely affected by an order of the Board may file a petition for review of the order in the United States Court of Appeals for the circuit in which the violation allegedly occurred, or the circuit in which the complainant resided on the date of the violation.[25]

Criticisms of Section 1514A

While Section 1514A created a new right for corporate whistleblowers, some commentators have criticized the law as being inadequate.[26] It has been suggested that the limited avenues for making a complaint may deter some employees from coming forward with complaints.[27] It has also been argued that the ninety day deadline for filing a complaint with OSHA is unreasonable as the time for filing runs from the day that the violation occurs, as opposed to ninety days from when the violation is discovered.[28] Another criticism of Section 1514A is that ALJs and federal district judges are likely to apply an objection standard, as opposed to the more employee-favorable subjective standard, in evaluating whether the complainant reasonably believed that certain conduct violated federal securities laws, which, according to this argument's proponents, will make it harder for complainants to prevail.[29] Other criticisms of the statute and related regulations include the argument that Congress was not serious about Section 1514A because it gave enforcement responsibility to OSHA instead of the SEC, which has the "technical expertise to truly evaluate the complainant and ascertain whether fraud and other manipulation of stock (and/or the marketplace) has taken place; [while] OSHA would not."[30] One commentator has opined that the Section 1514A regulations create a "relaxed structure in which a complaint can be filed, lacking effective means to discourage frivolous filings" and that the regulations reiterate "vague definitions of important concepts within the statute."[31] Finally, some may argue that since Section 1514A does not provide for a right-to-jury trial in cases where jurisdiction is transferred to federal court, that complainants will be at a disadvantage.[32]

OSHA Statistics

SOX retaliation complainants began filing complaints with OSHA in 2002. The number of complaints increased through Fiscal Year 2005 ("FY") to a high of 285 complaints in 2005, before dropping to 223 complaints in FY 2006.[33] From the date of enactment through December 10, 2006, a total of 881 SOX whistleblower complaints were received by OSHA; out of 881 complaints, 791 have been concluded, with 110 withdrawn, 586 dismissed, and 127 found to have merit (of which 110 have settled).[34] Based on the total number of complaint investigations completed, the reasonable-cause finding percentage for SOX whistleblower complaints is 16%.[35] However, a recent article noted that in cases that are appealed out of the OSHA investigative stage to ALJs or the Board of Review "only 5 whistleblowers have won, though that number dwindled to 4 last summer, when the agency's administrative review board overturned a case on appeal… Companies have appealed 3 of the remaining 4 to the board, whose handful of judges so far have not decided an appeal in favor of a whistleblower.[36]

Illustrative Decisions Under Section 1514A

In the federal courts, only a few SOX retaliation cases have been decided on the merits.[37] Recently, the Second Circuit, in *Alliance Berstein Inv. Research & Mgmt., Inc. v. Schaffran,*[38] found that the issue of whether a SOX retaliation claim was excluded from arbitration as "a claim alleging employment discrimination" under Rule 10201(b) of the Code of Arbitration Procedure of the National Association of Securities Dealers (NASD) was a question for the arbitration panel under the NASD Code of Arbitration Procedure.[39]

(1) Evidentiary Framework

The foundational elements for succeeding on a SOX whistleblower complaint are laid out in *Collins v. Beazer Homes, Inc.*[40] The complainant must show that: "(1) she engaged in protected activity; (2) the employer knew of the protected activity; (3) she suffered an unfavorable personnel action; and (4) circumstances exist to suggest that the protected activity was a contributing factor to the unfavorable action."[41] The court stated that "proximity in time is sufficient to raise an inference of causation."[42] The court then noted that the defendant "may avoid liability if it can demonstrate by clear and convincing evidence that it 'would have taken the same unfavorable personnel action in the absence of [protected] behavior.'"[43]

In *Collins,* soon after the plaintiff, Collins, started working for the defendant, she began having differences with her manager, the division president, and the director of sales.[44] Collins alleged that these individuals were improperly favoring a particular advertising agency.[45] Collins complained to the vice president of sales and marketing of these problems, along with other generalized allegations of "improper conduct."[46] Collins was later terminated and filed a complaint with OSHA requesting whistleblower protection under SOX.[47] When OSHA failed to issue a final administrative decision with 180 days, Collins filed her case in federal court, and after discovery, the defendant moved for summary judgment.[48] Collins alleged that she was terminated because she reported violations of the defendant's internal accounting controls in violation of securities laws.[49] In defense, the company argued that Collins' complaints were not covered by SOX, because she never made *specific* allegations of securities or accounting fraud or violations of any specific SEC rules, but instead made vague or imprecise

complaints.[50] The district court, in denying the defendant's motion for summary judgment, found that SOX protects "all good faith and reasonable reporting of fraud" and that there was a genuine issue of material fact as to whether the complaints were protected activity under SOX.[51] Even though the district court found that "the connection of Plaintiff's complaints to the substantive law protected by Sarbanes-Oxley is less than direct," it allowed the plaintiff's complaint to proceed.[52] The district court also found that summary judgment was inappropriate because there was a factual dispute over whether the defendant would have taken the same employment action absent the protected activity.[53]

(2) Protected Activity

In *Romaneck v. Deutche Asset Management*, plaintiff Romaneck had been subpoenaed to testify before the SEC.[54] He was subsequently fired by the defendant Deutsche Asset Management and was allegedly informed that his firing was due to his intent to testify and "spill the beans on everything he knew" about clients' prohibited "market timing" transactions, and, therefore, he was "not a team player."[55] Romaneck sued for, among other things, wrongful discharge under Section 1514A of SOX. The court, in finding that summary judgment for the defendant was not appropriate on plaintiff's SOX whistleblower claim, noted that "protected activity" under SOX includes not only reporting a specific SOX violation, but also activities such as filing, testifying or otherwise participating in a proceeding if it relates to an alleged securities law violation.[56] Here, the district court found that the plaintiff's anticipated testimony before the SEC was sufficient to constitute protected activity under Section 1514A.[57]

(3) Employer Knowledge of Protected Activity

Courts have engaged in a fact-sensitive inquiry when determining whether an employer was put on notice as to alleged protected activity. Recently in *Fraser v. Fiduciary Trust Company International*,[58] the district court evaluated what constitutes notice to the defendant.

From 2000 to 2003, the plaintiff Fraser was a Vice President at Fiduciary Trust Company International, an investment management company.[59] Fiduciary was acquired by Franklin Resources Inc. in 2001, and Fraser claimed illegal conduct related to Franklin's acquisition of Fiduciary. Specifically, Fraser alleged that filings in connection with the acquisition contained "insufficient, not meaningful, materially false and misleading" statements.[60] Fraser was terminated and brought a SOX whistleblower claim, as well as, several other federal and state statutory claims and a common law claim for breach of contract.

The court addressed several issues in determining if Fraser's SOX claim could proceed to trial. First, Fraser related that he had sent E-mails to Fiduciary's Chief Investment Officer which claimed that the investment performance had suffered because they had failed to implement his recommendations for investing. The court dismissed this allegation, stating that the e-mail was more in the form of a complaint that his advice was not being followed and did not indicate anything to put Fiduciary on notice related to the fraud of the shareholders.[61] Additionally, Fraser's allegation in which he asserted that Fiduciary had discharged him after he had prepared a confidential letter alleging that a portfolio manager had not listened to investment strategy advice, was also dismissed. Here, the court concluded that the documents were "barren of any allegation of conduct that would alert Defendants that Fraser believed the company was violating any federal rule or law related to fraud on shareholders.[62]

Fraser also alleged, that he had prepared an email to distribute firmwide stating that the "company's Fixed Income Group was 'recommending a SELL on WorldCom bonds due to deteriorating industry conditions, continued pricing pressures and heightened competition,'" but was told not to send it out and that he made the Company's President aware of this incident.[63] In addition, Fraser alleged that one to two weeks prior to his termination, he confronted the Head of the Company's Fixed Income Group concerning a scheme to manipulate and falsify managed assets. Fraser alleged that this scheme resulted in Fiduciary receiving a nominal consulting fee, but that his report was "brushed off" by management. [64] The court ultimately determined that Fraser satisfied the elements for a SOX whistleblower claim on his allegations related to the WorldCom bond incident and the alleged scheme.[65] In another case, *Richards v. Lexmark International, Inc.,* the plaintiff had been employed by the defendant for just over two years, when, in late 2002, the employer began to discuss firing him.[66] Lexmark had a well-documented history of performance problems with Richards and his difficulties getting along with coworkers. The company also had well-established documentation of its likely intention to fire Richards in January 2003.

In December 2002, Richards was assigned to assess the company's inflated levels of inventory displayed through record keeping over the previous two years.[67] He provided a preliminary analysis on January 3, 2003, asserting that the company's accounting and bookkeeping methods would potentially lead to erroneous inventory-management reporting. Richards was terminated the next day, at which time he filed a complaint with OSHA alleging that he was fired over the concerns he raised regarding Lexmark's accounting practices.[68]

Lexmark argued that ample documentation proved that it would have fired Richards despite the report he filed. However, construing the evidence in Richard's favor, the ALJ held that the proximity in time between his protected activity and his discharge was more than sufficient to raise an inference of causation, and that Lexmark failed to show by clear and convincing evidence that it would have fired him even in the absence of this conduct.

In June 2006, the case was again reviewed by the ALJ. The main issue addressed was whether Richards reasonably believed that what he was reporting was a violation, such as providing false information to investors which they may rely upon. The ALJ noted that the burden lay with Richards to establish both a subjective and objective element, that he must have actually believed there was a violation, and that that belief must have been reasonable, taking into consideration his training and experience.[69]

Richards' main concern was that upper management was receiving data that was misleading, and that management decisions based upon that information could mislead the

public.[70] The ALJ concluded, however, that Richards did not go so far as to say that the data included intentional misrepresentations or fraud or that that information was disseminated to investors and shareholders.[71] In determining that Richards failed to establish reasonable belief that actual violations and intentional misrepresentations had occurred, the ALJ further noted that Richards did not mention any SEC rules or regulations, or fraudulent activity relating to criminal or civil statutes that were violated.[72]

The ALJ went on to state that no facts were demonstrated that would allow a reasonable person with Richard's training and experience to determine that there was a potential violation of SEC rules or securities fraud.[73] Therefore, Richards could not have reasonably believed that there was a violation, nor did he successfully communicate concerns about a violation.[74]

(4) Unfavorable Personnel Action

When making a determination whether an employment action is adverse for purposes of SOX, courts and ALJs sometimes look to cases decided under Title VII of the Civil Rights Act of 1964 ("Title VII") for guidance.[75] For example, in *Halloum v. Intel Corporation*, the ALJ concluded that a modified, personal corrective action plan which the company forced on the employee was indeed an adverse employment action.[76] The reasoning was that, while the original plan was acceptable, the modified plan included unattainable tasks and set him up for failure, thereby unfavorably affecting his employment.[77] In another case, *Bozeman v. Per-Se Technologies, Inc.,* Bozeman claimed that Per-Se Technologies retaliated against him for complaining to the SEC about "financial irregularities within the company."[78] Per-Se did not dispute that this conduct was a protected activity for purposes of Section 1514A.

Upon filing a claim with the SEC, Bozeman took a medical leave of absence under the Family Medical Leave Act ("FMLA") from March 2003 until his resignation in July 2003.[79] The cause of his leave was stated as severe hypertension, anxiety, and depression, which he attributed to his work environment and remained on physician recommended leave. Throughout the duration of his leave, Bozeman remained in contact with his employer and expressed his desire and intention to return to work.[80] On the day he was scheduled to return, Bozeman notified Per-Se of his resignation.

Bozeman subsequently filed an action against Per-Se and former supervisors alleging violations of Title VII, Section 1514A and as well as several common law claims. Bozeman's complaint alleged that defendants, including individual managers, violated his civil rights by retaliating against him because of his participation in investigations of alleged discrimination committed by defendants, the intentional infliction of emotional distress upon him and by negligently supervising, retaining, and hiring employees.

The court first ruled that Bozeman could not maintain a SOX claim in court against individual managers because he did not name them as respondents when he filed his initial SOX complaint with the DOL.[81] Next, the court rejected Bozeman's alleged "constructive discharge" based on Bozeman's resignation.[82] Here, Bozeman failed to establish the requisite hostility directed at him to support a constructive discharge and was unable to establish an adverse employment action. Bozeman's resignation did not qualify as an adverse action under SOX because his working conditions were not so intolerable that a reasonable person would conclude that he had no other option than to quit. Bozeman contended that he felt he had been "met with hostility" at a meeting in which his managers discussed his returning to work.[83] The court stated, Plaintiff's subjective feeling of hostility . . . is not an adverse employment action."[84]

(5) Causal Connection between Protected Activity and Adverse Action

One of the most difficult elements of proof for plaintiffs in Section 1514A cases is connecting the alleged protected activity to the unfavorable job action. In *Sussberg v. K-Mart Holding Corporation*, the plaintiff, a buyer for K-Mart retail stores, claimed his employment was terminated by K-Mart in violation of Section 1514A.[85] Sussberg claimed retaliation for informing his superiors that his direct supervisor may have been accepting bribes and kickbacks from clothing vendors.

The district court granted K-mart's motion for summary judgment, concluding that Sussberg failed to establish a causal connection between any protected activity and his termination. K-Mart argued that the time lapse between Sussberg's alleged protected activities and his termination was more than five months and that his original allegations went back twenty months prior to his termination. The district court agreed with K-Mart's argument, noting that "while the passage of time is not a conclusive factor, at some point Sussberg's involvement…can no longer shield him from being discharged, particularly where there are intervening events."[86]

(6) Exhaustion of Administrative Remedies

In addition to meeting the requisite standard for a prima facie case, established in *Collins*, complainants are required to first exhaust all administrative remedies. For example in *Willis v. Vie Financial Group*, *Inc.*, an employee filed an administrative complaint with OSHA over his employer's threats to terminate him and strip him of his job responsibilities.[87] However, he did not include the allegation that he was terminated from his position in retaliation after he advised his employer that it had failed to comply with NASD requirements. The district court held that it could not consider a retaliatory discharge claim because it was not raised in the administrative complaint. Therefore, since the plaintiff failed to exhaust all administrative remedies, the court dismissed his retaliatory discharge claim. Nonetheless, the plaintiff was permitted to proceed on his retaliation claim over diminished responsibilities, since it amounted to an adverse change in working conditions.

(7) Preliminary Orders of Reinstatement

In *Bechtel v. Competitive Technologies, Inc.*, the Second Circuit reversed the district court's injunction order enforcing the preliminary order of reinstatement issued by OSHA.[88] The court of appeals held that the district court lacked the power to enforce OSHA's preliminary order under the plan language of Section 1514A. The court of appeals added that the language of the SOX whistleblower provision only provides federal jurisdiction to actions brought by the DOL and private parties

when a final order has been issued or when no final order is issued within 180 days after the filing of the complaint. The court found the statutory grant of federal jurisdiction did not extend to preliminary orders and concluded that the district court lacked jurisdiction to issue an injunction enforcing OSHA's preliminary order of reinstatement.

(8) Extraterritorial Application of Section 1514A

In *Carnero v. Boston Scientific Corp.,* the First Circuit held that the whistleblower protections of Sarbanes-Oxley do not extend to foreign citizens working outside the United States for foreign subsidiaries of companies covered by SOX, since there is a general presumption against applying statutes extraterritorially, and since Congress did not indicate that it intended Section 1514A to be applied extraterritorially.[89]

(9) Definition of Employer

In *Brady v. Calyon Securities (USA)*, the district court dismissed the SOX whistleblower claim of the plaintiff on the grounds that he was an employee of a non-publicly traded company.[90] The court rejected the plaintiff's argument that because his employer acted as an agent for certain publicly-traded companies related to investment banking activities, that he was protected by Section 1514A.[91]

(10) Preemption

A district court recently rejected a defendant's argument that a retaliation claim brought under the laws of Puerto Rico was preempted by Section 1514A of SOX. In *Melendez v. Kmart Corporation*,[92] the court, in reviewing the statutory language under Section 1514A(d), found no congressional intent to preempt other federal or state laws.[93]

CONCLUSION

Section 1514A has provided corporate whistleblowers with important new protections. The evidence to date shows that complaints filed with OSHA have increased in the four and one-half years since enactment and that merit-finding rates are relatively high. However, plaintiffs whose complaints are appealed out of the OSHA investigative process have not fared as well before ALJs and the federal district courts. Plaintiffs appear to have the most difficulty proving protected activity and a nexus between the protected activity and the adverse employment action. The recent cases demonstrate that courts are reluctant to stray from the specific statutory language set out in Section 1514A and appear to be relying on case law from other DOL-enforced whistleblower statutes to interpret Section 1514A. While reasonable minds may differ on the question of whether Section 1514A needs to be re-examined, it will remain one of the many potential tools for plaintiffs in employment cases challenging a termination or other adverse job action.

Endnotes

1 Pub. L. No. 107-204, 16 Stat. 745 (codified as amended in scattered sections of Title Eighteen of the United States Code). *See generally*, Chiara, John B. and Orenstein, Michael D., "Whistleblower's Nocturne in Black and Gold-The Falling Rocket: Why the Sarbanes-Oxley Whistleblower Provision Falls Short of the Mark", 23 Hofstra Lab. & Emp. L.J. 235, 237-38 (Fall 2005)(hereinafter cited as "Chiara & Orenstein, at p. ___").

2 18 U.S.C. §1514A, (a).

3 Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VII of the Sarbanes-Oxley Act of 2002 (Final Rule), 29 CFR Part 1980 (hereinafter "29 CFR §___").

4 18 U.S.C. §1514A(a)(1).

5 18 U.S.C. §1514A(a)(1)(A)-(C).

6 18 U.S.C. §1514A(a)(2).

7 18 U.S.C. §1514A(a).

8 *Id*. The types of employment actions that potentially trigger liability under SOX may be expanded by The United States Supreme Court's recent decision in *Burlington Northern & Santa Fe Railroad Company v. White*, __U.S._ __, 126 S. Ct. 2405, 2409 (2006) ("We conclude that the anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace. We also conclude that the provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant. In the present context that means that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.

9 18 U.S.C. §1514A(b)(1). SOX "is one of 14 whistleblower laws passed since 1974 enforced by the DOL [covering] employees connected to specific topics such as: nuclear materials, airline, trucking, shipping safety, air wand water pollution, [and] abuse of migrant workers." Day, K., *White-Stop Campaigns: Some Firms Are Trying to Limit Protection of Workers Who Expose Wrongdoing*, Washington Post (April 23, 2006). The 14 statutes enforced by OSHA and the regulations governing their administration are listed on OSHA's website. *See* http://www.osha.gov/dep/oia/whistleblower/index.html. Many states, such as New Jersey, have enacted whistleblower statutes that have been liberally construed by their respective state courts. *See, e.g.,* Mehlman v. Mobile Oil Corp., 153 N.J. 163, 707 A. 2d 1000 (1998). In some states, a common law retaliatory discharge cause of action co-exists with a statutory whistleblower action. *See, e.g.,* Guy v. Mutual of Omaha Ins. Co., 79 S.W. 3d 528 (Tenn. 2002).

10 18 U.S.C. §1514A(b)(1). 29 CFR §1980. 114(a). The complainant is also required to file with the ALJ or the Board of Review a notice of intention to file a complaint in federal court fifteen days prior to filing the federal court complaint. *Id*. at §1980. 114(b).

11 *See generally* 29 CFR Part 1980.

12 *Id*. at §1980. 103(c).

13 *Id*. at §1980.104(b). The prima facie requirements are: "(i) The employee engaged in a protected activity or conduct; (ii)The named person knew or suspected, actually or constructively, that the employee engaged in the protected activity; (iii)The employee suffered an unfavorable personnel action; and (iv) The circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable action." Id. The rules provide that "[n]ormally the [prima facie] burden is satisfied, for example, if the complaint shows that the adverse action took place shortly after the protect activity, giving rise to the inference that it was a factor in the adverse action." *Id*. at §1980.104(b)(2). However, courts have held that "mere allegations of whistleblowing without a connection to securities fraud will result in a dismissal of a civil claim." Fatino, J., *The Sarbanes-Oxley Act of 2002 and the New Prohibition on Employer Retaliation Against Whistleblowers: For Whom The Bell Tolls or Tooting One's Own Horn*? 51 S.D.L. Rev. 450, 454 n. 20 (2006) ("Fatino, J.")(citing Rogus v. Bayer Corp. No. 3:02cv1778 (MRK), 2004 U.S. Dist. LEXIS 17026, at *18n. 6 (D. Conn. 2004)).

14 29 CFR §1980.104(c). The employer has 20 days from receipt of notice of the complaint to provide a position statement and supporting evidence or request a meeting with the Assistant Secretary to present its position. *Id.*

15 *Id*. at 1980.105(a).

16 *Id*. at §1980.105(a)(1).

17 *Id*. at §§1980.105(b)(c). The preliminary order is stayed, with the exception of the portion, if any, requiring preliminary reinstatement, upon the filing of timely objections. Id. at §1980.106(b)(1). If no timely objections are filed, the findings and/or preliminary order become the final decision of the Secretary, not subject to judicial review. Id. at §1980,106(b)(2). Judicial enforcement is authorized where a party fails to comply with a preliminary

order of reinstatement or a final order or the terms of a settlement agreement. Id. at §1980.113.

18 *Id*. at §§1980.107 & 1980.109. The ALJ is required to award a make whole remedy, including "reinstatement of the complainant to that person's former position with the seniority status that the complainant would have had but for the discrimination, back pay with interest, and compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney's fees." Id. at §1980. 109(b).

19 *Id*. at §1980.109(a).

20 *Id*.

21 *Id*. at §1980.110(a).

22 *Id*. at §1980.110(b).

23 *Id*. The Board is required under the regulations to issue a final decision within 120 days of the conclusion of the hearing. *Id.* at 1980.110(c).

24 *Id*. at §§1980.110(d)(e).

25 *Id*. at §1980.112(a).

26 *Chiara & Orenstein*, at 251-54; *Whistle-Stop Campaigns*, at 1-3, Cf. Lundgren, A., *Sarbanes-Oxley, Then Disney; The Post-Scandal Corporate-Governance Plot Thickens,* 8 Del. L. Rev. 195, 199-204 (2006).

27 *Chiara & Orenstein,* at 251-52.

28 *Id*. at 253. For example, in *Harvey v. Home Depot, Inc.*, DOL-ALJ, No. 2004-SOX-00020 (May 28, 2004) the ALJ dismissed the employee's retaliation complaint finding that the complaint was not timely filed within the 90 day window. *See also* McClendon v. Hewlett-Packard Company, 2005 U.S. Dist. LEXIS 29449, at *6-13 (D. Idaho 2005).

29 *Chiara & Orenstein*, at 253-54. A subjective standard focuses on what the plaintiff actually believed at the time the complaint was made while an objective standard is more restrictive, focusing on what a reasonable person would have believed under the same or similar circumstances.

30 Fatino, J. *supra* at 461.

31 *Id*.

32 *Moy, L. & Neilan, L. Whistleblower Claims Under The Sarbanes-Oxley Act of 2002,* 1556 PLI/Corp 451, 472 (Sept-Dec. 2006), "In the absence of an explicit legislative grant, courts have held this to mean that the right [to a jury trial] simply does not exist." *Id*. [citing *Fraser v. Fiduciary Trust Co.*, 417 F. Supp. 2d. 310 (S.D.N.Y. 2006) [remaining citations omitted].

33 Telephone interview with OSHA *Official Nilgun Tolek, conducted by Lauren Donald* (December 18, 2006) (hereinafter, "OSHA Stats"). The regulations provide for "investigative settlements" and "adjudicatory settlements" that can be enforced by a federal district court. 29 CFR §§1980.111(d)(1)&(2) and §1980.113.

34 OSHA Stats.

35 *Id*. By comparison, from FY 1992 to FY 2005, the reasonable cause finding percentage for all charges filed with the Equal Employment Opportunity Commission ("EEOC") ranged from a high of 9.9% in FY 2001 to a low of 2.2% in FY 1996. *See* EEOC All Statutes FY 1992- FY 2005, http://eeoc.gov/stats/all.html.

36 Whistle-Stop Campaigns, at 1.

37 *Chiara & Orenstein*, at 254.

38 445 F.3d 121, 127 (2d Cir. 2006). *See also* Boss v. Solomon Smith Barney, 263 F. Supp. 2d 684 (S.D.N.Y. 2003) (court enforced agreement to arbitrate involving SOX retaliation claim). Accord Guyden v. Aetna Inc., 2006 U.S. Dist. LEXIS 73353 (D. Conn. 2006). The Second Circuit's decision in Alliance suggests that SOX retaliation claims will be subject to private agreements to arbitrate similar to employment discrimination claims under the Federal Arbitration Act. See Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 149 L. Ed. 2d 234, 121 S. Ct. 1302 (2001).

39 445 F. 3d at 127.

40 334 F. Supp. 2d 1365, 1375 (N.D. Ga. 2004). In noting that there was little case law on Sarbanes-Oxley, the district court looked to other whistleblower provisions enforced by the DOL. Id. at 1374. The district court noted that "[t]he Sarbanes-Oxley Regulations specifically indicate that consideration was given to the regulations implementing the whistleblower provisions of the Wendell H. Ford Aviation Investment Reform Act for the 21st Century ("AIR 21"), 29 C.F.R. § 1979; the Surface Transportation Assistance Act ("STAA"), 29 C.F.R. § 1978; and the Energy Reorganization Act ("ERA"), 29 C.F.R. 24. See. 29 C.F.R. § 1980 at 2. Moreover, the legal burdens of proof in, Sarbanes-Oxley are taken from AIR 21, 49 U.S.C. § 42121. See also 42 U.S.C. §5851(b)(3) (legal burdens of proof for whistleblowing under ERA)."

41 334 F. Supp. 2d at 1375.

42 *Id*.

43 *Id*. at 1376 [quoting 49 U.S.C. §421219(b)(2)(B)(iv].

44 334 F. Supp 2d at 1368.

45 *Id*.

46 *Id*. at 1369.

47 *Id*. at 1370.

48 *Id*. at 1370-71.

49 *Id*. at 1372.

50 *Id*. at 1376.

51 *Id*. at 1376-77.

52 *Id*. at 1377.

53 *Id*. at 1381.

54 2006 U.S. Dist. LEXIS 59397 (N.D. Cal. August 17, 2006).

55 *Id*. at *18.

56 *Id*. at *18-19.

57 *Id*.

58 417 F. Supp. 2d 310 (S.D.N.Y 2006).

59 *Id*. at 315.

60 *Id*.

61 *Id*. at 322.

62 *Id*.

63 *Id*. at 333.

64 *Id*. at 317.

65 *Id*. at 324.

66 2004-SOX-49 (ALJ Oct. 1, 2004).

67 *Id*. at 14.

68 *Id*. at 18.

69 2004-SOX-49 (ALJ June 20, 2006) at 32.

70 *Id*. at 33.

71 *Id*.

72 *Id*. at 34.

73 *Id*. at 16-18.

74 *Id*. at 33-34.

75 42 U.S.C.§2000e et seq.

76 2003-SOX-7 (ALJ Mar. 4, 2004).

77 *Id*. at 7-9.

78 456 F. Supp. 2d 1282 (N.D. Ga. 2006).

79 *Id*. at 1342, 1361.

80 *Id*. at 1309.

81 *Id*. at 1357.

82 *Id*. at 1356-57.

83 *Id*. at 1360.

84 *Id*.

85 2006 U.S. Dist. LEXIS 86110 (E.D. Mich. 2006).

86 *Id*. at *25-26.

87 2004 U.S. Dist. LEXIS 15753 (E.D. Pa. 2004).

88 448 F.3d 469 (2d Cir. 2006). *See also* Welch v. Cardinal Bankshares Corp., 454 F. Supp. 2d 552 (W.D. Va. 2006) (District Court concluded that it did not have jurisdiction to enforce a preliminary order of reinstatement under Section 1514A.).

89 433 F.3d 1, 7-9 (1st Cir. 2006).

90 406 F. Supp. 2d 307, 318 (S.D.N.Y. 2005).

91 *Id*.

92 2006 U.S. Dist. LEXIS 15694 (D. PR 2006).

93 Section 1514A(d) provides in pertinent part that, "nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law, or under any collective bargaining agreement."

Corporate Governance Reform & Director Elections

*By Daniel I. Fisher**

The beginning of this decade featured a number of high-profile corporate scandals which have led to a sea change in the way public companies operate—best exemplified by the disclosure and controls requirements of the Sarbanes-Oxley Act of 2002. However, those scandals have also led to a greater focus on the roles and responsibilities of Boards of Directors, and to a search by stockholder activists for reforms that would increase what they describe as "director accountability." While no single reform has had a significant impact to date, a number of changes that are currently in various stages of implementation could significantly alter the way directors are elected at public companies, and thus the way such companies operate. These changes could both make it more difficult for incumbent directors to win re-election, and encourage, simplify and lower the cost of proxy contests by stockholder activists.

The Trend Towards Majority Voting

Perhaps the most significant potential change is the sweeping reform movement to change the voting standard directors must meet to be elected. Traditionally, directors of most U.S. public companies have been elected by plurality voting. Under plurality voting, assuming that a quorum is present at the stockholders' meeting, nominees with the greatest number of votes are elected as directors, up to the total number of directorships up for election. As a result, unless dissident stockholders run a competing "slate" of nominees (a difficult and expensive process), under plurality voting the Board's own nominees are essentially guaranteed a successful election. While stockholders have the option to "withhold" votes from some or all of the board's nominees, absent competing candidates such "withhold" votes are merely symbolic and do not affect the actual election of directors; as a result, the only alternative for stockholders seeking to change the composition of the board is to run an expensive proxy contest.

The majority-voting movement, which has been led by certain activist stockholders (primarily the United Brotherhood of Carpenters and Joiners and other labor unions), seeks to change the legal standard for director elections from a plurality—which provides only a symbolic opportunity to oppose a board's nominees—to a majority. To implement a majority-voting standard, companies must amend their constituent documents (generally in the form of bylaw amendments for Delaware corporations and charter amendments in the case of corporations organized under other jurisdictions) to provide that director nominees must receive a majority of the votes cast to be elected to the board.[1] As a result, a campaign by stockholders against a director's election held under the majority-voting standard can have the very real result of denying the director's election. However, in situations where the unsuccessful director is an incumbent director, under the corporate laws of nearly all states, that incumbent continues to serve on the board as a director until resignation, removal or the election of a successor at the next stockholders meeting. This is referred to as the "holdover" problem, since an unsuccessful director is "held over" and remains on the board despite the apparent expressed wishes of the voting stockholders. As a result of the holdover problem, companies adopting majority voting generally couple these provisions with resignation mechanisms similar to those described in the next paragraph.

The initial response of much of corporate America to the rise of majority voting was not to change the legal standard for director election to a majority. Instead, many corporations adopted stand-alone "director-resignation policies" as part of their corporate governance guidelines, which attempted to address the underlying theme—that stockholders' opposition to director candidates in uncontested elections should be given weight. Under these policies, the first prominent example of which was adopted by Pfizer in June 2005, director nominees for whom more votes are withheld than cast are legally elected (since the underlying election standard is not changed), but are required to submit their resignation to the Board, which in turn must consider and act upon the recommendation. Proponents of these policies argue that they give clear effect to the expressed will of stockholders (by requiring a resignation if a nominee does not receive a majority vote), while at the same time providing for corporate continuity and flexibility in the Board's actions (since the Board's nominees will be elected absent a competing slate, and the Board is allowed procedural and substantive flexibility in its decision-making). Generally, director-resignation policies set forth guidelines for consideration of such resignations, including the standards the board (or designated committee) will apply, requirements for disclosure and provisions that the director or directors whose resignations are being considered are not to participate in the deliberations.[2]

Although many public companies followed Pfizer's lead and adopted director-resignation policies, activist stockholders were not satisfied with this approach and continued to pressure companies to adopt the majority-voting standard throughout the 2006 proxy season, principally by means of stockholder proposals to adopt majority voting. Many companies opposed these efforts, on the grounds that the stockholders' goals were essentially achieved by the adoption of stand-alone director-resignation policies. To be sure, the only technical difference in application between majority voting and a stand-alone director-resignation policy is that new director nominees (not incumbents) in companies adopting the former reform are not elected (creating a vacancy to be filled by the Board), while such nominees are elected in companies adopting the latter reform (though required to submit a resignation). However, the unspoken feeling among stockholder activists who have campaigned for majority voting even in companies which have adopted director-resignation policies is that the change in legal standard for election makes clear the seriousness of stockholder opposition and reduces the chance that a resignation submitted by a director will be rejected.[3]

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The 2006 proxy season featured hundreds of stockholder proposals to implement majority voting: a general trend emerged. These proposals received approximately 41% of the vote at companies with pre-existing stand-alone director-resignation policies and approximately 57% of the vote at companies without policies, clearly showing that not all stockholders agreed that a stand-alone policy needed to be replaced. However, even companies that successfully resisted shareholder proposals to implement majority voting did so in the midst of a shift by a number of large public companies towards the voluntary adoption of majority voting. Beginning with Intel's adoption of a majority-voting bylaw in January 2006, there has been significant increase in the number of companies (including some of America's best known corporate giants) that have adopted majority voting bylaws, including some that had previously adopted stand-alone policies.

Many companies that have accepted the seeming inevitability of majority voting are still trying to determine the most advisable method of implementation—in particular, the manner in which majority-voting bylaw amendments may be amended in the future, especially in light of recent amendments to the Delaware General Corporation Law (DGCL). In response to the majority-voting movement, the DGCL was recently amended to provide that, where stockholders adopt bylaw amendments specifying the vote for election of directors (i.e., adopting majority voting), these amendments may not be subsequently modified or deleted by the Board of Directors, as would otherwise be the case with a Delaware corporation's bylaws (§216 of the DGCL).[4] Unsurprisingly, activist stockholders have argued that it is crucial that Boards not have the power to amend or delete majority-voting bylaw amendments, while companies have argued that Boards need to retain the flexibility to alter the voting standard in the face of possible unforeseen circumstances. As a result, future stockholder proposals may be submitted even when companies have adopted majority-voting bylaws that could be amended by the board, and the issue of boards' power to amend a majority-voting bylaw has developed into a key point of negotiation between stockholders considering submitting proposals and companies seeking a negotiated solution (typically involving companies adopting some form of majority voting) to avoid such proposals. Regardless of the form or individual features, and despite the debate over their appropriateness, the concept of majority voting has gained a strong and increasing level of support. According to one recent study, as of October 2006, approximately 36% of the companies in the S&P 500, and 31% of the Fortune 500, have adopted some form of the majority-voting principle.

The Elimination of Broker Discretionary Voting for the Election of Directors

An additional development that affects director election contests is the elimination of broker discretionary voting. Shares of public companies beneficially owned by individuals are often legally held in the name of a bank, broker or similar intermediary. As a result, when a stockholders' meeting is called, brokers will request instructions as to how the beneficial owners would like their shares to be voted. If the individuals have not responded within ten days of the stockholders' meeting, NYSE rules permit brokers to cast the votes at the broker's discretion on matters deemed "routine."[5] Traditionally, the election of directors in uncontested elections has been deemed routine, and brokers have generally tended to vote for the Board's candidates, and thus companies could count on a significant reservoir of votes in an uncontested election.[6]

However, in light of developments in director elections and corporate governance activism—including majority voting and the rise of organized "withhold" and "just vote no" campaigns—the NYSE formed a proxy working group in April 2005 to consider and recommend possible reforms to proxy voting. In June 2006, the proxy working group issued a recommendation that the uncontested election of directors be classified as "non-routine" and thus not eligible to be voted on at the discretion of brokers when those brokers' clients, the individual beneficial owners, do not give the brokers voting instructions. Though this change will not be implemented until the 2008 proxy season, there have already been signs of significant consternation among public companies—especially those governed by a majority-voting standard or that are the target of a concentrated withhold or other similar campaign.[7]

The Uncertainty Surrounding Proxy Access

In 2003, the Securities & Exchange Commission (SEC) proposed rules that would have established what came to be referred to as "proxy access;" providing that, in certain situations, long-term stockholders of public companies would be able to nominate director candidates to be included on the company's proxy card and other proxy materials. This reform would likely have greatly reduced the logistical and financial burdens on stockholder activists seeking to nominate director candidates, and seemed likely to increase the number of contested director elections and the possibility that the nominees of stockholder activists could be elected to boards with increased frequency. The proposal was met with significant debate in the corporate community and, for a variety of reasons, in 2004, the SEC declined to adopt final rules implementing proxy access, making it essentially a dormant issue.

That year, however, the American Federation of State, County and Municipal Employees (AFSCME) submitted a stockholder proposal for inclusion in the proxy materials for the American International Group (AIG) at their 2005 annual meeting which would have amended AIG's bylaws to include proxy-access provisions generally similar to those that had been proposed by the SEC. SEC rules allow the exclusion of stockholder proposals from a company's proxy materials when the proposals relate to "an election" of directors, and traditionally the SEC has permitted companies to exclude stockholder proposals implementing proxy access on these grounds.[8] However, when AIG excluded the AFSCME's proposal, the labor union sued, and the U.S. Court of Appeals for the Second Circuit ruled that the SEC had not properly determined that stockholder proposals on proxy access were excludable. The Second Circuit ruling—which can be interpreted as requiring companies under the Second

Circuit's jurisdiction to include proxy access proposals similar to AFSCME's in their proxy materials—was met with dismay by many corporate commentators as well as by the SEC. The Commission immediately indicated that it was prepared to amend the proxy rules, in response to the court's ruling, in a manner that would presumably allow companies to exclude proxy-access proposals. However, while the SEC was expected to address the issue at its December meeting, it did not do so, and gave no public explanation as to why it was silent, or when new rules might be forthcoming.[9] Moreover, in January the SEC declined to either agree or disagree with the request for no-action relief sought by Hewlett-Packard to exclude a proxy access proposal from its proxy materials, adding to the lack of clarity on the issue.

Internet Delivery of Proxy Materials

The SEC has recently adopted final rules that take significant steps toward allowing anyone soliciting proxies for a public company stockholders' meeting (i.e., both the company and stockholders soliciting in opposition) to satisfy the proxy requirements by delivering solicitation materials electronically. The new rules require parties soliciting proxies to notify stockholders of the internet availability of proxy materials, but not (as previously had been the case) physically to print and mail the proxy materials to stockholders. This process could yield cost savings for public companies. However, this benefit may well be offset by the advantage it gives to stockholder activists seeking to contest company solicitations, for whom the cost reduction will be far more significant. At a minimum, the "e-proxy" rules should lead to an increase (possibly a large one) in the number of proxy contests for the election of directors and in other situations, such as the approval of significant business transactions, where a stockholder vote is required.

The final impact of the rise of majority voting and the elimination of broker-discretionary voting in director elections may take a number of proxy seasons to be fully appreciated. However, public company directors and their advisors will surely need to be mindful of these reforms in approaching stockholder relations and future director elections, and should have well-considered plans in place for dealing with the subject. The possibility that proxy-access proposals will be allowed (or even that the proxy-access rules themselves will be revived), coupled with the possible advent of proxy material e-delivery, could foretell an increased level of proxy contests and dissident stockholder activism, as well as the next wave of reform.

Endnotes

1 Generally, majority-voting only applies to uncontested elections, on the theory that, where there is a competing slate of nominees, stockholders' votes have an actual impact, as stockholders are presented with a choice. In elections held under the majority voting standard, stockholders are able to vote "for" or "against" a candidate; and only candidates with more for than against votes are elected.

It is also unclear how a contested election under a majority voting standard would work in practice; confusing disclosure, improper votes and the election of no directors could result. In recognition of this, Institutional Stockholder Services ("ISS"), a leading proxy advisory firm, has stated that, while in general strongly supporting majority voting, it opposes majority voting that does not include an exclusion for contested elections. ISS will generally recommend against voting to elect directors who approve implementation of majority voting without a provision that contested elections be held under the plurality standard.

2 As described above, companies which adopt majority-voting bylaw or charter amendments (changing the legal standard for election) generally also adopt some form of a director resignation policy, either within the bylaw or charter amendment or separately, to address the issue of holdover directors.

3 For the 2006 proxy season, ISS' policy was to recommend that its clients vote for stockholder proposals on the adoption of majority voting, even when the company in question had adopted a stand-alone director-resignation policy, unless the stand-alone policy was sufficiently strong, the company made valid arguments against adoption of majority voting and the company had a history of strong governance features and corporate accountability. ISS only recommended against one majority-voting proposal under this framework, in the case of General Electric (which recently announced that it would proceed to adopt a charter amendment implementing a majority-voting standard in 2007). For the 2007 proxy season, ISS has announced it will recommend "for" standard majority-voting proposals without the previous exception.

4 The DGCL was also amended to permit directors to submit irrevocable resignations contingent on the occurrence of future events (§141(b) of the DGCL)—in other words, resignations that spring into effect if the director fails to receive the required vote under a majority-voting bylaw or director-resignation policy. This avoids the potentially problematic issue of directors refusing to submit resignations, and has enabled companies to make director nominations contingent on the submission of such resignations.

5 For technical reasons relating to the structure of broker-dealer regulation, the NYSE rules apply to elections at public companies listed on both the NYSE and NASDAQ.

6 For example, the well-known "withhold" campaign run against Michael Eisner at the Walt Disney Company's 2004 annual meeting resulted in Mr. Eisner receiving 55% of the votes, with 44% withheld. If the election of directors had not been deemed a routine matter, Mr. Eisner would have received 45% of the votes, with 54% withheld.

7 Broker discretionary voting for the election of directors often helps achieve a quorum; the elimination of such voting increases the chance that companies will lack a quorum at stockholders' meetings—and thus will be unable to conduct any business at all. Automatic Data Processing has estimated that if broker discretionary voting had been eliminated for the 2004 proxy season, as many as 20% of companies would have failed to achieve a quorum. Since, in general, if a quorum is achieved for one proposal that quorum carries over to other proposals to be voted on at the same meeting (even if some shares are not voted on the other proposals), it seems likely that there will be an increase in the number of "routine" proposals (principally, ratification of auditor selection) voted on at stockholders meetings, as companies seek to ensure broker discretionary votes are present for quorum purposes.

8 The reason stockholder proposals on majority voting have generally been allowed while stockholder proposals to implement proxy access have not been permitted is the SEC's policy position that the stockholder proposal process should not be used to promote proxy contests for the election of directors.

9 At least one of the Democratic appointees to the SEC has indicated general support for the proxy-access concept and it is possible that SEC Chairman Christopher Cox was unable to achieve a political consensus to address the issue.

Business Judgment Rule on the Line: *Tower Air, IT Group* and Notice Pleading in Federal Court

*By Randall W. Bodner & Peter L. Welsh**

The business judgment rule has long been a cornerstone of corporate law and business practice in America. Under the law of corporations of most states, the business judgment rule provides a presumption that the directors of a corporation have acted on an informed basis and in the best interest of the corporation.[1] In order to bring an action against corporate directors and officers, plaintiffs have long been required both to plead and to prove facts sufficient to overcome the protections of the business judgment rule.[2] As applied for decades by Delaware courts, plaintiffs have long been required to advance more than merely conclusory allegations that corporate fiduciaries have breached their fiduciary duties or mismanaged the affairs of the corporation. Rather, plaintiffs must allege specific facts sufficient to rebut the business judgment rule's presumptions.[3]

The requirement that plaintiffs allege, with specificity, facts sufficient to overcome the business judgment rule's presumption of diligence, good faith and independence by corporate directors and officers is fundamental to the law of corporations.[4] Indeed, in order to serve its purpose, the business judgment rule must be effective at the pleading stage of litigation. If a director or officer could be subjected to expensive and time-consuming discovery based on bare allegations of mismanagement or conclusory allegations of a fiduciary duty breach, a principal purpose of the business judgment rule would be undermined. Complaints advancing nothing more than conclusory allegations of fiduciary duty breaches have therefore typically been dismissed by courts in Delaware and in other jurisdictions.[5]

In a recent decision in the Tower Air bankruptcy case, however, the United States Court of Appeals for the Third Circuit held that the liberal notice pleading standard of Rule 8 of the Federal Rules of Civil Procedure trumps the more stringent pleading requirements imposed by the business judgment rule. In *Stanziole* v. *Nachtomi (In re Tower Air)*, a panel of the Third Circuit Court of Appeals reversed the dismissal of a complaint under the business judgment rule by the United States District Court for the District of Delaware on the grounds that Delaware's requirement that a plaintiff allege with specificity facts sufficient to rebut the business judgment rule's presumption does not apply in federal courts. The court held that, in federal court, Rule 8 of the Federal Rules, and its *de minimus* notice pleading requirements,[6] trumps the more exacting pleading requirements under Delaware law.[7] In particular, the Third Circuit held that, unlike Rule 8 of the Delaware Chancery Court, Rule 8 of the Federal Rules of Civil Procedure does not "require a claimant to set out in detail the facts upon which he bases his claim."[8] Accordingly, a complaint that would not survive a Rule 12(b)(6) motion to dismiss in the Delaware Chancery Court could well survive a motion to dismiss in federal court, the Third Circuit panel noted.

Taken at face value, the Third Circuit's decision in *Tower Air* largely eliminates, in federal court, the protections traditionally afforded by the business judgment rule at the pleading stages of litigation. Following *Tower Air*, in order to survive a motion to dismiss and proceed to discovery in a district court in the Third Circuit, a plaintiff need only advance a short, plain statement that the directors and/or officers have breached their fiduciary duties or committed mismanagement.[9] And if the decision in *Tower Air* is more widely adopted, directors and officers of many an American corporation can expect to be subject to more costly and time consuming litigation challenging ordinary course business decisions.

Tower Air was a Delaware corporation founded in 1982. The company existed primarily as a charter airline operating flights from the United States to overseas destinations. By 1999, Tower Air operated fourteen Boeing 747's and employed more than 1,400 people worldwide.[10] By the mid-1990s, the Company was operating at a loss and experiencing financial difficulties. In 2000, Tower Air was forced to file for protection under Chapter 11 of the Bankruptcy Code. In 2001, the Tower Air bankruptcy case was converted from a Chapter 11 proceeding to a Chapter 7 proceeding. Thereafter, the Chapter 7 Trustee sued the Tower Air directors and officers for breach of fiduciary duty.[11]

The adversary complaint filed against the Tower Air directors alleged various acts of mismanagement but did not allege any self-dealing or conflicts of interest on the part of the Company's directors or officers. Count One of the complaint alleged that "Tower Air's directors breached their fiduciary duty to act in good faith by consistently declining to repair Tower Air's older engines in lieu of leasing or buying new engines." Count Two of the adversary complaint alleged that "Tower Air's officers also breached their fiduciary duty to act in good faith by leasing or buying new jet engines, by failing to tell the directors about maintenance problems, and by failing to address the maintenance problems." Count Three alleged that "Tower Air's directors breached their fiduciary duty to make decisions in good faith when they approved multi-million dollar leases and purchases without consideration." Count Three also alleged that "the directors failed to keep themselves adequately informed regarding the daily management of Tower Air by ignoring Tower Air's maintenance problems, letting [the CEO] run the Tel Aviv office independently, not reviewing [the CEO's] decision to fly the Santo Domingo route, and failing to establish management controls to ensure that used tickets were processed." Count Four alleged that the Tower Air officers breached their fiduciary duty as a result of the same conduct alleged in Count Three against the directors. Count Five of the

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complaint challenged the same conduct alleged in counts one through four and labels the conduct "gross negligence." Count Six challenged the same conduct and alleged that the conduct constitutes "corporate waste" by the Tower Air directors. Count Seven of the complaint alleged that the Tower Air officers were also liable for "corporate waste."[12]

The United States District Court for the District of Delaware dismissed the adversary complaint under the business judgment rule. The district court held, in particular, that the adversary complaint failed to allege facts sufficient to overcome the business judgment rule's presumption that directors "'making a business decision, not involving self-interest, act on an informed basis, in good faith and in the honest belief that their actions are in the corporation's best interest.'"[13] Judge Kent A. Jordon dismissed the complaint in its entirety on this basis.[14] The Third Circuit reversed the district court's decision in significant part.[15] The court of appeals based its decision on the perceived difference between notice pleading under the Federal Rules of Civil Procedure, on the one hand, and notice pleading under the Delaware Chancery Rules on the other hand. The court held, in particular, that, notwithstanding the fact that the text of the relevant parts of Federal Rule 8 and Chancery Rule 8 are identical, the heightened pleading standard required to overcome the business judgment rule in fiduciary duty cases brought in the Delaware Chancery Court is a function of Delaware Chancery Rule 8.[16] The court held further that Rule 8 of the Federal Rules of Civil Procedure does not impose a similar heightened pleading requirement on plaintiffs seeking to bring fiduciary duty claims in federal court: "By requiring Stanziale to allege specific facts, the District Court erroneously preempted discovery on certain claims by imposing a heightened pleading standard not required by Federal Rule of Civil Procedure 8."[17] The court concluded that the supposed conflict between Chancery Rule 8 and Rule 8 of the Federal Rules of Civil Procedure must be resolved in favor of the Federal Rules and its liberal notice pleading requirements. As a consequence, to state a claim in federal court in the Third Circuit, a plaintiff seeking to bring a fiduciary duty claim need only plead a "simple brief statement of claims of irrationality or inattention [that] gives the directors and officers fair notice of the grounds of those claims."[18]

Although the court let stand the district court's dismissal of certain claims in the adversary complaint, it reversed the district court's dismissal of other claims that clearly fall within the protections traditionally afforded by the business judgment rule. For example, the Third Circuit reversed the district court's dismissal of a claim for breach of fiduciary duty based on the Tower Air directors' alleged approval of multimillion dollar jet engine leases. Not only did the court overturn the district court's dismissal of this claim under the business judgment rule, the court of appeals concluded that the question of whether the plaintiff had stated a claim for breach of fiduciary duty on this basis was not even a "close question."[19] The court of appeals, moreover, went one step further. The court held that these allegations, not only clearly stated a claim for breach of fiduciary duty, but these same allegations also stated a claim for *bad faith*.[20] Though not discussed in any detail in the decision, the practical effect of this holding was to deny the Tower Air directors, at least at the pleading stage, the protections traditionally afforded under Delaware's exculpation statute, Delaware General Corporation Laws § 102(b)(7). The fact that the Third Circuit evidently allowed the plaintiff to plead around both the business judgment rule and Delaware's exculpation statute with such apparent ease is particularly noteworthy.[21]

Shortly after the Third Circuit's reversal of his decision in *Tower Air*, Judge Jordan had another opportunity to weigh in on the business judgment rule in the case of *IT Litigation Trust* v. *D'Aniello (In re IT Group, Inc.)*.[22] The Creditors Committee in the IT Group, Inc. bankruptcy case filed suit against the directors and officers of IT Group, Inc. as well as the Carlyle Group, a private equity firm that had made a convertible preferred investment in IT Group and had appointed five of ten of the IT Group's Board of Directors.[23] Following the filing of an amended complaint in the action, the defendants moved to dismiss the complaint in its entirety. While partially dismissing certain of the counts in the complaint, the court left in tact many of the counts. In declining to dismiss entirely several fiduciary duty claims against both the IT Group directors and the Carlyle Group, Judge Jordan explicitly acceded to the binding effect of *Tower Air*.[24] At the same time, Judge Jordan took the opportunity, in an extraordinary three page footnote, to criticize the Third Circuit's holding in *Tower Air*.[25] Judge Jordan's analysis points out several shortcomings in the Third Circuits *Tower Air* decision and his thoughtful analysis deserves close attention by any court adjudicating such issues in the future.

The IT Group was a Delaware Corporation that provided consulting, engineering, construction, environmental remediation, and facilities and waste management services. The Carlyle Group invested $45 million in the IT Group in 1996. In return, Carlyle received convertible preferred stock and the right to elect a majority of the IT Group's directors.[26] Beginning in 1998, the company embarked on a "roll-up" strategy which involved acquiring several firms in the same industry as IT Group. Between 1998 and 2000, the company acquired some eleven firms and grew IT Group's revenues from $360 million to $1.4 billion. IT Group's debt, however, increased from approximately $172 million to $1 billion in 2000. By January, 2002, IT Group filed for bankruptcy. Thereafter, the company was liquidated.[27]

The Creditors Committee in the IT Group bankruptcy proceeding filed suit against the directors and officers of the company and against the Carlyle Group, advancing claims for breach of fiduciary duty, corporate waste and deepening insolvency. The Creditors Committee also challenged some $8.9 million in dividends as well as $850,000 in consulting fees paid to Carlyle, alleging that such payments were preferential payments and fraudulent conveyances under Section 547 of the Bankruptcy Code and Section 548 of the Bankruptcy Code, respectively.[28]

In reaching its decision to deny the defendants' motion to dismiss the complaint, Judge Jordan noted that the core fiduciary duty allegations in the amended complaint were deficient in several respects. Judge Jordan observed that the core allegations in the complaint—namely, that the dividend

and consulting payments made to Carlyle, and the IT Group directors' approval of those payments, amounted to violations of the directors' fiduciary duties as well as unlawful dividends—state a claim under Delaware law only if the directors approving those payments lacked independence from Carlyle.[29] Yet, with respect to the directors' independence, the complaint merely alleged that Carlyle "took control" of IT Group and "possessed and exercised control over the IT Group." The court held that such "conclusory" allegations of interestedness were nonetheless sufficient under *Tower Air* to survive a motion to dismiss:

> [W]hile I seriously doubt that the conclusory allegations of control in the Complaint would survive a 12(b)(6) motion in the Delaware Chancery Court, they do put defendants on notice that the claim here is based on the Carlyle Defendants' actual control of the IT Group and the lack of independence of the directors concerning the payments to this controlling group. Given that the Third Circuit has emphasized the view that the Federal Rules of Civil Procedure do not require a plaintiff to plead detailed facts to make out a claim for breach of fiduciary duties under Delaware law, *Tower Air*, 416 F.3d at 236-39, I am bound to hold that the Plaintiffs' allegations are sufficient in this case.

For this reason, the district court allowed many of the plaintiff's claims to survive the motion to dismiss.[30]

In his three page footnote in *In re IT Group*, Judge Jordan criticized the Third Circuit's decision in *Tower Air* on both legal and public policy grounds.[31] With respect to the legal deficiencies of the decision, the court noted that the *Tower Air* decision was founded on the fundamental principle that "when a state procedural rule conflicts with an on-point Federal Rule of Civil Procedure, a federal court should apply the Federal Rule." As Judge Jordan points out, however, application of this principle to cases like *Tower Air* and *IT Group* presupposes that the heightened pleading required to overcome the business judgment rule under Delaware law—and under the law of many other states—is a function of procedural and *not* a substantive law. For, if the business judgment rule's pleading requirement is a substantive rule of law, then, under the long line of cases following *Erie* v. *Tompkins*, a federal court should apply the state substantive rule of law, rather than the Federal Rule of Procedure.[32] As Judge Jordan explained

> [T]he Delaware requirement that there be more than conclusory allegations to support fiduciary duty claims does not appear to me to be simply a matter of procedure. Rather, the pleading requirements shape the substance of fiduciary duty claims by enforcing the business judgment rule, which is fundamental to Delaware corporate law. . . . The rule is a matter of substantive corporate law. *See Citron* v. *Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 64 (Del. 1989) ("The [business judgment] rule operates as both a procedural guide for litigants and a substantive rule of law.") First, it prevents the courts from second-guessing the decisions of directors and officers based on results of those decisions rather than on the care, loyalty and good faith of the directors making the decision. . . . Second, the business judgment rule protects "against the threat of sub-optimal risk acceptance.[33] *Gagliardi*, 683 A.2d at 1052.

Because it is a substantive rule of law, Judge Jordan argues, *Erie* requires that the heightened pleading requirement of the business judgment rule prevail over Rule 8 of the Federal Rules.[34]

As for the policy deficiencies in the *Tower Air* decision, the court stresses the ex ante costs to shareholders of a rule that permits shareholder plaintiffs to freely challenge director decisionmaking.[35] In particular, the court made the critical point that the costs of forcing directors to defend loosely-pled complaints and face the inconvenience, stress and expense of protracted litigation based on nothing more than a "short plain statement" of inattention, is a cost that will be borne in no insignificant part by the shareholders themselves.[36] How? By deterring optimal risk taking by directors and officers.[37] As Delaware Chancellor William Allen observed in his insightful decision in *Gagliardi v. Trifoods*, shareholders should be cautious about endorsing rules that impose personal liability on directors:

> Corporate directors of public companies typically have a very small proportionate ownership interest in their corporations and little or no incentive compensation. Thus, they enjoy (as residual owners) only a very small proportion of any "upside" gains earned by the corporation on risky investment projects. If, however, corporate directors were to be found liable for a corporate loss from a risky project on the ground that the investment was too risky (foolishly risky! stupidly risky! egregiously risky!—you supply the adverb), their liability would be joint and several for the whole loss (with I suppose a right of contribution). Given the scale of operation of modern public corporations, this stupefying disjunction between risk and reward for corporate directors threatens undesirable effects. Given this disjunction, only a very small probability of director liability based on "negligence", "inattention", "waste", etc., could induce a board to avoid authorizing risky investment projects to any extent! Obviously, it is in the shareholders' economic interest to offer sufficient protection to directors from liability for negligence, etc., to allow directors to conclude that, as a practical matter, there is no risk that, if they act in good faith and meet minimal proceduralist standards of attention, they can face liability as a result of a business loss.[38]

The final chapter in the litigation over the business judgment rule in the *IT Group* litigation has not yet been written. Presumably as a prelude to pressing the *Erie* analysis, the defendants in *In re IT Group* had sought an order from Judge Jordan certifying for a decision by the Delaware Supreme Court the fundamental question of whether the heightened pleading required to overcome the business judgment rule is a procedural rule or a substantive rule of law under Delaware law. On February 9, 2006 in a brief decision, Judge Jordan declined to certify this question, noting that the matter had been decided already by the court of appeals in *Tower Air* and that the district court was therefore bound by that decision. Judge Jordan noted that the defendants were free to address "their concerns, and perhaps mine, regarding the pleading standard, if this matter is heard by the Third Circuit on appeal."[39] It remains to be seen whether the case will be appealed.

It remains to be seen also whether the Third Circuit will reconsider its *Tower Air* decision, either on appeal from Judge Jordan's decision *IT Group* or in another such case. It likewise remains to be seen whether other district courts and courts of appeals in the United States will adopt the court of appeals'

analysis in *Tower Air,* on the one hand, or Judge Jordan's analysis in *IT Group*, on the other hand. The resolution of these questions will likely be of great significance to the law of corporations, to directors and officers and ultimately to shareholders of the American corporation.

Endnotes

1 Aronson v. Lewis, 473 A.2d 805, 812 (1984).

2 *See, e.g.,* Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1279 (Del. 1989); Citron v. Fairchild Camera & Instrument Corp., 569 A.2d 53, 64 (Del. 1989); *Aronson*, 473 A.2d at 812.

3 *See In re Compucom Sys., Inc. Stockholders Litig.*, No. CIV. A. 499-N, 2005 WL 2481325 (Del. Ch. Sept. 29, 2005) (Rule 12(b)(6) motion to dismiss granted under the business judgment rule); *In re Encore Computer Corp. S'holder Litig.*, No. 16044, 2000 WL 823373, *5-7 (Del. Ch. June 16, 2000) (same); *In re 3COM Corp. S'holder Litig.*, No. C.A. 16721, 1999 WL 1009210, *3 (Del. Ch. 1999) (same); Parnes v. Bally Entertainment Corp., C.A. No. 15192, 1997 WL 257435 *2-3 (Del. Ch. May 12, 1997) (same); McMillan v. Intercargo Corp., 768 A.2d 492 (Del. Ch. 2000) (same); *In re Budget Rent-A-Car Corp. S'holder Litig.*, Civ. A. No. 10,418, 1991 WL 36472, *5 (Del. Ch. March 15, 1991) (same); Lewis v. Leaseway Transp. Corp., No. CIV. A. 8720, 1990 WL 67383 (Del. Ch. May 16, 1990) (same); President and Fellows of Harvard College v. Glancy, No. CIV. 18790, 2003 WL 21026784, *21-22 (Del. Ch. 2003) (same); Shepard v. Meridian Ins. Group, Inc., 137 F. Supp. 2d 1096 (S.D. Ind. 2001) (same); McMichael v. United States Filter Corp., No. EDVC 99-182VAP, 201 WL 418981, *9-14 (C.D. Cal. 2001) (same); Kenney v. Bear Stearns & Co., Inc., No. C-92-1845-DJL, 1993 WL 491309 (N.D. Cal. 1993)(same); Domingo v. C. True Building Corp., 246 A.D. 337, 666 N.Y.S.2d 914 (Supr. Ct. 1998) (same); Hudson v. Prime Retail, Inc., No. 24-C-03-5806, 2004 WL 1982383 (Md. Cir. Ct. 2004)(same); NCS Healthcare v. Candlewood Partners, *LLC*, 827 N.E.2d 797, 803 (Ohio Ct. App. 2005) (upholding dismissal of case on ground that plaintiff "failed to allege facts sufficient to overcome the business judgment rule."); Stamp v. Touche Ross and Co., 636 N.E. 2d 616, 621-22 (Md. 2003) (upholding 12(b)(6) dismissal under business judgment rule); Foster v. Town and Country Trust, No. 24-C-06-001442, 2006 WL 991000, *2 (Md. Cir. Ct. 2006) (same); Black v. Fox Hills North Comm. Assoc., 599 A.2d 1228, 1231 (Ct. App. 1992) (same); Wittman v. Crooke, 707 A.2d 422 (Md. 1998) (same); W.O.R.C. Realty v. Carr, 616 N.Y.S.2d 977 (N.Y. Supr. Ct. 1994) (same); Malpiede v. Townson, 780 A.2d 1075 (Del. 2001) (Rule 12(b)(6) motion granted under the business judgment rule and Delaware's exculpation statute); *In re Lukens, Inc. S'Holders Litig.*, 757 A.2d 720 (Del. Ch. 1999) (same); *In re Frederick's of Hollywood, Inc.*, No. CA 15944, 2000 WL 130630 (Del. Ch. Jan. 31, 2000) (same); Nebenzahl v. Miller, No. CIV. A. 13206, 1996 WL 494913, *2-3 (Del. Ch. Aug. 29, 1996) (same); *In re Wheelabrator Technologies Inc. S'holder Litig*, C.A. No. 11495, 1992 WL 212595 (Del. Ch. 1992) (same); *see also* Loudon v. Archer-Daniels-Midland Co., 700 A2d 135 (Del. 1997) (duty of disclosure claims dismissed on 12(b)(6) motion).

4 Orman v. Cullman, 794 A.2d 5, 19 (Del. Ch. 2002) ("'A cardinal precept of the General Corporation Law of the State of Delaware is that directors, rather than shareholders, manage the business and affairs of the corporation.' The business judgment rule is a recognition of that statutory precept.") (quoting *Aronson*, 473 A.2d at 811.)

5 *See, e.g.,* Spiegel v. Buntrock, 571 A.2d 767, 777-78 (Del. 1990); Cede & Co. v. Technicolor, Inc., 634 A.2d. 345, 361 (Del. 1993); *Citron*, 569 A.2d at 64; Krim v. Pronet, Inc., 744 A.2d 523, 527 (Del. Ch. 1999) ("If the proponent fails to meet her burden of establishing facts rebutting the presumption, the business judgment rule, as a substantive rule of law, will attach to protect the directors and the decisions that they make.") (citing Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985); *In re BHC Comm., Inc. S'holder Litig.*, 789 A.2d 1, 4 (Del. Ch. 2001) ("Of course, it is a bedrock principle of Delaware corporate law that, where a claim for breach of fiduciary duty fails to contain allegations of fact that, if true, would rebut the business judgment rule, that claim should ordinarily by dismissed under Rule 12(b)(6)."); *Gaylord Container Corp. S'holder Litig.*, 753 A.2d 462, 475 (Del. Ch. 2000)("Of course, the business judgment rule exists in large measure to prevent the business decisions of the board from being judicially examined for their substantive reasonableness."); Ash v. McCall, No. Civ. A. 17132, 2000 WL 1370341 (Del. Ch. 2000); *In re CareMark Int'l, Inc. Deriv. Litig.*, 698 A.2d 959, 967-68 (Del. Ch. 1996)("[T]he business judgment rule is process oriented and informed by a deep respect for all good faith board decisions."); Gagliardi v. Trifoods, Int'l, Inc., 683 A.2d 1049, 1052 (Del. Ch. 1996) ("Thus, to allege that a corporation has suffered a loss as a result of a lawful transaction, within the corporation's powers, authorized by a corporate fiduciary *acting in a good faith pursuit of corporate purposes*, does not state a claim for relief against that fiduciary no matter how foolish the investment may appear in retrospect.").

6 *See In re Initial Public Offering Securities Litigation*, 241 F. Supp. 2d. 281, 323-324 (S.D.N.Y. Feb. 19, 2003).

7 Stanziale v. Nachtomi (*In re Tower Air, Inc.*), 416 F.3d 229, 237 (3rd Cir. 2005) (herein "*In re Tower Air*").

8 *Id.*

9 *Id.* at 239.

10 *Id.* at 231.

11 *Id.* at 233-34.

12 *Id.* at 234.

13 *Id.* at 234 (quoting Stanziale v. Nachtomi, No. 01-403, 2004 WL 878469 at *3 (D.Del. April 20, 2004)).

14 The Third Circuit rightly points out in its decision that Judge Jordon's decision blurred the distinction between pleading facts sufficient to allege demand excusal under Rule 23.1 and pleading facts sufficient to state a claim in spite of the business judgment rule. *Id.* at 236. Courts reviewing the sufficiency of allegations under Rule 23.1 require plaintiffs to plead "with particularity" facts sufficient to satisfy Rule 23.1's demand requirement. *See, e.g., Aronson*, 473 A.2d at 805; *see also* Fed. R. Civ. P. 23.1. Courts reviewing the sufficiency of allegations under the business judgment rule have sometimes required plaintiff's to plead "specific facts" sufficient to rebut the business judgment rule's presumption of non-liability. *See* Grobow v. Perot, 539 A.2d 180, 188 (Del. 1988); *see also Mills Acquisition*, 559 A.2d at 1279, *but see* Tooley v. AXA Fin., Inc., CA No. 18414, 2005 WL 1252378 *5, n. 21 (Del. Ch. May 13, 2005). Partly, this confusion is inherent in the Rule 23.1 analysis, which itself incorporates business judgment review as one of the two "prongs" of analysis. *Aronson*, 473 A.2d 805. Partly, this confusion is a by-product of those Delaware decisions analyzing claims under both Rule 23.1 and Rule 12(b)(6). *See, e.g., See In re Walt Disney Deriv. Litig.*, 731 A.2d 342, (Del. Ch. 1998), *rev'd on other grounds* Brehm v. Eisner, 746 A.2d 244 (Del. 2000).

15 *In re Tower Air*, 416 F.3d at 242.

16 *Id.* at 236 -37.

17 *Id.* at 237.

18 In its decision, the Third Circuit raised the question: "What should the District Court have required Stanziale to allege?" The Court then reviews the United States Supreme Court's endorsement in *Swierkiewicz* v. *Sorema*, 534 U.S. 506. 512 (2002) of Form 9 of the Federal Rules of Civil Procedure, which demonstrates that a complaint consisting of a single sentence can state a claim of negligence under Federal Rule of Civil Procedure 8. *Id.* at 238; *see also In re Initial Public Offering Sec. Litig.*, 241 F. Supp. 2d. at 323-324 ("'A complaint that complies with the federal rules of civil procedure cannot be dismissed on the ground that it is conclusory or fails to allege facts.' *Higgs v. Carver,* 286 F.3d 437, 439 (7th Cir.2002). 'The courts keep reminding plaintiffs that they don't have to file long complaints, don't have to plead facts, don't have to plead legal theories.' *Id*. To comply with Rule 8, plaintiffs need not provide anything more than sufficient notice. It can be read in seconds and answered in minutes.' *McHenry v. Renne,* 84 F.3d 1172, 1177 (9th Cir.1996).")

19 *In re Tower Air*, 416 F.3d at 240 ("The District Court appeared to wrestle with [this issue], but we do not think it presents a close question. We conclude that Stanziale plainly states a claim of inattention on [this basis.]")

20 *Id.* at 240 ("Stanziale argues on appeal that the directors' alleged rubber-

stamping of major capital expenditures is consistent with bad faith. We agree.")

21 The blurring of the line between breaches of the fiduciary duty of care, which are subject to exculpation, and breaches of the fiduciary duty of good faith, which are not subject to exculpation, is a separate but related development in corporate litigation in recent years that also suggests increased exposure of directors and officers. *See In re Walt Disney Deriv. Litig*., 825 A.2d 275 (Del. Ch. 2003); *In re Walt Disney Deriv. Litig*., No. 411, 2005, 2006 WL 1562446 (Del. June 8, 2006).

22 IT Group Litigation Trust v. D'Angiello (*In re IT Group, Inc.*), No. 02-10118, Civ. 04-1268, 2005 WL 3050611, *2 (D.Del.)

23 *Id*. at *8.

24 *Id*. at *8, n.10.

25 *Id.*

26 *Id*. at *2.

27 *Id*. at *3.

28 *Id*. at *4.

29 *Id*. at *8.

30 *Id* at *16.

31 *Id* at *8, n. 10.

32 Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); Fiat Motors of N. Am. Inc. v. Wilmington, 619 F. Supp. 29, 32 (D. Del. 1985); *In re General Motors Class E Stock Buyout Sec. Litig*., 790 F. Supp. 77, 80 (D. Del. 1992).

33 *In re IT Group*, 2005 WL 3050611 at *8, n. 10.

34 *Id.*

35 *Id*.

36 *Id*.

37 *Id*. (citing Gagliardi v. Trifoods, 683 A.2d 1049 (Del. Ch. 1996)).

38 *Id*. at 1052.

39 IT Litigation Trust v. D'Angiello *(In re IT Group, Inc.)*, No. 02-10118, Civ. A. 04-1268-KAJ, 2006 WL 319000 (D. Del.).

The McNulty Memorandum: Recent Modifications To Federal Prosecutorial Policy Regarding Corporations

*By George J. Terwilliger III**

On December 12, 2006, the Department of Justice ("Department") announced changes to its corporate prosecution policies in a memorandum issued by Deputy Attorney General Paul McNulty. The new policy replaces and effects a number of changes to the "Principles of Federal Prosecution of Business Organizations," set forth in earlier memoranda issued by McNulty's predecessors, notably the "Thompson Memo" of January 2003. The most significant changes are in two areas: rules for prosecutors seeking waivers of the attorney-client privilege or production of attorney work product, and prosecutors' considerations in assessing corporate cooperation where a company pays its officers' or employees' legal fees in connection with an investigation.

The revised memorandum has not received universal acclaim and in some quarters has been harshly criticized as an inadequate response to the waiver issue. Given the critical importance of according the attorney-client privilege the historical protection that it is due, continued close scrutiny of prosecutorial practices in regard to it are appropriate, and continued examination of both relevant practices and policies is healthy. It would seem, however, that giving the new policy an opportunity to play out in practice is a reasonable way to proceed with an assessment of its impact and value. Likewise, understanding the changes in policy and procedure will help both prosecutors and the private bar to work toward common objectives in regard to maintenance of the privilege in the context of government investigations.

Privilege Waivers: New Procedures

The Thompson Memo placed great weight on a corporation's "cooperation" with a government investigation in the determination of whether to pursue criminal prosecution of the corporation, particularly as regards the "authenticity" of such cooperation.[1] A corporation's cooperation was deemed "authentic" depended largely on "the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, waiver of the attorney-client and work-product protection."[2] The McNulty policy does not change the emphasis on the importance of cooperation, but makes significant adjustments to the factors by which prosecutors will make that assessment.

Thompson had been the subject of controversy. A chorus of voices from the business and legal communities rose decrying most particularly the memorandum's instruction to prosecutors to consider a corporation's willingness to waive applicable privileges in the assessment of whether the corporation had provided "authentic" cooperation, and the resulting pressure, direct and more subtle, on corporations to waive these protections in connection with government investigations. Until the recent revisions, it appeared that the business community and its lawyers disagreed with the Government both as to the wisdom of this policy and as to the facts regarding practices by prosecutors under it. The Department asserted that requests for such waivers were relatively rare, while the corporate defense bar and in-house counsel reported receiving them, in some form, frequently.

In the revisions effected by the new "McNulty Memorandum," the Department appears to have accepted that perception, that prior policy and its implementation had a deleterious effect on the attorney-client relationship. The revisions reaffirm that the Department's policy was not and is not intended to impinge on that relationship. As McNulty put it in the cover memorandum accompanying the revised policies, "[m]any of those associated with the corporate legal community have expressed concern that our practices may be discouraging full and candid communications between corporate employees and legal counsel. To the extent this is happening, it was never the intention of the Department for our corporate charging principles to cause such a result."[3] Similarly, the memorandum setting forth the revised policies now incorporates a paragraph recognizing the "extremely important function in the U.S. legal system" served by the attorney-client and work product protections, and noting that the attorney-client privilege is "one of the oldest and most sacrosanct privileges under U.S. law."[4]

The waiver-related revisions to Department policy are fairly extensive—indeed, an entirely new subsection of the Principles is devoted to the topic of "Waiving Attorney-Client and Work Product Protections" in the context of assessing corporate cooperation.[5] The McNulty Memorandum states the general policy that "[w]aiver of attorney-client and work product protections is not a prerequisite to a finding that a company has cooperated in the government's investigation."[6] Disclosure of such information may, however, "permit the government to expedite its investigation," and in some circumstances "may be critical in enabling the government to evaluate the accuracy and completeness of the company's voluntary disclosure" of other information.[7]

The McNulty Memorandum states that prosecutors may only request a waiver where there is a "legitimate need for the privileged information."[8] Such a "legitimate need" requires more than a conclusion that it is "desirable or convenient to obtain privileged information."[9] Rather, "careful balancing" of the policy considerations underlying the protections at issue and the government's law enforcement needs is required.[10] The memorandum indicates that this balancing test will turn on four factors:

(1) The likelihood and degree to which the privileged information will benefit the government's investigation;

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(2) Whether the information sought can be obtained in a timely and complete fashion by using alternative means that do not require waiver;

(3) The completeness of the voluntary disclosure already provided;

(4) The collateral consequences to a corporation of a waiver.[11]

If a legitimate need for waiver exists, a prosecutor "should seek the least intrusive waiver necessary to conduct a complete and thorough investigation, and should follow a step-by-step approach to requesting information."[12] This mandated approach distinguishes between two categories of privileged information or material that may be sought, requiring that a prosecutor seek and consider privileged factual information before requesting attorney-client communications or non-factual attorney work product. Further, the mandated approach requires consideration and approval of any requests for waiver by United States Attorneys and senior Department personnel.

A prosecutor who believes that there is a legitimate need for a waiver of privilege must first request "purely factual information, which may or may not be privileged, related to the underlying misconduct."[13] Such information is defined as "Category I" information, and may only be requested after the prosecutor has "obtain[ed] written authorization from the United States Attorney" in the district.[14] A request for such authorization to the United States Attorney must set forth the existence of a "legitimate need" and identify the scope of the waiver sought. The United States Attorney "must provide a copy of the request to, and consult with, the Assistant Attorney General for the Criminal Division before granting or denying the request."[15] A corporation's response to a request for a privilege waiver as to Category I information may be considered by the prosecutor in determining whether the corporation has cooperated.

If, and only if, the Category I information disclosed by a corporation "provides an incomplete basis to conduct a thorough investigation" may prosecutors request production of attorney-client communications, including legal advice given to the corporation before, during, and after the underlying misconduct, or non-factual attorney work product. Such information is defined as "Category II" information. Only in "rare circumstances," the McNulty Memorandum cautions, should waivers as to Category II information be sought.

Approval for a waiver request as to Category II information must be given in writing personally by the Deputy Attorney General.[16] As with Category I information, a request for such authorization must set forth the existence of a legitimate need and identify the scope of the waiver sought. Unlike with a request for Category I information, however, a prosecutor may not consider a corporation's refusal of such a waiver against the corporation in a charging decision.[17]

Any request for a waiver, whether as to Category I or Category II information, must be conveyed to a corporation in writing. Copies of waiver requests and the authorizations therefore must be maintained in, respectively, the files of United States Attorneys (with respect to Category I information) and the Deputy Attorney General (with respect to Category II information). Notably, federal prosecutors remain free, under these revised principles, to accept voluntary waivers of privilege.[18] A record of such waivers must be maintained in the files of the United States Attorney's office or the office of the Assistant Attorney General for the Division where the case originated.[19]

These modifications to the Department's policies regarding waiver signal recognition of the importance of the attorney-client and work product protections and re-enforce the protections traditionally afforded the privileged communications and work product. The policy should serve to diminish the incidence of waiver requests. It will not eliminate such requests, however, and the "credit" contemplated for voluntary waivers seems likely to ensure that corporations will continue to feel some pressure to waive privilege. Indeed, given the relatively onerous procedures a prosecutor must now undertake before requesting a waiver, it is not hard to imagine prosecutors tacitly pressuring corporations to agree to provide a "voluntary" waiver instead in some circumstances.

Moreover, certain difficulties that have faced corporations receiving requests for waivers since the Department instituted the policies of the Thompson Memo will likely persist. As has been noted elsewhere, a corporation faced with a request for waiver has been, under pre-revisions Department policy, presented with a dilemma in circumstances where it also faces potential civil suits by third parties on grounds related to the subject matter as to which a waiver is sought.[20] The company cannot readily risk being branded uncooperative by the Government, yet the increased exposure to potential civil liability that may result from a waiver effective as to third parties can increase the "cost" of such cooperation substantially, by providing litigation adversaries with privileged material—including perhaps vast amounts if a "subject matter" waiver is found—that they would otherwise not be entitled to receive. Compounding this difficulty is the fact that requests for such waivers have often been received early in the course of a criminal investigation, before very much substantive investigation of potential misconduct has taken place. This injects uncertainty regarding the true impact of a waiver into the calculation forced upon the corporate client.

This "Hobson's choice" for corporations may, of course, present itself somewhat less often if the revisions to the Department's policies lead to a decrease in requests for waivers.[21] Further, corporations may feel emboldened to refuse requests for waivers as to Category II information, as such refusals now may not be held against them in the assessment of their cooperation. Nevertheless, corporations faced with requests for waivers as to Category I information, or corporations desiring to gain the still-available benefits of a Category II waiver or a voluntary waiver, will likely continue to confront the prospect that providing privileged information to the government may result in a waiver as to third parties as well.

Although the McNulty Memorandum is silent on the issue, a corporation may seek to limit any waiver that it grants, both with respect to the parties as to whom the waiver

is effective and the scope of the waiver.[22] The circuits have split on the effectiveness of such efforts, but the clear majority rule is that voluntary disclosure of otherwise privileged or protected materials to the government operates as a waiver at least as to the materials produced, and potentially as to all materials on the same subject matter.[23] This possibility thus offers little comfort to corporations faced with waiver requests, and although the McNulty Memorandum's revisions may alleviate the difficulty somewhat, they will not resolve it.

Advancement of Attorneys' Fees: A Factor All But Eliminated

The other significant modification effected by the McNulty Memorandum relates to the treatment of a corporation's decision to advance attorneys' fees to employees who are subjects of an investigation. While it directs prosecutors to consider "whether the corporation appears to be protecting its culpable employees and agents,"[24] the memorandum states that prosecutors "generally should not take into account whether a corporation is advancing attorneys' fees to employees or agents under investigation and indictment."[25] Noting that a company's advancement of legal fees often merely represents the company's "compliance with governing state law and its contractual obligations," the memorandum makes the sensible point that compliance with such law or obligations "cannot be considered a failure to cooperate."[26] This general prohibition, however, does not prevent a prosecutor from inquiring "about an attorney's representation of a corporation or its employees."[27] Further, the memorandum states that in "extremely rare cases" where a company's advancement of attorneys' fees is "intended to impede a criminal investigation," a prosecutor may consider that fact in making a charging decision.[28]

While the McNulty Memorandum does not reference them, two decisions by Judge Lewis Kaplan of the federal district court for the Southern District of New York in the Summer of 2006 bear on the treatment of the issue of attorneys' fees effected by the McNulty Memorandum.[29] In an investigation of KPMG for marketing and implementing improper tax shelters, Judge Kaplan found, the United States Attorney's Office for the Southern District of New York pressured KPMG to cut off payment of legal fees for certain of its employees by holding open the implied threat of corporate indictment and prosecution if it did not.[30] Judge Kaplan concluded that the Government's conduct violated the defendants' Fifth Amendment rights to due process and Sixth Amendment rights to counsel.[31]

Regardless of the rationale behind the change, or the catalyst for it, the modification to Department policy regarding advancement of attorneys' fees, unlike the modifications to policy regarding waivers, does not appear to permit much "wiggle room" for prosecutors. Consideration of this factor now appears all but foreclosed in the assessment of corporate cooperation.

CONCLUSION

In sum, the recent changes to federal prosecutorial policy regarding corporations signal a recognition on the part of the Department that the intense focus on corporate "cooperation" in recent years had spawned at least two troublesome, if not counterproductive, trends. The modification of policy related to privilege waivers and advancement of attorneys' fees should go some way toward restoring balance between respecting the rights of corporate defendants and encouraging cooperation with government investigative efforts. How these measures will be put into effect, of course, remains to be seen.

Endnotes

1 Memorandum from Deputy Attorney General Larry D. Thompson to United States Attorneys re: "Principles of Federal Prosecution of Business Organizations," January 20, 2003 (cover letter).

2 *Id.*

3 Memorandum from Deputy Attorney General Paul J. McNulty to United States Attorneys re: "Principles of Federal Prosecution of Business Organizations" (cover letter).

4 *Id.* at 8 (citing Upjohn v. United States, 449 U.S. 383, 389 (1976)).

5 *Id.*

6 *Id.* A similar statement appeared in the Thompson Memo, which stated that "[t]he Department does not… consider waiver of a corporation's attorney-client and work product protections an absolute requirement" and directed prosecutors to consider the corporation's willingness to waive these protections, "when necessary to provide timely and complete information as one factor in evaluating the corporation's cooperation." Thompson Memorandum at 7.

7 McNulty Memorandum at 8.

8 *Id.*

9 *Id.* at 9.

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.* Federal prosecutors in litigating Divisions within Main Justice must seek authorization for waiver requests for Category I information from the Assistant Attorney General of the Division. Where Category II information is concerned, the Assistant Attorney General in question must submit the request to the Deputy Attorney General. *Id.* at 11.

16 Two exceptions to the requirement of Deputy Attorney General approval are set forth in the McNulty Memorandum: requests for waivers as to (1) legal advice contemporaneous to underlying misconduct where the corporation or one of its employees is relying on an advice-of-counsel defense; and (2) legal advice or communications in furtherance of a crime or fraud coming within the crime-fraud exception to the attorney-client privilege. *Id.* at 10. Where these circumstances are present, a prosecutor should seek approval for a waiver request as if the information were Category I information.

17 While a refusal to waive may not be considered against a corporation, a waiver may be considered in the corporation's favor. *Id.* at 10.

18 *Id.* at 11.

19 Interestingly, after setting forth these restrictions on requests for waivers, the McNulty Memorandum subsequently modifies the section of the Principles related to corporate efforts to obstruct a government investigation by adding as an example of such conduct "overly broad or frivolous assertions of privilege to withhold the disclosure of relevant, non-privileged documents." *Id.* at 12.

20 *See, e.g.*, George J. Terwilliger & Darryl S. Lew, *Privilege in Peril: Corporate Cooperation in the New Era of Government Investigations*, 7 Engage 25 (March 2006).

21 In this regard, it should be noted that the McNulty Memorandum directs consideration of the "collateral consequences to a corporation of a waiver" as part of the determination of whether a "legitimate need" for privileged material exists. McNulty Memorandum at 9. How prosecutors will weigh the risk of compelled disclosure of privileged material to third parties in this context remains to be seen.

22 Some courts have distinguished between a "selective" waiver, which "permits the client who has disclosed privileged communications to one party to continue asserting the privilege against other parties," and a "partial" waiver, which "permits a client who has disclosed a portion of privileged communications to continue asserting the privilege as to the remaining portions of the same communications." Westinghouse Elec. Co. v. Republic of the Philippines, 951 F.2d 1414, 1423 n.7 (3d Cir. 1991) (citations omitted); *accord In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 294 n.5 (6th Cir. 2002). Partial waivers seldom arise in practice, however. The general term "limited waiver" is used herein for the claim that a third party may not discover privileged materials voluntarily disclosed to the government pursuant to an official investigation.

23 For cases generally rejecting the concept of limited waiver, *see* Permian Corp. v. United States, 665 F.2d 1214, 1219–20 (D.C. Cir. 1981); United States v. Massachusetts Inst. of Tech., 129 F.3d 681, 686 (1st Cir. 1997); *In re John Doe Corp.*, 675 F.2d 482, 489 (2d Cir. 1982); *Westinghouse*, 951 F.2d at 1425; *Martin Marietta.*, 856 F.2d 619, 623 (4th Cir. 1988); *Columbia/HCA*, 293 F.3d at 302; Weil v. Invest./Indicators, Research and Mgmt., 647 F.2d 18, 24 (9th Cir. 1981); and *In re Qwest Comms. Int'l Sec. Litig.*, 450 F.3d 1179 (10th Cir. 2006). For caselaw embracing the concept, *see* Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1978) (en banc); Pritchard-Keang Nam Corp. v. Jaworski, 751 F.2d 277, 284 (8th Cir. 1984) (following *Diversified*); United States v. Shyres, 898 F.2d 647, 657 (8th Cir. 1990) (same); *see also* St. Paul Reinsurance Co., Ltd. v. Commercial Fin. Corp., 197 F.R.D. 620, 639 (N.D. Iowa 2000) (applying *Diversified*'s analysis to the work-product doctrine); Biben v. Card, 119 F.R.D. 421, 428 (W.D. Mo. 1987) (recognizing a limited waiver to the extent that "the information involved was communicated to independent outside counsel for the purpose of assisting the [holders of the privilege] in investigating their own alleged wrongdoing")

24 The memorandum provides as examples of such protection "retaining the employees without sanction for their misconduct or… providing information to the employees about the government's investigation pursuant to a joint defense agreement." McNulty Memorandum at 11.

25 *Id.*

26 *Id.*

27 *Id.* at 11-12.

28 *Id.* at 11 n.3.

29 The Thompson Memo cited the "advancing of attorneys' fees" as an example of a way in which a corporation might protect and support culpable employees and agents. Thompson Memo at 8.

30 United States v. Stein, 435 F. Supp. 2d 330, 341-47 (S.D.N.Y. 2006). The basis in policy for the government's position, Judge Kaplan found, was the Thompson Memo's cooperation provisions, and particularly those related to attorneys' fees.

31 *Id.* at 362, 367.

Criminal Law and Procedure

The Vienna Convention and the Supreme Court: Reaching the Limits of Internationalism?

*By Kent Scheidegger**

The Supreme Court has taken much criticism in certain circles for paying too much attention to "international opinion" in interpreting the Constitution of the United States.[1] However, in the cases on the Vienna Convention, (which really do involve international law), the High Court has been surprisingly un-swayed by international opinion. Four cases have settled on the side of domestic law enforcement—though the fifth, looming on the horizon, may prove the most difficult.

The United States ratified the Vienna Convention on Consular Relations on November 24, 1969.[2] Article 36 of the treaty provides:

> 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State: ... ¶ (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner.... The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph; ...
>
> 2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

Despite imposing a new obligation on arresting law enforcement agencies, this provision went nearly unnoticed in American criminal law for a quarter century. A 1995 law review article states: "[T]he only reported case on the application of Article 36 of the Vienna Convention, did not involve a criminal arrest, but instead concerned the detention of a foreigner whose immigration status was irregular."[3] After all, the Sixth Amendment and the *Miranda* rule already gave a right to counsel at trial and before questioning, and a notification of that right.[4] Thus, although the obligation to "inform the person concerned" was frequently ignored in the United States, as in other countries, neither the defense bar nor foreign governments showed much interest.[5] All that changed in the 1990s. The fact that most of the foreign-national murderers on death row in the United States had not been informed of their consular-notification rights upon arrest was seen as reason to prevent their execution. Not only did convicted murderers and their attorneys seize on this argument, but so did their home countries—which joined the fray.

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Breard, LaGrand, and Procedural Default

Using the Vienna Convention in this manner had a problem that may be said common to novel arguments. A basic rule of American criminal procedure requires that most objections be raised in the trial court, and an objection is typically defaulted if not raised at the proper time. This is true of constitutional requirements as well as those based on statutes and rules of court.[6] In federal habeas corpus proceedings, the Supreme Court has created two exceptions through which a defaulted claim may be considered. One requires a showing of good cause for the default and resulting prejudice from the violation.[7] The other requires a compelling showing that the prisoner is actually innocent of the crime, which is extremely rare in any capital case that has progressed to the federal habeas stage.[8]

As the Supreme Court was shaping the procedural default rule, it noted that the rule operates in conjunction with the right to effective counsel.[9] If an error really does go to the fundamental fairness of a trial, an effective lawyer will object, and there will be no default. If the lawyer is ineffective, that ineffectiveness is both an independent claim for relief and "cause" for the default, opening the door to federal habeas relief. In this way, the procedural default rule operates as a filter, cutting off borderline claims raised late in the process but keeping relief available for fundamental ones.

The first Vienna Convention case to come to the Supreme Court was that of Angel Francisco Breard. In 1992, Breard left the house armed with a knife, and found Ruth Dickie, a thirty-nine-year-old woman who lived alone in an apartment in Arlington, Virginia. There Breard raped her and stabbed her five times in the neck. Guilt of the crime was proven conclusively by DNA, forensic evidence, and his confession.[10]

On appeal to the Virginia Supreme Court and in a subsequent state habeas petition, Breard made no mention of the Vienna Convention. He raised the issue for the first time on the third review of his case, a habeas petition in federal district court, claiming his rights were violated because the arresting authorities did not inform him of his right to have the Paraguayan Consulate notified.[11] The district court dismissed the claim as procedurally defaulted, and the Fourth Circuit affirmed. Paraguay and its official meanwhile initiated a flurry of litigation in the federal district court, in the International Court of Justice (ICJ), and in the Supreme Court under original jurisdiction.[12] The ICJ issued an order requesting the United States to take measures to ensure that Breard was not executed pending proceedings.

The case came to the Supreme Court on the eve of execution, with a request for stay of execution. Both Breard and Paraguay took the position that the Vienna Convention trumps the procedural default rule because it is the "supreme law of the land."[13] Given the long-established rule that rights under

the Constitution itself can be defaulted if not timely raised, the Court had little difficulty dispatching the argument that the Supremacy Clause somehow made treaty rights immune from default.[14] Further, the Court noted that the principle of harmless error would also apply. Even a clear violation of a right is generally not a ground for reversal of a judgment unless it causes some harm, i.e., may have had an effect on the outcome. Vienna Convention claims are no different.

On the question of who would ultimately decide procedural default issues, the Supreme Court made clear that it would. The High Court would give the opinion of the ICJ "respectful consideration," but treaty rights must be invoked in accordance with the procedure of the forum state under both general principles and Article 36(2) of the Vienna Convention itself, and the Supreme Court, not the ICJ, would decide those questions to the extent they involved federal law.[15]

The opinion ends with a curious mix of Executive-Judicial and federal-state separation of powers issues—a mixture that will probably come back to the Court soon. As a result of diplomatic discussions with Paraguay, the Secretary of State requested the Governor of Virginia stay execution. The Supreme Court replied, so is the Governor's prerogative.[16] Had the Executive done more than request, a different issue would have been presented—the primacy of the Executive in foreign relations. As it was, the Governor denied the request and the stay, and Breard was executed. Paraguay dropped its ICJ case.[17]

The next case would actually result in an ICJ decision. Brothers Karl and Walter LaGrand attempted to rob the Valley National Bank in Marana, Arizona, on January 7, 1982. They bound and gagged the manager, Ken Hartsock, and another employee, Dawn Lopez. Later, they stabbed both. Guilt was proven by the surviving victim's testimony, the license number of their car, Karl's fingerprint inside the bank, and both brothers' confessions. The Arizona Supreme Court affirmed in 1987. The appeal made no mention of the Vienna Convention.[18] The LaGrands first contacted the German Consulate in 1992, having learned about the Vienna Convention from an independent source.[19] For the next seven years, Germany assisted the LaGrands but filed no action on its own behalf in any American or international court. State review of the case had been completed by 1992, so the Vienna Convention claim was raised for the first time on federal habeas corpus. The district court denied the claim as procedurally defaulted, and the Ninth Circuit affirmed.[20]

A defaulted claim may be considered if there is cause for the default—defined as an objective factor external to the defense—and resulting prejudice, or if the petitioner is actually innocent.[21] Ineffective assistance of counsel at trial or on appeal may qualify as cause, but Karl had not shown any reason why his lawyer could not have raised the claim on state collateral review, and Walter had waived his ineffectiveness claims in order to keep the same lawyer throughout the proceedings.[22] The Supreme Court denied certiorari on November 2, 1998.

There was another theory that might have been used to argue cause, but it is not discussed in the opinion. This argument is best illustrated by the Supreme Court case of *Strickler v. Greene.*[23] The prosecution's failure to disclose material inculpatory evidence in its possession is a Due Process violation, and continued failure to disclose can be cause for default of that claim as to any defaults occurring prior to the time defense gains knowledge of the evidence.[24] By analogy, the defense could argue that the failure to give the advisement required by the Vienna Convention is both a violation and a cause for not raising it. The weak point of this argument is that defense counsel is not precluded from raising the issue, advisement or no advisement. The underlying fact of defendant's citizenship is equally accessible to the defense, if not more so, and the Vienna Convention itself is a matter of law. The reason there are so many defaulted claims, of course, is that most American criminal defense lawyers, like most police departments, never heard of the Vienna Convention before the mid-1990s.

On March 2, 1999, the day before the scheduled execution of Walter LaGrand, and seven years after it learned of the case, Germany filed an action in the ICJ. That court issued an order stating that: "The United States of America should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings."[25] The ICJ issued this order sua sponte and with no opportunity for the United States to respond.[26] Germany then sought to invoke the Supreme Court's original jurisdiction, and requested a stay to enforce the ICJ's order. The High Court declined 7 to 2, noting both the tardiness of the request and the jurisdictional problems. In decisions before and since, the Supreme Court has held that a stay should be denied when a known claim is held until the eve of execution and then filed with a demand that the execution be further stayed until the claim can be litigated.[27] The Court's refusal to assist in enforcing the ICJ's provisional remedy order may be an implicit rebuke of that court for issuing the order in such circumstances.

Unlike Paraguay, Germany did not drop its ICJ suit after the defendant was executed. The ICJ's opinion addressed many issues, but the most important was its discussion of the procedural default rule:

> By [the] time [Germany was able to provide assistance], however, because of the failure of the American authorities to comply with their obligation under Article 36, paragraph 1(b), the procedural default rule prevented counsel for the LaGrands to effectively challenge their convictions and sentences other than on United States constitutional grounds. As a result, although United States courts could and did examine the professional competence of counsel assigned to the indigent LaGrands by reference to United States constitutional standards, the procedural default rule prevented them from attaching any legal significance to the fact, *inter alia*, that the violation of the rights set forth in Article 36, paragraph 1, prevented Germany, in a timely fashion, from retaining private counsel for them and otherwise assisting in their defence as provided for by the Convention.[28]

If assistance from the German Consulate really would have made a difference, nothing stopped the LaGrands' attorneys from requesting such assistance themselves. The Ninth Circuit reviewed Karl LaGrand's ineffectiveness claim on the merits, and nothing stopped him from claiming that the failure to seek assistance was ineffective. The ICJ was unwilling to see the right to effective assistance as cushioning the procedural default rule the way the Supreme Court did in *Carrier*. Because the Vienna Convention claim itself was defaulted before the consulate had actual notice, and the violation itself was not recognized as

cause, the ICJ held that the procedural default rule as applied to the case failed the requirement that local rules must enable full effect to be given to the purposes of Article 36.

The Avena Case

Mexico is the foreign country with the largest number of citizens on death row in America, by a wide margin. In 2003, Mexico filed an ICJ action on behalf of fifty-four of its nationals. The ICJ issued its decision the following year, by which time two of the cases had been otherwise resolved. Although the decision was hailed as a defeat for the United States, the ICJ in fact decided many important points in the United States' favor.

Mexico's farthest-reaching claim was that a simple Vienna Convention violation alone required vacating all fifty-two of the remaining convictions and sentences. The ICJ rejected this contention.[29] The requirement of "reparation" requires only that each case be examined for prejudice actually caused by a violation, and that a remedy be provided in such an event.[30]

The claim that all statements and confessions taken prior to notification of the consulate be excluded on any retrial was also soundly rejected. Only a causal connection between the violation and the obtaining of the statement would warrant such exclusion.[31] Further, the ICJ's ruling on the timing of notification of the consulate guaranteed that there would rarely be a causal connection.

Obviously, there is no causal connection when the statement or confession precedes the violation. Article 36, paragraph 1(b), requires that the arrestee be informed of his rights "without delay," and if he requests notification, the consulate must be notified "without delay."[32] The ICJ rejected the claim that notice to the arrestee necessarily precedes interrogation.[33] During preparation of the Convention, suggested time periods for notification ranged from a minimum of forty-eight hours up to one month, and the ICJ rejected the argument that the adopted term "without delay" meant "'immediately' upon arrest."[34] Without further explanation, however, the ICJ nonetheless found a duty to inform the arrested person as soon as he is learned to be a foreign national or grounds materialize to think he may be.[35] The ICJ goes on to find a violation in the case of an arrestee whose birthplace was stated in the arrest report but who was informed of these rights forty hours later.[36] However, there is no comparable requirement of immediacy regarding actually notifying the consulate:

> Mr. Hernández (case No. 34) was arrested in Texas on Wednesday 15 October 1997. The United States authorities had no reason to believe he might have American citizenship. The consular post was notified the following Monday, that is five days (corresponding to only three working days) thereafter. The Court finds that, in the circumstances, the United States did notify the consular post without delay, in accordance with its obligation under Article 36, paragraph 1 (b).[37]

Unlike the *Miranda* rule, the Vienna Convention notification provisions were not drafted with interrogation in mind. "[D]uring the Conference debates on this term, no delegate made *any connection* with the issue of interrogation."[38] Unlike a request for counsel under *Miranda*, there is no requirement under *Avena* to refrain from interrogation until a request for consular notification has been fulfilled.[39] Also unlike *Miranda*, there is no waiver to be made as a condition for interrogation.[40]

Because consular notification is a matter of timing unrelated to the taking of the statement, it is more like the prompt appearance requirement than the *Miranda* requirement. *United States* v. *Mitchell*[41] held that a statement made promptly upon arrest was not rendered inadmissible under *McNabb* v. *United States*[42] by a subsequent violation of the prompt appearance rule. Similarly, if consular notification is not overdue when a statement is taken, the fact that the notification is not made when it later becomes due has no causal connection to the making of the statement, and the subsequent violation is no ground for suppression.

On the question of procedural default, the ICJ largely reiterated what it said in *LaGrand*. It stood by its theory of the violation itself causing the default, noting: "[N]or has any provision been made to prevent its application in cases where it has been the failure of the United States itself to inform that may have precluded counsel from being in a position to have raised the question of a Vienna Convention violation at trial."[43] Where this was the case, the ICJ held that the United States would have to waive the procedural default to provide a review and reconsideration.

Medellín and the President's Memorandum

The first of the *Avena* 52 to reach the U. S. Supreme Court was Jose Medellín, who was found guilty of murder. In 1993, Elizabeth Pena and Jennifer Ertman, ages sixteen and fourteen, took a shortcut to their homes in Houston, Texas.[44] They encountered a gang called "The Blacks and Whites," one of whom was Medellín, a young man born in Mexico, who had had lived in the United States since he was a small child. The gang subjected the girls to an hour of gang rape and sodomy, then strangled the girls to death to prevent them from identifying the assailants, stomping and kicking their bodies to make sure they were dead. After his arrest, Medellín admitted his substantial participation in the crimes, including personal participation in strangling Elizabeth. He first informed authorities he was born in Mexico several hours after this statement, but was not advised that he had the right to notify the Mexican Consulate.

Medellín made no claim under the Vienna Convention on direct appeal of his sentence, but he raised the claim for the first time in a state habeas petition. The state courts rejected the claim; on federal habeas corpus, the federal district court also rejected the claim, and denied a certificate of appealability.[45] The ICJ decided *Avena* while Medellín's application to the Fifth Circuit for a certificate of appealability was pending. The Court of Appeals also denied a certificate of appealability. It gave two reasons for denying appeal on the Vienna Convention claim. First, the claim was defaulted under *Breard v. Greene*, and, notwithstanding a contrary ICJ ruling, Supreme Court precedent was binding on the Court of Appeals until the Supreme Court overruled it. The panel also held it was bound by a prior panel decision that the Vienna Convention created no individually enforceable rights, until that decision was reconsidered by the court en banc.[46] Curiously, the opinion did not mention a third, obvious reason for denying the appeal.

In the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress changed the standard for certificates of appeal-ability, requiring the petitioner to make a substantial showing of the denial of a *constitutional* right. [47] Whatever rights the treaty in question may confer, in the end they are treaty rights, not constitutional rights.

The Supreme Court granted certiorari. On the day the briefs of Texas and supporting *amici* were due, President Bush issued a Memorandum for the Attorney General stating:

> I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its inter-national obligations under the decision of the International Court of Justice in the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America) (Avena), 2004 ICJ 128 (Mar. 31), by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.[48]

This memorandum, combined with several other obstacles to enforcing the ICJ decision on federal habeas corpus, convinced the Supreme Court to dismiss the writ of certiorari.[49] In addition to the certificate of appealability problem, the rule in *Reed v. Farley* sharply limits the cognizability of non-constitutional claims on federal habeas corpus.[50] Also, the "deference" standard of AEDPA makes very doubtful the ability of a federal habeas court to overturn a state court decision in full accord with Supreme Court precedent at the time of the decision, notwithstanding later legal developments.[51] Finally, there are limitations on habeas relief regarding the creation of new rules and the exhaustion of state remedies.[52] The Court's recitation of barriers to federal habeas relief is dictum and not holding, but it indicates that federal habeas will be of little use as a forum for adjudicating Vienna Convention cases. The focus shifts back to state court.

Sanchez-Llamas, Bustillo, and "Respectful Consideration"

The Supreme Court has issued only one opinion on the merits since *Avena*, in a pair of cases arising from the state courts. In this opinion, the High Court said it would give "respectful consideration" to the views of the ICJ, but that apparently means little more than considering the ICJ's opinion as it would that of any other court and not as a precedent with any particular binding force.

Moises Sanchez-Llamas, a citizen of Mexico, shot and attempted to murder a police officer. He received *Miranda* warnings in both English and Spanish before making incriminating statements, but was not informed of his rights under the Vienna Convention. He moved at trial for the statements to be suppressed, but the trial court denied the motion. The state courts affirmed on appeal.[53]

In the Supreme Court, the Government of Mexico filed a brief in support of Sanchez-Llamas. Six pages of that brief are devoted to the argument that suppression of evidence should be granted as a remedy.[54] But, notably, there is no citation to a case where a court of Mexico has suppressed a statement as a remedy for a Vienna Convention violation—no statement by the Government of Mexico that it has provided such a remedy in the past, and no commitment that it will provide such a remedy in the future. Unless Mexico has achieved 100% compliance with Vienna Convention requirements among its police force, exceedingly unlikely, there are violations, and one would expect to see Mexico's suppression remedy cited in this brief if it existed. The brief submitted by the European Union similarly did not cite a single case in which any of its member nations has suppressed a statement on this ground. There are a few Australian cases suppressing statements, but on closer examination each of these cases suppressed the statement as a result of multiple violations, not just the consular notification problem.[55]

A claim that a treaty requires suppression of a statement under circumstances where *no* other signatory to that treaty would suppress the statement would not be expected to get far, and it did not. "It is implausible that other signatories to the Convention thought it to require a remedy that nearly all refuse to recognize as a matter of domestic law."[56] The Supreme Court lacks any general supervisory authority to impose an exclusionary rule on state courts; so, such a rule could only come from the treaty itself. But the treaty neither contains nor implies any such rule.[57] Somewhat surprisingly, the Court did not mention that the *Avena* decision also rejected any blanket rule of exclusion.

Bustillo's case, on the other hand, presented a direct conflict with *Avena*. Bustillo, a citizen of Honduras, was convicted of murder in a Virginia state court. His defense was that another man, also Honduran, committed the crime. He raised his Vienna Convention claim for the first time on state habeas, claiming that the Honduran Consulate could have been of assistance in locating the other man, who may have fled to Honduras immediately after the crime.[58] The state courts denied the claim on the ground that Bustillo had failed to raise it at trial or on direct appeal.[59]

With the *Breard v. Greene* precedent on point, the primary argument for the defendant was that the ICJ decisions in *LaGrand* and *Avena* required reconsideration. "In a similar vein, several *amici* contend that 'the United States is *obligated* to comply with the Convention, *as interpreted by the ICJ*.' Brief for ICJ Experts 11 (emphases added)."[60] The Supreme Court did not agree with the ICJ experts. While the Court said it would give the ICJ's interpretation "respectful consideration," it denied that the ICJ's decisions were binding precedent, although they may have binding effect in the case actually adjudicated by the ICJ.[61] Treaties are federal laws, and the ultimate responsibility for their interpretation for American courts lies with the Supreme Court, just as it does for federal statutes and the Constitution. The ICJ's decisions on procedural default were erroneous, the Supreme Court said, because they had underestimated the importance of procedural default rules in an adversarial (as opposed to inquisitorial) system.[62] Justice Breyer, dissenting, thought that the ICJ decision should have more respect.[63]

The Last Question

The Supreme Court rejection, in *Bustillo*, of the ICJ's *Avena* decision comes with one important qualification: the Court quoted the statute of the ICJ for the proposition that "[t]he ICJ's decisions have 'no binding force except between the

parties and in respect of the particular case.'"[64] In *Bustillo*, the Court emphasized the phrase "no binding force," but in a case involving one of the death row inmates involved in the *Avena* case, the "except" clause may bear emphasis. The President's memorandum, noted above, is limited to those cases.

The case most likely to bring these issues back to the Supreme Court is the same *Medellín* case the Court considered but dismissed before. Shortly after the President issued his memorandum, (and while the Supreme Court case was still pending), Medellín filed a new state habeas petition with the Texas Court of Criminal Appeals. Texas law allows a successive petition if "the factual or legal basis of the claim was unavailable on the date of the previous application."[65] The Solicitor General of the United States made an unusual appearance in state court, arguing that all of Medellín's other arguments were meritless—neither the Vienna Convention, the Optional Protocol, nor the *Avena* decision by its own force required waiving Texas's procedural default rule—but the President's memorandum did so require.

The Texas Court of Criminal Appeals rejected the argument. Cases on Executive agreements with other countries did not provide a basis for this memorandum, because a unilateral memorandum is not an agreement.[66] The CCA went on to hold, "The Supreme Court's determination about the domestic effect of ICJ decisions—that they are entitled only to 'respectful consideration'—based on its interpretation of the Statute of the ICJ and the United Nations Charter in *Sanchez-Llamas* forecloses any argument that the President is acting within his authority to faithfully execute the laws of the United States."[67]

But this is not quite true. The *Sanchez-Llamas* holding dealt with the non-binding effect of ICJ decisions in cases other than the case actually adjudicated by the ICJ. *Medellín* is distinguishable from *Bustillo* in this regard. The extent to which American courts need to comply with *Avena* in the cases it adjudicated remains an open question.

Medellín filed his certiorari petition in the Supreme Court on January 19, 2007.[68] The issues of presidential power and the role of international law in state court adjudications make the case a strong possibility for Supreme Court review. These questions may well be answered by this time next year.

CONCLUSION

The Vienna Convention appears to be headed back to obscurity as far as the practice of criminal law in the United States is concerned. The primary, if not single, purpose for which it could have been useful at trial—suppressing statements of the defendant—was nullified in *Sanchez-Llamas*. Its usefulness on appeal or habeas corpus when trial counsel does not raise it was greatly diminished by the accompanying *Bustillo* case. When the few dozen cases of the *Avena* inmates are resolved, there may well be little left to litigate.

Endnotes

1 *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 628 (2005) (Scalia, J., dissenting); *see also* Richard A. Posner, *The Supreme Court—Foreword: A Political Court*, 119 Harv. L. Rev. 32, 84-85 (2005).

2 21 U.S.T. 77.

3 Schenk & Quigley, *Foreigners on Texas's Death Row and the Right of Access to a Consul*, 26 St. Mary's L. J. 719, 730 (1995).

4 Miranda v. Arizona, 384 U.S. 436 (1966).

5 *See* Schenk & Quigley, *supra* note 3, at 729.

6 *See* Yakus v. United States, 321 U.S. 414, 444 (1944).

7 *See* Wainwright v. Sykes, 433 U.S. 72, 90-91 (1977).

8 *See* Schlup v. Delo, 513 U.S. 298, 321 (1995).

9 *See* Murray v. Carrier, 477 U.S. 478, 496 (1986).

10 *See* Breard v. Commonwealth, 445 S.E.2d 670, 673-74 (Va. 1994).

11 *See* Breard v. Greene, 523 U.S. 371, 373 (1998).

12 *See id.* at 374-75.

13 *See id.* at 375.

14 *See id*. at 375-76.

15 *See id*. at 375.

16 *See id.* at 378.

17 *See* Case Concerning Vienna Convention on Consular Relations (Para. v. U.S.) 1998 I.C.J. 426 (Order of Nov. 10).

18 *See* State v. LaGrand, 734 P.2d 563 (Ariz. 1987).

19 *See* LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466, 477, ¶ 22 (*hereinafter* "LaGrand ICJ").

20 *See* LaGrand v. Stewart, 133 F.3d 1253 (9th Cir. 1998).

21 *See id*. at 1261.

22 *See id*. at 1262.

23 527 U.S. 263 (1999).

24 *See id*. at 283.

25 LaGrand ICJ, ¶¶ 30-32.

26 *See* Federal Republic of Germany v. United States, 526 U.S. 111 (1999) (per curiam).

27 *See* Gomez v. United States District Court, 503 U.S. 653, 654 (1992); Hill v. McDonough, 126 S. Ct. 2096, 2104 (2006).

28 LaGrand ICJ, ¶ 91.

29 Case Concerning Avena and other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Judgment of Mar. 31) (Avena), ¶¶ 126-27.

30 *See id*. ¶¶ 121-23.

31 *Id*. ¶¶ 119-121.

32 *See* Avena, *supra* note 29, ¶50.

33 *Id*. ¶87.

34 *Id*. ¶85.

35 *Id*. ¶88.

36 *Id*. ¶89.

37 *See Avena*, ¶97.

38 *Id.* ¶87 (emphasis added); cf. *Miranda* (deciding admissibility of statements obtained during custodial interrogation).

39 *Avena*, *supra* note 29, ¶87; cf. *Miranda*, at 473-74.

40 Cf. *Miranda*, at 479.

41 322 U.S. 65, 69-70 (1944).

42 318 U.S. 332 (1943).

43 *Avena*, ¶ 113.

44 Medellín v. State, No. 71,997 (Tex. Crim. App. May 16, 1997); Medellín v. Dretke, 371 F.3d 270, 273-274 (5th Cir. 2004); Jennifer Ertman & Elizabeth Pena—Murder Victims, *at* http://www.murdervictims.com/Voices/jeneliz.html (last visited Jan. 12, 2007).

45 Medellín v. Dretke, *supra* note 44, 371 F.3d at 274.

46 *Id*. at 279-280.

47 28 U.S.C. § 2253(c)(2) (emphasis added).

48 George W. Bush, Memorandum for the Attorney General (Feb. 28, 2006), http://www.whitehouse.gov/news/releases/2005/02/20050228 18.html (visited January 12, 2007).

49 Medellín v. Dretke, 544 U.S. 660, 664 (2005).

50 512 U.S. 339 (1994).

51 28 U.S.C. § 2254(d).

52 *Medellín*, 544 U.S. at 664-66.

53 Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2675-76 (2006).

54 *See* Brief for Government of the United Mexican States as Amicus Curiae in Sanchez-Llamas v. Oregon, U.S. Supreme Court No. 04-10566, 24-30.

55 *See* Brief for Criminal Justice Legal Foundation as Amicus Curiae in Sanchez-Llamas v. Oregon, U.S. Supreme Court No. 04-10566, pp. 14-18.

56 *See* Sanchez-Llamas, 126 S. Ct. at 2678.

57 *See id*. at 2679-80.

58 *See id*. at 2676-77.

59 *See id.* at 2682.

60 *Id*. at 2683.

61 *See id*. at 2683-84.

62 *See id*. at 2686.

63 *See id*. at 2703.

64 *Id*. at 2684, quoting Statute of the International Court of Justice, Art. 59, 59 Stat. 1062, T.S. No. 993 (1945) (emphasis omitted).

65 Tex. Code Crim. Proc. art. 11.071, § 5(a)(1).

66 Ex parte Medellín, No. AP-75,207 (Tex. Crim. App. Nov. 15, 2006), paragraph following note 209.

67 *Id.*, text accompanying notes 124-125, citing Sanchez-Llamas, 126 S. Ct. at 2684-85.

68 Petition for Certiorari in Medellín v. Texas, U.S. Supreme Court No. 06-984.

Attorney-Client Privilege Waivers in Criminal Investigations

*George J. Terwilliger III, Mary Beth Buchanan, William B. Mateja, & Theodore B. Olson**

George J. Terwilliger III: Let us call a spade a spade and put this issue in perspective. While the matter is one of very great practical concern to counsel, business leaders and business managers who have to deal with it, what we are dealing with here are core aspects of our legal system. That is what the privilege of attorney-client communications and the work product doctrine are essentially—the pillars upon which the legal system and the operation of our ordered system of law depends. We ought to be careful about tinkering very much with these foundation stones.

Our present situation has evolved through a number of different elements, all of which are outlined in the paper, not the least of which is a much more aggressive policy attitude (appropriately so) on the part of the Justice Department, the SEC, and other federal and state enforcement entities, toward business crime and crime in the marketplace. I favor that approach. A dishonest marketplace cannot be a free marketplace, and it is important that the playing field be level. Prosecutors play a very important role in accomplishing that end. But, increasingly, as that has occurred—and in part because of some policy changes that were perhaps not too well thought-out, or executed poorly—we have reached the point where the privilege really is in peril, and we ought to be worried about that.

For those of you who do not deal with this issue, a brief: current Justice Department policy allows prosecutors to assess whether or not to prosecute a company, a corporation or another business entity, in part and in no small measure actually on the basis of whether that company has cooperated with the government; and, in assessing operation, in turn, as part of that cooperation, prosecutors are permitted to waivers of the attorney-client privilege or work product material. Now, as much as we would like to cooperate with prosecutors and provide such information, the problem this presents is the scope of the waiver that results in such circumstances.

We can agree on the importance of government policies that promote robust internal compliance programs and careful self-examination by companies of not just the ethics of their business behavior but the legal compliance of their operations. We can also agree that attorneys play a vital role in corporate governance: we want attorneys involved in business decisions and conducting the affairs of incorporation. When business decisions are made, lawyers ought to be in the room, particularly given the general complexity of the regulatory legal environment.

In the post-Enron world, as we have come to call it, corporations work under very tough enforcement. The use of criminal sanctions against businesses for conduct undertaken in the commercial marketplace is not at all uncommon. In this environment, it is only logical, common-sensical in fact, that legal advice be more important than ever in business decision-making.

Additionally, there is a long history of the SEC and, more recently, the Department of Justice, looking to counsel as adjuncts in their law enforcement functions. Right now I am involved in several cases where, in essence, we are conducting investigations in which the privilege has been waived, and the results of those investigations are being turned over to the Government in real time as a measure of the company's cooperation. Former Judge and SEC Director of Enforcement Stanley Sporkin, said recently (while he was still Director) that our budgets the agency was so limited in its resources, it could not do all the mop-up work in the cases it was handling. It decided then to enlist the private sector. This was an affirmative policy choice to use outside lawyers as adjuncts to the Government. Bill Kolasky, formerly Deputy Assistant Attorney General in the Antitrust Division, said in 2002 that it was critical the company's lawyers regularly attend management meetings and respond quickly to questions with advice that takes full account of the practical business issues a client faces.

I could give many more examples. Suffice it to say, the challenge this brings about is getting lawyers in the room, getting them involved in the discussion, without the burden of having business people looking over their shoulders at the lawyers thinking, "What are you going to reveal?" Is there really any confidentiality left? What trust can I enjoy with counsel when I share my concerns and look for advice? Can I speak freely now? Am I going to run afoul of the law? And so forth. So, I think the objective is finding a better way to do this under the law. And that is an objective on both the investigatory side and the business operations side. It is an objective common to both business and government.

The privilege waiver is getting them away from this common objective, because limited waiver agreements between investigating agencies (e.g. the Commission, the Justice Department and others) are for the most part ineffective in the face of challenges against a third party for communications or work product waivers. The majority view in the federal courts, to sum up as much as one can generalize, is that a waiver privilege is to one party as a waiver privilege is to all. The same goes generally for work product. If you disclose work product to the Government, the chances of being able to protect that disclosure in a challenge against third parties is pretty slim.

If you are interested in this issue and looking for a good discussion of the law on this issue, I would commend to your attention the Sixth Circuit's 2002 decision in the Columbia HCA Healthcare Fraud litigation; particularly the dissent of Judge Boggs, who was a Reagan appointee in that case. I think this is one of the most well-reasoned judicial explanations that I have ever seen. And it explains why recognizing some kind of

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limited waiver and enforcing limited waivers, where information has been turned over to the government in an investigatory setting, makes sense.

Where we stand today is perhaps best illustrated by a case recounted recently in a *National Law Journal* article. A law firm, in connection with McKesson's merger with HBOC, did an internal investigation and made certain disclosures concerning accounting irregularities of about $42 million. The firm that conducted the investigation wrote a report, and then turned it over to the authorities, at which point they limited waiver agreement; (the report was limited to authorities, not turned over to third parties, as we would typically expect). That report has now been the subject of litigation in five different courts, with the following results:

A state court in Delaware upheld the limited waiver (an opinion worth reading).

A Georgia state court refused to limit the waiver.

A California state court refused to limit the waiver.

A federal judge in the Northern District of California agreed to limit the waivers (there are differing results within the same jurisdiction).

Another federal judge, in the same district, hearing a case against a former executive of the company, refused to limit the waiver.

Needless to say, the results are all over the map. As the judge put it, the law is in the state of helpless confusion regarding enforcement of limited waivers. This only gets more complicated when you venture beyond the borders of the United States. Many European countries now have data protection or data privacy laws that prohibit companies or their agents from disclosing information obtained from their personnel or their personal files. While there are certain exceptions to this that can sometimes be used to interview employees and get information from them, if you want to turn that information over to the government under a limited privilege agreement or some other kind of an arrangement, the data protection laws further complicate that problem.

So, what can we do about this? I tried to address that question in the paper. There are a number of possibilities considered there, including legislative solutions. I think it is unlikely that there is judicial solution to this, absent some legislative initiative. Except for the Eighth Circuit, there has been little sympathy in the courts. Here in the D.C. circuit, Judge Mikva wrote a decision a long time ago that continues to hold sway, basically saying, "I don't see how it enhances the value of the attorney-client privilege to recognize a limited waiver. A waiver is waiver." And that seems basically to be the law.

The sentencing guidelines have some things now concerning cooperation that might be an avenue of redress. The SEC, I will say, to its credit, has introduced legislation that would try to address this issue. But there are a couple of immediate, practical things that can be done until some more comprehensive solution can be found, and they are discussed in the paper. One is to think about, when commencing an internal investigation with the idea that the results are to be disclosed to the government, doing it as a non-privileged exercise to begin with; making it clear to the Government, to the employees, to the company involved, that this is not a privileged exercise, "We intend to disclose this." The downside with that, of course, is that all of the information gathered is still available to the third parties from whom one is trying to shield it in a limited waiver agreement, and it is certainly a disincentive in the case where a company might suffer considerable exposure to third-party claims to even undertake the internal investigation.

Another possibility, which still has the advantage of cooperation with the government, and prosecutors' cooperation, is to provide the Government with a roadmap to conduct its own investigation. Obviously, you can turn over documents for the most part, company records, without waiving privilege' we are generally obligated to do that. But you can say, "You should look at these documents; you should talk to these individuals about these particular topics." You obviously must exercise care in how you do that—not waive privilege or to turn over work product. But it is a way to skirt the issue somewhat.

This is an important public policy issue, not just as a legal policy issue. It is about the Government being able to effectively regulate the commercial marketplace to make it honest—a laudable goal. For companies to play in that program, however—for them to conduct solid internal compliance programs, to do internal investigations, and, where appropriate, to engage in voluntary disclosures—a solution to this problem needs to be found.

Again, speaking very practical level, lawyers need to be woven into the fabric of business operations and business decisionmaking. And if they are not, it is not just the business that loses the benefit of sound legal advice, it is this entire endeavor to try and enhance the compliance and the ethics of business operations.

Mary Beth Buchanan: This is certainly an extremely important issue. And I think that, regardless of where you sit, whether you are on the enforcement side or a defense lawyer or even in the plaintiffs bar, you probably have a firmly held position. But I think that it is important for us to try to look at these issues from the various perspectives and try to understand why we each see these issues as we do and try for some solutions—try to discover how the government might continue to do what it needs to do to investigate fraud, and how the defense bar might protect its clients, and how the plaintiffs bar, of course, might do what it needs to do.

I think it is important to spend little time talking about what the Government's position is and why we hold this position, and then move on to whether the solutions that George Terwilliger has offered in his paper are viable ones. I will tell you at the outset that I think that some of them indeed are. First, it is important to understand what the Government is looking at when it decides to prosecute a corporation. I think most of you are probably familiar with the nine Thompson factors. I am not going to go over all of those because the one, for our purposes, that we are really concerned with is factor four. Number four says that we should consider the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents—including, if necessary, the waiver of corporate

attorney-client and work product protection.

Now, the reason that factor is so important is that when the Government uncovers wrongdoing, it has to decide who the culpable individuals or entities are and who should be prosecuted. Should we prosecute the individuals, or should we prosecute individuals and the corporation? Or, possibly, no one at all? We have to sort and figure out whether the corporation is really part of the wrongdoing or whether it might be a victim of wrongdoing; and we want corporations to help us to get to that answer as quickly as possible. I think that we have been pretty clearer in trying to spell out what we mean by cooperation, but as I attend these programs, and even as I read the first part of George's paper and listened to his remarks, I am still not sure that everyone understands; so, I am going to discuss that with you today.

What the Government wants to know is: What happened? Who did it? And, how did they do it? I submit that those things we are trying to find are factual, and for the most part they are not going to involve attorney-client privileged information. Most likely we are really talking work product. Because the individuals that probably hold the information the Government needs are not the clients of the counsel; they are the employees of the corporation. That is a very important fact to keep in mind. Not the client. So, there is not an attorney-client relationship (usually) between these witnesses and the counsel. These are generally the people that hold the information the Government needs. We want the counsel to tell us what they know, who's has talked to who, what might they tell us, and what documents we are going to need. And if we can get that information, then we do not need any type of waiver whatsoever.

Now, where does the problem come in? The problem generally comes in when these employees of the corporation are the ones who probably participated in the wrongdoing. For example, a CFO directs the accountant to the misstate earnings and expenses, to book these in wrong quarters to inflate the earnings of the corporation. The Government is going to be looking at the corporation, the CFO, possibly the accountants, and anyone else who may have helped in this process. Is the CFO going to want to talk to us? Probably not. The accountant? Probably not. So, if the counsel has interviewed these people, then the counsel could probably begin with saying, "You know, we think the CFOI instructed the accountant to incorrectly book these entries. And we think that if you get the information on these invoices and you get the accounting entries and you talk to everyone in the accounting department and you specifically talk to Joan and Barbara, you are probably going to get what you need." That is probably what they are going to say. And if we get that, that is a great start. That gives the Government the ability to undertake this investigation and figure out what it needs.

Now, sometimes we are going to need to compare what those witnesses told us, if we have reason to believe that they are not being totally honest, and if they refuse to talk with us at all. That is when we are most likely to need the statement counsel has taken. And certainly that statement could be work product, depending on how it was taken. If the counsel just goes to the employee and says, "Write down what happened," and the employee writes that down, they can turn that over and there may not be any waiver needed at all. But of course, if the counsel is undertaking some pretty extensive questioning of the witness, then, we are probably talking about work product.

So, we have not been walking into investigations asking corporations to waive privileges as a matter of course. We are trying to tell people that they need to be mindful of the problems that waiver does pose on a corporation, that they should try to use some other means first before they request waiver. I think that message is being heard. And it's been very helpful to us.

To give an example of what we encounter, when we are conducting an investigation: there are generally four types of corporations we meet. First, the corporation that says, "I'm not going to cooperate with you; I can't possibly cooperate because I'm not willing to waive, because if I wave, then I'm going to be subject to all this civil litigation, and I'm just not doing it." That particular corporation is not going to get any credit for cooperation, and they may very well be prosecuted.

The second is what I call the corporation that pretends to cooperate. That is the kind that will answer your subpoenas late; will not really give you what to asked for; might give you four times what you asked for in an attempt to try to hide the real thing that you wanted; and then claim that certain types of information are privileged, when in fact they are not. And that is a corporation which I would suggest is exactly the example used to the Thompson Memo for a corporation that is not cooperating.

The third kind realizes that it is in serious problems, and that the only way to possibly avoid being indicted, given the extent of harm and the far-reaching fraud within the corporation, is to come in and offer to waive privileges and give the Government everything it has in its possession, including the information from internal investigation.

Fourth and last is the kind that I actually prefer to deal with most. That is the corporation that comes in and says, "I want to cooperate with the Government. I made early disclosure. I understand what you need. I'm going to try to give you what you need. But you have to understand that I want to maintain my privileges if I can. So what do you need?" What happens next in this case is you sit down and you work through those issues, and usually you do some of the things George suggests in his paper. That is the optimal situation, I think.

As regards George's suggestions, I actually did not expect to agree as much as I do. But I do think that corporations should try to produce non-opinion work product, because that is what we want: the factual results of the investigation. And I think that the recommendation of "a roadmap" is well-prescribed. In fact, exactly what we want. As I told you at the outset of my remarks: Who did it? Where do we find it? What documents do we need? We can get them. And this roadmap would not, I think, contain so much analytical judgment that it would be viewed as work product.

The other issue, doing separate investigations, is also an interesting one. If, for example, counsel just tried to get the facts from the witnesses, those statements could then be turned over to the Government and would probably not constitute any work product at all. If, for example, the counsel needs to go back to those statements and try to uncover more information, then at

that point you may be bringing work product into the interview. So, if you could separate the counsel, have the general counsel just collect the facts and then perhaps have an outside counsel to do more analytical review, the document would stand a higher chance of being protected as work product.

I am very encouraged by the paper George has submitted. If we could only get more defense counsel thinking along these lines, I think we would get very close to meeting the goals that the Department of Justice has set and the goals of the Defense Bar.

William B. Mateja: To start, I will tell you that I think it is extremely helpful that people like George have given some thought to this issue. I agree with him; describing the issue, the words he used were that it was a "very practical concern." I am not sure that I would go quite so far as to echo him in that the privilege is "in peril." I was with the Department of Justice (DOJ), and I do not think that they would characterize it thusly, either. I do not think that our prosecutors believe that routine requests for waivers are being made—though, I know, the Defense Bar (which I am now part of) would disagree strongly. Somewhere in–between, I think, is where the truth lies. It is a concern, and I am glad people are giving it some thought.

From a personal standpoint, I would add, the idea that George's suggestion that businesses give the Government a roadmap, if no legislative solution proves forthcoming, is a great idea. Quite frankly, I already put it into practice. I have two cases at present, where that is what we have done. I represent a company, and I went to the Government, to two different U.S. attorney's offices, early on in each case, and said, "We want to cooperate. We want the benefit of cooperation, but we are not willing to waive the privilege. It's too important to us. It's sacrosanct. But I'll tell you what. We're going to get you the facts. We're going to make sure that's available to you. And if we can get the facts to you, then and only then will we get to the issue about whether or not we need to waive." We call this "an oral download."

So, in the cases that I happen to have, this is what we have done with the prosecutors and the FBI, and it has worked extremely well thus far. We got very close at times to thinking perhaps we might have to waive some limited privilege, but we were able to work through it and get the facts to the Government without. There's a lot of value to this approach.

But you do have to be careful. You cannot just take a report and read it verbatim to the government. You have to go through it and sort out the facts, if there is no waiver of privilege.

Now, I will say, as far as selective waiver and legislative selective waiver go, there might be a kind of slippery slope. When I was at DOJ, we looked at the issue. DOJ never came to a solid position, but I can relate a few practical concerns that came up during our review of selective waiver. It came up in connection with our review of House Bill 2179, which was the bill that was proposed by the SEC. It talked about how you can turn over certain information to the Government, without it constituting a waiver of privilege. The problems, as we saw it, was: What happens if that information is disclosed to the Government (say, the Justice Department), and the Department feels like it needs to go to the appropriate regulatory agency? Can they give it to the regulatory agency? For example, say it is the FDA that is the regulatory agency, and the issue happens to come up in the context of tobacco litigation. Say, all of a sudden we find out that the information that is going to be disclosed to the Government bears upon a very important public health risk, which the Government feels that it needs to make public—feels, that it would be remiss not to do so. What do you do, as the Government, once you have this information?

And so, that is just one problem. And for that reason, I am not necessarily sure that selective waiver is the answer. A lot of people do. But, as a defense lawyer, one of the concerns that I have is that I am not sure I want the Government coming to me every time, saying, "You have got to turn over x and y, because we have this statute." Is that really the right way to approach this?

The right way to approach it, in my opinion, is to better educate prosecutors and defense lawyers about what the DOJ's policy is right now. I have talked with various people in the Defense Bar and talked about it at length. The DOJ's policy is a very reasonable policy if it is followed; prosecutors just have to know about it. That policy, as Mary Beth said, is: the facts. "If you get us the facts, that's all we need." The Government is not going to bother you, unless, say—to pick from the few limited situations where perhaps waiver of the attorney-client privilege would be important to catch the crooks—unless reliance on counsel is the defense. Obviously, if reliance on counsel is the defense, then it is important to know about what happened during communications with counsel.

People that I have talked to, on the defense side, have looked at this, and this guidance is available; it is out in front. It is the Q&A contained in the United States Attorney's Bulletin, issued in November 2003. Back then, I was a U.S. attorney, and when Jim Comey became the Deputy Attorney General, he came to me and said, "You know what? I think it would be important for us to make this official department policy. How can we do it? I don't want to issue a Thompson Memo either. I don't want there to be the Comey Memo."

So what we did was put together a speech which embodies the Q&A, and it was delivered to the ABA at its annual Healthcare Fraud Institute. It was in New Orleans, in May 2004. Jim followed up on that at the White Collar Crime Institute, held in Las Vegas in March 2005. Both of those speeches, or at least pertinent excerpts from them, along with the Q&A, are available. And we need to do a better job of educating everybody about that policy.

A quick excerpt: this is from Jim's speech in New Orleans. He starts by saying, "I'd like to spend the remainder of my time with you this afternoon discussing an issue that has generated tremendous sound and fury, while at the same time generating a great deal of confusion. That is the Department's policies on requests for waivers of the work product protection and attorney-client privilege in the context of cooperation during our investigations of corporate wrongdoing."

Further on he says, "What constitutes thorough cooperation will necessarily vary in every case. At a minimum, it must be recognized that if a corporation has to learn precisely what happened and who is responsible, then they have to turn

this over to the government if they wish to make a claim that they've cooperated and deserve either the benefit of cooperation in the charging decision or a reduced culpability score under the sentencing guidelines. The bottom line is that for a corporation to get credit for cooperation, it must help the government catch the crooks. Sometimes a corporation can provide cooperation without waiving any privileges. Sometimes in order to fully cooperate and disclose all the facts, a corporation will to make some waiver because it gathers the facts through privileged interviews and protected work product of counsel. How a corporation discloses the facts will vary, and that's where the rubber hits the road. The government does not require any particular method so long as the cooperation is thorough. All pertinent facts are disclosed, including the identification of all culpable individuals, all relevant documents, and all witnesses with relevant information."

There are a couple things from this speech that I want to explore very quickly, because I think, perhaps, there are some notions I need to dispel. Mary Beth touched on one of them, a very important one, which is: What are we talking about when we talk about attorney-client privilege? I will tell you, ninety-five to ninety-nine percent of the time, from what I have seen, it is not attorney-client privilege at all that is asked to be waived, but work product. Work product, to my way of thinking, and I think for most, does not hold quite the same "sacrosanctness" as attorney-client privilege. If you think about it, even under the Federal Rules of Civil Procedure—at least as to fact work product—if the Government establishes substantial hardship, it is entitled to that. And even if it is opinion work product, if they show compelling evidence that they need that, they are still entitled to it (as opposed to attorney-client). That is something Jim speaks to a great deal, because sometimes what we are looking for is work product. When we are looking for attorney-client privilege, it is the kind of situation that I mentioned where there is reliance upon counsel, and that is where, no matter what you are able to put in front of us (at least in front of DOJ), it is probably going to entail a waiver of the privilege.

One last thing I just want to say. It is okay for the government to ask for this, to ask for cooperation from companies. George pointed that out. I think Mary Beth reiterated it. But I spoke, not too long ago, on this issue, at the National Chamber, and there were a number of people that spoke who said, "In some situations it is not appropriate for the Government to ask for cooperation."

But think about that. The Government needs Corporate America's help to get to the bottom of things, to make sure there is integrity in the financial marketplace. Sometimes, companies are in the position of being able to get us those facts. And if the company wants the benefit of cooperation… well, I know you may be thinking, "It's always going to want it." Well, you do want it, but sometimes there are pluses and minuses, and you have to weigh those things. If the company wants the benefit of cooperation, it has to help the Government.

Theodore Olson: I think I have been out of the Department of Justice too long, because I just do not buy some of the things I am hearing. Still, let me start by acknowledging my respect for the people in the Department of Justice that have established this program. Larry Thompson is a close friend and someone I admire enormously, as is Jim Comey, Mary Beth Buchanan and the rest of the U.S. attorneys. Everything I say should be framed within that context. I respect the people in Department of Justice. I respect their mission. I respect the way they go about discharging their duties and goals. But I respectfully disagree with some things about the policy.

Everyone understands that it is the mission of the Department of Justice to catch the crooks. But it turns out that it is a lot easier to catch the crooks if can have the help of their lawyers in catching them—or the alleged crooks, because these people do not all turn out to be crooks. Someone that is under investigation may not be a crook. But if you turn the lawyer into an agent of the Government, that has serious ramifications with respect to the Sixth Amendment right to counsel and the value that society for several centuries, going back to the English common law values, has placed on the relationship between an individual or a corporation and the attorney.

Society wants individuals, persons, corporations to seek the advice of counsel. It is seen as a way to ensure that citizens comply with the law, and the privilege, the right to confidentiality in communications, is fundamental, essential to the attorney-client relationship. You take away the privilege, you take away the relationship.

Now, first of all, why use the quotation marks. When the government says it is not an "absolute requirement," that is like saying "The money is of no object." You know immediately the money is an object. When the government says "It's not an absolute requirement," it may be a pretty important requirement. It is said to be a factor in evaluating cooperation, and failure to cooperate, according to the introduction of the Thompson Memorandum, should weigh in favor of corporate prosecution. So, if there is no waiver of the attorney-client privilege, there is no cooperation, and that is a factor that should weigh in favor of prosecution. Given the power and the impact of the prosecution, the word voluntary ought to be put in quotations. I will come back to that in a moment.

Mary Beth Buchanan and Bill Mateja said the same thing: all the Justice Department really wants is work product. But the policy does not say, "We only want work product;" it says "work product and attorney-client privilege." That is spread throughout the questions and answers, the policies, and everything else. Now, maybe in some cases, the Justice Department's desires can be satisfied by providing work product, but that threat of potential requirement hangs over the corporation—and without which there is a question about whether there has been actual cooperation.

I know there is dispute about what happens. But it is not just how often it happens, but the threat in the policy which states that cooperation will be ascertained in conjunction with the willingness to waive attorney-client and work product privileges. The corporation and its counsel are put in the position of *having* to come forward.

I know Bill and Mary Beth said that is not the model. The model is only number four, where it says, "We really don't do these things but let us help you to get what you want." But the policy says the willingness to waive attorney-client

privilege is a factor, and many corporations and many lawyers understandably think that the expression of that willingness is important. And, of course, work product alone encompasses, embraces, and entails attorney-client privileged material very, very often.

There is another point I wanted to make about the position that Mary Beth took. She articulates a much softer approach, but was very careful to say, "This is just my personal view." There are ninety-six U.S. Attorneys, and many, many other prosecutors in the Department of Justice and the other agencies of the government, including the SEC. Some of the policy recently articulated states that decisions with respect to waivers should be cleared with or are subject to supervision by the U.S. Attorneys. I probably do not have the details exactly right, but we know sometimes that works and sometimes it does not. We have all been in this business long enough to have witnessed, let us say, overzealous U.S. Attorneys. Sometimes they are well-supervised and sometimes not. And we are not just talking about the Department of Justice. We are talking about all kinds of law enforcement agencies at the federal level. Let us not forget the state agencies and prosecutors that can learn from this thing. I could mention some names of some state prosecutors… So, these are other factors. The policy may be enforced or applied in one way in one office, in a completely different way in another office.

Bill Mateja says that it is "okay" for the government to ask for this. Well, is it really okay to ask citizens to waive a constitutional privilege as a condition of not being prosecuted? The consequences of being prosecuted to a corporation include the immeasurable immediate damage to share price, and thus to the value of the stockholders' collective investment; the company's ability to raise capital; credit rating; reputational injury to the brand and product line; inability to transact certain business; issues of disbarment; serious injury to the officers' reputations; pressure on Boards of Directors to change management, wholesale housecleaning before there has been any determination of guilt of those individuals under Government suspicion; immense legal fees; damage to the company's credibility with regulators. And there are just a few things of immediate and inexorable consequence with an indictment.

With that Draconian potential out there, saying, "Well, this is a factor that we'll take into consideration that will auger in favor or against prosecution," makes it almost imperative for the corporation to acquiesce at virtually any cost to prevent indictment from taking place.

I hasten to add that I am not an expert in this field. Everyone else up here has been, I think, both a prosecutor and a defense lawyer. I have not. The positions I held in the Department of Justice did not directly involve me in prosecution. But I have been exposed to companies or clients that were in these situations, and while there is a lot of talk about internal investigation and the hiring of outside counsel to do special investigations, it seems to me that there is no principle that really limits the requested waiver to either outside counsel, to special investigations. Conceivably, and in most instances probably, all counsel is required—inside corporate counsel, outside counsel that were not hired for the special investigation—anyone with any information that would help the prosecutor catch the crooks.

The consequences of these waivers are not just that the information will be demanded in civil litigation. That is a very serious consequence. In fact, the existence of the waiver is an incentive to litigation because now you have all this information, "the roadmap," so to speak, available to the class action lawyers, making it much easier to collect those contingent fees. But that is not all. There are other governmental agencies that are likely to follow. There are congressional investigations. Those of us who have been in town a while know the consequence of congressional investigations and the synergy that exists between the congressional investigator and the congressional investigation staffers, the class-action lawyers and the press; a triangle that can get the company into sufficient trouble and cost a lot of money.

The other consequence which George mentioned is that people will not launch internal investigations. They will not rely as much as they normally would on their lawyers. They may withhold information if they know that it is not privileged, that it is at least a risk that it might not be privileged. They will assume that it might not be privileged. and that inhibits the whole attorney-client relationship.

It also affects the ability of the lawyer in charge of the process. He may couch things in terms that he thinks will be less harmful to the client. These days, lawyers are often the subject of investigation, if they are perceived as part of the problem or too much of an obstruction. Lawyers are at risk themselves, and will therefore tend to act in self-protective ways; which inhibits the effectiveness of the attorney-client relationship.

Now, let me come to a final couple points. It seems to me that the waiver of the attorney-client privilege amounts to a waiver of the Sixth Amendment right to counsel altogether. The waiver of the privilege means that the lawyer really cannot properly defend the client. Let us say, if plea bargaining negotiations break down, that the lawyer is of no use anymore. That lawyer's communications have been compromised. The lawyer has already become, to large degree, an agent of the Government, and, in part, a potential witness against the client. The attorney is seriously compromised at that point, and therefore the general ability to give legal advice is compromised.

We are thinking of this only in terms of the attorney-client privilege. Is there any principle that you know that prompt the Government to say, "If you're really want to be cooperative, waive the spousal privilege, the physician-patient privilege, the clergy privilege…" I cannot remember all the names of these privileges. But what is the principle that would limit it to the attorney-client privilege? The only one that I can think of is that the attorney is the one that really has, in most cases, the evidence to catch the crooks. But it might be the doctor. It might be the spouse. It might be someone else. It is not necessarily limited to attorney-client privilege.

And we are talking in terms of corporations, but what is the principal basis upon which this practice would be strictly limited to corporations as opposed to individuals? Why not say this to an individual that you are investigating? "I want to decide whether to prosecute you're not, and part of that decision is whether or not you wave the attorney-client privilege." If this

were widespread with respect to individuals, will the ultimate plea bargain be accepted by the judge as truly voluntary, truly knowledgeable, based upon advice of counsel—the counsel that has already been compromised? These are just some of the things that occur to me.

My final thought, with respect to Georgia's paper (which is really truly terrific): One of the points in there is to negotiate the agreement, even if you are in the districts where there is no such thing as a limited waiver, at least under some of these court decisions. If nothing else, this provides you with the opportunity to preserve the issue for appeal. There is going to be a decision someday, and you would not want to be the lawyer that did not have the agreement that would provide the predicate for the appeal that might be the case for the Supreme Court.

There is also some reference in the paper about putting in a provision that deals with the agreement which states that this can be submitted under appropriate circumstances to a court in the form of a stipulation, so it becomes part of a court order. That may not work in all cases, but it might in some. I think there is a hint of this in George's paper. And it seemed to me a good idea in the negotiations with the Government to put in a requirement that the Government come in and support the claim of privilege, limited privilege, when the class-action lawyers come after the materials; so that the lawyer for the defendant company is saying, "Not only we have disagreement. It was a limited waiver, but the Government's coming in and saying, 'Yes. That would do damage to the Government, and we think that the court should respect it.'" In fact, there is a common interest, something like a joint defense agreement basis for the Government entering into this deal with us with respect to the limited nature of the waiver, so the court has got some reason other than "Gee, we don't like to do it."

Environmental Law & Property Rights

Standing in the Hot Seat: Climate Change Litigation

*By Jonathan H. Adler**

The future of climate change policy may be decided in a federal courtroom rather than on Capitol Hill. In recent years, state attorneys general and environmentalist groups have brought lawsuits seeking to force action on the issue of climate change under a range of statutes and legal theories. One case, *Massachusetts v. EPA*, was argued before the Supreme Court in November 2006. More are on the way.

The plaintiffs in *Massachusetts* charge that the Environmental Protection Agency is obligated to regulate vehicular emissions of greenhouse gases as "pollutants" under the Clean Air Act (CAA). Other lawsuits seek to force the EPA to regulate greenhouse gas emissions from power plants and classify carbon dioxide as a criteria air pollutant subject to a national ambient air quality standard like particulates or ozone smog. Still other lawsuits call for federal agencies to consider the potential effect of agency actions on global climate change under the National Environmental Policy Act or allege that greenhouse gas emissions contribute to the "public nuisance" of global warming under federal common law. How courts resolve these and other pending cases could shape the force of climate change policy for years to come.

Standing's Requirements

A threshold issue in climate change litigation: whether environmental plaintiffs have standing to sue over climate change. This is an important question; if plaintiffs do not have standing, federal courts lack the jurisdiction to hear their claims. Article III of the Constitution confines federal jurisdiction to "cases" and "controversies." This limitation helps ensure that courts decide only matters that are fit for judicial resolution. As such, the standing requirement is an essential component of the separation of powers, helping to safeguard individual liberty, maintain political accountability and protect the democratic legitimacy of federal policy. As Chief Justice John Roberts observed in a 1993 law review article, "[b]y properly contenting itself with the decision of actual cases or controversies at the instance of someone suffering distinct and palpable injury, the judiciary leaves for the political branches the generalized grievances that are their responsibility under the Constitution."[1]

The basic requirements for standing were outlined in the seminal case of *Lujan v. Defenders of Wildlife*.[2] In order to establish standing, a plaintiff must make three showings. First, he must demonstrate that he has suffered an "injury-in-fact" that is "actual or imminent" *and* "concrete and particularized." Second, the plaintiff must demonstrate that the alleged injury is "fairly traceable" to the conduct challenged in the litigation. Third, the plaintiff must show that a favorable decision will redress the alleged injury. As the Supreme Court has made clear time and again, most recently in *DaimlerChrysler v. Cuno*, the burden is on the plaintiff to demonstrate that he has standing.[3] Standing cannot simply be assumed by the court, even if the issue is not raised by the parties.

The very nature of climate change makes standing claims particularly difficult. An injury-in-fact must be both "actual or imminent" *and* "concrete and particularized"—a test climate change plaintiffs may find difficult to meet. As explained below, insofar as litigants assert near-term effects—those that are most likely to be "actual or imminent"—they are more likely to be general, climatic effects that are not concrete and particularized to the particular litigants. The converse is also true. Insofar as a plaintiff asserts specific, localized effects so as to meet the concrete and particularized requirement, the harms alleged will be farther off in the future—resulting from accumulated climate change over years, if not decades—and therefore less likely to meet the actual or imminent requirement. Given the global nature of climate change, redressability is also a concern, as unilateral U.S. regulation, even regulation far in excess of what is sought in current cases, will do little, if anything, to forestall future climate change.

Standing is not the only jurisdictional hurdle for plaintiffs in climate change cases. There are prudential reasons for courts to stay their hands as well. As a general matter, federal courts are reluctant to intervene on major policy questions with international implications. The last several presidential administrations have been actively involved in international discussions over what, if anything, to do about climate change. The United States has signed various agreements, including the Kyoto Protocol, but no treaty with binding limitations has been submitted to the Senate for ratification. Nonetheless, the U.S. continues to talk with other nations about alternative approaches to climate change, and has agreed with several nations to pursue the development and proliferation of low-emission technologies. Whether these approaches constitute a wise or sufficient response to climate change, the existence of international agreements and ongoing negotiations could further discourage courts from entering the fray. Indeed, as of this writing, at least one federal court has found climate-based nuisance claims to constitute "political questions" unfit for judicial resolution.[4]

Climate Standing in Court

Courts have already divided on whether climate change plaintiffs have standing to bring their claims in federal court. In *Massachusetts v. EPA* a three judge panel of the U.S. Court of Appeals for the District of Columbia Circuit split three ways on the standing question in rejecting the petition for review.[5] Judge Sentelle concluded the plaintiffs lacked standing, finding the asserted injuries too diffuse and generalized to

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meet the requirement that the asserted injury be "concrete and particularized." Judge Randolph failed to resolve the standing question, finding it bound up in the merits of the case, and seized upon an alternative basis to reject the petition for review. Judge Tatel, in dissent, thought the standing hurdle was easily met, given Massachusetts' detailed allegations of the particular harms that could befall the state plaintiffs. This, Tatel believed, was sufficiently "concrete and particularized" to satisfy the standing test.

This was not the first time the D.C. Circuit was called upon to answer the standing question. In 1990, in *City of Los Angeles v. NHTSA*,[6] the court held that plaintiffs had standing to challenge the National Highway Transportation Safety Administration's failure to consider the potential effect of automotive fuel economy standards on greenhouse gas emissions and climate change under the National Environmental Policy Act (NEPA). Judge Douglas Ginsburg dissented, arguing the panel decision effectively "eliminated" the standing requirement in NEPA cases "for anyone with the wit to shout 'global warming' in a crowded courthouse."[7] Before additional climate change cases could make their way to the D.C. Circuit, however, *City of Los Angeles* was effectively overruled in a subsequent case.[8]

While the threat of climate change may not have been enough to demonstrate standing in the D.C. Circuit, NEPA plaintiffs have fared better in federal district courts in other circuits. In *Friends of Earth, Inc. v. Watson*, the federal district court for the Northern District of California found that environmental plaintiffs had standing to challenge the failure of the Export-Import Bank and the Overseas Private Investment Corporation to conduct environmental impact statements that considered the potential effect of funded projects on greenhouse gas emissions.[9] In June 2006, another federal district court found that environmental plaintiffs had standing to raise claims under the Clean Air Act linked to climate change.[10]

Does Climate Change Cause an "Injury-in-Fact"?

While global warming is a valid environmental concern, federal courts should be reluctant to find that environmentalist plaintiffs have standing to raise climate change claims in federal courts. Allegations that greenhouse gases will cause injuries due to effects on the climate, almost by definition, are the sort of generalized grievance unfit for judicial resolution. Insofar as petitioners seek to identify specific harms that could result from the failure to control greenhouse gas emissions, it is difficult to show legally cognizable injuries that are *both* actual or imminent *and* concrete and particularized. Indeed, as environmentalist petitioners strain to demonstrate their alleged harms to satisfy one prong of the injury requirement, they undermine their ability to satisfy the other requisite half of the test. There is also reason to doubt whether climate claims are judicially redressable in any meaningful sense, particularly in cases where they seek to force federal regulation, and not just the generation of additional information or analyses (as in NEPA cases).

That climate change may be an urgent concern provides no argument for discarding the traditional requirements of standing. As the Supreme Court noted in *United States v. Richardson*:

> It can be argued that if [petitioners are] not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately the political process.[11]

That an issue cannot be litigated does not mean it will not be addressed. Whether they, or any other potential plaintiffs, have standing, environmentalist groups and state governments retain their ability to seek redress of their grievances through the political process. Indeed, the regularity with which climate change emerges in Congressional debate, the increased relevance of environmental concerns in national political campaigns, and the rapid speed at which states have adopted various climate-related measures, amply demonstrate that the political process is fully capable of adopting climate policies if and when the public demands such action. A Republican Congress may have been reluctant to regulate greenhouse gases, but a Senate Environment and Public Works Committee chaired by Senator Barbara Boxer (D-CA) is unlikely to be so reticent.

The injury-in-fact requirement of Article III is a particular problem for environmentalist plaintiffs in climate change cases. As noted above, in order to have standing, petitioners must allege an injury in fact that is *both* "actual or imminent" *and* "concrete and particularized." The injury must also be concrete "in both a qualitative and temporal sense."[12] Yet this is a difficult showing for climate plaintiffs to make. As characterized by the Supreme Court in various cases, to be "actual or imminent," an alleged injury must be "palpable," "certainly impending"or "real and immediate," and not "hypothetical." Allegations of a far-off injury at a much later date are too speculative to suffice. As the Court explained in *Lujan*:

> Although 'imminence' is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending.[13]

Insofar as litigants assert near-term effects—such as the minor perturbations in the climate that may have been detected, they are general, climatic effects that are not concrete and particularized to the petitioners. Insofar as petitioners allege current harm from changes in the global climate, they are merely alleging the sort of generalized grievance that should not be sufficient to establish standing. Current changes in the global climate are felt by all U.S. citizens—indeed by all citizens of the world. They are not particular to any specific set of environmentalist plaintiffs, nor can they be.

The strength of the scientific evidence supporting estimates of the anthropogenic contribution to climate change does not alter the analysis. Courts need not question environmentalist plaintiffs' presentation of contemporary climate science to conclude that they lack standing. As the Court concluded in *Friends of the Earth v. Laidlaw Environmental Services*, "The relevant showing for purposes of Article III standing… is not injury to the environment, but injury *to the plaintiff*."[14] Claims about current or projected climatic changes are not, by themselves sufficient to confer standing absent a demonstration of harm to the plaintiffs themselves in

a concrete and personal way. Accepting that human activities are contributing to a gradual rise in global mean temperatures does not, by itself, resolve the standing inquiry.

For instance, insofar as the plaintiffs in *Massachusetts v. EPA* have sought to allege harms particular to them—specific, localized effects such as the fear in the Commonwealth of Massachusetts an eventual rise in sea levels over the next century will lead to property loss—the harms alleged are too remote to satisfy the actual or imminent requirement. Even the best predictions of what may transpire in the earth's climate in the year 2050 or 2100 are too speculative and distant to fulfill the requirement that alleged injuries are "actual or imminent" Unlike claims of an immediate environmental impact, these allegations rely upon many variables, including but not limited to estimates of future greenhouse gas emissions, climatic feedback mechanisms, and other exogenous variables, that may change dramatically in the years to come. This makes the claims too speculative to satisfy the injury requirement.

The potential seriousness of climate change does not obviate petitioners' obligation to demonstrate that they meet the requirements of Article III standing, or alter the analysis of injury. Even where the injury alleged is "one of the most serious injuries recognized in our legal system," this Court has recognized its obligation to ensure that the plaintiffs completely satisfy the requirements of Article III, as "the federal judiciary may not redress [any injury] unless standing requirements are met."[15] If "environmental concerns provide no reason to disregard limits in the statutory text," as Justice Kennedy argued in *Rapanos v. United States*, such concerns clearly provide no reason to disregard the jurisdictional limitations imposed by Article III.[16]

Unredressable Injuries

It is not enough to establish standing, that a petitioner demonstrate "injury-in-fact." Plaintiffs must also demonstrate that the injury alleged is fairly traceable to the federal action challenged and is likely to be redressed by the relief sought in federal court. This is also a difficult showing for environmental plaintiffs to meet.

The federal regulation plaintiffs in *Massachusetts* hope will result from their litigation, by itself, will not likely have any meaningful, even measurable, effect on the alleged injuries. The environmentalist plaintiffs' ultimate claim is that the EPA is required to regulate tailpipe emissions of greenhouse gases from new motor vehicles under Section 202 of the CAA. U.S. motor vehicles as a whole constitute approximately six percent of global emissions, yet those vehicles potentially subject to EPA regulation—new vehicles—are only a small fraction of this percentage, and the rate of emission reduction is a function of gradual fleet turnover. As greenhouse gas emissions from other parts of the world likely will continue to climb, the effect of such regulation in the U.S. would be truly negligible.

Even if one assumes that EPA regulation could eliminate *all* vehicular emissions of greenhouse gases tomorrow, it is arguable whether any meaningful effect would result. Dr. T.M.L. Wigley of the National Center for Atmospheric Research demonstrated that, were all developed nations to fully comply with the greenhouse gas emission reduction targets established by the Kyoto Protocol, and maintain such controls through 2100, this would only change the predicted future warming by 0.15ºC by 2100; projections in sea-level rise would be modified by only 2.5 centimeters.[17] Yet the reductions modeled in Wigley's study are several times greater than the complete elimination of all greenhouse gas emissions from the U.S. transportation sector, let alone any realistic estimate of emission reductions to be achieved from the imposition of regulatory controls over time. Add in the lead time, that petitioners acknowledge is necessary for emission reductions to be implemented economically, and the amount of tangible redress plaintiffs can hope for approaches zero.

The plaintiffs in *Massachusetts* argue that regulations in the U.S. would spur technological change and encourage other nations to follow suit—which may be so, but is not a legally sufficient basis on which to find redressabiltiy for the purposes of standing. Claims about the future actions of various third parties are not subject to federal jurisdiction. Whereas in *Lujan* the redressability of the plaintiffs' claims depended upon the compliance of another agency within the federal government, the claim of redressability in *Massachusetts* is contingent upon the future actions of foreign governments, private firms, and the market for automotive technologies. Whether other countries would come to mandate technology developed in response to U.S. regulation, as some environmentalist groups claim, the unconstrained, voluntary actions of third parties at some indefinite point in the future cannot serve to satisfy the redressability requirement of standing. Such claims are simply too conjectural to satisfy standing under Article III.

States Seek Standing as States

Some state attorneys general have claimed that states should have standing because judicial resolution of specific claims, such as whether the EPA has authority to regulate greenhouse gases under the Clean Air Act, will affect the ability of states to adopt greenhouse gas regulations of their own. For instance, some state amici in *Massachusetts* argue for standing because the EPA's *failure* to regulate greenhouse gas emissions from motor vehicles "could be and indeed have been challenged as preempted based on the EPA's decision." Their claim is that some states "are harmed by the EPA's decision because it intrudes on their sovereignty by subjecting them to claims that they are prevented from regulating motor vehicle emissions as the CAA permits."

Whether states are subject to claims of federal preemption is, however, a sufficiently independent question from whether the EPA the authority to regulate greenhouse gas emissions under the Clean Air Act that states cannot ground their claim of standing on EPA's refusal to regulate. While some may argue that the EPA's lack of authority under Section 202 is a basis for preempting states from adopting emission standards of their own, a contrary decision by EPA would stop opponents of state regulation from forwarding other plausible claims of preemption. Moreover, state amici cannot demonstrate that the EPA's lack of authority to regulate vehicle emissions of greenhouse gases will lead to the preemption of state efforts to adopt such controls, as there are many alternative bases upon which courts could conclude that state regulation of greenhouse

gases is preempted. Not only may courts conclude that state efforts to regulate greenhouse gases are preempted by Section 202(a), irrespective of EPA's authority under the CAA, but other provisions of federal law, such as the Energy Policy Conservation Act, may be sufficient to preempt state efforts.

As the Supreme Court has noted in another context, it is just not possible for a litigant to prove in advance that the judicial system will lead to any particular result in his case,[18] so the states' effort to ground their standing claim on what legal claims will or will not be advanced as a result of EPA's decision must fail. Even if the Supreme Court were to conclude that EPA had the authority to regulate greenhouse gas emissions under the CAA, and EPA to adopt such emission standards, there is no guarantee that states would be free to adopt their own regulations on vehicular emissions. Among other things, state efforts to regulate vehicular emissions would still be contingent upon the issuance of a waiver from the EPA under CAA Section 209, as well as a determination that the ability of states other than California to adopt vehicle emission controls under CAA Section 177 extends to emissions that are not subject to regulation under the CAA's non-attainment provisions. Thus, states' ability to regulate automotive emissions would remain wholly speculative.

Some states argue that "because the EPA has refused to regulate emissions of pollutants associated with climate change from motor vehicles, California's standards are the only ones available to the States that desire to regulate such emissions." Yet this would be equally true were the EPA to regulate greenhouse gas emissions from motor vehicles. Under the CAA, the only option states ever have with regard to the regulation of motor vehicle tailpipe emissions is to accept existing federal standards or to adopt relevant standards adopted by the state of California. This remains so irrespective of whether EPA has or exercises the authority to regulate tailpipe emissions of greenhouse gases. So, even assuming that the states suffer the injury they allege, they would still lack standing because their alleged injury is neither fairly traceable to the EPA's alleged failure to regulate greenhouse gas emissions, nor can it satisfy the requirement of redressability.

Cooling Courts to Climate Claims

In filing lawsuits over climate change, environmental plaintiffs have sought to drag federal courts into a complex and contentious policy question at the intersection of economics, environmental protection, international diplomacy, and distributive justice. This is an invitation courts should not accept. How and when the United States should address the threat of global warming is a decision that should be made in the halls of Congress, and perhaps in international treaty negotiations—not in federal courts. If environmentalist groups and others believe the political branches' voluntary initiatives and agreements with other nations to encourage low-emission technologies are insufficient they can make their case in the public square and through the established democratic political process, push for change.

Climate change is doubtless a serious public policy issue. Global warming may in fact be the greatest environmental concern of the twenty-first century. But this does not mean that courts should abandon traditional limitations on their jurisdiction. Current claims of injury from global warming are quintessential generalized grievances that Article III courts are not competent to address. However serious or urgent the threat of climate change may be, such concerns are best resolved through the political process, and not federal litigation.

Endnotes

1 John G. Roberts, Jr., *Article II Limits on Standing*, 42 Duke L.J. 1219, 1229 (1993).

2 504 U.S. 555, 560-61 (1992).

3 126 S.Ct. 1854 (2006).

4 Connecticut v. AEP, _____ (D. Conn __).

5 __ F.3d. ___ (D.C. Cir. 2005).

6 912 F.2d 478 (D.C. Cir. 1990).

7 *Id.* at 484 (D.H. Ginsburg, dissenting).

8 *See* Florida Audubon Soc. v. Bentsen, 94 F.3d 658 (D.C.Cir. Aug 20, 1996)

9 2005 WL 2035596 (N.D.Cal.,2005).

10 Northwest Environmental Defense Center v. Owens Corning Corp., 434 F.Supp.2d 957 (D.Or.,June 8, 2006).

11 418 U.S. 166, 179 (1974).

12 Whitmore v. Arkansas, 459 U.S. 149, 155 (1990)

13 *Lujan*, 504 U.S. at 564 n.2 (quotations omitted).

14 Friends of the Earth v. Laidlaw Environmental Services, 528 U.S. 167, 181 (2000) (emphasis added).

15 Allen v. Wright, 468 U.S. 737, 756-57 (1984).

16 126 S.Ct. 2208, 2247 (2006) (Kennedy, J. concurring in the judgment).

17 T.M. L. Wigley, *The Kyoto Protocol: CO2, CH4 and Climate Implications*, 25 Geophysical Research Letters 2285 (1998).

18 *Supra* note 12, 159-160.

Federalism and Separation of Powers

The State Secrets Privilege: Necessary Evil?

*By Claudio Ochoa**

The state secrets privilege is a common-law evidentiary privilege that allows the Executive to withhold certain information from civil discovery if it believes disclosure would harm the national security or foreign policy of the United States. The privilege is absolute. If a court accepts the Executive's assertion that the subject evidence could reasonably harm the nation's security, the information may not be disclosed regardless how great the need of the party seeking discovery is said to be. In addition to sanctioning sensitive evidence or information in its possession, the Executive can apply the privilege to protect against disclosure of the nation's intelligence gathering sources, methods, and capabilities, and against disruption of diplomatic relations with foreign governments.[1]

The Bush Administration has been thoroughly criticized for its use of the privilege, which it has invoked on numerous occasions.[2] The most notable invocations include dismissals of (1) a suit brought by a FBI "whistleblower" against the Bureau;[3] (2) a claim that the CIA discriminated against an African-American operations officer because of his race;[4] (3) allegations that CIA operatives kidnapped, tortured and held *incommunicado* a foreign-national until releasing him without charges more than a year later; and (4), most recently, the attempt to prevent judicial review of the National Security Agency's domestic surveillance program.[5]

Due to the alarming outcome required by the privilege in these and other cases, the state secrets privilege has come under attack as "undemocratic" and a "relic of the cold war."[6] This article examines the state secrets privilege, its jurisprudential evolution, its critiques and its justifications.

The Jurisprudential Evolution of the Privilege

American courts first alluded to the privilege in the 1807 treason trial of Aaron Burr.[7] While the case did not turn on the matter, the court acknowledged that there may be circumstances where courts should suppress evidence if "it would be imprudent to disclose," or was the "wish of the executive."[8]

The Supreme Court first addressed (a form of) the privilege in 1876 in *Totten v. US*, which involved the estate of a man who claimed he had entered into a clandestine agreement with President Lincoln to spy on the Confederacy during the Civil War.[9] Although he had performed the service, after the President's death, the Government refused to pay his estate, questioning Lincoln's prerogative to enter into such a contract. In reviewing the lower court's opinion, which supported the Government's refusal, the Court noted that its objection was not to the contract, but to the power of the courts to act upon this issue. Given the secret nature of the employment, the Court found that the Judiciary could not review the matter without exposing sensitive details that could pose a "serious detriment [to] the public."[10]

The Supreme Court dismissed the case and closed its opinion by declaring:

> It may be stated as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated.[11]

The Judiciary did not significantly modify privilege jurisprudence until 1953, when the Supreme Court decided *U.S. v. Reynolds*, which established the basis for our current understanding of the doctrine. *Reynolds* concerned the deadly crash of a B-29 aircraft that was testing secret electronic equipment.[12] Three widows of the deceased civilians onboard sued the Government under the Federal Tort Claims Act. At issue was access to the official accident report, which the Government refused to produce to the plaintiffs on the grounds it was "privileged." The Government also refused to provide the report to the district and appellate court so each could judge the sensitivity of the information itself. Consequently, both courts rejected the Government's privilege claim, holding it in violation of the Constitution's system of checks and balances, and entered judgment for the plaintiffs.[13]

The Court reversed the Third Circuit, however, concluding that such a privilege did exist and should be weighed in the facts of the case. In an attempt to craft a compromise between national security and the need for judicial inquiry, it held that the Executive may invoke this privilege if it can "satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interests of national security, should not be divulged."[14] Recognizing that "judicial control over the evidence in a case can not be abdicated to the caprice of executive officers,"[15] it added that a court should at the same time "not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers."[16]

The decision acknowledged a principle of proportion: the greater the need demonstrated by the moving party, the further the court should inquire as to the propriety of allowing the privilege's invocation.[17] The Court, however, warned that such inquiry did not constitute a strict balancing test: "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake."[18] Subsequent courts have affirmed this principle, arguing that the balance was "struck"[19] in *Reynolds* "between the interest of the public and the litigant in vindicating private rights and the public's interest in safeguarding the national

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security."[20] In other words, the privilege is absolute—"[n]o competing public or private interest can be advanced to compel disclosure."[21]

Reynolds announced a two-part procedure through which the Executive can formally assert the privilege. First, there must be a formal claim of privilege, lodged by the head of the department that has control over the matter, after personal consideration by that officer.[22] Second, once properly invoked, a court must review the claim to determine if the "circumstances are appropriate for a claim of privilege; such a judicial enterprise requires delicacy, so as not to 'forc[e] a disclosure of the very thing the privilege is designed to protect.'"[23] Courts must uphold the privilege if the Government provides adequate demonstration that "the information poses a reasonable danger to secrets of state."[24]

When considering *Reynolds*, it is important to note that the Supreme Court decided the case during the emergence of the Communist threat. This context appears to have contributed to its decision to suppress the B-29 crash report ("we cannot escape judicial notice that this is a time of vigorous preparation for national defense").[25] Still, the Court's recognition of the privilege appears to stand independent of this fact ("the principles which control the application of the privilege emerge quite clearly from the available precedents)."[26]

Criticism of the Privilege

Criticism of the privilege is understandable given its effect on two staples of our system of government: (1) the concept of separation of powers, and (2) the protection of individual rights.

Separation of Powers

The tension between the privilege and separation of powers was articulated best by the Third Circuit in *Reynolds*:

> But to hold that the head of an executive department of the Government in a suit to which the United States is a party may conclusively determine the Government's claim of privilege is to abdicate the judicial function and permit the executive branch of the Government to infringe the independent province of the judiciary as laid down by the Constitution . . . the Government of the United States is one of checks and balances. One of the principal checks is furnished by the independent judiciary . . . Neither the executive nor the legislative may encroach upon the field which the Constitution has reserved for the judiciary by transferring to itself the power to decide justiciable questions which arise in cases or controversies submitted to the judicial branch for decision.[27]

Courts have nevertheless been reluctant to scrutinize executive invocations of the privilege because national security matters are uniquely within its expertise. As such, the Executive deserves "the utmost deference."[28] Without a meaningful check-and-balance, though, it is conceivable the Executive could abuse this power to shield information for reasons other than national security. As the Supreme Court noted in *U.S. v. Nixon*, in its discussion of the President's claim of executive privilege:

> It is but a small step to assert a privilege against any disclosure of records merely because they might prove embarrassing to government officers. Indeed it requires no great flight of imagination to realize that if the Government's contentions in these cases were affirmed the privilege against disclosure might gradually be enlarged by executive determinations until, as is the case in some nations today, it embraced the whole range of governmental activities.[29]

Despite this warning, courts have tended to grant the Executive significant license to label evidence "secret." This allows it to protect information even for inappropriate purposes—including "to cover up embarrassment, incompetence, corruption or outright violation of law."[30] History is scattered with various examples of such abuse.[31] Some critics claim that the Executive abused the privilege in the very case in which the Supreme Court first formally discussed the privilege, *U.S. v. Reynolds*.[32]

John Dean, former White House Counsel to President Nixon, goes so far as to assert that "the invocation of national security [in state secrets cases] borders on being a hoax."[33] In his opinion, secrets that could harm national security are very rare—most assertions of the privilege are designed to protect embarrassing information and executive overreach of power.[34] As a result, the privilege is "more a sword than a shield," because the government can dispose of a case without litigating the legality of its actions and without having to say exactly why the privilege applies.[35]

Individual Rights

The second critique of the state secrets privilege concerns its effect on individual and constitutional rights. When invoked, the privilege may infringe, if not quash, these rights in the following ways:

i) *Dismissal of legitimate claims*: "Denial of the forum provided under the Constitution for the resolution of disputes, U.S. Const. art. III, § 2, is a drastic remedy that has rarely been invoked."[36] Yet, this is often the result if the Executive chooses to invoke the privilege. Because there is no balancing of the merits of a claim versus the importance of the "secret information," courts will dismiss even legitimate and meritorious claims if they accept the Government's assertion that discovery could reasonably harm national security.[37] In some instances, this could effectively allow executive agencies to "opt out of compliance" with federal statutes by claiming simply that the subject matter touches on issues of national security.[38]

ii) *Ex parte communications*: "Justice is rooted in the notion that 'truth will emerge from two advocates presenting their version of the facts in a structured format to a neutral and detached decision-maker.'"[39] But invocation of the privilege often results in ex parte communications between federal officials and the judge, during which the government seeks to persuade the court that issues of national security are at stake. Because opposing counsel often lacks the adequate clearance, counsel may never know the substance of these meetings or the evidence presented by the Government. Additionally, ex parte communications may deny counsel the right to be heard on an issue, as guaranteed by the Sixth and Fourteenth Amendments.[40]

iii) *In camera review:* "Disclosures in camera are inconsistent with the normal rights of a plaintiff of inquiry and cross-examination, of course, but if the two interests cannot be reconciled, the interest of the individual litigant must give way to the government's privilege against disclosure of its secrets of state."[41]

iv) *"Blind Counsel":* Private counsel require access to information about their client's case in order to serve as an effective advocate. As a result of ex parte communications, classified evidence, and redacted briefs and opinions, it may be impossible for counsel to know the basis of a court's ruling. "In appealing such a ruling," scholars William Weaver and Robert Pallitto note, "it is unclear how a litigant would be able to go about addressing arguments it may not see, drawn from evidence it may not review."[42]

v) *Substantive rights:* The Bill of Rights guarantees certain rights to each citizen of the United States, such as the right to free speech and protection against unreasonable search and seizure. In some recent cases, plaintiffs have claimed that the Government has infringed on these rights in violation of the Constitution. Yet, by invoking the state secrets privilege, the Executive can shield any alleged constitutional violation from substantive review by a court, regardless of the merits of the claim. In this sense, it appears ultra-constitutional.[43]

Justification for a Strong Privilege

Although these are real and concerning byproducts of the privilege, many argue that they must be considered in conjunction with the privilege's justification.

Separation of Powers

First and foremost, it is argued, the Executive does not have absolute, un-checked power to invoke the privilege. The privilege is only absolute in the sense that issues of national security will always pre-empt those of the individual. However, before the privilege can reach that point, a court must be satisfied that the case poses a reasonable danger to secrets of state.[44] A court is free to review, question and analyze the Government's assertion until it reaches that level of comfort. It is ultimately up to the court whether to allow its invocation.

Courts have granted the Executive extreme deference in examples where it has been invoked because they themselves have recognized that the Judiciary is ill-equipped to review matters of national security.[45] For instance, in *Haig v. Agee*, the Court noted: "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention."[46] Likewise, *El-Masri v. Tenet*: "courts must [] bear in mind the executive branch's preeminent authority over military and diplomatic matters and its greater expertise relative to the judicial branch in predicting the effect of a particular disclosure on national security."[47]

This position has been reinforced by what has become known as the mosaic theory, which recognizes that "intelligence gathering . . . is more akin to the construction of a mosaic than it is to the management of a cloak and dagger affair. Thousands of bits and pieces of seemingly innocuous information can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate."[48] Thus, the Executive, which "must be familiar with 'the whole picture,' as judges are not, [is] worthy of great deference given the magnitude of the national security interests and potential risks at stake."[49]

This deference may be grounded on a deeper level, as well. There is significant authority for the argument that the President's authority to invoke the privilege is in part based on Article II of the Constitution, not just strictly the common law.[50] It is widely recognized that the President has the "authority to control access to information bearing on national security . . . [which] exists quite apart from any congressional grant. . . . The authority to protect that information falls on the President as head of the Executive Branch and as Commander in Chief."[51] In *Nixon*, the Supreme Court "emphasized the heightened status of the President's privilege in the context of 'military, diplomatic, or sensitive national security secrets.'"[52]

Notably, Justice Stewart, in his concurrence in *New York Times Co. v. U.S.,* recognized that Executive power in the areas of national defense and international relations were largely unchecked by the legislative and judicial branches.[53] Rather than rein in this power, he concluded: "The responsibility must lie where the power is. If the Constitution gives the Executive a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense, then under the Constitution the Executive must have the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power successfully."[54]

The Founders themselves apparently recognized at least the need for such a privilege. John Jay in *The Federalist Papers* observed that the only way the Executive could gather valuable intelligence was if it could protect its sources from discovery, even by other branches of the government.[55] George Washington, in deciding whether to turn over documents to the Congress, stated that "he could readily conceive there might be papers of so secret a nature, as that they ought not to be given up."[56] His cabinet, including members Thomas Jefferson and Alexander Hamilton, unanimously agreed that "the Executive ought to communicate such papers as the public good will permit, and ought to refuse those, the disclosure of which would injure the public."[57]

Although all these instances dealt with Executive privilege—withholding documents from Congress or the public at large—there is no reason to believe the state secrets privilege—the withholding of evidence in litigation based on national security concerns—should operate differently. The public, and both the legislative and judicial branches can lay an equal claim on the information. Thus, the genesis of the privilege was not the Cold War, but a recognized need to ensure the continued existence of the country.

Individual Rights

At the outset, it must be noted that the state secrets privilege directs dismissal only if the information at issue goes to the core of the claim or a potential defense. It is undeniable that the privilege has a devastating effect on individual litigants who face such a result, but this is an inescapable fact of competing interests. It is often recognized that "[t]he state secrets privilege

is the most basic of government privileges [because] it protects the survival of the state, from which all other institutions derive."[58] In other words, the very purpose of the privilege is to serve the common good. And for this reason, the law must render individual interests secondary to the general citizenry, especially in the context of terrorism where there is a significant potential of wide-spread public harm.

The Fourth Circuit directly faced this dilemma in *Sterling v. Tenet*, where the defendant brought a racial discrimination suit against the Director of the Central Intelligence Agency.[59] In dismissing his claim under the Government's invocation of the privilege, the court noted:

> We recognize that our decision places, on behalf of the entire country, a burden on Sterling that he alone must bear. 'When the state secrets privilege is validly asserted, the result is unfairness to individual litigants—through the loss of important evidence or dismissal of a case—in order to protect the a greater public value.' Yet there can be no doubt that, in limited circumstances like these, the fundamental principle of access to court must bow to the fact that a nation without sound intelligence is a nation at risk.[60]

Secrecy, although disfavored in a democratic government, has long been held a requisite for any successful intelligence operation. [61] The view was put by George Washington, the first President of the Republic, during his time as General:

> The necessity of procuring good intelligence, is apparent and need not be further urged. All that remains for me to add is, that you keep the whole matter as secret as possible. For upon secrecy, success depends in most Enterprises of the kind, and for want of it they are generally defeated.[62]

Further justification of the privilege is made on the grounds that not only is secrecy necessary to gain valuable intelligence to protect Americans but also in ensuring that the very methods used to secure that information not be compromised. According to the current administration, "disclosure of this information 'would enable adversaries of the United States to avoid detection from the nation's intelligence activities, sources, and methods, and/or take measures to defeat or neutralize those activities, thus, seriously damaging the United States' national security interests.'"[63] To give a plaintiff or even a group of plaintiffs the power to force the Executive to disclose details about secret informants, operations, or programs (including those that have been successful in gathering information or preventing attacks)—thereby compromising their integrity and the safety of American citizens—would "convert the constitutional Bill of Rights into a suicide pact."[64]

One might add that the state secrets privilege is also comparable to several other recognized evidentiary privileges.[65] To take one example: the privilege against self-incrimination. This privilege is also absolute in the sense that a witness can maintain it regardless of the need of the Government or any other party.[66] In order to allow its invocation, "the court must be satisfied from all the evidence and circumstances, and 'from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.'"[67] "If the court is so satisfied, the claim of the privilege will be accepted without requiring further disclosure."[68]

CONCLUSION

For these reasons, it can well be argued that the privilege is neither undemocratic nor a relic of the Cold War. Due the drastic effect it has on litigants each time it is invoked, it is also evident, however, that the privilege comes at the expense of individual liberty. This tradeoff, always distasteful, may in the end be necessary to ensure the survival of the very system of government that allows us to pursue those liberty interests in the first place.

Endnotes

1 Memorandum In Support of the United States' Assertion of State Secrets Privilege at 6-7, Arar v. Ashcroft, No. 04-CV-249-DGT-VVP (E.D.N.Y. 2005).

2 *See, e.g.*, Mark Folman, *The Bush Code of Secrecy*, Salon.com, June 23, 2006 ("when it comes to protecting its secrets, the Bush administration has flexed unilateral power to a degree never before seen in U.S. history").

3 Edmonds v. Department of Justice, 323 F. Supp. 2d 65 (D.D.C. 2004).

4 Sterling v. Tenet, 416 F.3d 338 (4th Cir. 2005).

5 Hepting v. AT&T Corp., 2006 U.S. Dist. LEXIS 49955 (N.D. Ca. 2006); Terkel v. AT&T Corp., Memorandum Opinion and Order, Case No. 06 C 2837 (N.D. Il. 2006).

6 *See, e.g.*, Shayana Kadidal, The State Secrets Privilege and Executive Misconduct, University of Pittsburg Law School *Jurist*, June 16, 2006; William Fisher, *"State Secrets" Privilege Not So Rare*, Inter Press Service News Agency, August 15, 2005, *available at* www.ipsnews.net/news.asp?idnews=29902.

7 United States v. Burr, 1807 U.S. App. LEXIS 492 (D. Va. 1807).

8 *Id.* at 23–24.

9 Totten v. United States, 92 U.S. 105 (1876).

10 *Id.* at 106-107.

11 *Id.* at 107.

12 Reynolds v. U.S. (*Reynolds II*), 345 U.S. 1 (1953).

13 *See* Reynolds v. U.S. (*Reynolds I*), 192 F.2d 987, 995 (3d Cir. 1951) ("we regard the recognition of such a sweeping privilege against any disclosure of the internal operations of the executive departments of the Government as contrary to a sound public policy").

14 *Reynolds II*, 345 U.S. at 10.

15 *Id.* at 9-10.

16 *Id*. at 10.

17 *Id*. at 11.

18 *Id*. (citing Totten, 92 U.S. 105).

19 J. Steven Gardner, Comment, *The State Secret Privilege Invoked in Civil Litigation: A Proposal For Statutory Relief*, 29 Wake Forest L. Rev. 567, 575 (1994) (citing In re United States, 872 F.2d 472, 476 (D.C. Cir. 1989) (citation omitted)).

20 *Id.* (citing Halkin v. Helms (*Halkin II*), 690 F.2d 977, 990 (D.C. Cir. 1982)).

21 *Id.* (quoting Ellsberg v. Mitchell, 709 F.2d 51, 57 (D.C. Cir. 1983), *cert. denied sub nom.* Russo v. Mitchell, 465 U.S. 1038 (1984)); see also, e.g., Frost v. Perry, 919 F. Supp. 1459 (D. Nev. 1996) for an example of a case where the court held that the privilege mandated dismissal even in light of a strong public interest, the alleged disposal of hazardous waste near a lake.

22 *Reynolds II*, 345 U.S. at 7-8.

23 *In re* United States, 872 F.2d at 475 (citing *Reynolds II*, 345 U.S. at 8).

24 *Halkin II*, 690 F.2d at 990.

25 *Reynolds II*, 345 U.S. at 10.

26 *Id*. at 7-8 (citing Firth Sterling Steel Co. v. Bethlehem Steel Co., 199 F. 353 (E.D. Pa. 1912) and *In re* Grove, 180 F. 62 (3d Cir. 1910)).

27 *Reynolds I*, 192 F.2d at 997.

28 United States v. Nixon, 418 U.S. 683, 710 (1974).

29 *Reynolds I*, 192 F.2d at 995 (recalling the words of Edward Livingston: "No nation ever yet found any inconvenience from too close an inspection into the conduct of its officers, but many have been brought to ruin, and reduced to slavery, by suffering gradual imposition and abuses, which were imperceptible, only because the means of publicity had not been secured") (citation omitted).

30 Gardner, *supra* note 19, at 585.

31 Gardner, *supra* note 19, at 575 (citing as historical examples of abuse: "assertions of privilege in the Watergate scandal, the burglary of Daniel Ellsberg's psychiatrist's office, actions during the Vietnam war and the bombing of Cambodia, the wiretapping of 'radical' domestic political organizations, and the diversion of the proceeds of the Iranian arms sale to Nicaraguan Contras.").

32 *See, e.g., Government Is Abusing "State Secrets Privilege" to Cover Up National Security Blunders, ACLU Says*, Press Release, ACLU, January 1, 2005, *available at* www.aclu.org/safefree/general/18815prs20050112.html (relating that in 2004, one of the original *Reynolds* plaintiffs obtained a declassified copy of the accident report. According to some, the once classified report contains no state secrets, but instead confirms that crew error and faulty maintenance of the B-29 fleet caused the crash.). *But see* Federation of American Scientists, *Government Denies Fraud in 1953 State Secrets Ruling*, FAS Project on Government Secrecy, January 26, 2004, *available at* http://www.fas.org/sgp/news/secrecy/2004/01/012604.html (responding to this claim, the government stated, "The mere fact that information … may strike the plaintiffs today as innocuous, trivial, or unimportant, is simply not probative" of whether they were sensitive 50 years ago).

33 John W. Dean, ACLU v. National Security Agency*: Why the "State Secrets Privilege" Shouldn't Stop the Lawsuit Challenging Warrantless Telephone Surveillance of Americans*, FindLaw, June 16, 2006, *available at* http://writ.lp.findlaw.com/dean/20060616.html.

34 *Id.*

35 *Id*.

36 *In re United States,* 872 F.2d at 477 (citing Fitzgerald v. Penthouse Int'l, Ltd., 776 F.2d 1236, 1242 (4th Cir. 1985)).

37 El-Masri v. Tenet, 2006 U.S. Dist. LEXIS 34577, at *20 (E.D. Va. 2006) ("The applicability of the state secrets privilege is wholly independent of the truth or falsity of the complaint").

38 William G. Weaver and Robert M. Pallitto, *State Secrets and Executive Power*, Political Science Quarterly, Volume 120, Number 1, 103 (2005) (citing Tilden v. Tenet, 140 F. Supp. 2d 623, 627 (E.D. Va. 2001)).

39 *See* Brian M. Tomney, Case Note: *Contemplating the Use of Classified or State Secret Information Obtained Ex Parte on the Merits In Civil Litigation*: Black Tea Society v. City of Boston, 57 Me. L. Rev. 641, 650 (2005) (citing Roberta K. Flowers, *An Unholy Alliance: The Ex Parte Relationship Between the Judge and the Prosecutor*, 79 Neb. L. Rev. 251, 253 (2000)).

40 *See* Tomney, *supra* note 39, at 644-47.

41 Heine v. Raus, 399 F.2d 785, 791 (4th Cir. 1968).

42 Weaver & Pallitto, *supra* note 38, at 107.

43 *Id.* at 87.

44 Sterling v. Tenet, 416 F.3d 338, 345 (4th Cir. 2005) ("But both Supreme Court precedent and our own cases provide that when a judge has satisfied himself that the dangers asserted by the government are substantial and real, he need not—indeed, should—probe further.").

45 *Id.* at 348 (rejecting plaintiff's proposal that the court adopt special procedures that would it allow it to review the secret material because "[s]uch procedures, whatever they might be, still entail considerable risk."). "Inadvertent disclosure during the course of a trial—or even in camera—is precisely the sort of risk that Reynolds attempts to avoid. At best, special accommodations give rise to added opportunity for leaked information. At worst, that information would become public, placing covert agents and intelligence sources alike at grave risk." *Id.*

46 453 U.S. 280, 292 (1981).

47 El-Masri v. Tenet, 2006 U.S. Dist. LEXIS 34577, at *14.

48 Halkin v. Helms (*Halkin I*), 598 F.2d 1, 8 (D.C. Cir. 1978).

49 CIA v. Sims, 471 U.S. 159, 179 (1985) (affirming that "[i]t is conceivable that the mere explanation of why information must be withheld can convey valuable information to a foreign intelligence agency").

50 *See generally* Memorandum in Support of the United States' Assertion of State Secrets Privilege at 3-4, Arar v. Ashcroft, C.A. No. 04-CV-249-DGT-VVP (E.D.N.Y. 2005) (citing U.S. v. Nixon, 418 U.S. 683, 710 (1974) for the proposition that "[t]he state secrets privilege is based on the President's Article II power to conduct foreign affairs and provide for the national defense, and therefore has constitutional underpinnings.").

51 Department of Navy v. Egan, 484 U.S. 518, 527 (1988) (citations omitted).

52 *Nixon*, 418 U.S. 683, 706 (1974).

53 *See* New York Times Co. v. U.S., 403 U.S. at 728-30 (Stewart, J., concurring).

54 *Id.*

55 *See* Randolph Moss, Deputy Assistant Attorney General, Statement Before the Permanent Select Committee on Intelligence, U.S. House of Representatives (May 20, 1998) (citing The Federalist No. 64, at 392-93 (John Jay) (Clinton Rossiter ed., 1961).

56 *Id.* (citing 1 Writings of Thomas Jefferson 303 (Andrew Lipscomb ed. 1903) (The Anas)).

57 *Id.* (citing 1 Writings of Thomas Jefferson at 304).

58 *Id.* at 93 (quoting Brian Z. Tamanaha, *A Critical Review of the Classified Information Procedures Act*, American Journal of Criminal Law 13, at 318 (1986)).

59 416 F.3d 338 (4th Cir. 2005).

60 *Id.* at 348 (citing Fitzgerald v. Penthouse Int'l, 776 F.2d 1236, 1238 n.3 (4th Cir. 1985); *Reynolds II,* 345 U.S. at 11).

61 CIA v. Sims, 471 U.S. 159, 172 n.16 (1985) ("[s]ecrecy is inherently a key to successful intelligence operations").

62 *Id.* (citing 8 Writings of George Washington 478-479 (J. Fitzpatrick ed., 1933) (letter for George Washington to Colonel Elias Dayton, July 26, 1777)).

63 Memorandum in Support of the United States' Assertion of State Secrets Privilege, *supra* note 1, at 10 (citations omitted).

64 Adam J. White, *The Truth About Secrets: The Bush Administration's Use of the State Secrets Privilege is Neither Novel Nor Undemocratic*, The Weekly Standard, June 1, 2006.

65 *See, e.g.*, Sterling v. Tenet, 416 F.3d 338, 344 (4th Cir. 2005) (citing U.S. v. Zolin, 491 U.S. 554 (1989) which "relied heavily upon Reynolds in discussing a judge's role in determining whether a particular attorney-client conversation fell outside the attorney-client privilege because the client was seeking advice regarding the perpetration of 'a future crime or fraud'").

66 *Reynolds II*, 345 U.S. at 532-33.

67 *Id.* (citing Hoffman v. U.S., 341 U.S. 479, 486-487 (1951)).

68 *Id.*

NSA Surveillance: The Litigation and its Implications

*By Thomas R. McCarthy**

On December 16, 2005, the *New York Times*[1] reported that President Bush had authorized the National Security Agency (NSA) to conduct surveillance of communications within the United States in the absence of court approval for the purposes of effectuating the mandate of the joint resolution Congress passed shortly after the September 11, 2001 terror attacks.[2] The day after the news leak, President Bush, in his weekly radio address, confirmed the existence of the Terrorist Surveillance Program ("TSP"). The President stated that he had "authorized the National Security Agency, consistent with U.S. law and the Constitution, to intercept the international communications of people with known links to al Qaeda and related terrorist organizations," and he gave a limited description of the process used periodically to review and reauthorize the TSP.[3] An additional element of the TSP was alleged in May 2006, when *USA Today* reported that AT&T, Verizon, and BellSouth had provided the Government with access to the communications records of tens of millions of Americans,[4] a charge the companies have consistently denied.[5] The Government has not confirmed the existence of this alleged "records" element of the TSP.

The revelation of the TSP's existence elicited substantial press attention and resulted in the filing of numerous lawsuits[6] challenging its lawfulness under the Constitution and various federal statutes—including the Foreign Intelligence Surveillance Act (FISA),[7] the Wiretap Act,[8] and the Electronic Communications Privacy Act[9]—as well as under various state constitutions and statutes. Recently, the District Courts for the Northern District of California and the Eastern District of Michigan have issued controversial opinions in two cases currently pending on appeal to the Ninth and Sixth Circuit Courts of Appeals, respectively.[10] The outcome of these appeals has the potential to impact profoundly the separation of powers and alter the balance between the protection of civil liberties and the ability of the Government to protect the nation against future terrorist attacks.

Notable Litigation

ACLU v. NSA was filed in January of 2006 in the Eastern District of Michigan, challenging the lawfulness of the TSP and requesting declaratory and injunctive relief.[11] The Government responded by filing a motion to dismiss or, in the alternative, for summary judgment, relying largely on its assertion of the state secrets privilege.[12] On August 17, 2006, Judge Anna Diggs Taylor issued an opinion granting summary judgment in favor of the Government with respect to the alleged records element of the TSP, while declaring the confirmed "contents" element of the TSP unconstitutional and permanently enjoining the NSA from continuing to conduct it.[13] The NSA appealed to the Sixth Circuit Court of Appeals, which has stayed the district court's order while the appeal is pending.[14]

Hepting v. AT&T Corp. challenges the constitutionality of the TSP in the context of a civil claim against AT&T for its alleged cooperation with the NSA's surveillance activities, and was filed in the Northern District of California by the Electronic Frontier Foundation on behalf of AT&T customers.[15] The Judicial Panel on Multidistrict Litigation consolidated several similar actions into a multidistrict litigation ("MDL") with *Hepting* as the lead case.[16] Believing federal interests were at stake, the Department of Justice intervened in the case. As in *ACLU v. NSA*, the Government filed a motion to dismiss the case on the basis of the state secrets privilege, with AT&T claiming additional common law and qualified immunities.[17] The court engaged in in camera and ex parte review of certain classified documents, and on July 20, 2006, Judge Vaughn R. Walker denied these motions. The defendants appealed to the Ninth Circuit Court of Appeals, and Judge Walker is presently considering the defendants' motions to stay proceedings while the appeal is pending.

Important Constitutional Questions

There are a number of constitutional questions at the heart of the ultimate question of the legality of the TSP. First, the plaintiffs in the suits filed claim that the TSP violates the First Amendment because it chills their overseas communications, "disrupting [their ability] to talk with sources, locate witnesses, conduct scholarship, and engage in advocacy."[18] Although the court in *ACLU v. NSA* found such a chilling effect,[19] it is unclear the asserted fear can be demonstrated to be objectively reasonable given that the Government has refused to divulge any information as to the identity of the intercepted communicants.[20] The Supreme Court has rejected such speculative claims in a case challenging "the Department of the Army's alleged 'surveillance of lawful and peaceful civilian political activity.'"[21] In that case, the Court explained that "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm."[22]

Second, plaintiffs argue that the contents element of the TSP violates the Fourth Amendment because it permits the NSA to intercept communications in the absence of either a warrant or probable cause.[23] Although Judge Taylor held that the confirmed contents element of the TSP violates the Fourth Amendment, there are a number of reasons why a warrant might not be required.[24] As a principal matter, it is not clear that the Fourth Amendment even applies in this context. For example, this Amendment does not apply to non-citizens abroad.[25] Nor does it apply to foreign aggressors.[26]

In addition, the Government has argued that no warrant is required because the President has "inherent constitutional authority to conduct warrantless searches for foreign intelligence purposes" pursuant to his authority over foreign affairs and his power as Commander-in-Chief.[27] Indeed, the Foreign Intelligence Surveillance Court of Review has explained that the President has inherent constitutional authority to conduct

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foreign intelligence surveillance.[28] Even aside from these arguments, it is possible that the warrant requirement is not applicable because the situation involves "special needs" that go beyond basic law enforcement.[29] Likewise, the warrant requirement may not be applicable because the nature of the intercepted calls—"international communications of people with known links to Al Qaeda and related terrorist organizations"[30]—is such that the callers had a reduced expectation of privacy.[31]

Third, plaintiffs in both cases have argued that, by operating outside the strictures of FISA, the Wiretap Act and ECPA,[32] the TSP constitutes a violation of the separation of powers.[33] Conversely, it can be argued that to the extent that electronic surveillance is a tool of war, any attempt to limit the President's ability to utilize this tool could constitute an unconstitutional encroachment on his powers as Commander-in-Chief under Article II of the Constitution.[34] Or, it could be argued that the courts should find that Congress impliedly authorized the TSP when it enacted the AUMF in order to avoid ruling on this fundamental constitutional question.[35]

Resolution of these issues implicates not only the Government and its efforts in the War on Terror. A number of these cases challenging the TSP include private telecommunications companies as defendants. These private defendants may well be entitled to protection from liability even if the TSP is ultimately found unlawful, to the extent that they cooperated with government investigations under the assumption that the Government's exercise of its authority was lawful.

A Threshold Question: State Secrets

Perhaps the most important issue presented in these cases, practically speaking, is the threshold issue of state secrets, because it may be dispositive of all of these cases. This privilege protects confidential government information from discovery where revelation would be inimical to national security.[36] It can require dismissal of a case in three distinct ways.[37] First, a successful claim of the privilege removes from consideration evidence that may be necessary for the plaintiff to establish the prima facie elements of his claim. Second, summary judgment may be required if the evidence excluded would otherwise provide the defendant with a valid defense to the claim. Third, if the "very subject matter of the action" is itself a state secret, then the court should dismiss the action in order to respect the separation of powers and protect national security.[38] For example, the Supreme Court has a long history of dismissing cases in which a plaintiff sues the Government over a covert agreement between the two parties.[39]

The federal courts have set out guidelines for courts to consider when faced with a claim of the state secrets privilege.[40] As a general matter, "public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated."[41] Thus, where the privilege applies, it is absolute.[42] Moreover, judicial deference to Executive assertions of the privilege is appropriate. That is, "courts must [] bear in mind the Executive Branch's preeminent authority over military and diplomatic matters and its greater expertise relative to the judicial branch in predicting the effect of a particular disclosure on national security."[43] In addition, the Executive need not demonstrate that disclosure of the asserted state secrets *will* impair the defense of the nation, disclose intelligence-gathering capabilities and methods, or disrupt foreign relations. Rather, the Executive need only show a "reasonable danger" that these harms may arise,[44] or a "reasonable possibility that military or state secrets would be revealed."[45] Furthermore, courts must be careful to remember that "intelligence gathering . . . is more akin to the construction of a mosaic than it is to the management of a cloak and dagger affair. Thousands of bits and pieces of seemingly innocuous information can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate."[46] And when determining what information is to be protected by the privilege, non-sensitive information should be segregated from protected information to allow for the disclosure of the former.[47] Last, the privilege protects not only the existence of a secret government program but also the method and means of such a program. This is so even where the existence of the secret program has been disclosed.[48]

Judge Taylor and Judge Walker applied these doctrines with mixed results. As to the confirmed "contents" element of the TSP, despite the fact that the Government has disclosed neither the method and means of surveillance nor the intended targets of the surveillance, Judge Taylor—arguably in disregard of *Halkin v. Helms*—concluded that this element of the TSP is not a state secret.[49] Judge Taylor did, however, rule that the alleged records element of the TSP is a state secret and dismissed the records-based claims. Judge Walker similarly concluded that the confirmed contents element of the TSP is not a state secret. In his view, because the Government had already admitted the TSP's existence, along with a few details about the TSP, there could be no danger of divulging sensitive state secrets.[50] Indeed, he permitted discovery as to whether AT&T received a certification from the Government directing AT&T to assist it in monitoring communications content. Interestingly, Judge Walker declined to rule as to the alleged records element of the TSP. Although implying that this element of the TSP is a state secret, Judge Walker emphasized that the Government could make disclosures during litigation that make the subscriber records program "no longer a secret" and so he denied the Government's motion to dismiss.

These decisions yield a less than robust state secrets privilege. First, to the extent the courts failed to protect the contents element of the TSP under the privilege, the courts appeared to ignore the rule that the mere fact of the existence of an otherwise secret government program does not warrant the disclosure of the means and methods of its operation. Second, Judge Walker's decision to allow the claims based on the alleged records element of the TSP to survive seems to flip the state secrets doctrine on its head. It tends to support a regime that favors disclosure, not one in which courts should generally defer to Executive assertions of the privilege. Indeed, Judge Walker's decision appears to assume there is a "reasonable possibility that military or state secrets [about the alleged records element] will be revealed."[51]

These decisions on the state secrets privilege could have far-reaching implications and lead to unintended and harmful results. Principally, they appear to undermine the Government's methods of conducting the war on terror by disclosing the method and means of the contents element of the TSP and the targets of surveillance. They may thus hinder the Government's arms of intelligence procurement.[52] In addition, these decisions would lead to an absurd result with regard to private cooperation in matters of national security. In *Totten v. United States*[53] and *Tenet v. Doe*,[54] the Court emphasized the Government's need and authority to keep secret arrangements secret, holding that parties to contracts with the Government may not sue on those contracts if their subject matter is a state secret. The decisions by Judge Taylor and Judge Walker may diminish cooperation between the Government and American businesses. Their rulings would permit third parties to sue American businesses for their actions in cooperating with the Government and force disclosure of the nature of those cooperative relationships even though American businesses themselves could be prohibited from disclosing these cooperative relationships and possibly from seeking the protection of the Government from any liability arising from their cooperative actions. Such a result would impose incalculable financial risks. Now more than ever, perhaps, it is more important the courts clarify the scope of the state secrets doctrine and decide whether American businesses have a continued role to play in national security.

Endnotes

1 James Risen and Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times, Dec. 16, 2005, at A1.

2 On September 14, 2001, Congress passed a joint resolution, commonly known as the Authorization for the Use of Military Force, that authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . . or harbored such organizations or persons." Authorization for Use of Military Force, Pub. L. 107-40, §§ 1-2, 115 Stat. 224 ("AUMF").

3 The White House, President's radio address, *available at* http://www.whitehouse.gov/news/releases/2005/12/print/20051217.html (last visited Jan. 26, 2007). Attorney General Alberto Gonzales subsequently made a similar public statement confirming the existence of and minimally describing the TSP. *See* The White House, Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence (Dec. 19, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/12/print/20051219-1.html (last visited Jan. 26, 2007). Several similar statements were made about the TSP by Executive officials. *See, e.g.*, The White House, *President Bush Discusses NSA Surveillance Program* (May 11, 2006), *available at* http://www.whitehouse.gov/news/releases/2006/05/20060511-1.html (last visited Dec. 10, 2006); U.S. Department of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President* (Jan. 19, 2006), *available at* http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf. The Bush Administration has neither confirmed nor denied that "purely domestic calls and electronic communications are being monitored." David Kravets, *Judge Mulling Whether to Dismiss Spy Lawsuit*, Associated Press State & Local Wire, June 23, 2006; *see also* Hepting v. AT&T Corp., 439 F. Supp. 2d 974 (N.D. Cal. 2006).

4 Leslie Cauley, *NSA Has Massive Database of Americans' Phone Calls*, USA Today, May 11, 2006, A1; *see also* Bruce Landis, *Utilities Chief May Probe Call Screening*, The Providence Journal, July 23, 2006, B-01.

5 *See* News Release, Bellsouth Corporation, *BellSouth Statement on Governmental Data Collection* (May 15, 2006), *available at* http://bellsouth.mediaroom.com/index.php?s=press_releases&item=2860 (last visited Jan. 26, 2007); News Release, Verizon Issues Statement on NSA Media Coverage (May 16, 2006), *available at* http://newscenter.verizon.com/press-releases/verizon/2006/page.jsp?itemID=29670712 (last visited Jan. 26, 2007).

6 Donna Walter, *Missouri Lawsuit Seeks to Stop Phone Inquiry*, Kansas City Daily Record, July 31, 2006, NEWS (reporting that "[s]ince January, more than 30 class action lawsuits have been filed against telecommunications carriers alleging they unlawfully assisted the NSA"). Complaints raising similar issues are also pending before state regulatory commissions. *See, e.g.*, In the Matter of the Complaint of the American Civil Liberties Union Fund of Michigan, et al. against AT&T Michigan and Verizon North, Inc., Mich. Pub. Serv. Comm'n, Case U-14985 (filed July 26, 2006).

7 50 U.S.C. § 1801 *et seq*.

8 18 U.S.C. § 2511

9 18 U.S.C. § 2701 *et seq*.

10 *See* Hepting v. AT&T Corp., 439 F. Supp. 2d 974 (N.D. Cal. 2006); ACLU v. NSA, 438 F. Supp. 2d 754 (E.D. Mich. 2006).

11 *ACLU,* 438 F. Supp. 2d 754.

12 *See id.* at 758-9.

13 *See id.* at 782. This opinion has been criticized as not being well-reasoned, even by many who agree with the result. *See* Adam Liptak, *Many Experts Fault Reasoning In Surveillance Decision*, N.Y. Times, Aug. 19, 2006, A1 ("Some scholars speculated that Judge Taylor . . . may have rushed her decision lest the case be consolidated with several others now pending in federal court in San Francisco or moved to a specialized court in Washington as contemplated by pending legislation.").

14 *See* ACLU v. NSA, 467 F.3d 590 (6th Cir. 2006). Oral argument was scheduled for January 31, 2007.

15 *Hepting,* 439 F. Supp. 2d at 978-979; *see* David Kravets, *Bush Administration Demanding Spy Lawsuit Dismissal*, Associated Press State & Local Wire, June 23, 2006.

16 Over 30 actions have been consolidated in this MDL in the Northern District of California. *See In re National Security Agency Telecommunications Records Litig.*, M:06-cv-01791-VRW.

17 *See Hepting,* 439 F. Supp. 2d at 979.

18 ACLU compl. ¶ 2, *available at* http://www.aclu.org/images/nsaspying/asset_upload_file137_23491.pdf (last visited Jan. 27, 2006).

19 ACLU v. NSA, 438 F. Supp. 2d 754, 776 (E.D. Mich. 2006).

20 *See* Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment, *available at* http://cryptome.org/aclu-34.pdf (last visited Dec. 14, 2006).

21 Laird v. Tatum, 408 U.S. 1, 2 (1972).

22 *Id.* at 13-14.

23 It does not appear that plaintiffs have challenged the alleged records element of the TSP on Fourth Amendment grounds. Such an attack would very likely be unsuccessful anyway because telecommunications subscribers have no privacy interest in the records of their communications and thus the acquisition of such records does not constitute a search within the meaning of the Fourth Amendment. *See* Smith v. Maryland, 442 U.S. 735, 744 (1979); United States v. Miller, 425 U.S. 435, 440 (1976); *Reporters Comm. for Freedom of the Press v. AT&T*, 593 F.2d 1030, 1045 (D.C. Cir. 1978).

24 *ACLU,* 438 F. Supp. 2d at 778.

25 *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 266 (1990) ("What we know of the history of the drafting of the Fourth Amendment also suggests that its purpose was to restrict searches and seizures which might be conducted by the United States in domestic matters."); *see id.* at 267 (holding that the Fourth Amendment does not "apply to activities of the United States directed against aliens in foreign territory or in international waters").

26 *See* Johnson v. Eisentrager, 339 U.S. 763, 775 (1950) ("[I]t seems not to have been supposed [by the Founders] that a nation's obligations to its foes could ever be put on parity with those to its defenders."); Kwong Hai Chew v. Colding, 344 U.S. 590, 596 n.5 (1953) ("once an alien *lawfully* enters and resides in this country he becomes invested with the rights guaranteed by the

Constitution to all people within our borders") (emphasis added); United States v. Esparza-Mendoza, 265 F. Supp. 2d 1254, 1271 (D. Utah 2003) (previously deported alien felons lack a "sufficient connection to this country" and thus "stand outside 'the People' covered by the Fourth Amendment").

27 Hepting v. AT&T Corp., 439 F. Supp. 2d 974, 986 (N.D. Cal. 2006)

28 In re Sealed Case, 310 F.3d 717, 742 (Foreign Intel.Surv.Ct.Rev. 2002).

29 *Hepting*, 439 F. Supp 2d at 986.

30 The White House, President's radio address, *available at* http://www.whitehouse.gov/news/releases/2005/12/print/20051217.html (last visited Jan. 26, 2007).

31 *See* United States v. Hall, 488 F.2d 193, 198 (9th Cir. 1973) ("It would be absurd to hold that one is constitutionally protected from any untoward results when he makes statements at a time when he has reason to know some third party is, or probably is, listening.").

32 In enacting FISA, Congress amended the Wiretap Act such that Section 2511(2)(f) now provides that the procedures outlined in FISA, the Wiretap Act and ECPA constitute "the exclusive means by which electronic surveillance … and the interception of domestic wire, oral, and electronic communications may be conducted." 18 U.S.C. § 2511(2)(f).

33 *See* Hepting, 439 F. Supp 2d at 978-79; ACLU v. NSA, 438 F. Supp. 2d 754, 758 (E.D. Mich. 2006). Judge Taylor accepted this argument, noting that "the President has acted, undisputedly, as FISA forbids," and reasoning that his "presidential power, therefore, was exercised at its lowest ebb and cannot be sustained." *ACLU*, 438 F. Supp. 2d at 778.

34 U.S. Const. art II, § 2.

35 Pub. L. 107-40, §§ 1-2, 115 Stat. 224.

36 *See* Tenet v. Doe, 544 U.S. 1 (2005); United States v. Reynolds, 345 U.S. 1 (1953); Totten v. United States, 92 U.S. 105 (1875).

37 *See Hepting*, 439 F. Supp. 2d at 984; Kasza v. Browner, 133 F.3d 1159 (9th Cir. 1998).

38 *See Reynolds*, 345 U.S. at 11 n.26; *Totten*, 92 U.S. at 107.

39 *See Tenet*, 544 U.S. at 9; *Totten*, 92 U.S. at 107.

40 For a more detailed description of the state secrets doctrine, *see* Claudio Ochoa's preceding article in this section.

41 *Totten*, 92 U.S. at 107.

42 Ellsberg v. Mitchell, 709 F.2d 51, 57 (D.C. Cir. 1983) ("No competing public or private interest can be advanced to compel disclosure.").

43 *See* El-Masri v. Tenet, No. 1:05-cv-01417 (E.D. Va. May 12, 2006). *See also* Halkin v. Helms, 598 F.2d 1, 8 (D.C. Cir. 1978).

44 *Ellsberg*, 709 F.2d at 58.

45 Jabara v. Kelley, 75 F. R.D. 475, 484 (E.D. Mich. 1977).

46 *Halkin*, 598 F.2d at 8.

47 *Ellsberg*, 709 F.2d at 57.

48 *See* El-Masri, No. 1:05-cv-01417 (E.D. Va. May 12, 2006).

49 ACLU v. NSA, 438 F. Supp. 2d 754, 778 (E.D. Mich. 2006).

50 Hepting v. AT&T Corp., 439 F. Supp. 2d 974, 991-992 (N.D. Cal. 2006); *see also Administration Appeals Domestic Spying Decision,* Associated Press State & Local Wire, Aug. 1, 2006.

51 Jabara v. Kelley, 75 F. R.D. 475, 484 (E.D. Mich. 1977).

52 This is so even though the President has elected to conduct "electronic surveillance that was occurring as part of the [TSP]" under the approval of the Foreign Intelligence Surveillance Court ("FISA Court") and not to reauthorize the TSP. *See* Letter from Attorney General Alberto R. Gonzales to Sens. Patrick Leahy & Arlen Specter of Jan. 17, 2007. Indeed, despite this decision to conduct pursuant to FISA Court approval electronic surveillance that was formerly a part of the TSP, the Government has continued to highlight the importance of protecting state secrets relating to the TSP. *See* Government's Supp. Submission Discussing the Implications of the Intervening FISA Court Orders of January 10, 2007 at 19-20, *ACLU v. NSA*, Nos. 06-2095, -2140 (6th Cir. filed Jan. 24, 2007).

53 92 U.S. 105 (1875).

54 544 U.S. 1 (2005).

Financial Services and E-Commerce

An Update on Terrorism Risk Insurance

*By Laura M. Kotelman**

On November 26, 2002, the President signed into law the Terrorism Risk Insurance Act of 2002 (TRIA).[1] The Act became effective immediately. It established a temporary Terrorism Risk Insurance Program ("Program") of shared public and private compensation for insured commercial property and casualty losses resulting from an act of terrorism. The Program, administered by the Secretary to the Treasury, was due to terminate on December 31, 2005. However, in December 2005, Congress passed the Terrorism Risk Insurance Extension Act of 2005 (TRIEA), extending TRIA for an additional two years.[2] It also made other significant changes to TRIA, discussed below.

Under TRIA, insured losses are covered if they result from an act of terrorism (including an act of war in the case of workers' compensation); covered, that is, by property and casualty insurance issued by an insurer (if the loss occurs within the U.S.); or to a U.S. air carrier, a U.S. flagged vessel (or vessel based principally in the U.S., on which U.S. income tax is paid and whose insurance coverage is subject to U.S. regulation), or at the premises of any U.S. mission.

TRIA enacted a Terrorism Insurance Program which provides federal compensation for insured losses arising from acts of terrorism. The federal compensation provided in the original Act was equal to 90% of the amount by which such insured losses exceed the applicable insurer deductible.[3] Participation by insurers is mandatory. In 2007, the amount of federal compensation provided was reduced to 85%.[4]

The act of terrorism must be certified by the Secretary to the Treasury. It must be a violent act or an act that is dangerous to human life, property, or infrastructure and must have resulted in damage within the U.S. or outside in the case of an air carrier, vessel or U.S. mission. It must have been committed by one or more individuals acting on behalf of a foreign person or interest as part of an effort to coerce the U.S. population or to influence the policy or affect the U.S. government's conduct by coercion. Property and casualty losses resulting from the Act must, in the aggregate, exceed $5 million.[5]

While TRIEA did not amend the definition of "act of terrorism," it did introduce a "Program Trigger" on March 31, 2006. The Program Trigger mandates that no compensation will be payable unless aggregate insurance industry losses resulting from a certified act of terrorism exceed $50 million in the remainder of 2006 and $100 million in 2007.[6]

The Department of Treasury's (DoT) Interim Guidance released in December 2005 says the DoT will determine whether the Program Trigger has been met through a similar process to that for determining aggregate insured loss amounts. Once the Program Trigger amount is exceeded, Treasury will notify insurers through a press release notice in the Federal Register and postings on its website.

TRIEA revised the definition of "Insurer Deductible" that adds new Program Years 4 and 5 to the definition. The insurer deductible is set as the value of an insurer's direct earned premium for commercial property and casualty insurance over the immediately preceding calendar year multiplied by 17.5% for 2006 and 20% for 2007.

The revised definition of "Property and Casualty Insurance" found in TRIEA excluded commercial automobile, burglary and theft, surety, professional liability, and farm owners multi-peril. While the revised definition excluded professional liability insurance, it explicitly retained directors' and officers' liability insurance.

For purposes of recouping the federal share of compensation under the Act, the "insurance marketplace aggregate retention amount" for the two additional years of the Program is increased from the level in 2005. For 2006 the "insurance marketplace aggregate retention amount" is established as the lesser of $25 billion and the aggregate amount, for all insurers, of insured losses during 2006. The "insurance marketplace aggregate retention amount" for 2007 is the lesser of $27.5 billion and the aggregate amount, for all insurers, of insured losses during 2007.

GAO Report on Terrorism Insurance

In September 2006, the U.S. Government Accountability Office (GAO) released a report entitled "Terrorism Insurance: Measuring and Predicting Losses from Unconventional Weapons is Difficult, but Some Industry Exposure Exists."[7] The report focuses on the exposures presented by "unconventional" or Nuclear, Biological, Chemical, and Radiological (NBCR) weapons, with little mention of more "conventional" or non-NBCR weapons. The key conclusion of the report is that, "given the challenges faced by insurers in providing coverage for, and pricing NBCR risks, any purely market-driven expansion of coverage is highly unlikely in the foreseeable future." While the GAO makes no recommendations, it created a strong argument for Congress to act before the expiration of the Terrorism Risk Insurance Act (TRIA) in 2007. The report makes the case that Congress needs to act to extend or replace TRIA, since NBCR is uninsurable. However, the report does not address the fundamental un-insurability of non-NBCR losses as well.

President's Working Group

Also in September 2006, the President's Working Group on Financial Markets released its report concerning the long-term availability and affordability of terrorism risk insurance. The report finds that, in general, any evaluation of the potential degree of long-term development of the terrorism risk insurance market is difficult.

TRIEA required that the Working Group perform an analysis regarding the long-term availability and affordability of insurance for terrorism risk, and to report to Congress by September 30, 2006. The Working Group posed specific

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questions, and solicited comments, including empirical data and other information in support of answers to these questions, where appropriate and available. It is chaired by the Secretary of the Treasury, and also includes the Chairmen of the Federal Reserve Board, Securities and Exchange Commission, and Commodity Futures Trading Commission.

The report finds little potential for future private market development for NBCR risks in particular. While the report makes no legislative recommendation, it does generate a strong argument for Congress to act before the expiration of the TRIA on December 31, 2007.

The report contains two significant findings about the ability of the private market, on its own, to underwrite terrorism risks. The report states:

> The greater uncertainty associated with predicting the frequency of terrorist attacks along with what appears to be a general unwillingness of some insurance policyholders to purchase terrorism risk insurance coverage makes any evaluation of the potential degree of long-term development of the terrorism risk insurance market somewhat difficult.
>
> In contrast to the overall market for terrorism risk insurance, there has been little development in the terrorism risk insurance market for CNBR (chemical, nuclear, biological, radiological) risks since September 11. Given that insurance companies have historically excluded coverage for these types of losses—even if not caused by terrorism—there may be little potential for future market development.

Nevertheless, the Working Group report does state that the "presence of subsidized federal reinsurance through TRIA appears to negatively affect the emergence of private reinsurance capacity because it dilutes demand for private sector reinsurance," an argument first articulated in a report issued in 2005 by the Treasury Department.

Insurer Perspective

Insurers are working to help Congress develop a market-based program that protects the economy against the risk of terrorist attack, promotes the development of robust private markets to assume more of this risk over time, and reduces taxpayer exposure to this risk over time. Insurers contend that capital is the key to terrorism insurance availability, and that continuing federal involvement and market freedoms are crucial to attracting additional capital.

Insurers seek a policy solution that adheres to three key propositions:

> The policy cannot discriminate on the basis of who is attacked. Any terrorist attack is an attack on all, and must be treated as such.
>
> The policy cannot discriminate in terms of the form of attack. Both the GAO Report and the PWG Report made it clear that nuclear, biological, chemical, and radiological (NBCR) risks can only be covered with a federal backstop. The same can be said for any attack that results in this level of devastation.
>
> The policy needs to refrain from picking winners and losers, when it comes to who can provide insurance. On that point, a competitive private market depends.

A reinsurance industry that supports public–private partnership is necessary to help stabilize the commercial insurance markets that underpin a free-market economy. Working with their client primary companies to manage their substantial retained exposure under TRIA, reinsurers have been willing to put limited capital at risk to manage terror-related losses. Reinsurers typically seek to manage the risk by offering terror coverage in a stand-alone contract rather than within a traditional all-peril catastrophe treaty contract, especially for insurers writing a national portfolio. Some regional carriers, with exposures limited to rural or suburban areas far from target risk cities and business centers, have secured terrorism coverage within their standard reinsurance programs, usually with some limitations as to the nature of the subject risk or size of subject event.

Reinsurers are only able to provide limited capacity for terrorism because the potential losses would place these companies at risk of insolvency. Reinsurers' capital is necessary to support all outstanding underwriting commitments they face, including natural disasters, terrorism, workers' compensation and other casualty coverages.

Some have suggested the possibility of the capital markets assuming terrorism risk. Catastrophe bonds are a known mechanism for using financial markets to absorb and spread natural hazards risk. However, terrorism presents a much greater underwriting and pricing challenge than natural catastrophe risk to the insurance and reinsurance industry as well as to those issuing and investing in catastrophe bonds. There is no reason to believe terrorism bonds are likely to be a significant provider of terrorism coverage in the foreseeable future. The capital markets face the same problems as insurers: inability to assess frequency of attack, a lack of predictive experience, correlation of loss to other exposures such as a stock market decline, and potentially devastating financial loss.

CONCLUSION

Insurance consumers and the companies they rely on to provide security from the potentially devastating financial losses of a terrorist attack are beginning to face a growing level of uncertainty surrounding the December 31, 2007 expiration of the Terrorism Risk Insurance Act (TRIA). Terrorist attacks are uninsurable because it is impossible to predict how frequently they will occur, where they will happen, or what form they will take. By establishing a high level financial backstop for terrorism losses, Congress has transformed an uninsurable risk into an insurable one. A review of market conditions in the wake of the 9/11 attacks demonstrated that a private market for terrorism insurance simply did not exist.

The economic consequences are very real. Unless high level backing for a public-private terrorism insurance partnership is continued, there could be significant market disruptions that will shrink the availability of terrorism insurance or dramatically increase the price of such coverage for buyers.

Congressional leaders have indicated that they intend to reduce the federal government's involvement in terrorism risk and increase private market involvement in solving this problem. A growing bipartisan consensus is emerging in the Congress that is committed to achieving a long-term, market-based solution with a continuing role for the federal government. Over time, the private sector can assume a greater

portion of the responsibility, but only with a public-private partnership is there any hope for terrorist insurance to be available and affordable.

TRIA is an important part of the program in the war on terrorism. It does not require an expensive federal bureaucracy to administer, it transfers much of the risk to private insurers, and it has stimulated economic growth by allowing millions of businesses to protect themselves from the financial devastation of a future terrorist attack. The impending expiration of the Act in December 2007 may mean a gradual shift of more responsibility for terrorism losses to the private market while at the same time following the example of more than a dozen other nations and making TRIA permanent.

Endnotes

1 Pub. L. 107–297.

2 Pub. L. 109-144.

3 (s. 103(e)(1)).

4 (s. 4).

5 (s. 102(1)).

6 (s.6).

7 GAO-06-1081.

Free Speech and Election Law

The Debate over Felon Voting

*By Roger Clegg, George T. Conway III & Kenneth K. Lee**

Today, from the bluest of the blue to the reddest of the red, almost every single state in the Union—forty-eight out of fifty—forbids felons from voting to varying degrees.[1] The District of Columbia also has a felon disenfranchisement law on its books to which the U.S. Congress acquiesced.[2] And although some states have restored the franchise to felons who have finished serving their sentences, the vast majority of states have continued to retain and adopt laws that prohibit felons from voting during their terms in prison. For example, convicts in Massachusetts could vote, even while in jail, until 2000. That November, however, the Bay State's voters faced a ballot question on a proposed state constitutional amendment to take away the incarcerated felons' franchise.[3] The amendment passed by a landslide, with 60% voting yes and only 34% voting no.[4] So, too, with Utah. Incarcerated felons had the right to vote there until 1998, when the state's voters similarly approved a constitutional amendment taking away the felons' franchise.[5] The proposition passed virtually by acclamation, 82% to 18% percent.[6]

Although forty-eight states have already spoken in support of felon disenfranchisement, others have championed felon voting rights as a just cause. The issue gained additional traction recently after several academics noted that Democratic presidential candidate Al Gore would have triumphed in Florida in 2000 and won the presidency, had felons been permitted to vote in that state.[7] But the case for letting felons vote is problematic both as a legal and policy matter.

As a legal matter, felon disenfranchisement laws have long been accepted in the American legal system and easily pass constitutional muster. Indeed, the Fourteenth Amendment explicitly permits states to adopt disenfranchisement statutes, and many such laws were enacted long *before* African-Americans enjoyed suffrage. These laws are also beyond the reach of the Voting Rights Act of 1965 (VRA). The legislative history of the VRA and its 1982 amendments makes very clear that the statute was not intended to cover felon disenfranchisement laws. Moreover, the VRA cannot be construed to encompass felon disenfranchisement laws because it would then exceed the enforcement powers of the Fourteenth and Fifteenth Amendments. Finally and most fundamentally, there are compelling policy rationales for such laws: society deems felons to be less trustworthy and responsible than non-felon citizens, and those who cannot follow the law should not participate in the passing of laws that govern law-abiding citizens.

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I. The Race-Neutral History and Constitutionality of Felon Disenfranchisement Laws

About a month before the 2004 presidential election, the Associated Press ran a newswire article stating that felon disenfranchisement laws "have roots in the post-Civil War [nineteenth] century and were aimed at preventing black Americans from voting."[8] Numerous other media outlets, including the *New York Times*, *Washington Post* and *USA Today*, also made similar statements about the origins of felon disenfranchisement statutes.[9] But such opinions are extremely tendentious.

Felon disenfranchisement laws are deeply rooted in Western tradition as well as American history. As Judge Henry Friendly explained, the Lockean notion of a social compact undergirds laws preventing felons from voting: someone "who breaks the laws" may "fairly have been thought to have abandoned the right to participate" in making them.[10] Alexander Keyssar, a Harvard professor and a critic of felon disenfranchisement laws, has acknowledged that such laws have "a long history in English, European, and even Roman law."[11] Similarly, a report issued by the Sentencing Project and Human Rights Watch conceded that "[d]isenfranchisement in the U.S. is a heritage from ancient Greek and Roman traditions carried into Europe."[12] And in recently upholding Florida's statute barring felons from voting, the en banc Eleventh Circuit observed that "[f]elon disenfranchisement laws are unlike other voting qualifications" in that they are "deeply rooted in this Nation's history."[13]

In the late eighteenth century, several states began passing felon disenfranchisement statutes. Between 1776 and 1821, eleven states disenfranchised persons convicted of certain "infamous" crimes.[14] By the eve of the Civil War, more than two dozen states out of thirty-four had enacted laws preventing those convicted of committing serious crimes from casting a vote.[15] And by the time the Fourteenth Amendment was adopted, twenty-nine states had established felon disenfranchisement laws.[16]

That long history effectively refutes the suggestion that felon disenfranchisement provisions are racially motivated.[17] Their antebellum origins show that they were aimed at whites and were maintained for race-neutral reasons: before the ratification of the Fourteenth Amendment, the states were free to, and the vast majority did, impose direct and express racial qualifications on the franchise.[18] As the en banc Eleventh Circuit observed in upholding Florida's felon disenfranchisement law, "at that time, the right to vote was not extended to African-Americans, and, therefore, they could not have been the targets of any [felon] disenfranchisement law."[19] Over seventy percent

of the states in the Union in 1861 had felon disenfranchisement laws—at a time when most African-Americans were still enslaved and did not have the right to vote. The pre-Civil War source of these laws "indicates that felon disenfranchisement was not an attempt to evade the requirements of the Civil War Amendments or to perpetuate racial discrimination forbidden by those amendments."[20]

The framers of the Civil War Amendments saw nothing racially discriminatory about felon disenfranchisement. To the contrary, they expressly recognized the power of the states to prohibit felons from voting. Section 2 of the Fourteenth Amendment provides that a state's denial of voting rights "for participation in rebellion, or other crime" could not serve as a basis for reducing their representation in Congress.[21] As the Supreme Court held in *Richardson v. Ramirez*, Section 2 is thus "an *affirmative sanction*" by the Constitution of "the exclusion of felons from the vote"—even felons who, like the plaintiffs in *Ramirez*, had finished their sentences.[22] This conclusion,

> rests on the demonstrably sound proposition that § 1 [the Equal Protection Clause], in dealing with voting rights as it does, could not have been meant to bar outright a form of disenfranchisement which was expressly exempted from the less drastic sanction of reduced representation which § 2 imposed for other forms of disenfranchisement.[23]

Thus, Section 2 of the Fourteenth Amendment "*expressly* permits states to disenfranchise convicted felons."[24]

Nor did the Reconstruction Congresses see any conflict between felon disenfranchisement and the Fifteenth Amendment. As the Supreme Court observed at length in *Ramirez*, Congress, in readmitting states to the Union, consistently approved state constitutions that excluded felons from the franchise.[25] In fact, the 40th Congress—*the very same Congress that proposed the Fifteenth Amendment*—approved such constitutions, and the next Congress did so both before *and after* the Fifteenth Amendment was ratified.[26]

In light of their historical origin, felon disenfranchisement laws, it seems, easily pass constitutional muster. As students of constitutional law know, the Constitution bars only laws that are facially discriminatory or motivated by intentional discrimination.[27] Contrarily, it appears that all of the felon disenfranchisement statutes on the books today were enacted or amended with a race-neutral purpose.[28] The Supreme Court has consistently held not only that "the states had both a right to disenfranchise [felons and] ex-felons," but that they had "a compelling interest in doing so."[29] As early as 1890, the Court held that a territorial legislature's statute that "exclude[d] from the privilege of voting … those who have been convicted of certain offenses" was "not open to any constitutional or legal objection."[30] A unanimous Warren Court decision recognized that a "criminal record" is one of the "factors which a State may take into consideration in determining the qualifications of voters."[31] Today's Court agrees: holding "that a convicted felon may be denied the right to vote" remains "unexceptionable."[32]

II. The Voting Rights Act's Inapplicability to Felon Disenfranchisement Laws

A. The Legislative History of the Voting Rights Act and its Amendments

Federal circuit courts are split as to whether the Voting Rights of 1965 (as amended by the 1982 amendment) can invalidate felon disenfranchisement statutes on the grounds that such laws have a racially disproportionate impact on minorities. While the Ninth Circuit has expressly held that the VRA can cover felon disenfranchisement laws,[33] the en banc Eleventh Circuit has ruled that it does not reach such laws.[34] And most recently, in 2006, Second Circuit en banc held that the VRA does not encompass New York's felon disenfranchisement.[35] The more sensible and reasonable interpretation of the VRA is that Congress did not intend it to apply to felon disenfranchisement statutes.

Congress passed the VRA to address various exclusionary practices that had been historically employed in the South to prevent blacks from voting. There is no indication in either the language or the legislative history of the original VRA that it was intended to cover felon disenfranchisement statutes. The only provision of the Act that Congress thought could remotely implicate felon disenfranchisement was Section 4 of the Act, which prohibits any requirement of "good moral character" to vote. But the Senate Judiciary Committee's report—joined by Senators Dodd, Hart, Long, Kennedy, Bayh, Burdick, Tydings, Dirksen, Hruska, Fong, Scott and Javits—took pains to note that even that provision "would not result in the proscription of the frequent requirement of States and political subdivisions that an applicant for voting or registration for voting be free of conviction of a felony."[36] On the floor, Senator Tydings repeated the point: the law would not bar states from imposing "a requirement that an applicant for voting or registration be free of conviction of a felony… These grounds for disqualification are objective, easily applied, and do not lend themselves to fraudulent manipulation."[37] The House Judiciary Committee report agreed: "[The VRA] does not proscribe a requirement of a State or any political subdivision of a State that an applicant for voting or registration for voting be free of conviction of a felony…."[38] These are the only references to felon disenfranchisement made in reports to the Voting Rights Act of 1965.[39] Thus, the legislative history appears to quite clearly show that Congress did not intend the VRA to cover felon disenfranchisement laws.

In 1982, Congress amended Section 2 of the VRA to bar procedures that "result" in the denial or abridgment of voting rights "on account of race or color."[40] The purpose of this amendment was to overrule certain Supreme Court decisions that Congress believed were contrary to the original intent of the statute. The amended statutory text, however, is notably ambiguous, and so "[u]nfortunately, it 'is exceedingly difficult to discern what [Section 2] means.'"[41] While the introduction of the word "result" arguably indicates that it might cover state actions not motivated by racial animus, the statute also incorporates the critical language in Fifteenth Amendment's prohibition of intentional racial discrimination—"den[ial] or abridg[ment]" of the right to vote "*on account of* race [or] color."[42] As discussed more fully below, the use of the words

"'on account of'" means that "'[t]he existence of some form of racial discrimination … remains the cornerstone of [Section 2] claims,'" and shows that "Congress did not wholly abandon its focus on purposeful discrimination when it amended the Voting Rights Act in 1982."[43]

The tension between "results in" and "on account of" renders the provision ambiguous. Indeed, it is precisely because of this ambiguity that the Supreme Court relied upon the 1982 legislative history to come up with the so-called *Gingles* "factors" in order to give content to Section 2.[44] Litigants who have launched VRA challenges to felon disenfranchisement laws have also sought to rely on this legislative history, over the extensive legislative history specifically dealing with the subject.

The legislative history of the 1982 amendments reflects scant suggestion that Congress changed the original intent to preserve felon disenfranchisement. Even though it "details many discriminatory techniques used by certain jurisdictions," "[t]here is simply *no* discussion of felon disenfranchisement in the legislative history surrounding the 1982 amendments."[45] Given that forty-six states in 1982 had felon disenfranchisement laws, it seems inconceivable that Congress would sub silentio amend the Voting Rights Act to invalidate the laws of forty-six states, many of which have had such statutes since the founding of the Republic.[46]

Overturning felon disenfranchisement remains a taboo cause in Congress to this day. The VRA's "one-sided legislative history is buttressed by subsequent Congressional acts. Since 1982, Congress has made it *easier* for states to disenfranchise felons."[47] The National Voter Registration Act of 1993 not only provides that a felony conviction may be the basis for canceling a voter's registration, but requires federal prosecutors to notify state election officials of federal felony convictions.[48] The Help America Vote Act of 2002 actually *instructs* state election officials to purge disenfranchised felons "on a regular basis" from their computerized voting lists.[49] The enactment of these provisions plainly "suggests that Congress did not intend to sweep felon disenfranchisement laws within the scope of the VRA."[50]

In considering the nascent Help America Vote Act, the Senate actually voted on a floor amendment that would have required states to allow felons to vote after they had completed their terms of incarceration, parole, or probation.[51] The proposal would only have applied to *federal* elections—and its sponsors emphasized they had no quarrel with denying the franchise to convicts who were still serving their sentences. In the words of the principal sponsor, Senator Reid, who was then the majority whip,

> We have a saying in this country: "If you do the crime, you have to do the time." I agree with that. . . . [T]he amendment . . . is narrow in scope. It does not extend voting rights to prisoners. I don't believe in that. It does not extend voting rights to ex-felons on parole, even though eighteen States do that.[52]

Despite being "narrow in scope," the amendment was rejected by a large bipartisan majority: thirty-one yeas, sixty-three nays.[53] Since then, bills have been repeatedly introduced in Congress that essentially copy Senator Reid's proposal verbatim—but not one has been so much as voted out of committee.[54]

B. The "Results" Test and the Claim of Disparate Impact

There is little indication in the legislative history of the 1982 amendments of the VRA that the introduction of the word "results" was intended to create a simple disparate impact test. The very language of the VRA seems to undercut any such claim: the continued requirement in the statute that the denial or abridgment of the right to vote be "*on account of race or color*" mimics the key phrase used in the Fifteenth Amendment's prohibition of intentional racial discrimination.[55] The plain meaning of "on account of" is "for the sake of" or "by the reason of,"[56] underscoring that "Congress did not wholly abandon its focus on purposeful discrimination when it amended the Voting Rights Act in 1982."[57]

The inclusion of the phrase "on account of race or color" appears to modify the word "results," thereby requiring some causational link between intentional racial discrimination and "results." But while felon disenfranchisement laws may have a disproportional impact on certain racial minorities, they do not violate the VRA insofar as the impact is not on "account of," "for the sake of," or "by the reason of race or color." As the Sixth Circuit said in rejecting a disparate impact-type VRA claim, felons are not "disenfranchised because of an immutable characteristic, such as race, but rather because of their conscious decision to commit a criminal act for which they assume the risks of detention and punishment."[58] Likewise, the Eleventh Circuit explained that Section 2 of the VRA,

> explicitly retains racial bias as the gravamen of a … claim. The existence of some form of racial discrimination therefore remains the cornerstone of § 2 claims; to be actionable, a deprivation of the minority group's right to equal participation in the political process must be on account of a classification, decision, or practice that depends on race or color. The scope of the Voting Rights Act is indeed quite broad, but its rigorous protections, as the text of § 2 suggests, extend only to defeats experienced by voters 'on account of race or color,' not on account of some other racially neutral cause.[59]

Accordingly, because "the causation of the denial of the right to vote to felons … consists entirely of their conviction, not their race,"[60] it "does not 'result' from the state's qualification of the right to vote *on account of race or color* and thus … does not violate the Voting Rights Act."[61] The "mere fact that many incarcerated felons happen to be black and [L]atino is insufficient grounds to implicate the Fifteenth Amendment and the Voting Rights Act," even under Section 2.[62]

So, if statistics showing racial disparities alone are insufficient to establish a Section 2 violation, even when the disparities *directly* relate to the electoral process, then statistics that are at least one step *removed* from that must also, by definition, be insufficient. Yet the case against felon disenfranchisement laws is based upon the assumption that "'race-based disparities *in sentencing*'"—"that, *as a result of racial discrimination in sentencing*, black and Hispanic felons are more likely to be sentenced to a term of imprisonment … and are therefore more likely to be disenfranchised."[63] But the case law establishes clearly that "[e]vidence of statistical disparities in an area external to voting, which then result in statistical disparities in voting," do not prove a Section 2 violation.[64] To ignore this

case law would allow felons to prove a denial of voting rights as a result of racial discrimination in sentencing on the basis of evidence *legally insufficient* to establish an actual claim of racial discrimination in sentencing. In *McCleskey v. Kemp*, the Supreme Court held that statistical disparities cannot be the basis for a Fourteenth Amendment claim to overturn a criminal conviction or sentence; a defendant must show that *he himself* or *she herself* suffered discrimination on the basis of race, and must show that on the basis of things that happened *in his or her case*.[65] "Because discretion is essential to the criminal justice process," statistical evidence "is clearly insufficient to support any inference that any of the decision-makers in [a particular] case acted with discriminatory purpose."[66] This is so even in a capital case, as *McCleskey*.

If the VRA were construed to ban felon disenfranchisement, then convicted felons could invoke the very same racial statistics that they cannot invoke to assert the right to walk the streets. And the VRA would probably become the basis for abolishing capital punishment nationwide, because if similar statistical disparities appear in capital sentences, then the carrying out of such sentences, which plainly effect a permanent denial of the right to vote, would necessarily "result[] in a denial or abridgment of the right … to vote on account of race or color."[67]

C. Any Prima Facie Showing of Adverse "Results" Is Easily Rebutted

Even assuming for the sake of argument that the 1982 amendments to the Voting Rights Act established some form of a pure disparate impact standard, states would still easily rebut any prima facie case of disproportional impact because of their strong and legitimate interests in maintaining their own electoral laws.[68] As discussed in Section IV, states have substantial reasons to limit the right to vote to persons deemed trustworthy, and thereby to exclude children, aliens, the mentally incompetent, and those who have been convicted of serious crimes.

The Supreme Court has held that "the State's interest in maintaining an electoral system . . . is a legitimate factor to be considered by courts among the 'totality of circumstances' in determining whether a Section 2 violation [of the 1965 Act] has occurred."[69] Thus, for example, the en banc Fifth Circuit rejected a challenge to Texas's county-wide election system for its district court judges—notwithstanding alleged disproportionate impact on minority candidates—on the grounds that the state had a "substantial interest" in linking jurisdiction and electoral base, and thereby promoting "the fact and appearance of judicial fairness."[70]

There is little doubt that the states have an equally substantial interest in preventing felons, especially those still incarcerated, from voting and potentially affecting elections. Thus, the Sixth Circuit held that the state's "legitimate and compelling interest" in disenfranchising felons outweighed any supposed racial impact.[71] Indeed, the framers of the Reconstruction Amendments found state authority to disenfranchise felons to be of such importance that they expressly permitted it in the text of the Fourteenth Amendment."[72] As the Supreme Court put it, "*[n]o* function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county and municipal offices…."[73]

D. The Clear Statement Rule: A Caution Against Preemption of States' Powers

An expansive reading of the VRA, covering felon disenfranchisement statutes, might also upset the balance between federal and state powers. The "clear statement" rule—which applies when the statutory text is ambiguous, as in the case of the VRA—cautions courts to tread lightly in interpreting vague statutes to avoid impinging upon the traditional spheres of the states:

> [I]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention *unmistakably clear* in the language of the statute …. [Congress must] make its intention *clear and manifest* if it intends to pre-empt the historic powers of the States.[74]

This rule of construction controls whenever a federal statute touches on "traditionally sensitive areas, such as legislation affecting the federal balance."[75] And when it applies, the rule requires that, absent a clear statement, courts must "interpret a statute to preserve rather than destroy the States' 'substantial sovereign powers.'"[76]

In *Gregory v. Ashcroft*, the Supreme Court faced the question of whether the Age Discrimination in Employment Act prohibited Missouri from enforcing a mandatory retirement age for state judges.[77] The Court held that it did not. It applied the clear statement rule because the case implicated "the authority of the people of the States to determine the qualifications of their government officials."[78] The fact that Congress's intent on the issue was "at least ambiguous" was enough to resolve the question: under the clear statement rule, it could not "give the state-displacing weight of federal law to mere congressional *ambiguity.*"[79]

Felon disenfranchisement involves authority that is at least as important as the state's power to determine "the qualifications of their government officials," as it involves the power to determine who gets to choose those officials and their qualifications. That by itself suffices to require a clear statement, but even more is involved here: the fundamental state power to "defin[e] and enforc[e] the criminal law," for which, of course, "the States possess primary authority."[80]

The confluence of these two fundamental lines of state authority appears expressly in the Constitution's text. Defering to the states to set voter qualifications even for *federal* elections,[81] as noted above, it also *affirmatively sanctions* the states' historic authority to disenfranchise people "for participation in rebellion, *or other crime*."[82] The states have the primary, if not exclusive, authority to decide whether felons should vote.

Accordingly, if it is to disturb the federal-state balance in the area of voter qualifications, Congress must be unmistakably clear about it, as it was about literacy tests,[83] educational-attainment requirements,[84] knowledge tests,[85] moral character tests,[86] vouching requirements,[87] English-language requirements,[88] English-only elections,[89] and poll

taxes,[90] to give just a few examples. But the text of the VRA makes no unmistakably clear statement—no statement at all—about felon disenfranchisement. And so it is hard to construe "to pre-empt the historic powers of the States"[91] and "destroy the States' 'substantial sovereign powers'"[92] by prohibiting felon disenfranchisement.

III. The Enforcement Powers of the Fourteenth and Fifteenth Amendments

Reading Section 2 of the VRA to bar felon disenfranchisement laws may also exceed Congress's enforcement powers under the Fourteenth and Fifteenth Amendments. These two Reconstruction amendments contain parallel grants of power to Congress to "enforce" the amendments' substantive provisions "by appropriate legislation."[93] But as the Supreme Court has emphasized in recent years, Congress cannot rewrite the constitutional provisions, as "Congress does not enforce a constitutional right by changing what that right is."[94] It has no power to engage in a "substantive redefinition of the … right at issue,"[95] and can only "enact prophylactic legislation"—legislation that "proscribes facially constitutional conduct"—to the extent necessary "in order to *prevent and deter un*constitutional conduct."[96]

Accordingly, the Supreme Court has insisted that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[97] To meet that test, Congress must do two things: (a) "identify conduct transgressing . . . substantive provisions" of the amendments; and (b) "tailor its legislative scheme to remedying or preventing such conduct."[98] The first requirement demands that Congress develop a "legislative record" that demonstrates a "history and pattern" of unconstitutional state conduct.[99] In other words, "[f]or Congress to enact proper enforcement legislation, there must be a record of constitutional violations."[100] To meet the second requirement, the purportedly prophylactic legislation must not be "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."[101] Congress thus must narrowly "tailor its legislative scheme to remedying or preventing such conduct."[102]

It would be difficult for Section 2 to pass either test if it were construed to prohibit felon disenfranchisement. To begin with, "when Congress enacted the VRA and its subsequent amendments, there was a *complete absence* of congressional findings that felon disenfranchisement laws were used to discriminate against minority voters."[103] In *Oregon v. Mitchell*, for example, the Supreme Court struck down the 1970 amendments to the VRA that, among other things, tried to lower from twenty-one to eighteen the minimum voting age throughout the nation, to the extent it applied to state elections.[104] In announcing the Court's judgment, Justice Black noted that "Congress made *no legislative findings* that the twenty-one-year-old vote requirement was used by the States to disenfranchise voters on account of race."[105] Congress has not made any such legislative findings about felon disenfranchisement, either.[106]

Not only has Congress not found that felon disenfranchisement has produced "any significant pattern of unconstitutional discrimination,"[107] and not only does "the legislative record … simply fail[] to show that Congress did in fact identify such a pattern,"[108] the record actually shows that Congress found the opposite. Congress saw nothing wrong with the "frequent requirement of States and political subdivisions that an applicant for voting or registration for voting be free of conviction of a felony,"[109] because it found that this requirement was "objective, easily applied, and do[es] not lend [itself] to fraudulent manipulation."[110] It found that "tests for literacy or good moral character should be scrutinized, but felon disenfranchisement provisions should not."[111] In short, "not only has Congress failed ever to make a legislative finding that felon disenfranchisement is a pretext … for racial discrimination[,] it has effectively determined that it is not."[112]

To apply Section 2 to strike down all felon disenfranchisement laws, would be "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."[113] Instead, it would "attempt a substantive change in constitutional protections"[114]—something the Constitution simply does not allow.

IV. The Policy Arguments for Felon Disenfranchisement

Former Vice President Al Gore, the frontrunner candidate in the 2000 Iowa presidential debates, explicitly endorsed the ban on felon voting, stating: "The principle that convicted felons do not have a right to vote is an old one, it is well-established," he said, adding that "felonies—certainly heinous crimes—should result in a disenfranchisement."[115]

As said at the outset, felon disenfranchisement laws have been justified on the basis of American adherence to Lockean notions of a social contract. To quote Judge Henry Friendly again, someone "who breaks the laws" may "fairly have been thought to have abandoned the right to participate" in making them.[116] Furthermore,

> it can scarcely be deemed unreasonable for a state to decide that the perpetrators of serious crimes shall not take part in electing the legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider their cases.[117]

That same reasoning motivated Massachusetts Governor Paul Celluci in 2000 to support a ballot initiative stripping incarcerated felons of the right to vote after prisoners began to organize a political action committee.[118] A Massachusetts state legislative leader commented about the state's now-abolished practice of allowing incarcerated felons to vote: "It makes no sense. We incarcerate people and we take away their right to run their own lives and leave them with the ability to influence how we run *our* lives?"[119]

This is the second traditional argument against felon voting: disfranchisement is also part of the punishment for committing a crime.[120] Criminal punishment can be meted out in various ways, including imprisonment, fines, probation, and the withdrawal of certain rights and privileges. In the American

system, it has long been established that "the States possess primary authority for defining and enforcing the criminal law."[121]

Lastly, on a moral level, society considers convicts—even those who have completed their prison terms—to be less trustworthy and responsible than non-convicted citizens.[122] In other areas of the law, full rights and privileges are not always restored to convicts, even though they may have "paid their debt to society."[123] For example, federal law prohibits the possession of a firearm for anyone indicted for or convicted of a felony punishable by at least one year in prison.[124] Also under federal law, anyone who has a "charge pending" or has been convicted of a crime punishable by imprisonment for one year or more cannot serve on a jury.[125] Even outside the realm of civic rights and privileges, society recognizes that an ex-convict may be less reliable than others. For example, employers routinely ask prospective employees whether they have been arrested (let alone convicted of a felony) because they suspect that the mere fact of an arrest may be an indication of untrustworthiness.

Critics of felon disenfranchisement laws note that these laws have a disproportionate impact on certain racial minority groups.[126] But opponents answer that this is not a sufficient reason to abolish longstanding and justifiable laws in the attempt to achieve some form of racial balance. As W.E.B. DuBois once exclaimed: "Draw lines of crime, of incompetency, of vice, as tightly and uncompromisingly as you will, for these things must be proscribed; but a color-line not only does not accomplish this purpose, but thwarts it."[127] In fact, the abolition of felon disenfranchisement laws may have the unintended effect of creating "anti-law enforcement" voting blocs and victimizing the vast majority of law-abiding citizens who live in high-crime urban areas—people who are themselves disproportionately black and Latino.[128]

Yet there may still be reasonable compromise on the issue of felon franchise. Not all crimes are equal, and some crimes are more reprehensible and likely to suggest untrustworthiness than others.[129] Americans may expect to see concessions made for those who have committed relatively minor crimes and exhibited good behavior for an extended period of time upon the completion of prison or parole terms.[130] Indeed, the National Commission on Federal Election Reform—a bipartisan, blue-ribbon panel chaired by former Presidents Ford and Carter—made a similar recommendation.[131] The restoration of an ex-convict's voting rights should be done on a case-by-case basis through an administrative mechanism. It should be difficult to draft a statute that draws a bright-line rule, taking into account factors such as the seriousness of the crime, the potential for recidivism, and the number of prior offenses.

Endnotes

1 *See* Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 Am. Sociological Rev. 777, 781-82 (2002) (noting that only Vermont and Maine permit incarcerated felons to vote).

2 The current felon disenfranchisement laws in D.C., the population of which is sixty percent African-American (Jesse McKinnon, U.S. Census Bureau, The Black Population: 2000 (2001), http://www.census.gov/prod/2001pubs/c2kbr01-5.pdf), were enacted by its own locally-elected Council after the introduction of home rule in 1974, and they were submitted to, and not objected to, by the Congress of the United States, the very body claimed here to have outlawed felon disenfranchisement.

3 *See* Mass. Const. amend. III, *as amended by* Mass. Const. amend. CXX (rendering "persons who are incarcerated in a correctional facility due to a felony conviction" ineligible to vote); *see also* Mass. Gen. Laws ch. 51, § 1 (2001) (decreeing the same law).

4 *See* http://www.sec.state.ma.us/ele/elebalm/balmpdf/balm2000.pdf (last visited Sept. 6, 2005) (stating the results of the aforementioned referendum under Question Number Two).

5 *See* Utah Const. art. IV, § 6 (declaring that "any person convicted of a felony . . . may not be permitted to vote . . . until the right to vote . . . is restored as provided by statute"); *see also* Utah Code Ann. § 20A-2-101.5 (1953) (permitting restoration of franchise to felons on probation, discharged from incarceration, or paroled).

6 *See* http://governor.state.ut.uslt_gover/98GenPropView.htm (detailing the election results for statewide proposition number four).

7 *See, e.g.,* Uggen & Manza, *supra* note 7, at 789-90.

8 *Millions locked out of US election*, Financial Rev., Sept. 23, 2004, *available at* http://afr.com/articles/2004/09/23 /1095651422800.html. After co-author Roger Clegg contacted the Associated Press, it corrected the erroneous statement.

9 *See* Roger Clegg, *Perps and Politics,* Nat'l Rev. Online, Oct. 18, 2004), *available at* https://www. nationalreview.com/clegg/clegg200410180844.asp.

10 Green v. Board of Elections, 380 F.2d 445, 451 (2d Cir. 1967).

11 Alexander Keyssar, The Right To Vote: The Contested History of Democracy in the United States 62-63 (Basic Books ed., 2000); *see also* Nat'l Comm'n on Fed. Election Reform, To Assure Pride and Confidence in the Electoral Process 45 (2001), http://millercenter.virginia.edu/programs/natl_commissions/final_report.html (noting that "the practice of denying the vote to individuals convicted of certain crimes is a very old one that existed under English law, in the colonies, and in the earliest suffrage laws of the states").

12 The Sentencing Project & Human Rights Watch, Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States (1998), http://www.hrw.org/reports98/vote/index.html.

13 Johnson v. Governor of Fla., 405 F.3d 1214, 1228 (11th Cir. 2005) (*en banc*).

14 Keyssar, *supra* note 11, at 63.

15 Keyssar, *supra* note 11, at 63.

16 *Accord* Richardson v. Ramirez, 418 U.S. 24, 48 (1974); Green v. Bd. of Elections, 380 F.2d 445, 450 (2d Cir. 1967).

17 *See* Keyssar, *supra* note 11, at 162 (arguing that late nineteenth century disenfranchisement laws outside the South "lacked socially distinct targets and generally were passed in matter-of-fact fashions"); Uggen & Manza, *supra* note 1, at 795 (explaining that some Southern states from 1890 to 1910 did act with racial intent in passing laws that disenfranchised persons who were convicted of crimes, but by that time, over eighty percent of the states in the U.S. already had felon disenfranchisement laws); Alexander Keyssar, *Did States Restrict the Voting Rights of Felons on Account of Racism?*, Hist. News Network, Oct. 4, 2004, http://hnn.us/articles/7635.html (noting that even in some states in the post-Civil War South, "felon disenfranchisement provisions were first enacted [by] … Republican governments that supported black voting rights").

18 *See* Keyssar, *supra* note 11, at 55-56 & Figure 3.1 (explaining that by 1855, twenty-five of the thirty States had express "race exclusions" that prevented blacks from voting, and the five that did not "contained only [four] percent of the free black population").

19 *Johnson*, 405 F.3d at 1218.

20 Baker v. Pataki, 85 F.3d 919, 928 (2d Cir. 1996) (*en banc*).

21 U.S. Const. amend. XIV, § 2.

22 418 U.S. 24, 54 (1974) (emphasis added).

23 *Id.* at 55.

24 *Johnson*, 404 F.3d at 1217 (emphasis added).

25 *Accord id*. at 1218 (discussing the long history of Florida's criminal disenfranchisement); *see* Richardson v. Ramirez, 418 U.S. 24, 48-52 (1974) (noting the approving congressional attitude toward state constitutional disenfranchisement provisions at the time of the Reconstruction).

26 *See Ramirez,* 418 U.S. at 51-52 (citing readmission statutes enacted in June 1868 and January, February, March, and May 1870). The Fifteenth Amendment was passed on February 26, 1869 by the Fortieth Congress (which began on March 4, 1867 and ended on March 3, 1869), and was ratified on February 3, 1870, during the Forty-First Congress. *See* Lexisnexis.com, Timeline for Ratifications of Constitutional Amendments, http://www.lexisnexis.com/constitution/amendments_timeline.asp (last visited Sep. 3, 2005).

27 *See, e.g.*, Washington v. Davis, 426 U.S. 229, 239 (1976) (holding that the Fourteenth Amendment bars only intentional discrimination by the state). This same standard almost certainly applies to its sister Reconstruction Amendment, the Fifteenth Amendment. *Id.*; *see also, e.g.*, City of Mobile v. Bolden, 446 U.S. 55, 62-65 (1980) (plurality opinion) (holding that the Fifteenth Amendment "prohibits only purposefully discriminatory denial or abridgement by government of the freedom to vote on account of race, color, or previous condition of servitude").

28 *See* Keyssar, *supra* note 11, at 63 (explaining that a felon disenfranchisement law that is facially non-discriminatory can still be unconstitutional if it was motivated by racial discrimination); *cf.* Hunter v. Underwood, 471 U.S. 222, 226-27 (1985) (striking down Jim Crow-era, misdemeanant disenfranchisement statute in Alabama that had been enacted with the intent to discriminate against blacks).

29 *See* Keyssar, *supra* note 11, at 162 (discussing the rationale and widespread support for the disenfranchisement laws).

30 *See* Davis v. Beason, 133 U.S. 333, 345-47 (1890) (holding that territorial legislatures had a right to impose "reasonable qualifications" on voters so long as they were "not inconsistent with the constitution or laws of the United States").

31 *See* Lassiter v. Northampton County Bd. of Elec., 360 U.S. 45, 51 (1959) (comparing the use of constitutionally allowable factors, such as a criminal record, with the constitutionality of using literacy as a voting requirement).

32 *See* Romer v. Evans, 517 U.S. 620, 634 (1996) (finding that while some voting requirements are no longer constitutional, a convicted felon still may be denied the right to vote); *see also*, *e.g.*, *Green*, 380 F.2d at 451(noting that the Supreme Court "frequently recognized" "propriety of excluding felons from the franchise," and citing cases in support).

33 *See* Farrakhan v. Washington, 338 F.3d 1009, 1019-20 (9th Cir. 2003) (finding that felons can challenge disenfranchisement statutes under the Voting Rights Act); *see also* Wesley v. Collins, 791 F.2d 1255, 1259-61 (6th Cir. 1986) (assuming that the Voting Rights Act applies to disenfranchisement laws but finding no violation); *cf.* Howard v. Gilmore, 205 F.3d 1333, 1333 (4th Cir. 2000) (unpublished) (dismissing suit for failure to state claim but assuming without discussion that the Voting Rights Act could be applied to felon disenfranchisement statute).

34 *See Johnson*, 405 F.3d at 1234.

35 *See* Hayden v. Pataki, 449 F.3d 305 (2d Cir. 2006) (*en banc*). A Second Circuit panel had dismissed a Voting Rights Act challenge by an incarcerated felon, but the court has agreed to rehear the issue *en banc*. *See* Muntaqim v. Coombe, 366 F.3d 102, 130 (2d Cir. 2004).

36 *See* S. Rep. No. 89-162, Pt. 3, 24 (1965), *as reprinted in* 1965 U.S.C.C.A.N. 2508, 2562 (identifying felon disenfranchisement laws as an exception to rule which prohibits use of tests or devices that are used to abridge the right to vote on the basis of race or color).

37 *See* 111 Cong. Rec. S8366 (1965) (statement of Sen. Tydings) (clarifying that the felon disenfranchisement laws are allowed, because they are objective means of determining qualifications for voting and are not subjective such as the good moral character requirement).

38 H.R. Rep. No. 89-439, 25-26 (1965), *as reprinted in* 1965 U.S.C.C.A.N. 2437, 2457.

39 *See Johnson*, 405 F.3d at 1233 (reviewing congressional statements in the House and Senate reports for the Voting Right Act's application to states' disenfranchisement provisions).

40 The 1982 amendments to the Voting Rights Act changed the statute such that it now reads: "No voting qualification or prerequisite to voting, or standard, practice or procedure shall be imposed or applied by any State or political subdivision *in a manner which results* in a denial or abridgment of the right of any citizen of the United States to vote *on account of race or color*." 42 U.S.C. § 1973(a) (1982) (emphasis added). It has previously read: "No voting qualification or prerequisite to voting, or standard, practice or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color."

41 *Accord Johnson*, 405 F.3d at 1229 (discussing the ambiguity in the Section 2 of the Voting Rights Act in its application to the felon disenfranchisement provisions); *see Muntaqim*, 366 F.3d at116 (analyzing the scope of the Voting Rights Act to determine if it encompasses states' disenfranchisement provisions and thereby creates a constitutional question) (quoting Goosby v. Town Bd., 180 F.3d 476, 499 (2d Cir. 1999)) (Leval, J., concurring).

42 U.S. Const. amend. XV (emphasis added).

43 *See Muntaqim*, 366 F.3d at 117 (reasoning that the Congress did not abandon its focus on purposeful racial discrimination with the amendment in 1982) (quoting Nipper v. Smith, 39 F.3d 1494, 1515 (11th Cir. 1994)).

44 *See* Thornburgh v. Gingles, 478 U.S. 30, 44-45 (1986) (establishing the following factors in determining validity of challenges under Section 2: the extent to which minority group members have been elected to public office; and the extent to which voting in the state or political subdivision is racially polarized, also recognizing that other supportive factors may exist, but that these are not essential to a minority voter's claim of dilution).

45 *See Johnson*, 405 F.3d at 1233-35 (emphasis added) (analyzing congressional records to find legislative intent for the Voting Rights Act's application to felon disenfranchisement provisions).

46 *See, e.g.*, *Muntaqim*, 366 F.3d at 123-24 (noting prevalence of felon disenfranchisement as a form of punishment in most states throughout U.S. history), *quoted in Johnson*, 405 F.3d at 1234 ("considering the prevalence of felon disenfranchisement in every region of the country since the Founding, it seems unfathomable that Congress would silently amend the Voting Rights Act in a way that would affect them").

47 *See Johnson*, 405 F.3d at 1234 (emphasis in original).

48 42 U.S.C. §§ 1973gg-6 (2002) (requiring the U.S. attorney to give written notice of any felony convictions in federal courts to the chief state election official).

49 42 U.S.C. § 15483(a)(2)(A)(ii)(I) (2002) (instructing the election officials to coordinate state computerized voter registration list with state agency records on felony status for the purpose of removing names of ineligible voters).

50 *Accord* Farrakhan v. Washington, 359 F.3d 1116, 1121 (9th Cir. 2004) (Kozinski, J., dissenting from denial of rehearing *en banc*); *see Johnson*, 405 F.3d at 1234 (discussing the various laws that Congress has enacted making it easier for states to disenfranchise felons).

51 *See* 148 Cong. Rec. S797-98 (Feb. 14, 2002) (proposed amendment 2879 to S. 565).

52 *See* 148 Cong. Rec. S801-02 (statement of Sen. Reid) (speaking in favor of the amendment which, aside from its narrow scope, could serve as an example to states); *see also* 148 Cong. Rec. S804-05 (statement of co-sponsor, Sen. Specter).

53 *See id.* at S809 (noting that twenty-three Democrats, forty Republicans voted "nay").

54 *See* Count Every Vote Act of 2005, S. 450, 109th Cong. § 701(d) (2005) (using identical language as that in Senator Reid's proposal to establish voting rights for ex-felons who have served their sentences); *see also* Ex-Offenders Voting Rights Act of 2005, H.R. 663, 109th Cong. (2005) (aiming to secure federal voting rights for qualified ex-offenders who have served their sentences); Ex-Offenders Voting Rights Act of 2003, H.R. 1433, 108th Cong. (2003); Civic Participation and Rehabilitation Act of 2003, H.R. 259, 108th Cong. § 3 (2003).

55 U.S. Const. amend. XV (emphasis added).

56 *See* Merriam-Webster Online Dictionary, http://www.m-w.com (last visited Aug. 15, 2005) (for the definition of "on account of").

57 *See Muntaqim*, 366 F.3d at 117 (analyzing the language of the 1982 amended Voting Rights Act to determine the legislative intent).

58 A*ccord* Johnson v. Bush, 214 F. Supp. 2d 1333, 1341 (S.D. Fla. 2002) (holding that disenfranchisement provisions do not deny people a right to vote due to an immutable characteristic, but because of their criminal acts), *aff'd in part and rev'd in part*, 353 F.3d 1287, 1303 (11th Cir. 2003) (holding that a fact-finder could conclude under the totality of circumstances test that the plaintiff's evidence demonstrates intentional racial discrimination behind Florida's felon disenfranchisement provisions), *vacated and reh'g* en banc *granted*, 377 F.3d 1163 (11th Cir. 2004), *aff'd*, 405 F.3d 1214 (11th Cir. 2005) (*en banc*) (holding that the Voting Rights Act's prohibition against voting qualifications that result in abridgment of the right to vote on account of race does not apply to Florida's felon disenfranchisement provisions); *see* Wesley v. Collins, 791 F.2d 1255, 1262 (6th Cir. 1986) (concluding that the disproportionate impact on Tennessee's black population did not result from Tennessee's qualification of the right to vote on account of race or color); *see also* Jones v. Edgar, 3 F. Supp. 2d 979, 981 (C.D. Ill. 1998) (holding that the plaintiff failed to show any connection between historical discrimination against blacks and the felon disenfranchisement provisions).

59 Nipper v. Smith, 39 F.3d 1494, 1515 (11th Cir. 1994) (quoting *League of United Latin Am. Citizens, Council No. 4434 v. Clements,* 999 F.2d 831, 850 (5th Cir.1993) (*en banc*)).

60 *See Johnson*, 405 F.3d at 1239 (Tjoflat, J., specially concurring) (holding that the facts presented in this case show no other causation than the criminal activity of the ex-felons for the denial to their right to vote).

61 *Wesley*, 791 F.2d at 1262 (emphasis added).

62 *See Jones*, 3 F. Supp. 2d at 981.

63 *See, e.g., Muntaqim*, 366 F.3d at 118 (emphasis by the Court) (quoting felon-appellant's brief).

64 *See Farrakhan,* 359 F.3d at 1117 (Kozinski, J., dissenting) (arguing that statistical disparities are not enough to establish vote denial under section two of the Voting Rights Act). *See also Wesley v. Collins*, 791 F.2d at 1262 (6th Cir. 1985) (upholding Tennessee's felon disenfranchisement provision against a Section 2 claim that was based, as here, on statistical disparities in conviction rates); *Ortiz v. City of Philadelphia Office of City Commissioners*, 28 F.3d 306, 314-15 (3d Cir. 1994) (finding that no evidence was presented to show that the neutral vote purging law discriminates against a particular class); *Salas v. Southwest Texas Junior College District*, 964 F.2d 1542, 1556 (5th Cir. 1992) (holding that the plaintiff failed to link low voter turnout by the Hispanic population to past official discrimination); *Irby v. Virginia State Board of Elections*, 889 F.2d 1352, 1358-59 (4th Cir. 1989) (deciding that the disparities between whites and blacks in representative positions does not in itself show that discrimination played a role in the selection or election process).

65 *See* 481 U.S. 279, 313 (1987) (ruling that the evidence failed to show that any decision maker in defendant's case acted with a discriminatory purpose, and that the statistical racially-correlated discrepancy did not show a significant risk of racial bias in Georgia's capital sentencing process).

66 *Id.* at 297.

67 42 U.S.C. § 1973(b) (1982).

68 *See, e.g.*, Roger Clegg, *Who Should Vote?*, 6 Tex. Rev. L. & Pol. 159, 173 (2001) (discussing the lack of constitutional or VRA violations in felon disenfranchisement provisions).

69 Houston Lawyers' Ass'n v. Attorney General of Texas, 501 U.S. 419, 426 (1991).

70 League of United Latin Am. Citizens v. Clements, 999 F.2d 831, 868-69 (5th Cir. 1993) (*en banc*).

71 *See* Wesley, 791 F.2d at 1260-61 (holding that when the felon disenfranchisement law is viewed in context of "totality of circumstances," it is apparent that the law does not violate the VRA).

72 *See Johnson*, 405 F.3d at 1232 (analyzing the constitutional implications of applying the Voting Rights Act to state felon disenfranchisement provisions).

73 *See* Oregon v. Mitchell, 400 U.S. 112, 125 (1970) (emphasis added) (discussing the constitutional objective of preserving states' rights and governing autonomy).

74 Gregory v. Ashcroft, 501 U.S. 452, 460-61 (1991) (emphasis added; citations and internal quotation marks omitted).

75 *Id.* at 461 (citations and internal quotation marks omitted).

76 Pa. Dep't of Corrections v. Yeskey, 524 U.S. 206, 209 (1998) (quoting *Gregory*, 501 U.S. at 460-61).

77 *See* Gregory v. Ashcroft, 501 U.S. 452 (1991).

78 *See id.* at 463.

79 *Id.* at 464, 467 (emphasis in original; citation and internal quotation marks omitted).

80 United States v. Lopez, 514 U.S. 549, 561 n.3 (1995); *see also* Harmelin v. Michigan, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring in judgment) (noting the longstanding tradition of deference to state legislature's role in criminal justice matters).

81 *See* U.S. Const. art. I, sec. 2, cl.1 (requiring that those who elect United States Representatives "shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislatures").

82 U.S. Const. amend. XIV, § 2 (emphasis added).

83 *See* 42 U.S.C. § 1971(a)(2)(C) (2005) (prohibiting states from conducting literacy tests as a qualification for voting unless it is administered to all voters, is wholly in writing, and answers are provided to voters within twenty-five days upon request); *id.* at § 1971(a)(3)(B) (defining literacy test as "any test of the ability to read, write, understand, or interpret any matter"); *see also* 42 U.S.C. § 1973b(c)(1) (2005) (explaining that the phrase "test or device shall mean "any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter").

84 *Id.* at § 1973b(c)(2) (explaining that literacy tests include tests to "demonstrate any educational achievement or his knowledge of any particular subject").

85 *Id.*

86 *Id.* at § 1973b(c)(3).

87 *Id.* at § 1973b(c)(4).

88 *See id.* at § 1973b(e)(1) (prohibiting the States from conditioning the right to vote upon the ability to understand the English language).

89 *See id.* at § 1973(b)(f)(1) (forbidding the States from holding English-only elections because of widespread discrimination of citizens who do not speak English).

90 *Id.* at § 1973(h)(a) (finding that poll taxes have no relation to the electoral process, prevent poor citizens from voting and have been used as a means to deter minorities from voting).

91 *Gregory*, 501 U.S. 452 at 461.

92 Penn. Dep't of Corrections v. Yeskey, 524 U.S. 206, 209 (1998) (quoting *Gregory*, 501 U.S. at 460-61).

93 U.S. Const. amend. XIV, § 5; *id.* at amend. XV, § 2.

94 City of Boerne v. Flores, 521 U.S. 507, 519 (1997).

95 Kimel v. Florida Board of Regents, 528 U.S. 62, 81 (2000).

96 Nevada Dep't of Human Resources v. Hibbs, 538 U.S. 721, 727-28 (2003) (emphasis added).

97 *Flores*, 521 U.S. at 520.

98 Fla. Prepaid Postsecondary Educ. Bd. v. College Savs. Bank, 527 U.S. 627, 639 (1999).

99 Bd. of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356, 368 (2001).

100 *Johnson*, 405 F.3d at 1231.

101 *Flores*, 521 U.S. at 532 (1997).

102 *College Savs. Bank*, 527 U.S. at 628.

103 *Johnson*, 405 F.3d at 1231 (emphasis added).

104 Oregon v. Mitchell, 400 U.S. 112 (1970).

105 *Id*. at 130 (emphasis added).

106 *See* Bd. of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356, 368 (2001) (striking down application of Americans with Disabilities Act against State employers because "[t]he legislative record … simply fails to show that Congress did in fact identify a pattern" of unconstitutional discrimination by States against the disabled); United States v. Morrison, 529 U.S. 598, 626 (2000) (striking down civil remedy for gender-motivated violence because "Congress's findings indicate that the problem of discrimination against the victims of gender-motivated crimes does not exist in all States, or even most States"); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91 (2000) (striking down application of the Age Discrimination in Employment Act against State employers because of "Congress's failure to uncover any significant pattern of unconstitutional discrimination here").

107 *Kimel*, 528 U.S. at 91.

108 *Garrett*, 531 U.S. at 369.

109 S. Rep. No. 162, 89th Cong., 1st Sess., Pt. 3, at 24 (1965), *as reprinted in* 1965 U.S.C.C.A.N. 2508, 2562.

110 111 Cong. Rec. S8366 (1965) (remarks of Sen. Tydings).

111 *Johnson*, 405 F.3d at 1233.

112 *Baker*, 85 F.3d at 929.

113 City of Boerne v. Flores, 521 U.S. 507, 532 (1997).

114 *Id*. at 509.

115 Transcript of January 17, 2005 Democratic Primary Debate, *available at* http://www.gwu.edu/~action/primdeb/primdeb0117tr.html.

116 *Green*, 380 F.2d at 451.

117 *Id.*

118 Clegg, *supra* note 81 at 172-73.

119 *Id.* at 172 (emphasis added; quoting Editorial, *Jailhouse Vote*, Wall St. J., Dec. 7, 1999, at A26 (quoting Massachusetts State Rep. Francis Marini)).

120 *See, e.g.*, Todd F. Gaziano, Election Reform, The Heritage Foundation, Mar. 14, 2001, *available at* http://www.heritage.org/Research/GovernmentReform/Test031401.cfm, (noting that felon disenfranchisement is permitted under section two of the Fourteenth Amendment).

121 *See* United States v. Lopez, 514 U.S. 549, 561, n.3 (1995) (internal quotation marks omitted).

122 Clegg, *supra* note 68, at 174.

123 *Id.*

124 18 U.S.C. § 922(d)(1), (g)(1) (2004).

125 28 U.S.C. § 1865(b)(5) (2000).

126 *See, e.g.*, The Sentencing Project, Felony Disenfranchisement, http://www.sentencingproject.org/issues_03.cfm (last visited Oct. 16, 2005); NAACP, Re-Enfranchisement, http://www.naacp.org/programs/vote/vote_reenfranchisement.html (last visited Oct. 16, 2005); Brennan Center for Justice, Voting Rights Restoration, http://www.brennancenter.org/programs/dem_vr_fvr.html (last visited Oct. 16, 2005).

127 Clegg, *supra* note 68, at 176.

128 *Id.* at 177.

129 *Id.* at 174.

130 *Id.*

131 *See* Nat'l Comm'n on Fed. Elec. Reform, *supra* note 11, at 45 (emphasis added) (recommending disenfranchisement until felons have fully served their sentences, including any term of probation or parole, or alternatively a lifetime disenfranchisement that nonetheless permits a clemency-like mechanism for restoring the franchise, in "particular cases"); *see also* Nat'l Comm'n on Fed. Elec. Reform, *Building Confidence in U.S. Elections*, *at* http://www.american.edu/ia/cfer/report/full_report.pdf, Sept. 2005, at 4.6.1 (recommending that "States should allow for restoration of voting rights to otherwise eligible citizens who have been convicted of a felony (other than for a capital crime or one which requires enrollment with an offender registry for sex crimes) once they have fully served their sentence, including any term of probation or parole.").

The Effect of Identification Requirements on Minority Voter Turnout

*By Hans A. von Spakovsky**

Voter fraud is a well-documented and existing problem in the United States.[1] While it is safe to say that many elections are conducted without voter fraud affecting the outcome or representing a significant factor in the race, there are sufficient cases of proven fraud and convictions by both state and federal prosecutors to warrant taking the steps necessary to improve the security and integrity of elections. There were many cases reported in the press in 2004 of thousands of fraudulent voter registration forms submitted to election officials in a dozen states across the country.[2] Obviously, when such fraudulent registrations are not caught by registration clerks, these registrations become a possible source of fraudulent votes as do frauds caused by impersonations of registered voters. For example, a New Mexico voter was not allowed to vote in 2004 because when he appeared at his polling place, he was told that someone else had already voted in his place.[3] In addition, someone could vote under the name of voters still on the roles but who have moved or died. In 2000, a review by two news organizations of Georgia's voter registration rolls for the previous 20 years found 5,412 votes had been cast by deceased voters—some on multiple occasions—and at least 15,000 dead people were still registered on the active voting rolls.[4]

Investigations by both the *Milwaukee Journal Sentinel* and a Joint Task force formed by the Milwaukee U.S. Attorney's Office and local law enforcement agencies found thousands of fraudulent and suspicious votes in that city, in a state that John Kerry won by only 11,384 votes in the 2004 election. Among the findings were that Milwaukee showed at least 4,500 more votes cast than the number of people listed as voting, as well as instances of suspected double voting, voting under fictitious names, and voting in the names of deceased voters.[5] As the *Milwaukee Journal Sentinel* noted, some of this voter fraud could have been prevented through photo identification since the Task Force had noted "cases of persons voting in the name of a dead person or as someone else… persons listed as voting who said they did not vote… people [who] registered and voted with identities and addresses that cannot in any way be linked to a real person."[6] These cases illustrate the need for requiring voters to show photo identification at the polls to authenticate their identity.[7]

A related and growing problem that also supports the need for requiring photo identification when voting is the increased number of noncitizens, both legal and illegal, who are registering to vote and voting in U.S. elections.[8] In the past four years alone, the Department of Justice has convicted more than a dozen noncitizens in Florida for registering and voting in elections in Broward, Miami-Dade, St. Lucie, Martin, and Palm Beach Counties, including one individual, Rafael Velasquez, who was a former candidate for the Florida legislature.[9] While this may seem to be a relatively small number of convictions, it is important to keep in mind that the Department of Justice has not conducted any comprehensive or systematic check of voter registration rolls in Florida to find noncitizens. There are at least 1.5 million noncitizens of voting age in Florida— "only 540 of them would have had to vote (or 540 more ineligible voters than may actually have voted) for Gore to reverse the presidential winner" in the 2004 election.[10] Could this many noncitizens vote in any one election? That question is succinctly answered by the findings of the Committee on House Oversight in the Dornan-Sanchez congressional election dispute in California in 1997. The Committee found 748 invalid votes due to noncitizens who had registered illegally in just one congressional district.[11]

According to Dan Stein of the Federation for American Immigration Reform, there were 11 states carried by President Bush in the 2000 election that "had small enough winning vote margins that voting by noncitizens could have tipped the results to Vice President Gore."[12] As another example of the prevalence of this problem, in a February 8, 2005 report to the President of the Utah Senate, the Legislative Auditor General John Schaff found that more than 58,000 illegal immigrants had Utah drivers' licenses and 37,000 had nondriver's license identification cards. Almost 400 of these illegal aliens had registered to vote and at least 14 had actually voted in Utah elections. In the ongoing lawsuit in Arizona over the state's new requirement that individuals registering to vote show proof of citizenship, the plaintiffs have apparently been forced to concede that Arizona has uncovered several hundred instances in which noncitizens were fraudulently registered to vote.[13] A review in 2005 by Paul Bettencourt, the Voter Registrar for Harris County, Texas, the third largest county in the country, found at least 35 cases in which noncitizens applied for or received a voter card, including a Brazilian woman who voted at least four times. As Bettencourt stated, "we regularly have elections decided by one, two, or just a handful of votes in any one of our more than 400 local government jurisdictions."[14]

It should be kept in mind that the federal government does not cooperate with inquiries by local election authorities on the immigration status of registered voters. Even if it did, it could only provide information on noncitizens that are in its files—individuals who are here legally and illegal immigrants who have been caught and a file created. Since the vast majority of illegal immigrants are not in its information system, the federal government could not provide accurate information on every registered voter even if it wanted to. Since more than half of the states do not require proof of legal presence in the U.S. to apply for a driver's license and the National Voter Registration Act (also known as Motor Voter) requires states to offer voter registration to persons who apply for a driver's license, voter rolls are guaranteed to become "inflated by non-citizens who are registered to vote… [t]he only question is the number."[15]

The solution to preventing fraudulent votes from being cast in polling places is to require all voters to present photo identification, a recommendation made by the bipartisan Carter-Baker Commission on Federal Election Reform. The Commission's recommendation was based on photo

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identifications issued under the REAL ID Act of 2005,[16] which requires states to verify each individual's full legal name, date of birth, address, social security number, and U.S. citizenship before the individual is issued a driver's license or personal identification card.[17] Similarly, the solution to preventing noncitizens from registering and voting in elections is to require all individuals registering to vote to provide proof of citizenship.

Those opposed to these requirements argue that they are unnecessary and discriminatory, and will lead to reduced turnout by minority voters. However, contrary to those claims, the documented history of fraudulent voter registrations and voter fraud, and increasing incidents of noncitizens registering and voting, show the need for such requirements. As former Congresswoman Susan Molinari pointed out, "[f]ar from discriminatory, a mandatory voter ID provides means by which more Americans may obtain the identification already required for daily functions—such as cashing a check, entering a federal building, or boarding an airplane."[18] There is also no evidence that minority voters have less access to identification documents than other voters, or that requiring proof of citizenship will disproportionately affect minority voters or lead to lower turnout of eligible voters if either requirement is implemented. As John Lott concluded in a recent study, "the non-photo ID regulations that are already in place have not had the negative impacts that opponents predicted." [19]

On October 29, 2002, President George Bush signed into law the Help America Vote Act of 2002 ("HAVA").[20] HAVA contained the first nationwide identification requirements for voters. It applies to first-time voters who register by mail and who have not previously voted in a federal election.[21] Under §303(b)(2)(A) of HAVA, when voting in person, such voters must present 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. Voters can avoid this requirement if they submit a copy of one of these documents with their voter registration form or if they drop off their registration form with an election official *instead* of mailing it in.[22] First-time registrants voting by mail using an absentee ballot must submit a copy of one of these documents with the absentee ballot. Any voter who does not have any of these documents can vote a provisional ballot that must be verified by local election officials to determine whether the voter is eligible to vote.[23] States and localities were required to comply with these provisions beginning January 1, 2004.[24] However, HAVA specifically provided that these identification requirements, as well as the other requirements in Title III of the law such as provisional voting and statewide computerized voter registration lists, were "minimum requirements" and nothing prevented a state from establishing requirements "that are more strict" so long as they are not inconsistent with other federal laws.[25]

Spurred in part by the passage of HAVA and the 2004 election, a number of states such as Georgia, Indiana, and Missouri passed legislation implementing photo identification requirements for voters that were stricter than the HAVA requirement. In addition to a voter identification requirement, Arizona also passed a requirement that an individual registering to vote show proof of citizenship. All of these state statutes have been attacked in court in litigation alleging violations of state law, the Voting Rights Act, Equal Protection, or the 24th Amendment (poll taxes). The objection to photo identification requirements is that they will reduce the turnout of black voters because fewer blacks possess identification documents than whites or that they will be intimidated by identification requirements and will not vote. These theories, however, are mostly anecdotal and not based on any objective evidence.[26] The new statutes passed by Georgia, Indiana, Missouri, and Arizona are either too recent to judge their possible effect on the turnout of voters or have not been implemented because of restraining orders. However, a number of states (including Georgia) have had less strict voter identification requirements in place for a number of years, and a review of turnout in those states reveals that they not only have no effect on the turnout of black voters, turnout actually increased after implementation of some requirements. Additionally, available information on photo identification possessed by individuals, particularly driver's licenses, shows no discrepancy between blacks and whites.

Driver's licenses, a primary form of picture identification, are possessed by a vast majority of Americans. According to an FEC report covering the 1995-96 period, approximately 87% of persons eighteen years and older have driver's licenses while an additional 3% or 4% have a photo identification card issued by the State motor vehicle agency.[27] The Federal Highway Administration ("FHA") reported in 2004 that the number of licensed drivers age 18 and over was 195,432,072.[28] Since the total population of the U.S. age 18 and over in 2004 according to the Census Bureau was 215,694,000, the percentage of the U.S. voting age population ("VAP") with a driver's license was 90.6%. Using the FEC's 3% to 4% figure for additional non-driver's license identification cards, approximately 94 to 95% of the VAP has, at a minimum, photo identification documents issued by state motor vehicle authorities. The FHA does not have information on driver's licenses by race; however, these statistics show that the number of individuals of voting age who do not have photo identification is very small.

Claims have also been made, particularly in the litigation in Georgia, that photo identification requirements discriminate against the elderly. But according to the Federal Highway Administration, the number of older Americans who hold driver's licenses as a percentage of their age group is surprisingly high. For example, 90.7% of persons age sixty-five to sixty-nine have a driver's license; 86.5% of persons age seventy to seventy-four have a license; and 82% of persons age seventy-five to seventy-nine have a license.[29]

The results of the 2004 election certainly do not support the claim that an identification requirement will decrease turnout. HAVA's national identification requirements, although limited, were in effect for the first time all across the country. However, turnout was 60.7% of the voting age eligible population, an increase of 6.4 percentage points over the turnout of 54.3% of the eligible population in the 2000 presidential election.[30] This was the largest increase in turnout since the 1948 to 1952 election, when turnout increased by 10.1 percentage points.[31] The Census Bureau publishes a report

every two years on voting and registration in federal elections based on responses from surveys. A comparison of the 2000 and 2004 reports shows that in the 2000 election, 56.8% of the eligible black population reported voting in the election. In 2004, when HAVA's limited identification requirement was in effect, 60% of the eligible black population voted, an increase of 3.2 percentage points.[32]

Another revealing analysis is obtained by reviewing the experience of four states that imposed in-person identification requirements on voters at the precinct. South Carolina, Georgia, Virginia, and Louisiana, allow or allowed a voter to present either photo identification or one of a long list of other documents. All but South Carolina allowed a signed affirmation of the voter's identity if the voter does not have the required identification documents. Having an affirmation exception might prevent decreases in minority voter turnout if it is actually true that minorities do not have identification documents. Nevertheless, such an exception would probably not reduce the intimidation factor if it is correct that minorities are intimidated by the challenge of presenting identification or having to take the extra step of completing an affidavit. Turnout would also be reduced (even with an affirmation exception) if it is true that identification requirements are applied in a discriminatory manner against black voters as has been claimed.[33] However, an examination of the turnout figures in presidential elections in South Carolina, Virginia, Georgia, and Louisiana, states that require identification at the polls, refutes these claims, as does the experience of Alabama and Florida.[34]

Percentage Turnout of Voting Age Population[35]
(*increase/decrease between elections*)

Year	*South Carolina*	*Virginia*	*Georgia*	*Louisiana*	*National*
1984	40.66%	50.69%	42.05%	54.55%	53.11%
(-/+)	(-1.75)	(-2.46)	(-2.65)	(-3.27)	(-3.0)
1988	38.91%	48.23%	39.4%	51.28%	50.11%
(-/+)	(+6.09)	(+4.61)	(+6.77)	(+8.55)	(+4.98)
1992	45%	52.84%	46.17%	59.83%	55.09%
(-/+)	(-3.44)	(-5.3)	(-3.74)	(-2.85)	(-6.01)
1996	41.56%	47.54%	42.43%	56.98%	49.08%
(-/+)	(+5.04)	(+5.46)	(+1.37)	(-2.75)	(+2.22)
2000	46.6%	53%	43.8%	54.2%	51.3%
(-/+)	(+4.6)	(+3.6)	(+7)	(+4.1)	(+9.6)
2004	51.2%	56.6%	50.8%	58.3%	60.9%

South Carolina

Under South Carolina Code §7-13-710, a voter must present his valid South Carolina driver's license or other form of identification containing a photograph issued by the Department of Public Safety at the polls. Under an amendment passed in 1988, if the voter is not licensed, the voter can alternatively present the written registration notification received after registering to vote as required by §7-5-125. This exception was first effective for the 1988 general election. An examination of South Carolina's turnout figures shows no effect from the state's identification requirements even with the state's significant minority population. According to the 2000 Census, South Carolina was 67.2% white and 29.5% black.[36] The percentage of the voting age population with driver's licenses in 2004 was 94.5%.[37]

South Carolina is one of the only states to provide turnout statistics by race. From 1984 to 2004, the total turnout broken out by the percentages of white/non-whites voting in the general election was as follows:[38]

Year	Total voting	White Turnout	Non-White Turnout
1984	*1,018,701*	*754,155 (74%)*	*264,546 (26%)*
1988	*1,041,846*	*796,542 (76.45%)*	*245,304 (23.55%)*
1992	*1,237,467*	*950,556 (76.8%)*	*286,911 (23.2%)*
1996	*1,203,486*	*908,503 (75.5%)*	*294,983 (24.5%)*
2000	*1,433,533*	*1,082,784 (75.5%)*	*350,749 (24.5%)*
2004	*1,631,148*	*1,197,416 (73.41%)*	*433,732 (26.59%)*

These figures reveal that in 1988 there was a slight drop in the number of non-white voters when compared to the 1984 election. The percentage of such voters was down 2.45 percentage points in the year that voters could use the voter registration card sent to all voters after they register in place of a South Carolina driver's license. If non-white voters had experienced prior problems voting due to the lack of a license, turnout should have increased, not decreased, in the election year when the voter registration card issued to all voters could be used as an alternative. However, this did not occur. A Census survey shows that despite the voter identification requirement, the turnout percentage of the black VAP in South Carolina has steadily risen since 1988, with the exception of 2004, and a slightly *higher* percentage of the black VAP turned out to vote in the 2000 election than the white VAP: 60.7% vs. 58.7%.[39] The total number of non-whites voting has steadily increased since 1988, rising from 245,304 voters to 433,732 voters in 2004.

Census Survey of Turnout of VAP by Race
South Carolina

Year	*White*	*Black*
1988	52.3%	40.7%
1992	61.6%	48.8%
1996	56.2%	49.9%
2000	58.7%	60.7%
2004	63.4%	59.5%

Similarly, no conclusions can be drawn of any kind of negative effect from identification requirements on the general trend of South Carolina's turnout when compared to national turnout. South Carolina has generally had a lower turnout than the majority of states. However, there are other states without

identification requirements with lower turnout. Although the 1988 turnout of VAP in South Carolina was below the national average of 50.11%, no significance can be attributed to this fact since other states without identification requirements have had lower turnout than South Carolina in different elections. In 2000, for example, South Carolina ranked 44th in terms of turnout.

In years that national turnout has declined, South Carolina's turnout has not decreased as much as the national decline; while in years that the national turnout has increased, South Carolina's turnout has generally increased at a greater rate (with the exception of 2004). For example, turnout declined nationally by 3 points from 1984 to 1988 but only declined 1.75 points in South Carolina. From 1988 to 1992, national turnout increased by 4.98 points from 50.11% to 55.09% yet turnout in South Carolina increased by 6.09 points, going from 38.91% to 45%. This trend was repeated in 1992-1996 (national decline of 6.01 vs. decline of only 3.44 in South Carolina) and 1996-2000 (national increase of 2.22 vs. increase of 5.04 in South Carolina). If identification requirements affected voters, it would be logical to assume that national turnout trends would be offset in states with significant minority populations that arguably make it more difficult for an individual to vote by requiring identification. South Carolina's record does not support that assumption.

Virginia

According to the 2000 Census, Virginia's population is 72.3% white and 19.6% black.[40] The percentage of the voting age population with driver's licenses in 2004 was 93.8%.[41] Virginia passed a voter identification requirement in 1999 that became effective for the 2000 Presidential election.[42] It requires a voter to present a voter registration card, a social security card, a driver's license, or any other photo identification issued by a government agency or employer. If the voter has none of these forms of identification, he can sign an affidavit attesting to his identity. Virginia does not keep statistics on the number of voters who complete such an affidavit in lieu of presenting a form of identification. Like South Carolina, however, Virginia's turnout does not substantiate any claim that having an identification or affidavit completion requirement intimidates voters and affects turnout.

In the 1996-2000 period, when the national turnout increased 2.22 points from 49.08% to 51.3%, and Virginia's identification requirement became effective, Virginia's overall turnout increased 5.46 points, going from 47.54% to 53%. Even after imposing a new identification requirement, Virginia's turnout increased at *twice* the rate of the national turnout. Virginia ranked twenty-ninth in turnout in the country. According to Census survey reports, the turnout of black voters in Virginia in comparison to the VAP of blacks dipped slightly, going from 53.3% in 1996 to 52.7% in 2000. The .5% difference between these numbers, however, is within the margin of error of the surveys. Although this study has only examined turnout in presidential elections, it should be noted that reported black turnout in the 1998 congressional election in Virginia according to the Census Bureau was 23.8%; yet in the 2002 congressional election, after implementation of the voter identification requirement, reported black turnout in the state was 27.2%, 3.4 percentage points higher.

Georgia

According to 2000 Census figures, Georgia has a population that is 65.1% white and 28.7% black.[43] The percentage of the voting age population with driver's licenses in 2004 according to Federal Highway Administration statistics when compared to Census reports was 89.8%.[44] Georgia's controversial 2005 photo identification law was actually an amendment to an existing state statute, reducing the number of acceptable forms of identification from seventeen to six. In 1997, Georgia first imposed an identification requirement, including both photo identification and a lengthy list of acceptable non-photo identification documents with an affidavit exception.[45] It was effective for the 1998 Congressional election and was first effective for a presidential election in 2000. Under the 2005 amendment, permissible documents are a driver's license, federal or state government photo identification, a passport, military photo identification or tribal photo identification. The affidavit exemption was eliminated. Discussion of the amended version of the statute will follow a discussion of the effect of the earlier identification law.

Turnout in Georgia has historically been amongst the lowest in the country. In the 1996-2000 period when the national turnout increased by 2.22 points and Georgia's identification requirement became effective, Georgia's turnout *increased* 1.37 points, going from 42.43% to 43.8%. In comparing that increase with the increase/decrease in turnout of all other states, Georgia ranked thirty-seventh in the country, ahead of Indiana which suffered a 3.73 point decline in turnout and behind Alaska with a 9.56 point increase in turnout from 1996 to 2000 (the largest increase in turnout of any state). Given Georgia's large minority population, a significant decrease in turnout in the 2000 election would have been expected if the assumptions underlying objections to identification requirements are valid. However, Georgia's turnout *increased* although not at as great a rate as the national increase.

Additionally, according to a Census Bureau survey, a *higher* percentage of blacks than whites reported voting in the 2000 election: 51.6% vs. 48.3%.[46] This compares to a Census report for the1996 election that shows 45.6% of blacks voted and 52.3% of whites voted.[47] Therefore, the percentage of blacks reporting voting in comparison to the black VAP actually increased by 6 points *after* identification requirements became effective. It appears that black voters were not affected by Georgia's identification requirements in the first presidential election after the law became effective. In the 2004 election, Georgia's total turnout rate increased 7 percentage points from the 2000 election, the tenth largest increase in the nation according to the Committee for the Study of the American Electorate. Even with the state's identification requirement, the Census Bureau survey shows that black voters again reported voting at a higher rate than whites in the 2004 election, 54.4% vs. 53.6%, an increase over their turnout in the 2000 election.

Census Survey of Turnout of VAP by Race
Georgia

Year	*White*	*Black*
1996	52.3%	45.6%
2000	48.3%	51.6%
2004	53.6%	54.4%

Because Georgia is covered by Section 5 of the Voting Rights Act,[48] the state was required to submit the 2005 amendment requiring photo identification to the Department of Justice (DOJ) before it became effective. DOJ reviews such submissions under a retrogression standard, i.e., will the voting change disproportionately affect minority voters and put them in a worse position than under the current law. DOJ precleared the law, finding no discriminatory effect on minority voters, and explained the reasons for its preclearance in a letter to Senator Christopher Bond on October 7, 2005.[49] This letter provides valuable information on the question of how many voters possess photo identification and whether there is any significant racial disparity. In fact, the letter states that on the primary claim that "African-American citizens in the State are less likely than white citizens to have the requisite photo identification," that assertion "is not true." DOJ made the following findings:

- Georgia's Department of Driver Services (DDS) showed 6.4 million photo identification holders, very close to the 6.5 million VAP projected by the Census Bureau, far larger than the 4.5 million registered voters in Georgia. The Census projection also included ineligible voters such as 50,000 prisoners and 228,000 illegal aliens.
- DDS had racial data for 60% of the card holders—the card holders who register to vote when they apply for a license. 28% of those card holders were black, slightly higher than the black percentage of the VAP in Georgia, indicating that of the DDS applicants who register to vote, blacks hold DDS identification at a *slightly higher* rate than white Georgians.
- Student photo identification issued by all Georgia state colleges are acceptable under the amended law and data from the university system showed that black students represented 26.8% of public college students, slightly more than their share of the state VAP in 2000.
- 2000 Census data showed that 19.4% of blacks worked for the government at the local, state, or federal level in Georgia, versus only 14.3% of whites. Blacks therefore have greater access to government employee identification.

Georgia also established a mobile bus system to provide DDS identification cards to locations remote from DDS offices and provided such cards to indigents for free. Despite all of these findings, a federal court issued an injunction against implementation of the law.[50] However, the court did *not* find any violation of the Voting Rights Act; the judge based his injunction on the Equal Protection clause due to problems the law would supposedly cause for elderly and poor voters (not minorities), and the twenty-fourth Amendment prohibition against poll taxes despite the state identification card being free for indigents. The judge granted a preliminary injunction against the statute in a 120-page slip opinion issued two days after the hearing on the matter. Since this paper is concerned with turnout results, an in-depth analysis of this court opinion will not be presented. However, the court's legal analysis is deeply flawed, particularly its view that incidental costs of obtaining a photo identification constitute a "poll tax." This is discussed at length in the Indiana decision cited later in this paper, where the court correctly noted that "the imposition of tangential burdens does not transform a regulation into a poll tax."[51]

The Georgia legislature amended the law in 2006 to make the state identification card free to any voter who requested one, without having to declare indigence, and authorized very county in the state (not just DDS offices) to issue photo identification cards. Despite these changes, the same federal judge issued a 193-page slip opinion again only two days after a hearing enjoining implementation of the amended statute.[52] However, this opinion was based on the short time remaining before the July eighteenth primary, the court holding that there was not sufficient time before the primary for individuals to obtain photo identification or for the state to educate the public about this requirement.[53]

In June, the Secretary of State also released a statement claiming that a comparison of the state's voter registration roll with the state's driver's license list revealed 676,000 registered voters without a driver's license.[54] This analysis, however, was deeply flawed, suffering from many of the same shortcomings as the expert analysis submitted to a federal court in the Indiana voter identification lawsuit that is discussed below. Most importantly, despite her access to other state records, the Secretary of State only compared the voter registration list to driver's license records, and did not run a data matching program with other available state records on photo identification cards acceptable under the law such as student identification cards issued by the state university system or employee identification cards issued by the state and local governments.[55] Individuals on the list without a social security number were shown as "not having a valid Georgia driver's license or DDS-issued Photo ID card."[56] She also failed to eliminate the names of military and overseas voters who are not subject to the identification requirements—Georgia has several large military installations and local election officials can identify military and overseas voters from their past applications for absentee ballots under the Uniformed and Overseas Citizens Absentee Voting Act.[57] The problems with Secretary Cox's list of registered voters who supposedly did not have photo identification cards was vividly illustrated by the fact that it mistakenly included a member of the state election board, relatives of two other members of the board (all of whom have photo identification) and, according to the testimony of the vice-chair of the state election board at the court hearing, included the federal judge in the voter identification case.[58]

Louisiana

According to the 2000 Census, Louisiana has a population that is 63.9% white and 32.5% black.[59] The percentage of the voting age population with driver's licenses in 2004 was 95.9%.[60] In 1997, Louisiana passed Act 779 amending the election code to require voters to identify themselves with a driver's license, other photo identification, or by completing an affidavit.[61] It became effective on August 15, 1997.[62]

During the 1984-2000 period, Louisiana's turnout was higher than the national turnout. Turnout ranged from a low of 1.17 percentage points greater than the national turnout in 1988 to a high of 7.9 points greater in 1996. It was 2.9 points greater in 2000, after identification requirements became effective. Of the five elections, the 2.9 point increase was the third largest. Two other elections (1984 and 1988) had smaller increases. A Census survey reveals that in the 2000 election, 66.4% of the white VAP reported voting and 63.2% of the black VAP reported voting.[63] This compares to a Census report for the 1996 election that shows 62.6% of the white VAP voted and 60.9% of the black VAP voted.[64] Thus, reported turnout of black voters in comparison to the black VAP increased by 2.3 points *after* the identification requirement became effective.[65] Although Louisiana's turnout in the 2004 election as 2.6 points below the total national turnout rate, the 62.1% turnout reported by black voters was 5.8 points *above* the reported national rate of black turnout of 56.3%. One can conclude that black voters in Louisiana have not been detrimentally affected by the state's identification requirements.

Census Survey of Turnout of VAP by Race
Louisiana

Year	*White*	*Black*
1996	62.6%	60.9%
2000	66.4%	63.2%
2004	64%	62.1%

Other States: Alabama and Florida

Although it has experienced only one presidential election since implementing a new identification requirement, the experience of Alabama, another Southern state with a large minority population covered under the special provisions of Section 5 of the Voting Rights Act, should be mentioned. Alabama implemented a new voter identification requirement in 2003 similar to HAVA.[66] According to Department of Transportation statistics, 105.5% of the VAP in Alabama hold driver's licenses.[67] In the 2000 election, the Census Bureau reports that 57.2% of blacks voted; in 2004, after the new identification requirement was effective, 63.9% of blacks reported voting, an increase of 6.7 percentage points. Florida, which implemented an identification requirement in 1998 with a variety of acceptable identification documents, also experienced a steady increase in black voter turnout after the effective date of the statute.[68] It went from a reported black voter turnout of 40.5% in 1996 before the identification requirement, to a black turnout of 42.3% in 2000 and 44.5% in 2004 after the identification requirement was effective. Florida also has a very high rate of driver's licenses being held by the VAP in 2004—almost 99%.

Recently Adopted Laws
Indiana

Indiana passed a photo identification requirement in 2005 as Senate Enrolled Act No. 483. It requires all voters to present a valid photo identification issued either by Indiana or the United States that has a picture of the voter, his name, and an expiration date that is either current or expires after the date of the most recent general election.[69] The law does not apply to absentee voters who send their ballot through the mail or to voters who reside in nursing homes. A voter without identification can vote a provisional ballot and has until the second Monday following election day to appear before county officials either with a photo identification or with an affidavit stating that he is indigent or has a religious objection to being photographed.[70] The Indiana Democratic Party filed suit against the state, claiming the identification requirement violated the first and fourteenth Amendments, 42 U.S.C. §1971, and the portions of the Indiana Constitution.

In a ruling on April 14, 2006, a federal judge denied the plaintiffs' motions for summary judgment and granted judgment for the state, holding that the identification requirement is "a constitutionally-valid, reasonable time, place, and manner restriction on voting and on voters."[71] The judge's characterization of the plaintiffs' case was caustic. She stated that they had "not introduced evidence of a single, individual Indiana resident who will be unable to vote…or who will have his or her right to vote unduly burdened."[72] The plaintiffs moved a political debate in the Indiana General Assembly into a judicial forum, having "failed to adapt their arguments to the legal arena" and basing their case "on little more than their own personal and political preferences."[73]

The judge did not even allow the expert report prepared for the plaintiffs into evidence because she viewed "the analysis and conclusions set out in it as utterly incredible and unreliable."[74] The report attempted to compare the voter registration list with driver's license files, but the court held it failed to account for voter roll inflation, compared demographic data from different years without qualification or analysis, drew obviously inaccurate and illogical conclusions, and failed to qualify the statistical estimates based on socioeconomic data. To the extent any parts of the report could be considered reliable, they actually strengthened the state's case since, for example, the report showed "an estimated 99% of Indiana's voting age population already possesses the necessary photo identification to vote."[75] That perhaps explains why, when Indiana held its federal primary in May after the court's ruling, "[a]cross Indiana, there were no reports of problems caused by the new requirement, with most areas reporting they did not have to turn away a single voter."[76]

The court also noted that the supposedly "common sense" claim that persons from lower socioeconomic levels will have a harder time obtaining photo identification because they do not drive or own cars, or have limited financial ability, is not true. To the extent the expert's socioeconomic analysis was accurate, it actually indicated "that voters without photo identification are not significantly more likely to come from low income segments of society."[77]

Arizona

Arizona passed Proposition 200 in the 2004 general election. Because Arizona is covered by Section 5 of the Voting Rights Act, the law was also subject to review by DOJ as the Georgia identification law was—DOJ precleared the law without objection. In addition to requiring a voter to show either one identification card with his name, address and photo, or two identification documents with his name and address, Proposition 200 also amended Arizona Revised Statutes §16-166 to require anyone registering to vote to prove U.S. citizenship by providing certain documentation such as a driver's license, birth certificate, passport, naturalization documents or any other "documents or methods of proof that are established pursuant to the Immigration Reform and Control Act of 1986." This last standard is particularly noteworthy, since the state will accept any document that the federal government accepts as proof of citizenship. This is a reference to the Employment Eligibility rification form (Form I-9), prepared by the Department of Homeland Security, which every employer in the United States is responsible for completing on every new employee to verify their employment eligibility as either a citizen or a noncitizen legally present and able to work in the U.S.[78] This requirement makes it difficult for litigants to argue that the state is acting unreasonably or somehow violating federal voting rights laws since Arizona is imposing the same requirement on individuals registering to vote that the federal government imposes on individuals who want to become employed.

However, a lawsuit was filed claiming the Arizona law violates the National Voter Registration Act. On June 19, 2006, a federal judge issued an order refusing to grant a preliminary injunction, correctly holding that "Arizona's proof of citizenship requirement does not conflict with the plain language of the NVRA" and that "the NVRA does not act as a ceiling preventing states from enforcing their own laws regarding voter qualifications."[79]

Missouri

The Missouri Voter Protection Act, Senate bills 1014 & 730, requires voters to show photo identification issued by the state or the U.S. government, including the military. Voters with disabilities, sincerely held religious beliefs, and those born before January 1, 1941, are exempt if they execute an affidavit. All nondriver's license identification cards are issued by the state for free and mobile units will go to nursing homes and other places accessible to the elderly and disabled. Two lawsuits that have been consolidated have been filed against the law in state court claiming violations of state law, but no significant rulings have occurred as this paper goes to print.[80]

In a very interesting analysis filed in the lawsuit in support of two intervenors, Jeffrey Milyo and Marvin Overby of the University of Missouri evaluated the number of eligible voters in Missouri who may not have photo identification. They estimate that the number of eligible voters out of a VAP of 4.5 million who do not have photo identification issued by Missouri's motor vehicles department and who are not residents of a nursing home (and thus exempt) was only about 19,000 persons. Comparing the voting age population with the number of identification cards issued by the state yields an estimate of only 51,064 voting age persons without such identification. However, after correcting the Census VAP estimate by taking out ineligible voters such as felons, the mentally incompetent, and individuals who do not meet residency requirements, as well as applying Missouri's statewide average voter turnout rate, they concluded that the "upperbound estimate for the number of persons who are eligible and may choose to obtain a new photo ID is 8,105 persons."[81]

CONCLUSION

The turnout of voters in presidential elections in South Carolina, Virginia, Georgia and Louisiana, states with significant African-American populations, as well as in Alabama and Florida, reveals no evidence substantiating the claim that the turnout of minority voters is negatively affected by identification requirements for voters. Available data indicates that the overwhelming percentage of the voting age population, black and white, already have a form of photo identification. It is, therefore, highly unlikely that new and stricter identification requirements for voters will adversely affect the turnout of minority voters, especially given the fail-safe provisional voting requirements in affect across the country as required by HAVA. Many critics of HAVA's identification requirements made exactly the same claims, and the turnout in the first presidential election after those requirements became effective saw an upsurge in black voting.

Given the numerous prosecutions for voter fraud that have occurred across the United States in recent years, the thousands of fraudulent voter registration forms submitted to election officials, the types of problems cited in the Wisconsin fraud investigation after the 2004 election, and registration and voting by noncitizens, requiring proof of citizenship to register and photo identification to vote is an important means of ensuring the integrity of our election process.[82] It is not a requirement that will prevent or deter minority voters from casting their ballots, but will help guarantee that their votes are not devalued by fraudulent or noncitizen voting.

Endnotes

1 *See* Larry J. Sabato & Glenn R. Simpson, Dirty Little Secrets: The Persistence of Corruption in American Politics (1996); John Fund, Stealing Elections: How Voter Fraud Threatens Our Democracy (2004); Tracy Campbell, Deliver the Vote: A History of Election Fraud, An American Political Tradition—1742-2004 (2005); Publius, *Securing the Integrity of American Elections: The Need for Change,* 9 Tex. Rev. L. & Pol. 2 (2005).

2 *Publius* at 288. *See also* "Vote Fraud, Intimidation & Suppression in the

2004 Presidential Election," American Center for Voting Rights, August 2, 2005, *available at* http://www.ac4vr.com/reports/072005/default.html.

3 Testimony of Patrick Rogers, Committee on House Administration, U.S. House of Representatives, Hearing on Non-Citizen Voting, June 22, 2006, http://cha.house.gov/hearings/Testimony.aspx?TID-896.

4 Jingle Davis, *Even Death Can't Stop Some Voters—Records: Illegally Cast Ballots Are Not Rare*, The Atlanta Journal-Constitution, November 6, 2000.

5 Preliminary Findings of Joint Task Force Investigating Possible Election Fraud, May 10, 2005, *available at* http://www.gwu.edu/~action/2004/states/wifraud051005.html.

6 Greg J. Browski, *Inquiry Finds Evidence of Fraud in Election*, Milwaukee Journal Sentinel, May 11, 2005.

7 Although this paper focuses on voting in polling places, the many reported cases of absentee ballot fraud make it clear that individuals submitting absentee ballots by mail should be required to include photo copies of identification documents with their ballots as well.

8 *Publius* at 292-296. At least eight of the 9/11 hijackers were registered to vote. Diane Ravitch, "Were the Hijackers Registered to Vote?" October 29, 2001, Hoover Institute; "House Passes Strong Border Security," Press Release of Cong. Sam Johnson, February 11, 2005.

9 "Department of Justice to Hold Ballot Access and Voting Integrity Symposium," Press Release of Department of Justice, August 2, 2005; "Election Fraud Prosecutions & Convictions, Ballot Access & Voting Integrity Initiative, October 2002—September 2005," Public Integrity Section, Criminal Division, United States Department of Justice.

10 Testimony of Dan Stein, President, Federation for American Immigration Reform, Committee on House Administration, U.S. House of Representatives, Hearing on Non-Citizen Voting, June 22, 2006, http://cha.house.gov/hearings/Testimony.aspx?TID=893.

11 Comm. on House Oversight, "Dismissing the Election Contest Against Loretta Sanchez," H.R. Doc. No. 105-416, Feb. 12, 1998, p. 15.

12 Testimony of Dan Stein ("[t]hose states were Colorado, Florida, Georgia, Missouri, Nevada, New Hampshire, North Carolina, Ohio, Tennessee, Texas, and Virginia. A switch of three votes in the Electoral College from Bush to Gore would have reversed the outcome of that election, so that voting of enough noncitizens to reverse the outcome in any one of those 11 states would have reversed the final outcome.")

13 Gonzalez v. Arizona, CV-06-1268 (D. Az. June 19, 2006), Brief of Protect Arizona Now and Washington legal Foundation as Amici Curiae in Opposition to Motions for Preliminary Injunction, p. 13.

14 Testimony of Paul Bettencourt, Tax Assessor-Collector and Voter Registrar, Harris County, Texas, Committee on House Administration, U.S. House of Representatives, Hearing on Non-Citizen Voting, June 22, 2006, http://cha.house.gov/hearings/Testimony.aspx?TID=895.

15 Testimony of Patrick Rogers.

16 Pub. L. No. 109-13, 49 U.S.C. §30301.

17 Report of the Commission on Federal Election Reform Building Confidence in U.S. Election, September 2005, pages 18-21, *available at* http://www.amercan.edu/ia/cfer/report/full_report.pdf. The author was one of the experts consulted by the Commission.

18 *Id*. at 90.

19 John R. Lott, Jr., "Evidence of Voter Fraud and the Impact that Regulations to Reduce Fraud have on Voter Participation Rates," August 18, 2006, *available at* http://ssrn.com/abstract=925611.

20 H.R. 3295, Public Law 107-252, 42 U.S.C. 15301 et. seq.

21 §303(b)(1), 42 U.S.C. §15483(b)(1).

22 This illustrates a major defect in HAVA—it is still possible for an individual to register to vote without any check being made of his identity.

23 §303(b)(2)(B) and §302(a)(3) and (4), 42 U.S.C. §§15483(b)(2)(B), 15482(a)(3) and (4).

24 §303(d)(2), 42 U.S.C. §15483(d)(2).

25 42 U.S.C. §15484.

26 The University of Wisconsin-Milwaukee released a study last year claiming that there is a racial disparity in the driver's licenses held by Wisconsin residents. John Pawasarat, "The Driver License Status of the Voting Age Population in Wisconsin," June 2005, *available at* www.eti.uwm.edu. However, this study admits that the data it obtained from Wisconsin on "DOT photo ID utilization was only available at the state level by age and gender," and not by race. As John Lott points out, this type of study "provides only a very crude measure of whether photo ID requirements will prevent people from voting. Some people without driver's licenses will not vote even when there are no photo ID requirements and others will go out to get a photo ID in order to vote." *Lott* at 3.

27 *The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office, 1995-1996*, Federal Elections Commission, 5-6.

28 *Licensed Drivers by Sex and Ratio to Population—2004,* U.S. Department of Transportation, Federal Highway Administration, Highway Statistics, 2004, *available at* http://www.fhwa.dot/gov/polic/ohim/hs04/dl.htm. For this calculation and all other calculations on driver's licenses in this paper, the number of licensed drivers under the age of 18 as listed in the table, *Licensed Total Young Drivers, by Age, 2004*, are subtracted from the total numbers for the U.S. and individual states listed in the first table. That number is then compared to the voting age population provided by the Census Bureau reports on registration and turnout in the 2004 election. These tables will be cited throughout this paper collectively as "Federal Highway Administration, Highway Statistics, 2004."

29 *Distribution of Licensed Drivers—2004 by Sex and Percentage in Each Age Group and Relation to Population*, U.S. Department of Transportation, Federal Highway Administration, Highway Statistics 2004; *available at* http://www.fhwa.dot.gov/policy/ohim/hs04/htm/d120.htm.

30 U.S. Election Assistance Commission, *Summary of the 2004 Election Day Survey*, September 2005, 7.

31 Committee for the Study of the American Electorate, "Turnout Exceeds Optimistic Predictions: More Than 122 Million Vote, Highest Turnout in 38 Years," January 14, 2005, at 1, *available at* http://election04.ssrc.org/research/csae_2004_final_report.pdf.

32 U.S. Census Bureau, "Voting and Registration in the Election of November 2000" (February 2002), Table A; Voting and Registration in the Election of November 2004 (March 2006), Table B. These Census Bureau reports are based on surveys conducted by the Census to determine the rates at which individuals register and vote in elections. While these self-reporting surveys may inflate actual results, they provide the best data available on turnout and can be compared historically and geographically since any inflation will be similar.

33 Robert Pear, *Civil Rights Groups Say Voter Bill Erects Hurdles*, N.Y. Times, October 7, 2002. The NAACP claims that if blacks do not have identification, they are sent home, but if whites do not have identification, they are allowed to vote.

34 It must be kept in mind when reviewing turnout rates that other factors may influence turnout such as local races of particular interest to voters and other historical and cultural factors.

35 Unless otherwise noted, national and state turnout figures are based on reports produced previously by the Federal Election Commission and now available on the website of the U.S. Election Assistance Commission; the EAC took over responsibility for maintaining election statistics when it was created by HAVA. Historical election turnout information is available at www.eac.gov. The EAC changed the turnout analysis for the 2004 election to citizen voting age population from voting age population, as conducted by the FEC for the 2000 and prior elections. While CVAP is more accurate, this change would obviously makes comparisons between 2004 and prior years difficult. Therefore, the historical turnout provided in this chart from 1984 to 2000 is for the voting age population from historical data; however, the turnout information for 2004 for the VAP is taken from electionline.org, "Holding

Form: Voter Registration 2006," July 2006, p. 15.

36 *State and County Quick Facts: South Carolina,* U.S. Census Bureau, *at* http://quickfacts.census.gov/qfd/states/45000.html.

37 Federal Highway Administration, Highway Statistics, 2004.

38 *South Carolina General Election, Statewide Votes Cast, Demographics by Race,* www.state.sc.us/cgi-bin/scs...countykey=ALL&regvot=VOT&demo=RACE.

39 *Table 4a. Reported Voting and Registration of the Total Voting-Age Population by Sex, Race, and Hispanic Origin, for States: November 2000.* U.S. Census Bureau, http://www.census.gov/population/socdemo/voting/p20-542/tab04a.pdf. All references in this paper to self-reported turnout of black and white voters come from these Census Bureau surveys of past presidential elections and will be referenced as "Census Bureau reports."

40 *State and County Quick Facts: Virginia,* U.S. Census Bureau, http://quickfacts.census.gov/qfd/states/51000.html.

41 Federal Highway Administration, Highway Statistics, 2004.

42 VA. CODE §42.2-643.

43 *State and County Quick Facts: Georgia,* U.S. Census Bureau, http://quickfacts.census.gov/qfd/states/13000.html.

44 Federal Highway Administration, Highway Statistics, 2004.

45 GA. CODE §21-2-417.

46 Census Bureau reports.

47 Census Bureau reports.

48 42 U.S.C. §1973c.

49 Letter of October 7, 2005, from William E. Moschella, to Sen. Christopher S. Bond. This letter is available on DOJ's website *at* http://www.usdoj.gov/crt/voting/misc/ga_id_bond_ltr.htm. The discussion of the preclearance in this paper is based solely on publicly available information and documents.

50 Common Cause v. Billups, 406 F.Supp.2d 1326 (N.D. Ga. 2005). In what may have been forum shopping, this lawsuit was not filed in the state capitol of Atlanta where the law was passed by the legislature and signed by the governor. It was filed in Rome, Georgia, where there is only one federal judge. The named defendant, Secretary of State Cathy Cox, also stated on numerous occasions, including during her testimony, her opposition to the law. *See* Letter from Secretary of State Cathy Cox to Governor Sonny Perdue, April 8, 2005, *available at* http://www.aclu.org/VotingRights/VotingRights.cfm?ID=18652&c=168; 406 F.Supp.2d at 6-8.

51 Indiana Democratic Party v. Rokita, No. 1:05-0634 (S.D. Ind. April 14, 2006), slip op. at 90.

52 Common Cause v. Billups, No. 4:05-00201 (N.D. Ga. July 14, 2006).

53 *Id*. at 169. The court also changed its mind on the issue of a poll tax, adopting the analysis of the Indiana decision and holding that providing identification cards without charge eliminated the claim that it was a poll tax despite the incidental costs involved. *Id*. at 177.

54 "Demographic Analysis Shows that Registered Voters Lacking a Driver's License or State-Issued Georgia ID Card are Disproportionately Elderly and Minority," Press Release of Secretary of State Cathy Cox, June 23, 20006, *available at* http://www.sos.state.ga.us/pressrel/062306.htm.

55 *Billups*, slip op. at 129.

56 *Id.* at 127.

57 42 U.S.C. §1973ff. In fact, §703 of HAVA amended UOCAVA to require states to report to the EAC the number of absentee ballots sent to uniformed services and overseas voters.

58 Carlos Campos, "No-Photo Voter List Criticized by GOP," *Atlanta Journal-Constitution*, August 5, 2006.

59 *State and County Quick Facts: Louisiana,* U.S. Census Bureau, http://quickfacts.census.gov/qfd/states/22000.html.

60 Federal Highway Administration, Highway Statistics, 2004.

61 La. Rev. Stat. Ann. §18:562.

62 Louisiana Office of the Attorney General, Op. No. 97-0458, October 24, 1997.

63 Census Bureau reports.

64 Census Bureau reports.

65 With a black voting rate of 60.9% in 1996, Louisiana was 10.3 points above the national black participation rate of 50.6% of black VAP as reported by the Census Bureau.

66 Ala. Code § 17-10A-1.

67 This may be due to Alabama residents who hold both a personal and commercial driver's license.

68 Fla. Stat. §101.043.

69 Ind. Code §3-11-8-25.1 and §3-5-2-40.5.

70 Ind. Code §§3-11.7-5-1; 3-11-7.5-2.5

71 Indiana Democratic Party v. Rokita, No. 1:05-0634 (S.D. Ind. April 14, 2006), slip op. at 5.

72 *Id*. at 3.

73 *Id.*

74 *Id*. at 43. The report did not meet the reliability standard for expert opinions set out in Federal Rule of Evidence 702. As just one example of how flawed the report was, the expert claimed there were 989,000 registered voters in Indiana without driver's licenses. When that number was added to the number of issued licenses (4,569,265), the total of 5,558,265 represents an "incredible 123% of Indiana's entire voting age population as determined by the Census." This was obviously wrong. *Id*. at 48.

75 *Id*. at 51.

76 Dan Stockman, *Election Day Calm as Voters Comply With Photo ID rule*, Journal Gazette, Mary 3, 2006.

77 *Rokita* at 53.

78 The I-9 Form and information about its use is available at http://www.uscis.gov/graphics/formsfee/forms/i-9.htm.

79 Gonzalez v. Arizona, No. 06-1268 (D. Ariz. June 19, 2006), slip op. at 9, 12. When Arizona held its election in March, "[t]here were no widespread reports of problems Tuesday in the first elections held under the voter identification requirements of Proposition 200" Matthew Benson, *Proposition 200 Causes Few Headaches at Polls*, Arizona Republic, March 15, 2006

80 Weinschenk and Jackson County v. Missouri, No. 06AC-00656 and 587 (Cir. Ct. of Cole County, Mo.).

81 Affidavit of L. Marvin Overby, in Support of Intervenors, Dale L. Morris and Missouri Senator Delbert Scott, Exhibit B, "Report on Kathleen Weinschenk et al. v. State of Missouri et al. and Jackson County, Missouri v. State of Missouri (Consolidated)," 1, 3, 5.

82 Driver's licenses should only be acceptable as voter identification if they are issued by a state in compliance with the REAL ID Act that requires proof of citizenship or a notation on the face of the card that the holder is not a citizen.

Public Financing of Campaigns: A Statistical Analysis

*By David M. Primo & Jeffrey Milyo**

The partial or full financing of elections at all levels of government is a central mission of the campaign reform community, but it faces vocal opposition from groups concerned about the normative implications of government-regulated speech. Many of the arguments that emerge in the debate over public financing are based on testable but unproven assertions, yet presented as fact. To wit:

- Eliza Newlin Carney of *National Journal* writes, "The simple fact is that public financing would make it easier for challengers to unseat incumbents, by leveling the political-money playing field."[1]

- A Public Campaign press release states, "Clean Elections puts voters first by leveling the playing field and allowing qualified people a chance to run for office without relying on money from powerful interests and lobbyists… Public financing of elections, or 'Clean Elections,' is a practical, proven reform."[2]

- Arguing in favor of a "clean elections" law for California, reform advocates Ted Williams and Susan Lerner write, "Until we change how election campaigns are funded, we will continue to have a stream of stories that make for great reading but which drive voters from the polls and perpetuate bottomless cynicism about feckless politicians." Earlier in the same op-ed, they write, "Full disclosure has not solved the problem. We now have a system in which full disclosure leads to the overwhelming desire to vote for 'none of the above.' Full disclosure has had the unintended consequence of breeding cynicism and voter apathy."[3]

As we will show in this article, none of the above statements is supported—and some are contradicted—by scientific evidence. In this article, we argue that the existing scientific evidence should give pause to both advocates and detractors of public financing, as public financing programs have a minimal impact on election outcomes. Given this, and considering the potential negative effects of such programs (including but not limited to increased government outlays), existing reforms would appear unlikely to generate net positive effects in a comprehensive cost-benefit analysis. (We know of no attempt at this sort of social accounting exercise.) However, just because existing reforms are ineffectual does not mean that future reform attempts are doomed to failure. What the evidence implies, though, is that states which choose clean elections laws should be aware that such reforms impose real costs on the citizenry for a very uncertain payoff.

We believe that normative discussions are most productive when grounded in empirical, social scientific evidence. It follows that a better understanding of the impact of public financing on the electoral process will improve the quality of normative debates on this issue. In the next section of the article, we discuss alternative public funding schemes and proposed reforms to the system. Next, we discuss normative arguments on both sides of the issue. Then, we analyze the findings from the scholarly literature on public financing. We conclude by addressing the implications of these findings for the ongoing debates on this important issue in election law.

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What is Public Financing?

We use the term "public financing" (or public funding) to refer to a system whereby tax revenues are used to pay for some or all of the costs of running for office. (Subsidies to political parties are sometimes included in the definition of public financing, as well, but we do not discuss these here.) In return for public subsidies, candidates must pledge to limit their expenditures. Decisions in *Buckley v. Valeo* and, more recently, *Randall v. Sorrell,* hold that mandatory expenditure limits are unconstitutional; these decisions necessitate that public financing systems be voluntary.[4] These programs are funded in a variety of ways, including through a tax check-off, voluntary contributions, surcharges, as well as from general appropriations, and they vary in terms of the manner in which funds are disbursed. In some jurisdictions, candidates receive matching funds for contributions. In others, they receive a lump sum.

As of 2005, fifteen states had public financing systems in place for some statewide offices.[5] Of these, Maine and Arizona have so-called "clean elections" laws for all statewide and legislative candidates; other states have such laws in place for a smaller set of races. In 2006, Connecticut also implemented a similar law affecting all statewide and legislative elections beginning in 2008. It is the first legislatively-enacted clean elections law applying to both the legislature and the governor; Maine and Arizona's were both enacted via ballot measures. Two cities, Albuquerque, New Mexico and Portland, Oregon, also recently enacted such laws. These programs provide a candidate with funds to run for office; in exchange, the candidate can neither raise nor spend any additional funds. It is this reform that is touted as "proven" and "practical."

At the federal level, presidential candidates can receive public funding in both the primary season and in the general election in return for agreeing to limit expenditures. For the primary, funding is provided via matching funds. For the general election, the candidate pledges to accept no contributions; in return, the candidate receives a lump sum to run for office (approximately $75 million for the major party candidates in 2004). This funding has proven inadequate in recent years, and by 2004, Howard Dean, John Kerry, and George Bush all opted out of the system during the primary. Kerry recently stated that his biggest regret from the campaign was accepting public funds during the general election.[6] Many observers believe that without significant reforms, all serious presidential candidates will opt out of the system completely in 2008. While there is

widespread agreement that the system is in trouble, multiple solutions have been proffered, ranging from the elimination of the system[7] to significant changes necessary for making the system viable once more.[8] In the meantime, legislation is periodically introduced in Congress to institute public financing for House and Senate races. On May 3, 2006, a reform group called the Americans for Campaign Reform took out a full page ad in the *New York Times* calling for public financing of Congressional races; the ad is reproduced as Figure 1, as it illustrates some of the arguments for public funding.

Across the country, state reform groups push for public financing in the states. Clean Elections laws are being proposed in several states, including California. Especially in light of *Randall v. Sorrell*, the June 2006 Supreme Court decision that overturned a Vermont law imposing spending limits on candidates for state offices, clean elections laws are the reform *du jour* in campaign finance. Reformers argue that large majorities of the public support public financing, but the reality is that support varies dramatically based on question wording.[9] Instead, campaign finance reform is an issue that bores the public.[10] As with most policy matters, the most intense support and opposition to any reforms is likely not to come from the public but from interest groups and elected officials. It is to their arguments that we now turn.

Arguments For and Against Public Financing

The claims made in favor and against public financing come in two forms: normative and positive. Normatively, those in favor of public financing view the entire process of fund raising as unseemly and inegalitarian. Therefore, decisions reached by officials elected under a system public financing system would be "more consistent with representative democracy," *even if policy were unchanged as a result*.[11] There is a belief that the money chase taints the process in ways that harms the relationship between elected officials and their constituents.

Those opposed to public funding hold that the policy requires that citizens subsidize the views of those with whom they disagree, and therefore is not an appropriate governmental function. For example, John Samples writes,

> Even if electoral competition did increase, public financing would still have one serious shortcoming: it forces each taxpayer to contribute to candidates and causes they oppose. It is similar to compulsory levies for the benefit of specific religions. Both force taxpayers to support views they oppose as a matter of conscience or interest. This compulsion has long been recognized and condemned.[12]

Samples goes on to note that the Senate Watergate committee cautioned against public financing of presidential campaigns, citing Jefferson's belief that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical."[13]

There are several *empirically-based* arguments in favor of public financing. We will focus on five of them, though others, like reducing the time spent on fund raising, lowering the amount of special interest pork doled out to contributors, and increasing the diversity of candidates, are often articulated. With regard to these three areas, we will simply note that reasonable theoretical arguments can be made for or against. These issues ultimately must be settled with empirical evidence, but currently no systematic evidence exists on these topics. Hence, we focus on the major claims of reformers that can be assessed empirically.

First, public financing will reduce the "corrupting" nature of the money chase, which will lead to improved citizen perceptions of government. This argument relies on connecting campaign contributions to corruption or the "appearance of corruption," which in turn fuels cynicism toward government. Preventing corruption and the appearance thereof are justifications for reform that are endorsed by the Supreme Court.

Second, it will increase the competitiveness of elections. Because raising funds is typically more difficult for challengers, public financing gives them a leg up. This may help both attract new candidates to the electoral arena and also increase the likelihood that a challenger beats an incumbent.

Third, and related to the first two reasons, the reinvigorated electoral system will prompt more participation in the electoral system. If public financing leads to more competitive elections and more favorable views of government, citizens will be more apt to participate via voting, volunteering, and so on.

Fourth, economist Steven Levitt argues that because campaign spending has little impact at the margin, funding campaigns at levels lower than what is typically spent will be a net gain for society.[14] In a novel research design, Levitt studies House races in which the same two candidates faced off against one another. This controls for candidate quality, a difficult-to-measure but presumably important component in determining a candidate's vote share. He finds that implementing mandatory spending limits would have affected only fifteen elections over four sets of congressional elections. A nearly identical finding results if campaigns were funded up to the same amount as the hypothetical limit. While Levitt raises concerns about the costs of a public funding system *vis à vis* simply requiring mandatory limits, his findings nonetheless suggest that few challengers would be hurt by such a hypothetical system.[15]

Fifth, some reformers claim that public financing will lead to better representation, because legislators and other elected officials will no longer be beholden to special interests. In the ad referenced earlier (see figure 1), the reformers write, "With public funding, wealthy special interests and their hired lobbyists would no longer have a commanding influence over our politics and government." Public financing can impact policy outcomes in two ways: by altering the membership of the institution in policy-relevant ways, and by altering the behavior of members. A change in the electoral environment may lead both to the election of different individuals to a given post, as well as changes in the types of individuals who run for office. Meanwhile, stricter limits on campaign contributions, tied to the acceptance of public funds, may reduce any inappropriate influence that occurs in the campaign contribution process.

Next, we turn to the empirical arguments made by opponents of public financing. They argue that incumbents are likely to benefit from such a system, since to mount successful challenges to incumbents, candidates require significant

infusions of money. A limit that is set too low (and it is difficult to assess what "low" is) may prevent challengers from mounting effective campaigns. Some opponents also believe that there may be a partisan bias to such reforms, aiding Democrats over Republicans. Others are concerned that in practice, reforms that will be enacted are likely to be difficult to administer, will not be changed quickly to address unintended consequences in the law, or just as bad, be subject to constant tinkering in an effort by individuals in power to gain electoral advantage.[16]

In a nutshell, then, proponents of reform argue that public financing will lead to more competitive elections, improved perceptions of government, increased citizen participation, and "better" policy-making. Opponents point primarily to the fact that public financing will tend to entrench incumbents, thereby accomplishing precisely the opposite of what reformers would like.

What We Know

In the remainder of this piece, we would like to subject these arguments to empirical scrutiny by articulating what we *do* know about existing public financing programs. First, the best evidence suggests that existing public funding programs have a non-positive impact on citizen perceptions of government. For example, in a recent article in the *Election Law Journal*, after significant statistical analysis, we find a modest *negative* effect of these programs on traditional measures of public confidence in the democratic process.[17] Moreover, we find a *positive* effect of simple disclosure requirements on the same; this directly contradicts the speculative claims made by many reformers.[18] This counterintuitive finding (at least for some) regarding public financing and public trust in government may be due to the fact that the promise of more complex reforms is rarely realized in practice.

Second, in a recent study with Tim Groseclose, we show that public financing has no impact on competitiveness in gubernatorial elections, nor does it confer an advantage to one party or another.[19] This finding emerged from our analysis of 370 gubernatorial races from 1978 to 2004 and are based on a comprehensive and rigorous statistical analysis. As such, our findings are more powerful than those found in earlier studies that are based upon anecdotal evidence, or simple case studies of the experience of a handful of states (or a single state).[20]

Third, at least at the congressional level, it is well-understood campaign spending has only a minimal effect on election outcomes *at the margin*.[21] "At the margin" refers to the impact of an additional dollar of spending on a candidate's vote share. These results, therefore, should not be interpreted to mean that money has no impact on election outcomes, but rather that candidates will tend to spend until each additional dollar of spending has little impact on the outcome. We are currently exploring whether this relationship is also true at the state level.

As noted above, Levitt has used this fact to argue that public financing would have little impact on election outcomes.[22] However, Levitt implicitly assumes that the strategic interaction between candidates, as well as candidate entry, would remain unchanged as a consequence. Further, he acknowledges that implementing limits would cause the results of some of races to change—given how few challengers are successful, even a handful of altered outcomes is noteworthy. Finally, Levitt focuses strictly on the *instrumental* impact of spending. But campaign spending also has positive effects on perceptions of government.[23] Moreover, Primo shows that aggregate spending on congressional elections does not appear to reduce trust in government.[24] However, there is also recent evidence that holding constant the level of spending, information on the amount and pattern of contributions in a privately financed system tells the voter little about the quality of candidates, offering some support for a well-funded system of public financing.[25]

Fourth, while reformers like John McCain are fond of making statements like, "I work in Washington and I know that money corrupts," science suggests otherwise.[26] Simply put, there is little to no evidence that campaign contributions have a systematic effect on policy outcomes at the federal level.[27] However, such an analysis still needs to be done at the state level, where the variety of campaign finance regulatory regimes may offer a better opportunity to uncover any potential connection between reforms and the influence of money.[28]

In short, systematic empirical analyses have resulted in virtually no evidence that public financing improves competitiveness, citizen participation in government, or citizen perceptions of government. In addition, given the weak evidence linking contributions to policy outcomes, we should not expect policy making to be significantly altered as a result of these laws. Regrettably, the scientific evidence is often trumped by anecdote in both court cases and in the reform community. How else can one square the above evidence with claims that public financing is a "practical, proven" reform?

What We Do Not Know

Existing studies of the effects of state public financing cited above are based on combining all types of public financing programs.[29] Proponents of reform argue that existing programs are often poorly funded or do not allow for enough spending; they point to recent reforms in Maine and Arizona as evidence that "clean elections" laws are where reforms should head. However, there is still no *systematic* evidence that these laws have had a significant impact on the system. The reason is that existing analyses of these laws are based on too little data. Further, short-term effects of a law may dissipate over time once elected officials have adjusted to the new electoral environment and once weak incumbents have been defeated or voluntarily retire.

But the lack of evidence does not stop journalists and reformers from touting Maine and Arizona as rousing successes. This is sometimes done by focusing on whatever aspect of reform appears best supported by the data. For instance, the Arizona-based Clean Elections Institute notes that twenty of thirty state Senate races were uncontested in 1998 (pre-reform), while only nine were uncontested in 2002 (post-reform).[30] This, of course, defines competitiveness as having an opponent. A more common and appropriate measure is whether a candidate had a *serious* competitor (with 60% typically being the vote share

below which a race is considered competitive).

We examined the 1998 and 2002 data for Arizona. First, in 1998, only seventeen of thirty races appeared to be uncontested. In 2002, twelve races were uncontested in the general election. Of the contested races, the average winning margin was (modestly) *lower* in 1998 than in 2002. Moreover, in 1998 four races had margins below 60%. In 2002 that number was again four. We are not claiming that public funding did or did not have a real effect on the races. We are arguing, however, that parsing one or two years of data hardly provides a ringing endorsement of clean elections laws.

It is too early to tell whether clean elections laws in Maine and Arizona will have systematic long-term effects on elections and policy. The initial findings, however, are far from a "slam dunk" in favor of such reforms. For example, in Maine, the percent of incumbents in competitive races after reform surpassed the pre-existing rate (from 1992-1996) only in 2004, or the third election cycle after the clean elections law went into effect.[31] However, the percentage of incumbents who run and win has changed little since the law went into effect. The results in Arizona are harder to interpret, because the clean elections law was implemented alongside term limits, thereby changing the political landscape dramatically. However, even in Arizona, the incumbent reelection rate, after dropping the first year the law was in effect (2000), has climbed back up to approximately 85%. While this data does not permit one to make causal claims, evidence that clean elections is a panacea is hard to amass.

Moreover, most analyses ignore the cost sides of such programs. A legitimate cost-benefit analysis would need to ask whether government outlays are justified by the effects of such laws. Finally, it is still too early to tell whether clean elections laws will have a long-lasting impact on the composition of state legislators or occupants of the governor's office, and in turn, on public policy.

We cannot emphasize enough how important it is not to draw conclusions from summary statistics. One has to account for other institutional factors that can mediate the impact of any campaign finance reform. For instance, if gerrymandering creates districts that are overwhelmingly tilted in favor of one party, then public financing is an exercise in futility, and one should expect it to fail. On the other hand, if public financing is enacted at the same time as term limits, it will be very difficult to assess the impact of public financing independently, as term limits will impact the types of candidates who run for office.

To date, no study has separated out the effects of reform details. For instance, how do different expenditure limits and matching provisions affect outcomes? One reason for the dearth of studies is the lack of sufficient variation to draw such fine-grained conclusions, compounded by the fact that campaign costs vary greatly across states. We hope to pursue such an analysis as states gain more experience with a variety of public funding laws.

Implications for the Reform Debate

Existing analyses show that public financing programs have little to no positive impact on competitiveness or perceptions of government. Clean elections laws may prove to be the reform that "saves" democracy, but the initial evidence suggests that reformers should proceed with caution. Given that reforms impose real costs on taxpayers, proposed reforms represent a risky proposition: there will be guaranteed costs but benefits that are likely to have a low mean (with a potentially high variance). Similarly, opponents should be careful not to overstate the case that such reforms entrench incumbents.

In theory, a public financing law could be designed that would increase the competitiveness of elections, and in turn might increase turnout (although, we are skeptical that any such reform will improve perceptions of government). Nevertheless, we are skeptical that such reforms can be designed. First, laws are not made in a vacuum but (typically) by elected officials with vested interests in the outcome. This increases the likelihood that any given reform will be a failure. Reformers might retort that this is why changes need to be enacted via the citizen initiative. This is not possible in states without the initiative, of course, and besides, should initiatives pick up steam, legislators may attempt to sideline them (both before and after they are proposed and/or enacted). For example, in 2006 just such an attempt was made in Arizona, though it ultimately failed. In the long run, then, one should not expect public funding laws to be designed with effectiveness in mind.

Second, even if political maneuvering were not an issue, the challenge of designing the rules with the right limits in place would remain. If the limits are set too low, incumbents will be advantaged. If the limits are set too high, taxpayers will incur needless costs, the system may difficult to sustain, and the costs may exceed the benefits. Moreover, campaigns that take place in a "free market" can adjust on the fly if spending is too low. Any public funding law that is to remain viable in the long run would need to have a mechanism built-in that allowed for such adjustments.

In short, there are both *political* problems and *design* problems associated with reform, just as with other reforms of government, such as budgetary policymaking.[32] Reformers will tend to argue that some reform is better than no reform, but existing studies suggest that the reverse may be true. How else to explain that public financing has potentially *harmed* citizen perceptions of government?

It is unclear, also, why a laissez-faire system of fully disclosed contributions but no limits on spending or contributions would be less desirable than public financing. The impact on trust, we expect, would be minimal, since the public thinks the current, hyper-regulated system is corrupt. Competitiveness would be likely to increase, as challengers would not have to worry about gathering donations in small amounts. Moreover, the absence of limits would allow candidates to raise funds from fewer donors, thereby minimizing fund-raising time. And such a system would also require no taxpayer funding.

Immediately following *Randall v. Sorrell*, reform groups called for a renewed effort to enact new campaign finance laws. Adam Lioz, a "democracy advocate" for the U.S. Public Interest Research Group, told *Roll Call*, "This decision just adds urgency to the movement to provide a public financing option."[33] In

a statement, Stuart Comstock-Gay, the Executive Director of the National Voting Rights Institute, said, "This [decision] will intensify support for voluntary public financing systems, and in the end a constitutional amendment to allow mandatory spending limits may be necessary."[34]

The galvanizing impact of *Randall* makes our paper particularly timely, and arguments like the ones that introduced this paper prompt us to call for greater attention to empirical evidence in the debate over clean elections proposals. We are not so naïve about politics to believe that proponents and opponents alike will stop making selective use of the evidence. As scholars, all we can do is present the evidence and call attention to erroneous claims. It is up to journalists and others who filter the arguments on both sides of the issue to familiarize themselves with this evidence.

Endnotes

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13 *Id.*

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Intellectual Property

Supreme Court Justices Halt Federal Circuit Advance on *Lear v. Adkins*

*By David E. Foster**

The Supreme Court recently put an end to Federal Circuit efforts to revive a doctrine that prohibits patent licensees from challenging the validity of patents they have licensed. Although this doctrine of "licensee estoppel" had been in something of a coma since the 1969 Supreme Court decision in *Lear v. Adkins*, it appeared that the Federal Circuit's revival efforts might nurse it back to health.[1] Whether the Supreme Court's recent decision in *MedImmune v. Genentech* is a temporary setback for the doctrine, or a binding "Do Not Resuscitate" order, remains to be seen.[2]

Landmark Cases

Lear v. Adkins

Prior to 1969, courts interpreted the common law of contracts as preventing a patent licensee from challenging the validity of a licensed patent under the doctrine of licensee estoppel. In *Lear v. Adkins*,[3] the plaintiff Lear had agreed to pay royalties for a license to use Adkins's gyroscope technology at a time when Adkins's patent application was still pending before the U.S. Patent and Trademark Office (PTO).[4] While the patent application was still pending, Lear ceased paying royalties to Adkins, though continued to produce the licensed gyroscopes. Once the patent issued, Adkins brought suit against Lear for breach of the license agreement. In defense, Lear sought to obtain a judgment that Adkins's patent was invalid.[5] The district court, however, directed a verdict in favor of Adkins, holding that Lear was estopped by the license agreement from contesting the patent's validity. The case was appealed all the way up to the United States Supreme Court.

The Supreme Court ruled that "the federal law of patents" trumps "the common law of contracts" and abrogated the doctrine of patent licensee estoppel.[6] The *Lear* Court stated that contract law "forbids a purchaser to repudiate his promises simply because he later becomes dissatisfied with the bargain he has made. . . . On the other hand, federal law requires that all ideas in general circulation be dedicated to the common good unless they are protected by a valid patent."[7] The Court identified a strong patent policy in favor of the elimination of invalid patents, and argued that licensees are often in the best position, and have the most incentive, to challenge the validity of a questionable patent.

The Constitution provides that Congress shall have the power to "promote the Progress of Science and the useful Arts, by securing for limited Times to . . . *Inventors* the exclusive right to their respective . . . Discoveries."[8] Congress has, for patent purposes, defined "inventors" as those who create inventions that are new, useful, and non-obvious.[9] Even if the Patent Office issues a patent, if a court later determines that the claimed invention is old, not useful, or obvious in view of the prior art, the patent is invalidated and the invention enters the public domain. The original patent applicant is no longer considered the "inventor" of the technology for patent purposes, and is no longer able to exclude others from using the technology or collecting royalties for its use. Even though in such a case the patent never should have issued, the former patent holder is also not required to return any license fees, royalties, or patent damages collected before the invalidity ruling, except perhaps in extreme cases rising to the level of fraud or patent misuse.

The *Lear* Court held a skepticism of patent grants and their potential effects on competition. Their decision expressed the view that invalidating improperly granted patents was a public good. Not only did the licensee in *Lear* benefit from the ability to challenge the patent, but once invalidated, other competitors in the marketplace would be able to practice the invention without having to pay a toll to the owner of an improperly granted patent. While Adkins would no longer have an extra incentive to invest in his technology, Lear's freedom from royalty obligations, together with potential new entrants to the market whose products could not be enjoined by Adkins, would have the effect of increasing competition and reducing prices to consumers.

C.R. Bard

The year after it was established, the Federal Circuit applied the patent policies expressed in *Lear* by holding that federal courts do have jurisdiction over a licensee's validity challenge, even when the license is still in effect.[10] In *C.R. Bard Inc. v. Schwartz*, the licensee had stopped paying royalties and the licensor sued in state court for royalties owed. The licensee responded by filing a declaratory judgment action in federal court. The appellate court held that, rather than a bright line rule requiring "termination of a license as a precondition to suit. . . . an examination of the totality of the circumstances must be made to determine whether there is a controversy arising under the patent laws."[11] According to that court, a bright line rule "would discourage licensees from contesting patent validity and would be contrary to the policies expressed in *Lear*."[12] It is worth noting, however, that in this case the licensee had stopped paying royalties, so that the licensor was the party in control of whether or not the license was terminated.

Shell Oil

By 1997, however, the Federal Circuit appeared to have changed its opinion of the patent policies expressed in *Lear*, and was working hard to limit its further application. The Federal Circuit no longer viewed patent validity challenges as a positive activity that courts should discourage validity challenges, favoring a perceived certainty and stability of patents and patent licenses. While officially acknowledging the supremacy of the Supreme Court, the Federal Circuit worked effectively to overrule the *Lear* decision by severely restricting its application.

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This is most prominently evident in *Studiengesellschaft Kohle M.B.H. vs. Shell Oil Co.*[13]

The *Shell Oil* decision seemingly purports to limit the rule established by the Supreme Court in *Lear* by superimposing on *Lear* a two-part test. In *Shell Oil*, the licensee had agreed to pay royalties for use of the licensor's patented process for producing a plastic (polypropylene) using a specific process. During the term of the license, the licensee began also to produce polypropylene using a second process that it did not disclose to the licensor, as required under the license agreement. The licensee failed to pay royalties on sales of polypropylene using the second process, even though it continued to pay royalties for its continued use of the first process. When the licensor ultimately discovered the licensee's second process, it brought suit to enforce the license agreement against the second process as well, and the licensee sought to challenge the validity of the patent claims as interpreted to read on the second process.

The Federal Circuit, departing from *Lear*, held that "a licensee . . . cannot invoke the protection of the Lear doctrine until it (i) actually ceases payment of royalties, and (ii) provides notice to the licensor that the reason for ceasing payment of royalties is because it has deemed the relevant claims to be invalid."[14] In other words, a licensee must breach its license agreement, advise the licensor of the reason for the breach, and subject itself to a claim for infringement damages and a potential permanent injunction in order to challenge the validity of the licensed patent. The Federal Circuit required the licensee to entirely give up its right to practice the first process in order to challenge the licensor's interpretation of the patent claims to cover the second process.

Gen-Probe

In *Gen-Probe Inc. v. Vysis, Inc.*, the Federal Circuit was faced with the choice of extending either *C.R. Bard* or *Shell Oil* to a new situation.[15] In keeping with its trend of constraining the application of *Lear*, the court extended *Shell Oil*.

Gen-Probe was perhaps a less sympathetic licensee than those in previous cases. The company licensed an issued patent on blood screening technology from Vysis as part of the settlement of an unrelated patent litigation. Gen-Probe then exercised an option to extend the license to its third-party allies in the assay market. Six months after obtaining the license, Gen-Probe filed a declaratory judgment action of non-infringement and invalidity, while maintaining that it would continue to pay royalties in order to remain in good standing under the license agreement until the claims of Vysis's patent were invalidated. The *Gen-Probe* court, while acknowledging the "totality of the circumstances" test in *C.R. Bard*, did not expressly apply the test, instead creating (although perhaps not explicitly) a bright-line rule that there is never a claim or controversy (and therefore no jurisdiction) in a declaratory judgment action for invalidity brought by a licensee who continues to pay royalties.

The MedImmune Case

In 1997, MedImmune and Genentech entered into a license agreement. At that time, Genentech owned a patent (Cabilly I) covering a use of cell cultures to manufacture human antibodies. It also had a pending continuation application based on the Cabilly application that would eventually issue as a patent in 2001 (the Cabilly II patent).[16] Under the 1997 agreement, Genentech licensed the Cabilly I patent (including the then-pending Cabilly II application) to MedImmune. The agreement stated that MedImmune would pay royalties on any product that fell under any licensed patent claim that had not expired or been held invalid.

When the Cabilly II patent finally issued, Genentech asserted that, under the license agreement, MedImmune owed royalties on the new patent for sales of its Synagis product that (presumably) did not infringe Cabilly I. This product represented 80% of MedImmune's sales. MedImmune believed the new patent was invalid, but paid the demanded royalties ("under protest") in order to avoid a potential injunction and damages. MedImmune then sued for a declaratory judgment of invalidity of the second patent.

Both the district and appellate court decisions in *MedImmune* were relatively straightforward applications of *Gen-Probe*. The Federal Circuit decision[17] summarized the district court's opinion[18] as follows: "The district court, applying *Gen-Probe*, dismissed [MedImmune's] suit as non-justiciable under the Declaratory Judgment Act"[19] holding that "MedImmune, as a licensee in good standing and not in reasonable apprehension of suit, cannot bring a declaratory action to challenge the patent under which it is licensed."[20] The Federal Circuit agreed with the district court's reasoning that MedImmune would have to breach the license agreement and subject itself to a patent infringement suit (and possible injunction excluding its product from the market) in order to create a controversy that would give rise to a declaratory judgment action. Although it is not clear that MedImmune argued the point, the Federal Circuit did not address a major difference between this case and *Gen-Probe*: the Cabilly II patent did not issue until *after* MedImmune had signed the license, while the patent involved in *Gen-Probe* issued before Gen-Probe signed its license. If the Federal Circuit had been applying a "totality of the circumstances" test, rather than a bright line rule, one would expect this point to have been addressed.

In the Supreme Court, the case continued to be argued on purely jurisdictional grounds. MedImmune and the United States as amicus curiae argued that Genentech's demand for royalty payments on MedImmune's Synagis product (asserted very soon after the issuance of the Cabilly II patent), together with MedImmune's statements that it was paying the royalties "under protest" created a "case of actual controversy" under the Declaratory Judgment Act.[21] Supporting this position, MedImmune argued that (1) neither the Constitution nor the Declaratory Judgment Act require an actual violation of a statute in order to challenge the statute in court; and (2) federal patent policy encourages and protects challenges to patent validity. Genentech countered that the Declaratory Judgment Act does not allow a party to obtain judicial advice on what would happen if it repudiated a contract, and that Article III of the Constitution forbids courts from taking such a case where there is no controversy.

In an 8-1 decision (Thomas dissenting) the Supreme Court reversed and remanded to the lower courts for further

review.[22] The Court held that MedImmune did not have to breach the license agreement in order for its validity challenge to be an actual controversy that could be addressed in court. The Supreme Court reasoned that MedImmune had alleged a legitimate contract dispute: Was it required to pay royalties under the Cabilly II patent, or did it not owe royalties because the patent was invalid and un-infringed by the Synagis product? The Supreme Court has previously ruled that declaratory judgment jurisdiction exists in other contexts where the plaintiff's self-avoidance of imminent injury is coerced by threatened (rather than actual) enforcement action, and the *MedImmune* court decided that the patent context should be treated no differently.[23]

The Court also found it important that the consequences of the threatened enforcement action by Genentech would be significant for MedImmune (80% of its business was at risk of being assessed royalties). The Court was unconvinced by Genentech's argument that MedImmune had waived any right to challenge the patent's validity, stating: "Promising to pay royalties on patents that have not been held invalid does not amount to a promise *not to seek* a holding of their invalidity."[24] The Court found that MedImmune was not repudiating the contract while continuing to reap its benefits; rather, it was asserting that a proper interpretation of the contract does not require payment of royalties on invalid patents and does not prohibit it from challenging the validity of the patents.

The *MedImmune* decision did not specifically address the tension between the *C.R. Bard* "totality of the circumstances" test and the *Gen-Probe* bright-line rule. Rather, it seems to have established a bright-line rule of its own: a licensee may always challenge the validity of a licensed patent, no matter its status under the license. A closer read of the case, however, reveals that this characterization is inaccurate—many questions remain open. For example, although the Court did create a bright-line rule with respect to the narrow jurisdictional question governing whether a federal court *may* hear MedImmune's case, it left open the question of whether the court *must* hear the case, let alone questions about which party might ultimately prevail…

As an initial matter, just because federal courts *may* here MedImmune's case, that does not mean that they *must* hear it. MedImmune's victory could be very short-lived if the district court decides that, in the discretion granted to it under the Declaratory Judgment Act, it should not hear the case.[25] This is unlikely, however: the district court indicated that it followed *Gen-Probe* out of obligation rather than choice.[26]

Assuming the jurisdictional hurdle is completely cleared, though, there is another matter the Supreme Court did not opine on: whether, in a case where the licensee has not repudiated the agreement (i.e., continues to pay royalties), licensee estoppel can or should apply in the merits of the dispute? The Court also did not opine on whether the language of the license agreement itself prohibits MedImmune from challenging the validity of the Genentech patent.

Looking to the Future

The *MedImmune* Court dodged the fundamental licensee estoppel problem that consumed a significant portion of the briefing and oral argument in the case. It will now be up to the district courts and the Federal Circuit to decide how to apply *MedImmune* to that problem. If the Federal Circuit interprets *MedImmune* to mean that a licensee can challenge a patent in all circumstances, patent settlements may never be finalized because an accused infringer who is licensed in a settlement agreement will be able to bring repeated challenges to the validity of the licensed patent, while continuing to operate under the protection of the license, (safe from an injunction or claims for enhanced damages). On the other hand, if the Federal Circuit limits *MedImmune* to its narrow jurisdictional holding, similar to what it has done with *Lear*, it may still successfully revive licensee esoppel. If this happens, a licensee may never be able to stop paying royalties on a licensor's patent, even if the patent is later declared invalid by a court or the PTO.

A *C.R. Bard*-like totality of the circumstances test for deciding when courts should allow licensees to challenge a licensed patent would go a long way toward solving the dilemma of how to allow licensees to invalidate questionable patents, while not opening the floodgates to frivolous or speculative challenges by licensees looking for a free shot. Had the Federal Circuit applied a totality of the circumstances test in *Gen-Probe* and *MedImmune*, it might have held that Gen-Probe was estopped from challenging the patent, but MedImmune was not. This reasonable result would have gone a long way toward establishing a framework for resolving the dilemma caused by either of the proposed bright-line rules.

Patent Policy

A patent is a time-limited government-granted monopoly over the invention—an apparatus (product) or method (process)—defined in the relevant claim. A single patent may have hundreds of claims, each claim functioning as its own stand-alone patent. In many ways patents are similar to other monopolies granted by the government to private interests. For example, the government grants geographically limited monopolies to public utilities, in order to encourage development of expensive infrastructure, by guaranteeing exclusive use of the infrastructure and a given rate of return on the investment. Similarly, the monopoly granted in a patent allows the inventor time-limited exclusive use of the invention in order to encourage innovation and allow the inventor to recoup investment (and further invest) in the development of his invention. In exchange for this monopoly grant, the government does not require investment, as it might with a public utility, but does require disclosure of the invention so that it will enter the public domain on expiration of the patent, so that others may freely use, and invest in, the technology.[27]

Most economic conservatives and libertarians are generally skeptical of both the competence of federal agencies and the government's granting of monopolies to private interests. These parties often seek to limit the use of government-granted monopolies (utilities, port authorities, etc.) as much as possible, and, when granted, to limit the scope as much as possible. For many, however, skepticism of agency competence and government monopoly-granting seems to fade when it comes to monopolies granted in the form of patents. This is true

despite statistics that indicate that, when it comes to granting patents, the government would do just as well flipping a coin: studies indicate that approximately *half* of all patents litigated to a final judgment on validity are held invalid.[28] Of course, patents on which there is a significant question of validity may be more likely to be litigated to final judgment. Nevertheless, this is a troubling finding for advocates of free and open competition, especially considering that many cases involving patents that would very likely be found invalid end up settling due to the accused infringer's aversion to even a low risk of an injunction and to his assessment of above-market damages.

There is no questioning the value of properly granted patents in encouraging investment in innovation and technological development. This is particularly true in industries such as pharmaceuticals, where the required investment in researching, developing, and testing a product is considerably high, but the costs of reverse engineering and copying the product are low. It is also true, however that an invalid patent is an unnecessary tax on innovation (and consumers) when enforced against an independent developer of the same technology.

Static vs. Dynamic View of Patents

Most of the case law, as well as the parties and many of the amici in the *MedImmune* case, take a simple "static" view of patents and patent licenses. In this view, patent claims, and their application to products, are well-defined and certain at the time of the signing of a license agreement, and throughout the term of the license. Under this static view, it is easy to make analogies between patent (intellectual property) rights and rights in physical property, such as real estate. To those who advocate a static view of patents, goals of certainty and finality are very important, so that questions of the scope and enforceability of a patent can be settled; an analogy to the idea of a "quiet" title in real estate. Advocates of this viewpoint also argue that from a contract perspective, the parties to a license agreement require certainty and finality in their agreement.

Far from being static, however, real world patents and licenses are dynamic entities. New information about prior art, on-sale products, or public disclosures may (and often do) come to light years after a patent has issued. This information can cause a patent previously thought to be valid to be completely invalidated, and thus the covered invention is in the public domain. Furthermore, patent owners may advocate very different interpretations of their patent claims depending on the situation. Also, by filing so-called "continuation" applications, a patent applicant can obtain a first patent on an invention while keeping the supporting application alive in the patent office for several years to pursue additional claims, maintaining the benefit of the original filing date for the later applications. This is what Genentech did in order to obtain the Cabilly II patent.

In contrast to real estate, where the metes and bounds of a piece of property are known, (or at least knowable through a relatively inexpensive survey), the metes and bounds of a patent, as defined in the claims, are much more uncertain, flexible, and subject to change. A single invention may be covered by hundreds of different patent claims, each functioning as its own separate patent. Furthermore, the metes and bounds of each patent claim cannot be rigorously determined through an inexpensive survey, but must be determined through costly patent office procedures or litigation that may take several years.

Bright Line Rules vs. Totality of the Circumstances

While those who subscribe to a static view of patents often advocate for bright line legal rules that will provide certainty and finality in patent issues, those who understand the dynamic view of patents know that certainty and finality with respect to many issues in patent licensing are illusions. Since patents are, in reality, dynamic creatures, static-view advocates of bright-line legal rules to provide certainty and finality in patent licensing are really arguing to shift the certainty/uncertainty from one party to the other. For example, a bright line legal rule that prevents a patent licensee from ever challenging the validity of a licensed patent provides great certainty for the patent owner: he will never face a validity challenge no matter what claims he is able to obtain from the patent office or how he chooses to interpret his claims against the licensee's products. This result, however, creates great *un*certainty for the licensee: he may be forced to pay royalties on additional products for continuation patents with (perhaps questionable) claims that were not even drafted when the license agreement was signed and which he could not have anticipated would issue from the patent office.

On the other hand, a bright line legal rule that allows the licensee always to challenge the validity of a licensed patent provides the licensee with a high degree of certainty; because, should he lose a validity challenge, he has protected his downside: his products are immune from a patent injunction and he has a preset royalty rate that the licensor cannot increase. The licensor, however, under this rule, faces far greater uncertainty as he may be subject to multiple, repeated validity challenges from the licensee each time the licensee finds new prior art or other potentially invalidating facts.

On remand, MedImmune will continue to argue that it is unfair that it should have to subject itself to the risk of a potentially ruinous injunction in order to challenge the scope of patent claims that were not in existence at the time it entered into the license agreement. On the other hand, Genentech will argue that, jurisdictional questions aside, it is unfair to allow a licensee to operate under the benefit of a license agreement while attacking the agreement as voidable. Genentech will further argue that if the courts extend the *MedImmune* ruling to the merits of the case, there will be a rash of patent litigation with licensees suddenly unhappy with their bargains bringing (or threatening) invalidity suits in order to attempt to change the terms of their deals, all while using their license agreements to protect their downside risk. Genentech will also claim that patent litigation will increase because the uncertainty of continuous expensive validity challenges will lead patent owners to seek the finality and certainty of court judgments rather than the uncertainty of patent licenses.

If Genentech prevails on the merits, however, it is unclear that a licensee would have *any* mechanism to stop paying royalties on a patent that had been declared invalid by the

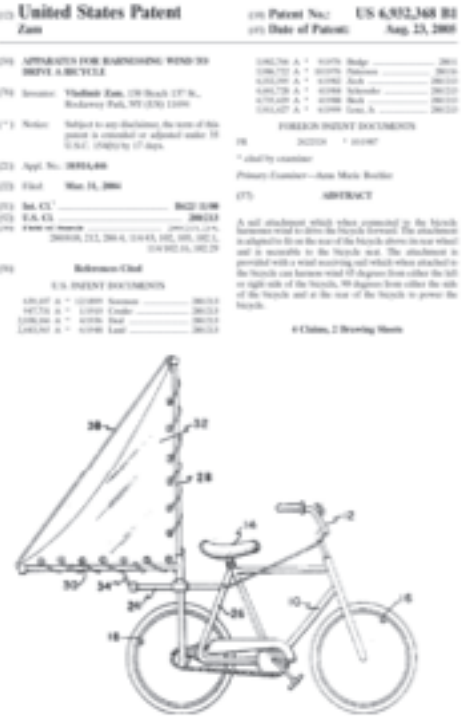
PTO (e.g., in an interference or re-examination proceeding) or a court in a case between other parties. It has generally been fundamental in patent law that a patent, once invalidated by a single court or the PTO could not be enforced against any party. However, if a licensee to the patent is always required to breach its license in order to challenge the validity of a licensed patent, licensors may effectively estop licensees from ceasing payments by licensing multiple patents—thereby subjecting the licensee to a suit on another patent if it ceases paying royalties on the invalid one, even where the patent has already been invalidated.

If the case makes it back up to the Supreme Court on the merits, it is difficult to predict how the Court will come out. During oral argument, the Justices expressed concern over the prospect of a flood of validity challenges in the courts. They also seemed skeptical of MedImmune's efforts to escape from a bargain it had intentionally and rationally entered into. On the other hand, during Genentech's argument, the Justices challenged Genentech's characterization of the license agreement as a type of compromise settlement of claims that MedImmune was trying to repudiate. The Justices recognized that the license at issue was a commercial patent license that included not-then-existing patents that could issue in the future, not the settlement of a litigation in which there were precise claims being asserted and settled.

Neither the oral argument nor the *MedImmune* opinion, however, give any hint that the Supreme Court would adopt a totality of the circumstances test to help solve these problems. In fact, Justice Breyer stated during oral argument: "[T]here are three possible positions on the question of whether a licensee can attack a contract…. One, he can never do it. Two, he can always do it. Three, it depends on what the contract said."[29] The Justices did not consider (and the Assistant to the Solicitor General arguing at the time did not raise) a fourth possibility: that it depends on the circumstances.

A totality of the circumstances test could reduce the number of validity challenges by holding non-breaching licensees to their deals on issues that were settled by those agreements, but allowing challenges in situations of changed circumstances, (such as a newly issued patent or a new claim interpretation asserted by the licensor), or the discovery of new information. As advocated by the amicus curiae American Intellectual Property Law Association (in a brief supporting Genentech), a court could certainly perform a factual inquiry to determine if the party challenging the patent was attempting to re-litigate an agreed settlement or secure the protection of a license simply to protect its downside, should its validity challenge fail.

As described above, the Federal Circuit's aversion to *Lear* seems to stem, at least in part, from favoring the values of finality and certainty in patent licensing over the licensee's right to challenge the patent. What this eventuates, however, is the favoring of *licensors'* interests in finality and certainty. A ruling applying licensee estoppel on the merits would increase licensors' finality and certainty at the expense of licensees. Licensors would be certain in the knowledge that their patents could not be attacked, but licensees would suffer a corresponding loss of certainty in that the licensor would then be able to take any interpretation of the patent claims it wanted with impunity. Licensees would not know whether or how licensors intended to assert a royalty obligation against future products the licensee may develop or acquire. Fully protected from a patent challenge, the licensor may adopt a claim interpretation, or obtain a continuation patent claim that is plainly invalid, but the licensee cannot challenge the new claim or interpretation without breaching the agreement and putting his existing products at risk of injunction.



For purposes of illustrating this scenario, suppose a bicycle shop owner licenses the actual patent shown above for a device to harness wind on a bicycle and begins manufacturing "sail bikes" as shown in the figure. As a gross over-simplification, assume a hypothetical claim for this invention recites the following elements: a bicycle, a sail, and a mast; where the sail is connected to the mast and the mast is connected to the bicycle. The bicycle shop owner produces sail bikes that meet with moderate success, but the patent owner becomes dissatisfied with the amount of royalties he is receiving, so he approaches the shop owner and demands that he also pay the negotiated royalty rate on all the jackets the shop sells because the jackets are marketed to cyclists who sometimes wear them on windy days, where they happen to catch the wind that helps to propel the bike just like a sail. The patent owner argues that in this case the cyclist functions as the mast in the claim and is connected to (wears) the jacket. The jacket functions as the sail when it catches a tail wind, and the cyclist is attached to the bike via the seat. Of course, this interpretation of the claim would make the patent clearly invalid, as the shop owner himself has been selling jackets for years before the March 2004 filing date of the sail bike patent. A bright line rule prohibiting a patent validity challenge by a licensee in good standing, however, would prevent the shop

owner from challenging this interpretation of the patent claim, unless he was willing breach the contract and subject his sail bike business to a certain injunction, since he acknowledges that, interpreted as he originally thought when he signed the license agreement, the patent is valid. Although this may seem a fanciful example, the reader is asked to consider that a patent issued to the infamous Jerome Lemelson that was asserted against both the Gillette Mach3 razor and the semiconductor manufacturing industry claimed that the invention described in the eleven-page specification was both a specialized-material manufacturing apparatus and a rocket engine.[30]

As shown in the sail bike example, for every gain in certainty and finality by a licensor, there is a corresponding loss of certainty and finality for the licensee. Any time a licensor becomes dissatisfied with his bargain, he can assert a brand new interpretation of his patent claims against other licensee products in an effort to extort a concession or force the licensee to choose between paying additional royalties and giving up the license. Additionally, the licensor could use continuation practice to obtain additional patent claims from the PTO, which may be of questionable validity and very different scope from the original claims in existence at the time of the license. This would discourage potential licensees from entering into license agreements since that means they may find themselves stuck paying royalties without the possibility of an invalidity challenge, while the competitor who chose not to take a license is free to challenge validity. Instead, many potential licensees may risk a litigation in which rights to challenge validity would at least be preserved.

Options for "Purchasing" Certainty and Finality

Given that, under a bright line rule, one party or the other will suffer a loss of certainty and finality, it makes sense to ask how future parties will protect themselves, depending on how cases like *MedImmune* are decided on the merits. If courts continue to constrain the application of *Lear*, licensees will seek to gain certainty by solidifying the licensor's patent claims at the time of the signing of the license. Since it would be their only shot, each licensee will attempt to limit the future patent claims the licensor can assert against it by memorializing specific claim interpretations in the license agreement. This will essentially turn every patent license into a *Markman* brief.[31] This will have the effect of greatly increasing the cost of patent licensing to both sides of the transaction as well as bogging down licensing negotiations in endless squabbles over the interpretation of various patent claim terms.

If the courts adopt a bright line rule that extends *Lear*, licensors are likely to add "no challenge" clauses to their licenses, although the enforceability of such clauses would be questionable. They might also add provisions for increased royalties or fee shifting if the licensee challenges a patent, or if the licensee mounts an unsuccessful challenge. Additionally, licensors will probably require greater up-front payments, and the use of running royalties will diminish.

More fundamentally, however, licensors may simply choose to invest in obtaining higher-quality patents. Patent practitioners know that it is extremely difficult to challenge a patent in court based on prior art that has already been scrutinized by the PTO. By investing more up-front in prior art searches and other due diligence measures (or petitioning the patent office to re-examine issued patents when new prior art is discovered), patent owners can "buy" as much certainty and finality as they want to invest in.

If a licensor wants to insulate himself from endless patent validity challenges, he need only invest in making sure any potentially invalidating art is before the patent examiner when the application is under review and that his claims are narrow enough to distinguish from the art. The patent owner may also invest in researching potential on-sale bars and other events that might invalidate the patent. By addressing these issues up-front, the patent owner will not only be taking arguments the licensee could use to challenge the patent off the table, he will be obtaining a stronger (perhaps narrower) patent. To put it another way, patent licensors should not be heard to complain about endless challenges to the validity of their patents when they have the option of insulating their patents against these challenges by investing more in the patent examination (or re-examination) process to make sure they are obtaining quality patents. While this will burden aspiring patent licensors with additional costs and may lead some to lose out on obtaining illegitimate patents they may otherwise have gotten through the patent office, the market at large will benefit from higher quality patents. There is no corresponding public benefit to *Markman*-style patent licenses. Of course, patent applicants are still welcome to under-invest in their patent applications, but the consequence may be a higher likelihood of a validity challenge down the road. Investment in higher quality patents will have a positive impact beyond the parties to a single licensing transaction, as they will better protect true innovators, while reducing the number of improperly issued patents.

Endnotes

1 Lear, Inc. v. Adkins, 395 U.S. 653 (1969).

2 MedImmune, Inc. v. Genentech, Inc., et al., 127 S.Ct. 764, 81 U.S.P.Q.2d 1225, 07 Cal. Daily Op. Serv. 278 (U.S., Jan 09, 2007) (NO. 05-608).

3 395 U.S. 653 (1969).

4 United States Patent and Trademark Office.

5 A court may find a patent claim invalid any time after it is issued by the PTO if a party demonstrates that the statutory patentability requirements (35 U.S.C. §§ 101-105) are not met or if the patent owner has misused the patent or obtained the patent through inequitable conduct before the PTO.

6 395 U.S. at 669.

7 *Id.* at p. 670-71.

8 U.S. Cons. art. I, § 8 (emphasis added).

9 35 U.S.C. § 1 *et seq*.

10 C.R. Bard, Inc. v. Schwartz, 716 F.2d 874 (Fed. Cir. 1983).

11 *Id*. at 880.

12 *Id*.

13 Studiengesellschaft Kohle, M.B.H. v. Shell Oil Co., 112 F.3d 1561 (Fed. Cir. 1997).

14 *Id.* at 1568.

15 Gen-Probe Inc. v. Vysis, Inc., 359 F.3d 1376 (Fed.Cir. 2004).

16 The Cabilly I patent is U.S. Patent No. 4,816,567 (filed April 8, 1983 and issued March 28, 1989); the Cabilly II patent, a continuation of Cabilly I, is U.S. Patent No. 6,331,415 (filed June 10, 1988 and issued December 18, 2001). As a continuation application, Cabilly II has an effective filing date of April 8, 1983, just like Cabilly I. Since the Cabilly II application was filed prior to June 8, 1995, its term is governed under the old rules, which provided for expiration 20 years from filing or 17 years from issuance, whichever is longer.

17 MedImmune, Inc. v. Genentech, Inc., et al., 427 F.3d 958 (Fed. Cir. 2005)

18 MedImmune, Inc. v. Genentech, Inc., et al., CV 03-2567 (C.D. Cal. Jan. 14, 2004; February 18, 2004; Mar. 15, 2004; April 29, 2004).

19 427 F.3d 958, 962 (citation omitted).

20 *Id.*

21 28 U.S.C. § 2201.

22 127 S.Ct. 764.

23 *See, e.g.*, Terrace v. Thompson, 263 U.S. 197 (1923) (plaintiff can challenge state anti-alien land law without actually entering into a lease); Steffel v. Thompson, 415 U.S. 452 (1974) (plaintiff can challenge state statue prohibiting handbill distribution without actually distributing handbills).

24 127 S.Ct. 764.

25 28 U.S.C. § 2201(a).

26 127 S.Ct. 764 (citing App. to Pet. for Cert. 31a).

27 Currently twenty years from the filing of the application.

28 *See e.g.,* John R. Allison & Mark A. Lemley, *Empirical Evidence on the Validity of Litigated Patents*, 26 AIPLA Q.J. 185 (1998).

29 MedImmune v. Genentech, Supreme Court Argument Transcript at 20 (available from www.supremecourtus.gov/oral_arguments/argument_transcripts.html).

30 *See* U.S. Patent Nos. 4,666,678 and 4,702,808.

31 *Markman* briefs and hearings are used in the claim interpretation phase of a patent litigation, and are named after *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996), the case that finally settled that claim interpretation is a question of law (not fact) for the court (not the jury) to decide.

Is Copyright Property?
Comments on Richard Epstein's *Liberty Versus Property*

*By Adam Mossoff**

In his essay, *Liberty versus Property*, Richard Epstein offers a Lockean justification for intellectual property rights generally, and copyright specifically. Epstein's thesis is profoundly important and basic: *all* legal property rights, including tangible property rights and intangible intellectual property rights, are born of important policy considerations. In proving this, he surveys the justification and development of property rights in the West, and he reveals with great clarity that many of the traditional (and tread-worn) policy issues concerning the definition of *tangible* property rights are eerily similar to the issues implicated in the now-raging debate concerning the definition of intellectual property rights, especially copyright in digital content.

Alas, his insight may fall on deaf ears. For the peer-to-peer (P2P) file swappers and their advocates in think tanks and academia, the problem with Epstein's thesis is reflected in the terms of his title: liberty vs. property. For these individuals, the Internet's unique or "exceptional" characteristics—whether in its end-to-end (E2E) infrastructure or in its transaction-cost-lowering effects—changes fundamentally the policy equation. Accordingly, these "Internet exceptionalists" have come to view the debate in terms of only one side of this juxtaposition: liberty.[1] In their minds, "digital copyright," and "intellectual property" generally, is an oxymoron. The digital realm is about freedom—in every respect, from its architecture to its ethos to its implications for politics (as Californians have discovered with a recall election spawned by petition forms that were easily disseminated and downloaded via the web). The enforcement of so-called "traditional" property entitlements on the Internet is, at best, misplaced, and, at worst, dangerous to the freedom and creative potential of this new realm. Their growing despair in response to the Copyright Term Extension Act, the Digital Millennium Copyright Act, and the Supreme Court's recent decision in *Eldred v. Ashcroft* is palpable.[2] Siva Vaidhyanathan decries extending copyright terms and applying copyright to novel forms of expression in digital media because this is "unjustifiably locking up content that deserves to be free."[3] Or, as Larry Lessig bluntly puts it: "[o]urs is less and less a free society."[4]

With growing alacrity, the Internet exceptionalists are thus attempting to frame the public debate solely in terms of freedom, liberty, creativity, our "common culture," and the public domain. No one seems to epitomize this better than the prominent tech commentator and blogger, Doc Searls, who lamented the *Eldred* decision, but came away from the experience having learned an important lesson: the fundamental issue in the policy debate is neither political nor legal, but "conceptual."[5] Searls realized that they lost *Eldred* because proponents of digital copyright—of copyright generally—have successfully defined their legal entitlements as *property*, which makes Searls and others who believe in the "public domain" and the "commons" sound like they are, well, for lack of a better term, "Communist."[6] Searls later wrote that they "need to figure a way around the Property Problem," because "we lose in the short run as long as copyright (and, for that matter, patents) are perceived as simple property. Our challenge is to change that."[7] Some do not even like the term "commons" because it is "itself is a 'property' metaphor."[8] "[W]e must change the terms of the debate,"[9] Vaidhyanathan has intoned, and thus recognize that "[c]opyright should be about policy, not property."[10]

There are two ways in which one can interpret the Internet exceptionalists' complaint about the "Property Problem" and their injunction that "copyright is policy, not property"—a strong sense and a weak sense. Before discussing these two senses, a brief remark about the scope of this essay is in order. This essay will describe in an abbreviated fashion how the property theory that Epstein explicates in *Liberty vs. Property* might respond to the specific claims advanced by the Internet exceptionalists. Accordingly, its purpose is not to offer a complete account of why digital copyright is property. That is not possible in a short commentary piece, particularly given the admittedly "heretical" nature of these remarks to the Internet exceptionalists and their web-surfing allies. The justification of the property theory itself is in Epstein's essay, and in other articles already written or yet to be produced.

When taken in its strong sense, the Internet exceptionalists' thesis quickly devolves into a truism about property rights as such. If it is true—as it must be—that copyright is policy, then it is equally true that *all* property rights are policy. In proving this point in his essay, Epstein prefers utilitarian analysis, and he has spent much of his professional life attempting to show the ways in which the incremental development of property rights in the West represents the slow (and unending) march to identify utility-maximizing rules for our social and political institutions. Yet, even if one does not wish to jump on the utilitarian train that Epstein is calling us all aboard, it is easy to see that *every* tangible property entitlement has arisen from a crucible of moral, political and economic analyses, and thus implicates the same questions about utility, personal dignity, and freedom that now dominate the debates over digital copyright. The preeminent property cases that every law student studies in the first year of law school are exemplars of this basic truth.[11]

When Internet exceptionalists maintain that "[c]opyright is not about 'property,' . . . . [i]t is a specific state-granted monopoly issued for particular policy reasons,"[12] then they must also maintain that no legal rights in any tangible things are *property*. Everything that everyone owns—tangible

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or otherwise—represent only state-granted monopolies issued to individuals for particular policy reasons. As Epstein rightly points out, at a fundamental level of analysis, property and monopoly are simply flip-sides of the *same coin*. Thus, in this strong sense, the Internet exceptionalists' complaint about extending copyright to digital media is, at the same time, neither informative nor instructive—unless one's goal is to restructure universally the concepts and legal rules for *all* property entitlements in American society.

It is unsurprising then that the Internet exceptionalists' rhetoric has produced the politically charged label of "Communist." When Dan Gillmor publishes a webzine article attacking the *Eldred* decision under the heading, "Supreme Court Endorses Copyright Theft," writing that the Supreme Court decision has sanctioned "a brazen heist," and asking his readers, "Who got robbed? You did. I did," one hears the rallying call: Copyright is theft![13] When one hears Lessig's similar complaint that the Copyright Term Extension Act is a "theft of our common culture,"[14] one hears again the rallying call: Copyright is theft! As Doc Searls aptly points out, it is no surprise that Gillmor's and Lessig's readers hear the echoes of the nineteenth-century socialists' self-described "battle cry": "Property is theft!"[15]

We are not compelled, however, to adopt only the strong sense of the Internet exceptionalists' rhetoric. There is also a weak sense to their claim that copyright is policy, not property; namely, that copyright is different from (tangible) property and, as best illustrated in the context of digital media, does not deserve the same moral or legal status typically afforded to our more traditional property entitlements. This is hardly a radical claim, and there is substantial evidentiary support for this proposition in the American copyright and patent scheme. As the Supreme Court has repeatedly stated: the constitutional grant of power to Congress to protect copyrights and patents "reflects a careful balance between the need to encourage innovation and the avoidance of monopolies which stifle competition without any concomitant advance in the 'Progress of Science and the useful Arts.'"[16]

From such judicial and legislative statements, the Internet exceptionalists make an important change to Epstein's juxtaposition. It is not "liberty vs. property," but rather "liberty vs. *monopoly*." And, they conclude, the stifling effects of extending the copyright monopoly to digital media substantially outweigh the negligible benefit of promoting innovation. Here the Internet exceptionalists adopt the same utilitarian metric employed by Epstein, arguing that "[b]efore the [copyright] monopoly should be permitted, there must be reason to believe it will do some good—for society, and not just for the monopoly holders."[17] Reflecting his desire that we interpret the Internet exceptionalists' claims in this weak sense, Lessig asks (somewhat rhetorically but obviously in frustration): "Does calling for balance make one a communist?"[18]

In this weak sense, therefore, the claim that "copyright is policy, not property," is simply shorthand for the proposition that we must achieve and maintain balance in the utility calculation of "liberty vs. copyright monopoly." There are two supporting premises for this proposition that Internet exceptionalists sometimes intermingle: the first is historical, and the second is analytical. On the historical side, they maintain that copyrights and other intellectual property rights have *always* been viewed as monopolies issued by the state according to a strict utility calculus. Again, this is not a radical claim. Thomas Jefferson, an avowed defender of natural rights, believed that "[i]nventions . . . cannot, in nature, be a subject of property," and that "an exclusive right" is granted to inventors by "Society" solely "as an encouragement to men to pursue ideas which may produce utility."[19]

The historical record, however, is not as one-sided as the Internet exceptionalists would like us to believe. Since the enactment of the Statute of Anne in 1709, the first modern copyright law, the justification for copyright has comprised *two* general normative theories. The first is utilitarianism, and the second is natural rights theory, particularly the labor theory of property and the social contract doctrine at the core of John Locke's political philosophy.[20] The labor theory of property is usually given short shrift by modern copyright scholars, but it certainly played a justificatory role in the historical copyright debates. As Representative Gulian Verplanck stated in defense of a bill that became the copyright act of 1831: "the work of an author was the result of his own labor. It was a right of property existing before the law of copyrights had been made."[21] State laws protecting intellectual property rights prior to the 1787 federal convention also reflected a Lockean influence; the New Hampshire legislature, to take but one example, enacted legislation to protect copyrights and other forms of intellectual property because "there being no property more peculiarly a man's own than that which is produced by the labour of his mind."[22] Moreover, the evolution and creation of new types of intellectual property rights in the nineteenth century, such as trademarks and trade secrets, followed the contours of a labor theory of property.[23] The initial definition and protection of trade secrets as property entitlements, for instance, derived its justification from the courts' belief that such rights were similar to other property rights born of valuable labor and already protected by the law.[24]

It is a profound oversimplification to declare that intellectual property rights, including copyright, have *always* been conceived *solely* as "monopolies" doled out by the state according to a utilitarian calculus that weighs social and scientific progress against the stifling effects and deadweight losses attributable to typical government-created monopolies. The proposition that "copyright is a property right" is not a novel form of political rhetoric invented by Jack Valenti sometime in the last twenty years in order to advance the interests of Hollywood before Congress.[25] In casting the history of intellectual property rights in this way, an interesting and multi-faceted historical record is flattened out in order to create a picture of what the Internet exceptionalists believe copyright and other intellectual property rights should be. As one critic has noted, this is not history, but rather the construction of a myth.[26]

Why the Internet exceptionalists retell the history of intellectual property rights in this way reflects their underlying conception of what is the nature of these "rights." As noted

earlier, they believe that intellectual property rights generally are merely "monopolies." In other words, copyrights and patents comprise only monopoly privileges handed out to authors and inventors by Congress under the Constitution's grant of authority to Congress that it "promote the Progress of Science and Useful Arts."[27] This is the analytical side of the weak interpretation of "copyright is policy, not property," and, once again, this is hardly a radical claim, as reflected in the Supreme Court's repeated references to copyright and patent rights as "monopolies."

This definition of intellectual property solely in terms of a utility-based monopoly, as opposed to a type of property, is actually the result of an impoverished concept of property that has dominated our political discourse in the twentieth century. At the turn of the century, legal scholars and judges redefined "property" as a set of "social relations"[28]—what later became known as a "bundle" of rights.[29] With this narrow focus on the purely *social role* of property, it was but a short step to focus on the one *social right* in the bundle of rights that constitute our modern understanding of property: the right to exclude. In fact, the Supreme Court would eventually declare that the right to exclude is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[30] As one prominent property scholar put it recently, the right to exclude is the *sine qua non* of a property right.[31]

This narrow definition of property as the right to exclude works well for tangible property entitlements, but it fails miserably to capture our intangible property entitlements. In the world of tangible property, there are fences and boundary lines that *physically* exclude non-owners. There is also ontological exclusivity: two people cannot occupy the same piece of land at the same time but in different ways. Two farmers who each attempted to till the same piece of soil—one trying to grow corn and the other wheat—would soon come to blows as to who may do what with the land.[32] Accordingly, the *fact* of physical exclusion serves as an objective baseline for defining the *right* to exclude.

For intellectual property rights, the problem with reducing property to the right to exclude is readily apparent. There is no natural exclusion of intellectual property entitlements: inventions, books, and computer code can be copied willy-nilly without taking the original physical product away from the inventor or author. Unlike that one acre of land over which the two farmers are pummeling each other, the P2P file swapper can trade music files without impinging on the original author's right to listen to his own song or on my right to listen to the copy that I rightfully have purchased. The right to exclude in intellectual property entitlements exists by legal fiat. It is solely a creation of the law with no natural counterpart in the actual facts of how people interact in the world. Thus, the exclusive rights granted to copyright and patent holders appear arbitrary—they are only legal figments of our collective social imagination. And these rights certainly do not fit the definition of *property*, which, as we are constantly reminded, is naturally exclusive.

When one throws into this policy mix the unique characteristics of digital technology, especially the Internet, it becomes clear that intellectual property "monopolies" should be restrained in our new digital world. There is no natural exclusion in the digital domain, and the creation of "artificial" barriers simply restricts free movement and stifles decision-making. Even if there were some type of objective baseline justifying exclusive copyright entitlements before the invention of the Internet, there certainly is none now. The P2P users of Napster, and now Morpheus and Kazaa, cheaply and easily copy files from one to another with nothing stopping them except their bandwidth allotment and the storage capacity on their hard drives—or the cease and desist letter from the Recording Industry Association of America. While bandwidth restrictions are somehow "real" to the P2P user, the cease and desist letter is not. And this makes sense only because people define "property" today solely in terms of exclusion. Doc Searls is correct: the problem *is* conceptual, but the real problem is that we are defining "property" in such a way that copyright and other intellectual property entitlements cannot be anything other than artificial monopolies, enforced at the policy whim of Congress.

It is at this fundamental level of analysis that Epstein's essay is most insightful. He reveals that the analytical framework that explains how physical property rights have been defined applies equally to intellectual property rights; the difference between the two types of property rights, as my fellow commentator, Solveig Singleton, notes, is not a difference in *kind*, but only one of *degree*. As with chattels or fishing rights, when one is faced with a different *context*, one must define one's property rules accordingly. The legal rules that make sense for dividing up farmland should not be applied deductively to fish or wild game, or vice-versa. This does not mean that these rights are not property rights, it means that they are only a different *type* of property right—but a property right nonetheless. To put it bluntly, if not in an oversimplified way, digital copyright (and intellectual property rights generally) is to the author and computer programmer today what fishing rights were to the whalers and fishermen of yesteryear.[33]

Although Epstein prefers to recast natural rights theory in solely consequentialist terms, there is a significant and substantive element of the theory, particularly the Lockean version preferred by Epstein, that is not fully captured in this retelling. The preeminent natural rights theorists—Hugo Grotius, Samuel Pufendorf, and John Locke—worked with a concept of property whose roots went far back into the Western canon, to the ancient Greek philosophers and the Roman lawyers. The principal focus of this tradition was the exact opposite of our contemporary view of property: they were concerned not only with how property functioned in complex social and economic relationships, but *how* property arose in the first place and *what* this told us about the nature of property as such. This explains the focus of these theorists on the analytical fulcrum creating property entitlements: the labor or acquisition or creative work that brings something into the world. And this provenance informed the natural rights theorists that the core or substance of property is the *action* that one takes to create and maintain the property;

thus, their definition of property as the right to use, possess and dispose of one's possessions.

This concept of property dominated the American understanding of property in the eighteenth and nineteenth centuries. It is revealed in the New Hampshire Supreme Court's explanation in 1872 that "[i]n a strict legal sense, land is not 'property,' but the subject of property. The term 'property,' . . . in its legal signification . . . . 'is the right of any person to possess, use, enjoy, and dispose of a thing.'"[34] Or, as James Madison wrote in 1792, "property" means more than just "land, or merchandise, or money," this concept has a "larger and juster meaning, [in which] it embraces everything to which a man may attach a value and have a right."[35] Property is the right to acquire, use and dispose of the things that one has created through one's labor. It is this concept of property that precipitated the virtual truism in American society that every person has a right to enjoy the fruits of one's labors.

It is also this concept of property—which focuses on the substantive relationship between a person and the thing that he has labored upon or created—that explains and justifies the protection of intellectual property rights, regardless of whether these rights exist in tangible books or computer code. A person's right to control the disposition of his creation, and thereby enjoy the fruits—the profit—of his labors, is central to the legal definition and protection of property entitlements.[36] As the New York Court of Appeals stated in 1856: "Property is the right of any person to *possess*, *use*, *enjoy* and *dispose* of a thing. . . . A man may be deprived of his property in a chattel, therefore, without its being seized or physically destroyed, or taken from his possession."[37] The court was speaking here of a state regulation that prevented a businessman from selling his goods, but the regulation did not require confiscation or possession of the businessman's land or place of business by the state authorities. In the context of tangible property rights, the courts have never demanded that a person be deprived *physically* of his property as a necessary prerequisite for finding a violation of one's property rights. Stealing the fruits of one's labors or indirectly interfering with the use of the property is sufficient; in other words, it is sufficient that one lose the ability to use, control or dispose of the values that one has created. It is this concept of property that explains why copyright is in fact *property*, rather than exclusive monopoly privileges meted out to authors at the leisure of the state's utility calculation.

As opposed to the excessively narrow definition of property today, the concept of property at work in natural rights theory is sufficient in breadth and scope to explain and justify myriad property entitlements in a variety of contexts—tangible and intangible. As noted earlier, it served as the analytical baseline for defining and protecting the new types of intellectual property that arose during the industrial revolution, such as trademarks and trade secrets. In the context of copyright, it was unclear at the turn of the century how our legal rules would apply to the amazing new inventions of the day, such as phonorecords and player pianos. Several decades later, the legal rules of copyright faced another revolution with the invention of radio and television. With each inventive leap forward, the legal protections evolved as well, *because* the author deserves to control the use and disposition of his property.

The past evolution of copyright law is notable because we are in the midst of another revolution today—the digital revolution. The impact of the digital revolution is as far reaching as was the industrial revolution of the nineteenth century, but it is important to realize that we are still in the midst of this revolution. It is not yet clear how and in what ways intellectual property rights should be best protected in the new digital domain, but the evolution of intellectual property rights is as necessary today as it was during the industrial revolution. It would be wrong to condemn outright our early attempts to define copyright entitlements for digital content, just as it would have been wrong to condemn the early attempts at defining trademarks in the nineteenth century. A doctrine in transition may be criticized for its various fits and starts, but the transition itself is not grounds alone for junking the doctrine as such.[38]

Endnotes

1 This is a protean term that does not have a precise definition. It covers a wide variety of positions, including individuals advocating for (1) the complete abolition of intellectual property rights in all digital content, and (2) the rolling back of intellectual property rights generally given what we have learned about the nature of innovative work in our new digital world. Moreover, the views of the players in the debate continue to morph along with the evolution of the digital world itself. As used in this essay, therefore, this term is limited to the positions described herein.

2 537 U.S. 186, 123 S. Ct. 769 (2003) (upholding the constitutionality of the CTEA).

3 Siva Vaidhyanathan, *After the Copyright Smackdown: What next?*, Salon.com, *at* http://www.salon.com/tech/feature/2003/01/17/copyright/ (Jan. 17, 2003).

4 Larry Lessig, *Free Culture*, O'Reilly Network, *at* http://www.oreillynet.com/lpt/a/2641 (last visited Aug. 19, 2002).

5 Doc Searls, *Going Deep*, *at* http://www.aotc.info/archives/000160.html#000160 (last visited Aug. 11, 2003).

6 *Id.*

7 Doc Searls, *Who Owns What?*, *at* http://www.linuxjournal.com/article.php?sid=6989 (last visited Aug. 11, 2003).

8 Larry Lessig, *Free the Air*, *at* http://www.lessig.org/blog/archives/001248.shtml (last visited Aug. 11, 2003) (reporting on and expressing agreement with Yochai Benkler's position here).

9 SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS 12 (2001).

10 *Id.* at 15.

11 *See, e.g.*, Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823) (discussing acquisition of title to land by the European settlers from the American Indians); Pierson v. Post, 3 Cai. R. 175 (N.Y. 1805) (addressing the requirements for claiming property in wild animals).

12 Vaidhyanathan, *supra* note 3.

13 Dan Gillmor, *Supreme Court Endorses Copyright Theft*, SiliconValley.com, *at* http://weblog.siliconvalley.com/column/dangillmor/archives/000730.shtml (Jan. 15, 2003).

14 Lessig, *supra* note 4.

15 Jean-pierre Proudhon, What Is Property? 13 (Donald R. Kelley & Bonnie G. Smith trans. 1994) (1840).

16 Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 146 (1989).

17 Larry Lessig, *May the Source Be With You*, Wired (Dec. 2001), *available at* http://www.wired.com/wired/archive/9.12/lessig.html (arguing against the protection of software code under copyright "monopolies").

18 Larry Lessig, *The Limits of Copyright*, Industry Standard (Sept. 8, 2001), *available at* http://www.lessig.org/content/standard/0,1902,16071,00.html.

19 Letter from Thomas Jefferson to Isaac McPherson (August 13, 1813), *reprinted in* The Life And Selected Writings Of Thomas Jefferson 629-30 (Adrienne Kock & William Peden eds., 1972).

20 Eldred, 537 U.S. 186, 123 S. Ct. at 785 n.18 (noting the "complementary" relationship between the utilitarian and labor-desert theories in copyright law).

21 Thomas B. Nachbar, *Constructing Copyright's Mythology*, 6 The Green Bag 2d 37, 40 (2002) (quoting 7 Register of Debates in Congress at 423-24 (Gales & Seaton 1831)).

22 Adam Mossoff, *Locke's Labor Lost*, 9 Univ. Chi. L. Sch. Roundtable 155, 164 (2002) (quoting Act for the Encouragement of Literature (1783)).

23 *See* Adam Mossoff, *What is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 415-424 (2003) (discussing the genesis in the nineteenth century of trade secret and trademark rights as intellectual property doctrines).

24 *See* Peabody v. Norfolk, 98 Mass. 452, 457-58 (1868) (protecting trade secrets as nonexclusive intellectual property rights because of their similarity to "good will," which is protected by the law when a "man establishes a business and makes it valuable by his skill and attention").

25 Valenti is President and CEO of the Motion Picture Association of America. *See* Frank Field, Furdlog, *at* http://msl1.mit.edu/furdlog/index.php?wl_mode=more&wl_eid=310 (June 12, 2003) (criticizing the proposition that copyright is property as merely a modern "political agenda").

26 *See generally* Nachbar, *supra* note 20.

27 U.S. Const. art. I, § 8, cl. 8.

28 Felix S. Cohen, *Dialogue on Private Property*, 9 Rutgers L. Rev. 357, 361–63 (1954).

29 Andrus v. Allard, 444 U.S. 51, 66 (1979).

30 Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979).

31 Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. 730, 730 (1998).

32 As one natural rights theorist succinctly put it: conflict over goods "shows the falsity of the old saying: 'Mine and thine are the causes of all wars.' Rather it is that 'mine and thine' were introduced to avoid wars." Samuel Pufendorf, De Jure Naturae Et Gentium 541 (C.H. Oldfather & W.A. Oldfather trans., 1934) (1688) (the title translates to *On the Law of Nature and Nations*).

33 Ghen v. Rich, 8 F. 159 (D. Mass. 1881) (discussing rules for resolving two fishermen's competing claims to a whale). *See also* James M. Acheson, The Lobster Gangs Of Maine (1988) (discussing, in part, how lobstermen have created a system of property rights without reference to the legal system).

34 Eaton v. Boston C. & M. R.R., 51 N.H. 504, 511 (1872).

35 James Madison, *Property*, Nat'l Gazette, Mar. 5, 1792, *reprinted in* James Madison, The Mind Of The Founder 186 (Marvin Meyer ed., 1981).

36 *See* Hecht v. Superior Court, 16 Cal. App. 4th 836 (1993) (holding, in part, that a man has a property right in his sperm because he has "decision-making authority as to the use of the sperm for reproduction," and this control over its *use* and *disposition* is an "interest [that] is sufficient to constitute property").

37 Wynehamer v. People, 12 N.Y. 378, 432 (1856) (emphasis added).

38 One of Larry Lessig's online petitions calls for Congress to roll back copyright protections to the rights set forth over two hundred years ago in the first copyright act of 1790. *See* Reclaim Copyright Law, *at* http://www.petitiononline.com/progress/petition.html (last visited Aug. 29, 2003).

International Law & National Security

The REAL ID Act Border Fence Provision: Congress Delegates Power To the Executive to Waive Laws In the Interest of National Security

*By Margaret D. Stock**

Most readers of *Engage* are likely familiar with the ongoing public controversy over proposals to build fences along the United States borders with Canada and Mexico. Like most Americans, they see the issue as one requiring hard policy choices by Congress. However, since 2005, Congress has delegated its legislative power and jurisdiction over this conflict almost entirely to the Executive. It has also deprived aggrieved parties of most judicial review of Executive decisions concerning construction of the fence.

On May 11, 2005, the United States Congress passed Section 102 of the REAL ID Act of 2005[1]—without debate and without any hearings—as part of a measure funding the war on terrorism; the section was described as an act to ensure speedy construction of a border fence between the United States and Mexico. This highly unusual law delegates to the Secretary of Homeland Security "sole discretion" to waive all local, state, and federal laws and regulations, if doing so is determined necessary to construction. Congress voted in addition to allow only the narrowest possible court review of the border fence decisions of the Secretary.

To date, Secretary of Homeland Security Michael Chertoff has twice invoked the law to waive application of U.S. environmental laws. His first invocation of the power effectively ended an environmental lawsuit that halted construction of a border fence near San Diego, California. His second invocation will likely forestall similar lawsuits over border fences and barriers planned in Arizona. Beyond the immediate effect of stopping certain environmental lawsuits, however, the law remains a precedent that could be broadly applied to override not only environmental laws, but also labor, safety, tort, and zoning laws, among others, as they inhibit construction anywhere along the U.S. border.

The law has been upheld by the one federal court to review it, yet raises novel legal questions. Through this law, Congress has delegated to the Executive sole discretion to waive "all legal requirements" that interfere with its legislative objective, although at the time of enactment it was unclear how many future border fences might be constructed. This unprecedented delegation of power raises novel separation of powers and federalism issues that should be of particular interest to conservatives and libertarians, and of general interest to vigilant Americans.

Nations have, for hundreds of years, built external walls in attempts to enhance their security by preventing people from crossing their borders. The Great Wall of China, Hadrian's Wall in Roman England, and the Berlin Wall are the most obvious examples. Until late in the twentieth century, however, the United States did not have a significant history of promoting border fences as official policy. In fact, most Americans appeared to view border barriers as reflective of totalitarian thinking; this view was perhaps best expressed when President Ronald Reagan famously stood at the Brandenburg Gate in Berlin and demanded, "Mr. Gorbachev, tear down this wall."[2]

This philosophy towards border walls began to change in the late 1990s, when the Congress and Executive first showed serious interest in fences as a means to protect certain areas of the border from migrants who were crossing illegally. This interest accelerated as illegal immigration became a topic of intense national discussion after the 2001 terrorist attacks on the World Trade Center and the Pentagon. By the end of 2005, the United States had constructed approximately fourteen miles of high-security border fencing along the U.S.-Mexico border, and was in the process of authorizing hundreds of miles of additional fencing. Discussions about completing a fence along the entire border between the United States and Mexico, and even along the border with Canada, were commonplace.[3] These discussions led ultimately to passage of the Secure Fence Act of 2006, in which Congress mandated the construction of more than eight hundred miles of additional border barriers along the southern U.S. border.[4] The U.S. trend tracks a similar trend world-wide, as countries such as Israel, India, and Saudi Arabia have recently constructed fences in an effort to enhance security.[5]

The evolution of the change in law affecting U.S. border fences has been equally rapid. In 1990, using its general power to control the border,[6] the United States Border Patrol began constructing the first significant American border fence near San Diego, California, in an attempt to cope with massive unregulated international migration in the area.[7] In 1993, the Border Patrol—with the help of the Department of Defense—completed a fourteen-mile "primary" fence in the same region.[8] This initial effort having been judged a success after illegal migration in the area dropped,[9] the Border Patrol later made plans to improve the primary fence with a three-tiered fence system that would include special lighting, roads, and high-technology sensors.

The Border Patrol's plan, however, ran into serious legal obstacles—primarily, but not entirely, as a result of conflicts with the California state Coastal Management Program. The Immigration & Naturalization Service (INS), and later the Department of Homeland Security (DHS), sought to build the fence in an environmentally sensitive area, and construction of the fence in the manner desired by the agencies would have violated various state and federal environmental laws. Thus, a conflict arose between environmental interests and perceived requirements of domestic security.

The first statutory authorization for the border fence itself had come in the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA).[10] Section 102 of IIRIRA

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gave the Attorney General the authority to construct fences at U.S. international borders, and Section 102(b) specifically authorized a border fence near San Diego. The language in the statute recognized that the construction of a border fence might result in conflicts with other laws. To deal with some of those conflicts, the law authorized safety features for Border Patrol agents, allowed the government to buy land and obtain real property easements, and waived the application of the Endangered Species Act[11] and the National Environmental Policy Act.[12]

By 2005, DHS had completed more than nine miles of the fourteen-mile "three-tiered" fence. The remaining miles of the fence had not been completed, however—in large part because of the legal stance taken by the California Coastal Commission (CCC), the state agency charged with responsibility for carrying out California's Coastal Management Program.[13] The CCC, which held regulatory authority under the federal Coastal Zone Management Act (CZMA), objected to the Border Patrol's plans to complete the border fence by dumping fill into a deep canyon called Smuggler's Gulch, "a 300-foot-deep gully that has been a prime route for bandits, border jumpers[,] and raw sewage from Tijuana to Southern California for more than 150 years."[14] The Border Patrol's plan apparently involved "shaving off the tops of two mesas and moving 2.2 million cubic yards of dirt to create" a road that could be more easily patrolled and fenced.[15] Although IIRIRA had allowed for a waiver of two environmental laws,[16] it did not waive all of them—and CCC cited numerous ways in which the Border Patrol's project did not comply with state and federal laws.[17]

Interestingly, neither INS nor its successor agency DHS ever attempted to exercise the environmental waiver authority granted in IIRIRA. Instead, INS—and later, DHS—reportedly complied with the requirements of the Endangered Species Act and the National Environmental Policy Act, the two laws for which it had been given the power to obtain waivers.[18]

Thus, when the 109th Congress convened for its first session in the fall of 2004, the San Diego border fence remained incomplete. At the same time, immigration issues were taking an increasingly visible and controversial place on the national legislative stage. Observers predicted that the border fence issue would be central to this debate.

The Congressional Research Service outlined several possible policy options for resolving the border fence conflict: Congress could (1) allow DHS to waive some or all applicable laws in order to expedite the construction of all fences along all U.S. international borders; (2) allow DHS to waive some or all applicable laws only to finish the construction of the fourteen mile triple-fence in San Diego; (3) establish a panel of experts to review all proposed border fence construction projects; or (4) require DHS to propose alternative construction plans that would mitigate the environmental impact of the fence's construction.[19]

Congress chose the first option. As the immigration debate heated up in the 109th Congress, proponents of the idea of a legal waiver succeeded in attaching border fence language to the House-passed "REAL ID Act of 2005," H.R. 418. The language chosen for the border fence section of the REAL ID Act caused an immediate stir among those who read it. Not only did the H.R. 418 language mandate that the Secretary of Homeland Security override possible environmental laws that conflicted with construction of any border fence, it delegated unprecedented power to the Secretary of Homeland Security to waive the application of all laws of any kind and denied aggrieved persons access to any federal court to review any administrative decisions.

Opponents of the REAL ID Act fought its enactment vociferously but were rebuffed. While H.R. 418 did not become law as a separate piece of legislation, its supporters managed in conference to mount a slightly modified version on the back of one of the traditional legislative workhorses of the U.S. government—a military appropriations bill. On February 11, 2005, as part of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005,[20] Congress enacted, and the President signed into law a broadly-worded border fence section. The enacted law stated:

> WAIVER OF LEGAL REQUIREMENTS NECESSARY FOR IMPROVEMENT OF BARRIERS AT BORDERS; FEDERAL COURT REVIEW.
>
> Section 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1103 note) is amended to read as follows:
> (c) Waiver.—
>
> (1) In general.—Notwithstanding any other provision of law, the Secretary of Homeland Security shall have the authority to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section. Any such decision by the Secretary shall be effective upon being published in the Federal Register.
>
> (2) Federal court review.—
>
> (A) In general.—The district courts of the United States shall have exclusive jurisdiction to hear all causes or claims arising from any action undertaken, or any decision made, by the Secretary of Homeland Security pursuant to paragraph (1). A cause of action or claim may only be brought alleging a violation of the Constitution of the United States. The court shall not have jurisdiction to hear any claim not specified in this subparagraph.
>
> (B) Time for filing of complaint.—Any cause or claim brought pursuant to subparagraph (A) shall be filed not later than 60 days after the date of the action or decision made by the Secretary of Homeland Security. A claim shall be barred unless it is filed within the time specified.
>
> (C) Ability to seek appellate review.—An interlocutory or final judgment, decree, or order of the district court may be reviewed only upon petition for a writ of certiorari to the Supreme Court of the United States.[21]

The earlier border fence law, Section 102(c) of IIRIRA, had only allowed for waiver of the Endangered Species Act and the National Environmental Policy Act. In marked contrast, the new provision of the REAL ID Act allowed for waiver of "all legal

requirements" that obstructed construction of border fences. The language "all legal requirements" was meant to include any local, state, or federal statute, regulation, or administrative order.[22] The law allowed the Secretary of Homeland Security to invoke the waiver upon notice in the Federal Register, and gave "sole discretion" to the office to decide if a waiver was necessary. Thus, as an initial matter, Congress' latest effort went far beyond any waiver language ever enacted.[23]

The judicial review provisions were also highly unusual, although they had been modified from the initial draft language so as to comply with Constitutional requirements.[24] Rather than denying all judicial review, the enacted law limited any judicial review to the Constitutional minimum and barred all review in any circuit court. (The legislators' choice of language may have been driven by a desire to avoid review by the Congressionally unpopular Ninth Circuit Court of Appeals, which had shown a propensity for rigorously enforcing federal environmental statutes.) Under the law, aggrieved parties can now seek review of border fence construction decisions only through an original action in U.S. district court and appellate review only in the U.S. Supreme Court.

Homeland Security Secretary Chertoff first invoked his authority under the newly enacted law on September 13, 2005. On September 22, 2005, he published a notice in the Federal Register, waiving eight separate laws—including the Administrative Procedures Act[25]—that he believed were standing in the way of completing the San Diego border fence.[26] Several environmentalist groups—including the Sierra Club, the California Native Plant Society, the San Diego Audubon Society, and the Center for Biological Diversity—had filed a lawsuit in 2004 challenging construction of the fence on the ground that its construction violated NEPA.[27] When Secretary Chertoff invoked his authority to waive the application of NEPA to construction of the border fence, the lawsuit fell into jeopardy of summary dismissal. In the face of an Order to Show Cause why their lawsuit should not be dismissed, the environmentalist groups argued that the REAL ID border fence provision was unconstitutional. According to these groups, the new law presented "no intelligible principle" for the Secretary of Homeland Security to follow regarding waivers, thus creating an unconstitutional delegation of legislative power to the Executive under the seventy-year-old precedents of *Panama Refining Co. v. Ryan*[28] and *Schechter Poultry Corp. v. United States*.[29]

In support of its argument that the environmental lawsuit should be summarily dismissed, the Government stated that Congress had articulated a general policy and the means to carry out that policy, as required by the Supreme Court's decision in *Mistretta v. United States*.[30] Furthermore, said the Government, Congress is permitted to delegate powers broadly in an area where the Executive has independent and significant constitutional authority—and the areas of immigration, national security, and border enforcement were such areas. U.S. District Court judge Larry Burns of San Diego agreed with the Government, ruling that the waiver was not unconstitutional, and tossing out the lawsuit.[31] The environmentalist groups did not appeal his decision.

The congressional push to construct border fences continued unabated throughout late 2005 and early 2006, with both the House and the Senate voting to construct additional fences. On October 26, 2006, President George W. Bush signed into law the Secure Fence Act of 2006, which provides for the construction of new border fences that are estimated by the Congressional Research Service to cost up to $60 billion dollars.[32] The Secretary of Homeland Security continues to have authority to waive any legal requirements that stand in the way of construction of these new fences as well, and those who would challenge his decisions in the courts will face the same limited judicial review. Thus, it appears that future environmental lawsuits—and other lawsuits as well—are likely precluded.

On January 12, 2007, Secretary Chertoff invoked his border fence waiver authority for the second time, publishing a notice in the Federal Register on January 19, 2007 stating that he was waiving "in their entirety, all Federal, State, or other laws, regulations and legal requirements of, deriving from, or related to" a spate of laws, including NEPA, ESA, the Clean Water Act, the Wilderness Act, the National Historical Preservation Act, the National Wildlife Refuge System Administration Act, the Military Lands Act, the Sikes Act, and the APA.[33] This waiver was intended to facilitate construction of border fences and barriers in the vicinity of the Barry M. Goldwater Range along the U.S.-Mexico border in Arizona.[34]

It remains to be seen whether frustration with other litigation will spur Congress to follow the precedent of the border fence provision by granting similar broad waiver authority—and similar limited judicial review—in other areas of "national security" law. In addition, the law's language raises troubling questions: To what extent can Congress delegate to the Executive "sole discretion" to "waive" domestic state and federal laws? How will laws such as the border fence provision address federalism concerns, such as the right of states to enforce their property, health, and safety laws? And finally, is it wise in a democratic republic to allow the logic of "national security" to trump all other laws, at the discretion of a Cabinet-level official? In the wake of the border fence provisions of the REAL ID Act, these questions remain unanswered.

Endnotes

1 Division B of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub.L. No. 109-13, 119 Stat. 231 (May 11, 2005). *See* 8 U.S.C.§1103 note.

2 Ronald Reagan, Remarks at the Brandenburg Gate, West Berlin, Germany, June 12, 1987, *available at* http://usgovinfo.about.com/gi/dynamic/offsite.htm?zi=1/XJ&sdn=usgovinfo&zu=http%3A%2F%2Fwww.reaganfoundation.org%2Freagan%2Fspeeches%2Fwall.asp.

3 *See, e.g.*, National Public Radio, "Talk of the Nation" (Transcript, May 22, 2005) (on file with author).

4 Secure Fence Act of 2006, Pub.L.109-367 (Oct. 26, 2006).

5 Martin Sieff, "Analysis: US Fence Follows Global Trend," United Press Int'l (May 24, 2006).

6 8 U.S.C. §1103(a)(5).

7 Blas Nuñez-Neto, Congressional Research Service, "Border Security: Fences Along The U.S. International Border" 1-2 (Jan. 13, 2005) [*hereinafter*, C.R.S. Report]. The discussion that follows relies primarily, although not entirely, on the history of the border fence given in this excellent report. The report was also later updated to reflect later changes in the law. *See* Blas Nuñez-Neto,

Congressional Research Service, Border Security: Fences Along The U.S. International Border (Updated, May 9, 2005).

8 *Id.*

9 *Id.* at 2 ("[T]he primary fence… proved to be quite successful but fiscally and environmentally costly"); *see also* U.S. General Accounting Office ("GAO"), "Border Control—Revised Strategy is Showing Some Positive Results," GAO/GGD-95-30 (December 1994), *available at* http://www.gao.gov/archive/1995/gg9530.pdf.

10 Illegal Immigration Reform & Immigrant Responsibility Act of 1996 ("IIRAIRA'), Pub.L. 104-208, Div. C (passed as part of the Omnibus Consolidated Appropriations Act of 1997). The border fence provisions are at 8 U.S.C. §1103.

11 Endangered Species Act of 1973, ("ESA"), 16 U.S.C. §§1531 et seq.

12 National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§4321 et seq.

13 *See* http://www.coastal.ca.gov/perresp.html.

14 John M. Broder, "With Congress's Blessing, A Border Fence May Finally Push Through to the Sea," N.Y.Times (July 4, 2005).

15 *Id.*

16 IIRAIRA Section 102(c) provided for a waiver of the Endangered Species Act of 1973 ("ESA"), 16 U.S.C. §§1531 et seq., and the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§4321 et seq.

17 *See* California Coastal Commission ("CCC"), "W8a Staff Report & Recommendation on Consistency Determination," CD-063-03, October 2003, *available at* http://www.coastal.ca.gov/cd/W8a-10-2003.pdf. *Hereinafter*, "W8a Staff Report."

18 CRS Report; "W8a Staff Report," at 14.

19 CRS Report at 6.

20 Pub. L. 109-13, 109th Congress, 119 Stat. 231.

21 Pub. L. 109-13, Div B, Title I, § 102, 119 Stat. 306.

22 H.Rept. 109-72 at 171 (2005).

23 The only similar law that this author has located is the Trans Alaska pipeline legislation, 43 U.S.C. §1652(c), which allows the Secretary of the Interior and other federal officers to "waive any procedural requirements of law or regulation which they deem desirable to waive in order to accomplish the purposes of this [law]…" This law also limits judicial review to Constitutional issues.

24 Denying all judicial review of federal government action is thought by most legal scholars to be unconstitutional. *See* Erwin Chemerinsky, Federal Jurisdiction (3d ed. 1999) at 201-07.

25 Administrative Procedures Act, 5 U.S.C. §§511-599.

26 70 F.R. 5562-02, 55563, 2005 WL 2295005 (F.R.).

27 Sierra Club v. Ashcroft, Case No. 04CV0272-LAB (JFS) (S.D.Cal., filed Feb. 2004).

28 293 U.S. 388, 415, 421 (1935) (holding a Congressional delegation to the President unconstitutional for lack of any intelligible principle where the delegation failed to "state whether or in what circumstances or in what conditions" the President could prohibit the transport of petroleum products).

29 295 U.S. 495, 541-50 (1935) (holding a Congressional delegation to the President unconstitutional where it conferred authority to regulate the entire economy "on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition'").

30 488 U.S. 361, 372-73 (1989) (interpreting "intelligible principle" to mean that Congress has "clearly delineate[d] the general policy, the public agency which is to apply it, and the boundaries of this delegated authority").

31 Leslie Berestein, *Federal Judge Rejects Attempt to Block Border Fence*, San Diego Union-Tribune, Dec. 13, 2005, at B2.

32 Todd J. Gillman, *Hutchison Skeptical of Border Fence*, Dallas Morning News, Jan. 10, 2007.

33 Dep't of Homeland Sec'y, Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 As Amended by Section 102 of the REAL ID Act of 2005 and as Amended by the Secure Fence Act of 2006, 72 Fed. Reg. 2535-36 (Jan. 19, 2007).

34 *Id.*

Is There A Danger the Emerging International Courts Will Be Politicized? Lessons from the International Court of Justice

*By Malvina Halberstam**

For centuries, international law regulated relations between states.[1] With rare exception, it did not create rights for individuals, nor impose responsibilities on individuals.[2] That has changed dramatically in the last few decades. The adoption of the Genocide Convention in 1948,[3] the Geneva Conventions in 1949,[4] several human rights conventions in the 1960s, such as the Covenant on Civil and Political Rights,[5] and treaties focusing on specific aspects of terrorism,[6] from airplane hijacking[7] to transportation of nuclear material,[8] have resulted in the creation of a significant body of substantive international law giving individuals rights—even against their own government—and holding individuals responsible for their acts.

There were, however, few mechanisms for implementing this body of law. There were few international courts in which one who claimed his rights had been violated could seek redress and none in which one who was responsible for even the gross violation of such rights could be tried.[9] Thus, the establishment of international tribunals to try and punish those responsible for unspeakable atrocities is a major development in international law and one to be applauded.

Yet, I have serious reservations about the Rome Statute establishing the International Criminal Court (ICC). It was adopted through a highly politicized process, which created a treaty with a number of flaws. I oppose some of its provisions on policy grounds—such as the provision that could be interpreted to mean that any Jew who lives in Jerusalem is guilty of a war crime and could be tried as a war criminal by the Court.[10] I believe other provisions make it impossible for the U.S. to ratify the Rome Statute consistent with the U.S. Constitution. For example, the United States ratified the Genocide Convention with a reservation,[11] necessary because prohibiting incitement to genocide, as required by the Convention, is not compatible with the First Amendment, as interpreted by the U.S. Supreme Court.[12] A similar reservation cannot be made with respect to the Rome Statute, which incorporates the Genocide Convention, because the Rome Statute does not permit reservations.[13] I have discussed some of these problems elsewhere and will not discuss them further here.[14]

Rather, I would like to focus on the question whether there is reason for concern that the adjudicating process itself may be politicized. Since the ICC is relatively new, it might be instructive to look at the decisions of the International Court of Justice (ICJ). At least two high-profile ICJ cases decided in recent years give reason for such concern: the decision in *Nicaragua v. United States*[15] and the Advisory Opinion on the Israeli security fence.[16]

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In *Nicaragua v United States*,[17] it was undisputed that Nicaragua had not filed a declaration accepting the compulsory jurisdiction of the ICJ. Rather, jurisdiction was claimed based on Art 36(5) of the ICJ statute, which provides:

> Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statue, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.[18]

Nicaragua signed the Protocol of Signature of the Statute of the Permanent Court of International Justice (PCIJ), and made a declaration recognizing the compulsory jurisdiction of the PCIJ in 1929. However, "that Protocol provided that it was subject to ratification, and that instruments of ratification were to be sent to the Secretary-General of the League of Nations."[19] In November 1939, some 10 years later, the Ministry of External Relations sent a telegram to the Secretary—General of the League of Nations that the Statute and the Protocol "have already been ratified" and that they "[w]ill send… in due course the instrument of ratification."[20]

No instrument of ratification was ever received, however. Nor was there evidence—or even a claim by Nicaragua—that an instrument of ratification had in fact been sent. This, despite the fact that, as stated by the Court in its decision, "on 16 December 1942, the Acting Legal Adviser of the Secretariat of the League of Nations wrote to the Foreign Minister of Nicaragua to point out that he had not received the instrument of ratification the *deposit of which is necessary to cause the obligation to come into effective existence.*"[21] The Nicaraguan Memorial acknowledged that "Nicaragua never completed ratification of the optional Protocol of Signature" and at the hearings on the case the Agent for Nicaragua explained that "the records are very scanty," and he was therefore "unable to certify the facts one way or the other."[22]

A report of the PCIJ covering 1939-1945 listed Nicaragua among the states that signed the optional protocol, but noted that Nicaragua had not ratified the Protocol of the Signature of the Statute.[23] Yearbooks of the ICJ included Nicaragua on the list of states bound by the compulsory jurisdiction provision of the ICJ but noted that it was based on a declaration under the PCIJ, and that the instrument of ratification was never received.[24] Other UN documents emanating from the Court and from the Secretary-General also listed Nicaragua as being subject to the compulsory jurisdiction provision.[25]

Although the Court acknowledged that consent to jurisdiction had to be expressed by "the deposit of the acceptance with the Secretary-General,"[26] it nevertheless determined that Nicaragua must be viewed as having accepted compulsory jurisdiction. The Court said:

> If the Court were to object that Nicaragua ought to have made declaration under Article 36, paragraph 2, it would be penalizing Nicaragua for having attached undue weight to the information given on that point by the Court and the Secretary-General of the United Nations and, in sum, having (on account of the authority of their sponsors) regarded them as more reliable than they really were.[27]

In other words, because documents issued by the Court and by the Secretary-General erroneously listed Nicaragua as having ratified the Protocol, it must be deemed to have ratified it. And this, even though those same documents included a caveat that Nicaragua's inclusion in the list was based on its ratification of the PCIJ but that its ratification of that instrument was never received.[28] Evidence submitted by the U.S. that in 1943 and again in 1955-58, when the question of an action *against* Nicaragua came up, Nicaragua had indicated to the United States that it had not consented to the compulsory jurisdiction of the ICJ, was dismissed by the Court as not "sufficient to overturn our conclusion."[29]

This is problematic. As the Court itself said:

> But Nicaragua has not been able to prove that it accomplished the indispensable step of sending its instrument of ratification to the Secretary-General of the League of Nations. It did announce that the instrument would be sent; but there is no evidence to show whether it was. Even after having been duly informed, by the Acting Legal Adviser of the League of Nations Secretariat, of the consequences that this might have upon its position vis-à-vis the jurisdiction of the Permanent Court, Nicaragua failed to take the one step that would have easily enabled it to be counted beyond question as one of the States that had recognized the compulsory jurisdiction of the Permanent Court of International Justice. Nicaragua has in effect admitted as much.
>
> The Court therefore notes that Nicaragua, having failed to deposit its instrument of ratification of the Protocol of Signature of the Statute of the Permanent Court, *was not a party to that treaty*.[30]

Yet, the Court held that it had jurisdiction.[31] Did it do so for political reasons, i.e. because it thought it important to deal will the issues raised by the case? To ultimately hold that the United States' use of force was a violation of article 51[32] (which itself involves a very problematic interpretation of article 51)?[33] Or can the decision be explained by the different jurisprudential backgrounds of the judges?

To me, it appears that the Court is finding jurisdiction where there is none, because it wants to decide a high-profile political case. If, as the Court concluded, Nicaragua did not ratify the PCIJ Protocol, there was no basis in the ICJ Statute for an action by Nicaragua against the U.S. without U.S. consent. There is nothing in the ICJ Statute authorizing the Court to assert jurisdiction as a means of atonement for its and the Secretary-General's errors. But, perhaps, the decision can be explained as reflecting a different legal philosophy, rather than as being politically motivated.

If there is room for even the slightest doubt in the *Nicaragua* case that the decision was politically motivated, there can be none, in my view, in the Israeli security fence case. The Court asserted jurisdiction to grant an Advisory Opinion even though the question involved a matter in dispute between states,[34] which would have brought the matter within the Court's contentious jurisdiction,[35] but only if Israel consented.[36] The Court rejected the argument that it did not have advisory jurisdiction "because the request concerns a contentious matter between Israel and Palestine, in respect of which Israel has not consented to the exercise of that jurisdiction."[37] It stated that "the lack of consent to the Court's contentious jurisdiction by interested states has no bearing on the Court's jurisdiction to give an advisory opinion."[38] Quoting from an earlier decision, it went on to explain:

> The consent of States, parties to dispute, is the basis of the Court's jurisdiction in contentious cases. The situation is different in regard to advisory proceedings even where the request for an opinion relates to a legal question actually pending between States. *The Court's reply is only of an advisory character; as such, it has no binding force*.[39]

The implication seems to be that the difference between contentious jurisdiction and advisory jurisdiction turns *not* on whether the question concerns a matter that is in dispute between states, but on the *effect* to be given to the answer: if the jurisdiction is contentious the Court's decision is binding; if the jurisdiction is advisory, the decision "has no binding force."[40] Aside from the fact that this would permit the Court to assert jurisdiction in every dispute between states, regardless of their consent, circumventing the limitation on the Court's jurisdiction that the consent requirement was designed to impose,[41] the Court seems to have disregarded its own distinction in this case. In its final paragraphs and in its conclusion the Court repeatedly states that Israel is "under a legal *obligation* to" do various things,[42] and that "all states are under an *obligation*" to do various things to ensure Israeli compliance.[43] Clearly, if Israel and other states are legally obligated to take actions as specified in the decision, it has "binding force." Decisions without binding force do not impose legal obligations.

Further, the General Assembly clearly did not need the Court's advice on a legal issue—the basis for the Court's advisory jurisdiction[44]—since it had already adopted a resolution denouncing Israel's construction of the fence as illegal,[45] the very question on which it was asking the Court for an advisory opinion. But the most egregious action—apart from the decision that Israel had no right to self-defense with regard to the terrorist acts against it[46]—may well have been the refusal to recuse a judge who had repeatedly spoken on the matter.[47]

Nabil Elaraby, the Egyptian judge, had made many speeches while Egyptian ambassador to the UN attacking Israeli policy, and played a leading role in the Tenth Emergency Special Session of the UN GA, from which the advisory opinion request emerged. In a newspaper interview after his ambassadorship (quoted by judge Buergenthal in his dissent), he referred to "the atrocities perpetrated [by Israel] on Palestinian civilian populations," and its "grave violations of humanitarian law."[48] Continuing, he criticized the Palestinians and Arab states for their failure to assert that Israel is occupying Palestinian territory in violation of international law. "I hate to say it," Elaraby was quoted in the article as saying, "but you do not see the Palestinians or any other Arab country today, presenting the issue thus when addressing the international community; 'Israel

is occupying Palestinian territory and the occupation itself is against international law...'"[49]

Still, the Court rejected the request that Judge Elaraby be recused.[50] It took the position that statements made in his capacity as a representative of Egypt, rather than in his individual capacity, could not be considered; that the Tenth Emergency Special Session made the request for the Advisory Opinion after Judge Elaraby "had ceased to participate in that session as representative of Egypt;" and that "in the newspaper interview… Judge Elaraby expressed no opinion on the question put in the present case."[51]

Only Judge Buergenthal dissented. He said:

> It is technically true, of course, that Judge Elaraby did not express an opinion on the specific question that has been submitted to the Court by the General Assembly of the United Nations. But it is equally true that this question cannot be examined by the Court without taking account of the context of the Israeli/Palestinian conflict and the arguments that will have to be advanced by the interested parties in examining 'The Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory.' Many of these arguments will turn on the factual validity and credibility of assertions bearing directly on the specific question referred to the Court in this advisory opinion request. And when it comes to the validity and credibility of these arguments, what Judge Elaraby has to say in the part of the interview…, creates an appearance of bias that in my opinion requires the Court to preclude Judge Elaraby's participation in these proceedings. [52]

It is a fundamental principle of justice that a judge be and appear to be impartial.[53] In the U.S., candidates for judicial appointment generally refuse to answer questions on issues that may come before them as judges, lest they be seen as having prejudged the matter. In the U.K., the House of Lords set aside a judgment in the *Pinochet* case because one of the judges was active in a charitable organization that was wholly controlled by Amnesty International, which had intervened in the appeal of the case.[54] By contrast, the Court that decided that Israel's construction of a barrier to keep out suicide bombers was illegal included a judge who repeatedly attacked Israel in his capacity as Egyptian ambassador to the UN, and in an interview given after his tenure as ambassador urged the Palestinians and other Arab states to make the argument that "Israel is occupying Palestinian territory, and the occupation itself is against international law," a highly controversial and complex legal question on which the Court had never ruled, but on which the answer to the question posed by the GA request for an advisory opinion would depend.[55] Yet, he did not recuse himself, and Israel's motion to recuse was rejected by the Court.

Space constraints do not permit a detailed analysis of the Court's decision in each of these cases. It should be noted, however, that in both cases, the Court created new rules of substantive law that enabled it to reach its results. In the *Nicaragua* case, the Court added two new requirements to the Charter provision for collective self-defense: (1) the state attacked must first *declare* itself to be a victim of an attack,[56] and (2) it must *request* the assistance of the state coming to its aid.[57] In the Israeli security fence case, the Court limited "the inherent right to self-defense," enshrined in Article 51 of the Charter,[58] to attacks by *states*. It held that there is no right to self defense to attacks by entities that are not states.[59] There is nothing either in the language or history of Article 51 to support these limitations and the Court cited no authority for its interpretation of article 51 in either case.[60]

There are many objective, principled decisions by the ICJ, made by judges who do not have a preconceived view of the matter. But, not all are. As the number of international courts increase and cases that may have important political implication are brought before them, great care must be taken to ensure that a Court not exercise jurisdiction beyond that conferred by the treaty establishing it, that it not reinterpret established legal principles to reach a particular result, and that judges who have previously expressed views on a question to be decided in a case not sit on the court that decides that case.

A legal system based on fair and just principles of law, objectively interpreted and applied by courts composed of judges who are fair, unbiased, and without preconceived views of the case, would be a great achievement at any level, especially at the international level, to be encouraged and supported. But, the opposite is also true. A system whose principles are not fair and just, or that permits judges who have expressed a preconceived opinion of a case to sit on the court that decides that case, is a perversion of justice to be condemned. Let us hope that the ICC and the other emerging international tribunals will be in the former category, not the latter.

Endnotes

1 *See* Louis B. Sohn & Thomas Buergenthal, International Protection of Human Rights 1-8 (1973).

2 Piracy is an example.

3 Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [*hereinafter* Genocide Convention].

4 Geneva Convention [I] for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention [II] for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention [III] Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 1351; Geneva Convention [IV] Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention of 1949].

5 International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171.

6 *See* Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 UNTS 219; Convention for the Suppression of the Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sep. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 178; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167; International Convention Against the Capture of Hostages, Dec. 17, 1979, T.I.A.S. No. 11,081, 1316 U.N.T.S. 205; Convention on the Physical Protection of Nuclear Material, Mar. 3, 1980, T.I.A.S. No. 11,080, 1456 U.N.T.S. 101; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Feb. 24, 1988, S. Treaty Doc. 100-19, 1589 U.N.T.S. 484; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, 1678 U.N.T.S. 304, *reprinted in* 27 I.L.M. 685 (1988); International

Convention for the Suppression of Terrorist Bombings, Jan. 12, 1998, 116 Stat. 721, 37 I.L.M. 249; International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 116 Stat. 724, 39 I.L.M. 270; The adoption of a Comprehensive Convention on Terrorism, proposed by the General Assembly, has been stalled in committee for several years because the Organization of the Islamic Conference ("IOC") has insisted on an exemption for "national liberation movements." *See* Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996, U. N. GAOR 61st Sess., Supp. No. 37, U.N. Doc. A/61/37 (Feb. 27, 2006). Such an exemption would effectively vitiate the convention. *See* Malvina Halbertam, *The Evolution of the United Nations Position on Terrorism: From Exempting National Liberation Movements to Criminalizing Terrorism Wherever and by Whoever Committed*, 41 Colum. J. Transnat'l L. 573 (2003).

7 *See, e.g.* Convention for the Suppression of the Unlawful Seizure of Aircraft, *supra* note 6.

8 *See, e.g.* Convention on the Physical Protection of Nuclear Material, *supra* note 6.

9 The Genocide Convention provides for the establishment of a special tribunal but none was ever established. *See* Genocide Convention, *supra* note 3, art. 6 ("Persons charged with genocide or any of the other acts enumerated in article III shall be tried by… such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.").

10 See Rome Statute of the International Criminal Court art. 8, July 17, 1998, 2187 U.N.T.S. 3 [*hereinafter* Rome Statute].

11 The Senate Resolution giving advice and consent to ratification of the Genocide Convention included a reservation that "nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States." *See* 130 CONG. REC. S14,076 (daily ed. Oct. 11, 1984). The United States ratified the convention Nov. 25, 1988 and it entered into force for the United States on February 23, 1989. *See* U.S. Dept. of State, Treaties in Force 432-435 (2006), *available at* http://www.state.gov/documents/organization/65521.pdf.

12 *See* Brandenburg v. Ohio, 395 U.S. 444 (1969) (speech may only be prohibited if it is "directed at inciting or producing imminent lawless action" and it is "likely to incite or produce such action."); Schenck v. United States, 249 U.S. 47 (1919) ("The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a *clear and present danger* that they will bring about the substantive evils that Congress has a right to prevent.") (emphasis added).

13 Rome Statute *supra* note 10, art. 120 ("No reservations may be made to this Statute.").

14 *See* AALS Panel Discussion on the International Criminal Court, 36 Am. Cr. L. Rev. 231, (1999)(statement by Malvina Halberstam).

15 Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U. S.), 1986 I.C.J. 14 (June 27) (decision on the merits) [hereinafter Nicaragua v. United States decision on the merits]; 1984 I.C.J. 392 (Nov. 26) (jurisdiction of the court and admissibility of the application) [*hereinafter* Nicaragua v. United States decision on jurisdiction]

16 Advisory Opinion, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 136 (July 9), *reprinted in* 43 I.L.M. 1009 [*hereinafter* Legal Consequences of the Wall].

17 Nicaragua v. United States decision on jurisdiction, *supra* note 15.

18 Statute of the International Court of Justice art. 36(5), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 [hereinafter I.C.J. Statute]. Technically the Statute of the I.C.J. is not a separate treaty, but part of the U.N. Charter. See U.N. CHARTER art. 92.

19 Nicaragua v. United States decision on jurisdiction, *supra* note 15, ¶15, at 399.

20 *Id.* ¶ 16, at 399-400.

21 *Id.* (emphasis added).

22 *Id.*

23 *Id.* ¶ 19, at 401.

24 *Id.*

25 *Id.* ¶ 20, at 401.

26 *Id.* ¶ 45, at 412.

27 *Id.* ¶ 46, at 412.

28 *Id.*

29 *Id.* ¶¶ 49-50, at 413-14.

30 *Id.* ¶¶ 25-26, at 404 (emphasis added).

31 *Id.* ¶ 109, at 441.

32 *See* Nicaragua v. United States decision on the merits, ¶ 235, at 121-22.

33 *See* text at notes 57-58 *infra.*

34 *See* I.C.J. Statute, *supra* note 18, art. 34(1) ("Only states may be parties in cases before the Court.").

35 *Id.* art. 36(2) ("The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court...").

36 *Id.*

37 Legal Consequences of the Wall, *supra* note 16, ¶ 46, at 152-53.

38 *Id.* para. 47, at 157-58.

39 *Id.* (emphasis added).

40 *Id.*

41 *Id.* ¶ 50, at 159.

42 *Id.* ¶ 145, at 196; ¶ 143, at 195 ("Israel has violated various international obligations incumbent upon it (see paragraphs 114-137 above)…. ").

43 *Id.* ¶ 146, at 196-97; ¶ 159, at 200.

44 I.C.J. Statute, *supra* note 18, art. 65(1) ("The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.").

45 G.A. Res. 10/13, ¶ 1, U.N. Doc. A/RES/ES-10/13 (Oct. 21, 2003) ("*Demands* that Israel stop and reverse the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, which is in departure of the Armistice Line of 1949 and is in contradiction to relevant provisions of international law.")

46 *See* Legal Consequences of the Wall, *supra* note 16, ¶ 139, at 194. The Court took the position that the right to self-defense only applies to attacks that emanate from another state and that since the Palestinian Authority was not a state Article 51 of the UN Charter did not apply. Judge Higgins disagreed with the Court on this point. She stated

> In paragraph 139 the Court quotes Article 51 of the Charter and then continues "Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State." *There is, with respect, nothing in the text of Article 51 that thus stipulates that self-defence is available only when an armed attack is made by a State.*…
>
> I also find unpersuasive the Court's contention that, as the uses of force emanate from occupied territory, it is not an armed attack "by one State against another." *I fail to understand the Court's view that an occupying Power loses the right to defend its own civilian citizens at home if the attacks emanate from the occupied territory*—a territory which it has found not to have been annexed and is certainly "other than" Israel. Further, Palestine cannot be sufficiently an international entity to be invited to these proceedings, and to benefit from humanitarian law, but not sufficiently an international entity for the prohibition of armed attack on others to be applicable. This is formalism of an unevenhanded sort. The question is surely where responsibility lies for the sending of groups and persons who act against Israeli civilians and the cumulative severity of such action.

Id. ¶¶ 33-4, at 215 (separate opinion of Judge Higgins) (emphasis added).

47 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 3, ¶ 8, at 7 (Jan. 30) (request for an Advisory Opinion Order of Jan. 30) [*hereinafter* Order of Jan. 30 on the Legal Consequences of the Wall].

48 *Id.* ¶ 8, at 8 (dissenting opinion of Judge Buergenthal, *quoting* Aziza Sami, *Nabil Elaraby: A law for all nations*, Al-Ahram Weekly (Cairo), Aug. 16-22, 2001, *available at* http://weekly.ahram.org.eg/2001/547/profile.htm).

49 *Id.*

50 See *supra* note 47.

51 Id. ¶ 8, at 5-6.

52 *Id.* ¶ 13, at 9-10.

53 It is "of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done." Rex v. Sussex, Justices, *Ex parte* McCarthy [1924] 1 K.B. 256, 259 (Lord Hewart, C.J.).

54 R. v. Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte (No.2), [2000] 1 A.C. 119, 137 (H.L.) (appeal taken from Eng.) (U.K.) ("in my judgment, the relationship between A.I. [Amnesty International], A.I.C.L. [Amnesty International Charity Ltd.] and Lord Hoffmann leads to the automatic disqualification of Lord Hoffmann to sit on the hearing of the appeal… ").

55 *See* Opinion Order of Jan. 30 on the Legal Consequences of the Wall, *supra* note 47, ¶ 8, at 8.

56 *See* Nicaragua v. United States decision on the merits, *supra* note 15, ¶195, at 104 ("Where collective self-defence is invoked, it is to be expected that the State for whose benefit this right is used will have declared itself to be the *victim* of an armed attack.") (emphasis added).

57 *Id.* ¶196, at 105 ("The Court concludes that the requirement of a *request by the State which is the victim* of the alleged attack is additional to the requirement that such a State should have declared itself to have been attacked.") (emphasis added).

58 U.N. Charter art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defence…").

59 *See* Legal Consequences of the Wall, *supra* note 16, ¶139, at 194 ("Israel does not claim that the attacks against it are imputable to a foreign State…. The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory."). *See also*, Separate Opinion of Judge Higgins, quoted *supra* note 46.

60 For a discussion of the history of Article 51, *see* Malvina Halberstam, *The Right to Self-Defense once the Security Council Takes Action*, 17 Mich. J. Int'l L. 229 (1996).

Charges of Judicial Activism in Europe

*By John Norton Moore**

Judicial activism was a core issue in the Senate hearings on President Bush's Supreme Court appointments. It has also become an issue in the debate about the future of the European Union (EU). Indeed, judicial activism at the European Court of Justice (ECJ) may be one factor in popular dissatisfaction with the European constitution. Several months ago, the new President of the European Council of Ministers, Austrian Chancellor Wolfgang Schuessel, called for a rethink over the role of the ECJ, which he said had "systematically extended European competences into areas where there was decidedly no European law." He cited decisions of the court concerning the role of women in the German army and access of nonnationals to Austrian universities.

Concerns of judicial over-reaching have also been raised over other decisions of the ECJ. Last September, it set aside a co-operative framework prescribing criminal penalties for environmental offences, as agreed among member states. The court did so on the grounds that only the EU legislature had the ability to take such action. It reached this conclusion despite an absence of general competence of the legislature to set criminal penalties and in the teeth of a provision in the EU Treaty which expressly confers authority for member states to co-operate in criminal matters. In London, *The Times*, reporting on this considerable transfer of power from member state capitals to Brussels, which had been bitterly fought by eleven EU governments, said: "An unprecedented ruling… by the Supreme Court in Europe gives Brussels the power to introduce harmonised criminal law across the EU, creating for the first time a body of European criminal law that all member states must adopt."

My attention to this growing European debate was triggered by an opinion expressed on 18 January, 2006, by the Advocate-General of the ECJ, concerning whether member states of the EU must submit their law of the sea disputes exclusively to the ECJ, or whether the dispute settlement procedures in other international agreements, including the United Nations Convention on the Law of the Sea 1982 (UNCLOS), are also available. While an opinion by the Advocate-General is not a final decision of the court, such opinions are so frequently accepted (in about 80% of the cases) and Advocate-Generals are so closely associated with the court that the opinion provides a fair target for appraisal of the judicial activism charge.

UNCLOS declares that "states parties… shall be presumed to have competence over all matters governed by this convention in respect of which transfers… [to an international organisation such as the EU] have not been specifically declared." Despite this, the Advocate-General determined that, even without any such declaration on the specific subject matter concerned, the ECJ had exclusive jurisdiction concerning law of the sea matters. Accordingly, he found that member states could not use the dispute settlement provisions they had mutually accepted under UNCLOS for settling disputes among themselves. Moreover, there was no declaration whatsoever transferring competence from the member states to the EU regarding dispute settlement—the specific issue before the court.

If the Advocate-General's opinion becomes an opinion of the court, it may well place the EU in violation of UNCLOS. But the opinion's implications for the functioning of the ECJ may be of even greater concern. The Advocate-General failed even to note the difference between the court having jurisdiction and the precise question before the court of whether it had exclusive jurisdiction overriding other dispute settlement procedures accepted by the member states elsewhere.

The basis on which he set aside the treaty obligations of member states to one another in UNCLOS was by invoking the language of Article 292 of the European Community (EC) Treaty that gives the ECJ jurisdiction over "disputes concerning the interpretation or application [of the treaty]," despite the absence in the underlying dispute of any issue concerning interpretation or application of that treaty. The Advocate-General therefore effectively set aside dispute settlement procedures agreed by EU members states specifically for interpreting UNCLOS to apply a provision allowing the ECJ to interpret its own constitutive treaty, which was not part of the underlying dispute.

The Advocate General proclaimed a "jurisdictional monopoly" for the ECJ, even if that court's jurisdiction did not extend "to the entire dispute." As to the problem then created for member states now deprived of a forum capable of resolving the entire matter, he said: "[Even] if confronted with genuine difficulties, member states are not allowed to act outside the EC context simply because they consider that such a course of action would be more appropriate."

With regard to the governing specifics of the EC declaration on signature of the 1982 UNCLOS Convention, the opinion noted simply that the EC had relied on a broader constitutive provision in its governing treaty as a legal basis for making its non-relevant declaration. Thus, constitutive power was confused with the specifics of action taken under that power, which specific action clearly did not exercise that power in any relevant way other than to confirm member state competence in the matter at issue.

An empowered and independent judiciary is an essential element to the rule of law. But there are fundamental, systemic principles underlying the judicial function. These include deference to the constitutive instrument establishing a court and interpretation and application of relevant laws in context and by their clear language and fundamental purpose. For a court to exceed these limits not only undermines the rule of law in the immediate case but, even more seriously, also risks permanent damage by undermining respect for an independent and empowered judiciary.

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Labor and Employment Law

The Pension Protection Act of 2006: Deathknell for Defined Benefit Pension Plans?

*By Michael J. Collins**

The private pension system in the United States has been in deep decline for many years. The Pension Benefit Guaranty Corporation ("the PBGC"), the federal agency that insures benefits under private-sector defined benefit pension plans, had an $18.9 billion deficit at close of the fiscal year ending September 30, 2006. In response to this crisis, Congress enacted the Pension Protection Act of 2006 ("the Act"). The primary goal of the Act is to preserve the private pension system by requiring employers to make larger contributions to their plans. However, the unintended effect may be to accelerate the longstanding trend away from defined benefit plans in favor of "401(k)" and other defined contribution plans.

Benefits to Employees

Americans support themselves in retirement with assets derived from three primary sources: Social Security, personal savings, and employer-sponsored retirement plans. Defined benefit pension plans are a particularly effective way to provide replacement income to workers after they retire. When benefits are taken in the form of an annuity, defined benefit plans pay predictable, secure benefits for life. Unlike most defined contribution plans, many defined benefit plans do not provide a "lump sum" distribution option. Rather, they provide annuity payments for life, and pay continuing annuity benefits to a participant's surviving spouse for the remainder of the spouse's life.

Defined benefit plans (including so-called "cash balance" plans that have been the subject of much controversy in recent years, due to their purported discrimination against older workers) have several important advantages compared to 401(k) plans and other defined contribution plans. First, participants bear the investment risk under defined contribution plans; their benefits are automatically reduced if their investments suffer a loss. Under a defined benefit plan, the employee receives a guaranteed benefit, and the employer is required to make up any shortfall resulting from investment losses. Second, because employers bear the investment risk, employees need not worry about investing in excessively conservative assets, a risk when a defined contribution plan is the participant's primary source of retirement income. Third, unlike defined contribution plans, defined benefit plans are insured by the PBGC. If plan assets are insufficient to satisfy liabilities upon plan termination and the employer is unable to make up the shortfall as a result of bankruptcy or otherwise, the PBGC guarantees a certain level of benefits. Fourth, the funding of defined benefit plans is more flexible. All benefits that accrue under a defined contribution plan during the year must be funded currently, even if the employer is experiencing severe financial difficulties. Thus, employer contributions to a defined contribution plan may be discontinued in down years, and there often is no way to make up for the lost contributions in later years. Under defined benefit plans, on the other hand, benefit accruals continue even if the employer is currently unable to afford to fund the plan.

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ERISA: Background

Private defined benefit plans are regulated pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"). After more than ten years of hearings and debate, Congress enacted ERISA in 1974, in response to perceived failures in the private pension system. Prior to ERISA, pension plans often were designed with such stringent vesting standards that few employees ever qualified for pensions, and many plans were inadequately funded. In addition, some plans were administered dishonestly or incompetently.

The most prominent example given for the need for greater regulation of private pension plans was the situation involving Studebaker Corporation's employees. In December 1963, following years of losses, Studebaker decided to close its manufacturing plant in South Bend, Indiana. The plant closing resulted in the dismissal of more than 5,000 workers and termination of a pension plan that covered 11,000 members of the United Automobile Workers. The plan's assets were far less than what was needed to provide the benefits vested under the plan. Approximately 3,600 retirees and active workers who had reached age sixty received the full pension promised under the plan, and roughly 4,000 other vested employees received lump-sum distributions of roughly 15% of the value of their accrued benefits. The remaining employees, who had not yet vested in any benefits under the plan, received nothing.

Among other mandates imposed by ERISA on pension plans are specified funding rules. These rules are designed to avoid Studebaker-type situations by requiring employers to fund the plan over time to ensure that there are sufficient assets to pay promised benefits. However, the rules do not require immediate funding of any shortfall. When bankrupt employers cannot afford to continue funding their plans, ERISA permits a "termination" of the plan, with the PBGC taking over administration. PBGC pays all promised benefits, generally subject to an annual maximum benefit (currently $49,500 per year for benefits that commence at age sixty-five, and actuarially reduced for pre-sixty-five benefit commencement). A number of prominent employers have terminated massively under-funded plans in recent years, including United Airlines, U.S. Airways, and Bethlehem Steel. Large plan terminations account for the bulk of PBGC's deficit.

The Crisis

The funded status of a pension plan is determined by two key variables, the interest rate and the return on plan assets. If interest rates decline, the present value of the promised benefits increases. If asset returns are poor, there are fewer funds available to pay benefits. This situation referred to as the "perfect storm" for pension plans, occurred in the early part of this decade. Interest rates have been historically low, driving up plan liabilities. In addition, the stock market decline that commenced in spring 2000 severely depleted plan assets. Although many sectors of the stock market have recovered, others have not. For example, the Nasdaq average is still more than 50% below its 2000 peak.

Because plan liabilities increased while assets decreased, ERISA's funding rules mandated higher contributions. These increases made it impossible for some employers to afford their plans. Other employers that did not meet ERISA's standard for terminating their plans instead "froze" the plans. A plan freeze preserves benefits accrued to date, but cuts off future benefit accruals. It is different than a plan termination because a termination requires full funding, which can be very expensive. A freeze has the same basic economic impact as a plan termination, without triggering the need to immediately fully fund the plan.

Decline in the Private Pension System

The statistics regarding the private pension system are sobering. In 1977, there were approximately 120,000 defined benefit plans maintained by private sector employers. This number increased to almost 173,000 by 1983, but declined to only 64,000 by 1995, and is below 50,000 now. In addition, many of the surviving plans are "frozen" and no longer provide for future benefit accruals. For example, IBM announced early in 2006 that it would freeze benefit accruals under its pension plan in 2008. Similarly, Verizon announced a freeze of its pension plan in December 2005. Other employers, such as Hewlett-Packard, have continued benefit accruals for existing participants, but do not permit new hires to participate in their plans.

The reasons for the decline are complex. It is at least in part market-driven, as 401(k) and other defined contribution plans are better-suited in many respects for a mobile workforce, the benefits being more "portable." Tighter governmental regulations on the amount of benefits that can be provided, and on disparities in the treatment of higher and lower-paid workers, have also made defined benefit plans less attractive to management. However, the expense of maintaining defined benefit plans probably has been the most important factor in the decline of the system.

The Pension Protection Act

The Pension Protection Act ("the Act") focuses on one problem with the pension system: limiting the PBGC's future exposure. In this area, it significantly tightens the plan funding rules. Some of the other key pension funding changes made by the Act include:

- Modification of the interest rates used to determine plan liabilities.
- Employers generally must now annually contribute the "normal cost" of the plan (i.e., the cost of benefit accruals for that year) and amortize over seven years any shortfall relating to prior years. This is significantly shorter than under prior law, which allowed some liabilities to be amortized over as many as thirty years.
- Special, additional funding rules for "at risk" plans, generally including most plans that are less than 70% funded, as determined using very conservative actuarial assumptions.

Likely Effect of the Act

Most of the provisions of the Act become effective January 1, 2008. The Act will likely be beneficial for employees of many *healthy* employers. Those employers will need to fund their plans more quickly, thereby providing more of a cushion in the event the employer later experiences financial difficulties that impact its ability to continue funding the plan.

However, the Act is likely to result in more pension plan terminations by less healthy employers. Because plans in poor shape are likely to be maintained by employers in precarious financial health, the "at risk" funding provision will mostly impact employers who can least afford to make additional contributions. In other words, employers who may struggle to make contributions required under prior law will now face larger obligations. This provision will probably drive some employers in precarious shape into bankruptcy. Once there, the additional funding obligations will make it easier for them to demonstrate to the bankruptcy court that they need to shed the plan to the PBGC in order to emerge from bankruptcy. Thus, more plans are likely to be terminated as a result of an act whose purported purpose is to shore up the pension system.

The Act is also likely to result in more plan freezes, even for employers that do not meet the standard for plan termination. By cutting off future benefit accruals, a plan freeze substantially reduces possible unexpected spikes in pension contribution obligations, and also reduces the risk that the plan will ever go into "at risk" status. Thus, any prudent employer has to consider whether continuing the plan is too risky for the employer's future financial health.

In sum, the Act seeks to preserve the private defined benefit pension plan system by putting plans on a surer financial footing. It will be interesting, however, to see if, consistent with the law of unintended consequences, it ends up further undermining that system.

Ninth Circuit U.S. Court of Appeals Holds United Parcel Service, Inc. Violated Americans with Disabilities Act, Forbidding Deaf Drivers

*By Matthew R. Estabrook & Erin Sheley**

Anyone who has traveled on an interstate highway has probably had the same experience: A car gets trapped in the blind spot of a truck, locked in by traffic in adjacent lanes. The truck's turn-signal flickers on and the truck begins to float into the car's lane. Frightened, the driver acts on instinct, blaring the horn to warn the encroaching truck. The truck driver, now alerted to the car's presence, changes course, narrowly averting disaster.

The Department of Transportation (DOT) likely had this scenario in mind when it issued regulations requiring drivers of commercial vehicles to pass a hearing test. The logic of the regulation is borne out by daily experience, not to mention the studies showing that deaf drivers pose greater risks on the road. On October 10, 2006, however, a panel of the United States Court of Appeals for the Ninth Circuit held that the United Parcel Service (UPS), in requiring this DOT-created test of all of its drivers, violated the Americans with Disabilities Act (ADA).

Influenced in part, perhaps, by an amicus brief filed by the Equal Employment Opportunity Commission, which argued that, since UPS already hires drivers with risk factors such as previous accidents, it unlawfully discriminates by excluding the risks inherent in deafness, the court imposed on UPS the burden of proving on a case-by-case basis that a given deaf candidate is unqualified to drive a package car safely. Beyond imposing a financial burden upon UPS itself, it could well be argued that this decision imposes needless safety risks on society at large and is at odds with the text of the ADA and applicable case law.

Factual Background

UPS considers applicants for package car driving positions solely from the ranks of its existing employees, who "bid" on them. As positions become available, they are considered in order of seniority. Potential drivers must then demonstrate that they satisfy a number of requirements, which vary somewhat from UPS district to UPS district. Generally such requirements include: 1) having completed an application; 2) being at least 21 years old; 3) possessing a valid driver's license; 4) having a clean driving record; 5) passing a UPS road test; and 6) passing the physical exam required by the Department of Transportation (DOT) for drivers of commercial vehicles.[1] The DOT physical criterion relevant to this case provides that:

> A person is physically qualified to drive a commercial motor vehicle if that person…. first perceives a forced whispered voice in the better ear at not less than 5 feet with or without the use of a hearing aid or, if tested by use of an audiometric device, does not have an average hearing loss in the better ear greater than 40 decibels at 500 Hz, 1,000 Hz, and 2,000 Hz with or without a hearing aid when the audiometric device is calibrated to American National Standard (formerly ASA Standard) Z24.5—1951.[2]

The current DOT physical standards do not, however, apply to all package car drivers, but only to those driving vehicles with a "gross vehicle weight" or "gross vehicle weight rating" (GVWR) of at least 10,001 pounds.[3] As of October 2003, the UPS fleet contained over 65,000 vehicles, about 6,000 of which have a GVR of less than 10,001 pounds and, thus, were not subject to the DOT hearing standard.[4] Nevertheless, for public safety and administrative efficiency, UPS has required all of its package-car drivers to meet the DOT physical standards, even if they go on to drive package cars that are not subject to DOT regulations.

Named plaintiffs Eric Bates, Bert Enos, Eric Bumbala, Babaranti Oloyede, and Edward Williams were UPS employees who had been denied positions driving package cars because they failed to meet the DOT hearing requirement for drivers of commercial vehicles. They brought suit, alleging that UPS's use of the DOT hearing requirements for drivers of package-cars not subject to DOT regulations constituted unlawful discrimination against deaf applicants in violation of the ADA. The United States District Court for the Northern District of California held that the plaintiffs satisfied their prima facie case of discrimination based upon UPS's categorical exclusion of deaf candidates from positions as package-car drivers, and upon the fact that at least one named plaintiff and one class member had met all criteria for the driving position, aside from the DOT physical.

Specifically, the district court found that Oloyede was "qualified" for the position on the basis of his good driving record, and that class member Elias Habib, a part-time UPS employee who drove a tug vehicle on the air ramp at a UPS facility and possessed a valid driver's license, was likewise qualified. The district court further found that UPS had failed to establish a business necessity defense under the ADA (as well as under the California Fair Employment and Housing Act[5] and Unruh Civil Rights Act[6]) and issued an injunction prohibiting UPS's exclusion of deaf employees from consideration for driving non-DOT-regulated vehicles.

The Decision of the Ninth Circuit Panel

On appeal, in an opinion written by Judge Berzon, the Ninth Circuit panel held, first, that because the alleged discrimination took the form of a qualification standard, the plaintiffs did not have the burden of establishing that the UPS hearing standard excluded individuals who were actually qualified to drive package trucks; second, that UPS had not established a business necessity defense under the ADA; and third, that the district court's injunction had intruded into UPS's business practices to the least degree possible. These holdings give short shrift to the plain language of the ADA and federal precedent requiring courts to choose the side of safety when considering an entity's claims of business necessity in close cases.

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"Qualified" Individuals under the ADA

The ADA prohibits covered employers from discriminating against a "qualified individual with a disability;" that is, an "individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[7] UPS argued that the plaintiffs were required to prove that they were "qualified" in order to make a prima facie case of discrimination under the ADA, pursuant to the familiar *McDonnell-Douglas* burden-shifting framework (which, in the case of pattern and practice discrimination, was articulated in *International Brotherhood of Teamsters v. United States*). However, the Ninth Circuit concluded that the burden-shifting framework was irrelevant, insofar as the alleged discrimination was embodied on the face of the contested policy.[8]

Instead, the court held that the plaintiffs must demonstrate their standing to sue by identifying at least one plaintiff "qualified" in the sense that he satisfied all other UPS prerequisites aside from the challenged DOT standard. Thus, considering whether Oloyede had suffered an injury sufficiently "concrete and particularized" and "actual or imminent" to establish standing under the first prong of *Lujan v. Defenders of Wildlife*,[9] the court imported the analysis of a Seventh Circuit holding in a Title VII disparate impact context: "[an unqualified] plaintiff would have no standing to sue… for he could not claim that he was injured… by defendant's use of an employment practice with an allegedly disparate impact."[10] The court applied this analysis to the issue of qualification under the ADA, concluding that the district court's factual findings regarding Oloyede's clean driving record and his earlier bids on a driving position established his having met the other prerequisites of the relevant UPS district. The court further found that the fact that Oloyede subsequently moved to another UPS position from which he was ineligible to bid on driving jobs did not undermine his standing, insofar as he had been "influenced by an allegedly discriminatory policy to avoid humiliating circumstances," and thus was "still aggrieved by that policy [because] he maintain[ed] a continuing interest in the benefit to which access ha[d] been denied."[11]

Significantly, the court held that to establish standing under the ADA, the plaintiffs did *not* have to prove that they were "qualified" in the sense that they *were actually capable performing the "essential function" of driving safely.*[12] UPS had argued to the contrary, pointing out that § 12112(a) of the ADA prohibits discrimination only against *qualified* disabled individuals—those who can perform a job's "essential functions." This argument appeared to find support in the Ninth Circuit's decision in *Kennedy v. Applause, Inc.*[13] which held, "in order to prevail on an ADA [claim], a plaintiff must establish… that he is qualified, that is, with or without reasonable accommodation (which he must describe), he is able to perform the essential functions of the job." The court rejected this UPS argument, emphasizing that § 12112(a) "does not stand alone in the ADA" and that it must be read in conjunction with § 12112(b)(6). This latter provision specifies certain kinds of prohibited discrimination, including "using qualification standards…that screen out or tend to screen out *an individual with a disability or a class of individuals with disabilities*" and lacks § 12112(a)'s express limitation to "*qualified*" individuals with disabilities. Thus, even though § 12112(a) does not prohibit discrimination against *unqualified* individuals, the court concluded that the plaintiffs did not bear the burden of proving that individuals who cannot meet the qualification standard are nevertheless "qualified with regard to the essential job function the standard addresses—here, safety."

In support of its construction, the court suggested that the § 12112(a) specification of a "qualified individual with a disability" would make no sense as applied to § 12112(b)(4), one of the other subsections describing prohibited discrimination, which refers to discrimination against a "qualified individual" known to associate with a disabled individual.[14] The court also relied on the legislative history of the ADA, which it stated, "treat[s] § 12112(b)(6) as a stand-alone provision, making no reference to the 'qualified individual with a disability' language in § 12112(a)."[15] Further, the court distinguished substantial Ninth Circuit precedents it conceded "have stated in general terms that ADA plaintiffs bear the burden of establishing that they are 'qualified individuals with disabilities,'" on the ground that those cases did not "for the most part" deal with challenges to a categorical qualification standard under § 12112(b)(6).

Business Necessity Defense

Of great concern to covered employers wishing to balance ADA compliance with their responsibility not to compromise public safety is the court's decision to uphold the district court's rejection of UPS's business necessity defense. The ADA allows the use of a qualification standard in hiring that would "screen out or tend to screen out an individual with a disability or a class of individuals with disabilities" if it is shown "to be job-related for the position in question and is consistent with business necessity."[16] *Morton v. UPS* established two situations in which a defendant may satisfy its burden under this defense in considering deaf applicants: 1) if "substantially all [deaf drivers] present a higher risk of accidents than non-deaf drivers," or 2) "there are no practical criteria for determining which deaf drivers present a heightened risk and which do not."[17]

In evaluating the expert testimony presented by UPS, the district court had observed that "all other things being equal, a driver with perfect hearing would likely pose less of a safety risk than a driver with impaired hearing," and that "there are, in theory at least, situations where a hearing driver would avoid an accident while a deaf driver, with all of the same training and skills except for hearing, would not."[18] Nonetheless, the district court found that this rationale was insufficient to establish business necessity, as "UPS had failed to demonstrate that those situations where hearing alone makes the difference between an accident and avoiding an accident would ever be confronted by a UPS package-car driver."[19]

The plaintiff's expert had testified that the most comprehensive study on the subject concluded that deaf male drivers pose an increased accident risk almost 1.8 times that of hearing male drivers, and that this study, if anything, under-represented the risk.[20] The district court dismissed this testimony, reasoning that "there was no significant difference in accident rates between deaf and non-deaf females" and that this unexplained gender anomaly served to "negate any conclusion that all or substantially all deaf drivers present a heightened

risk of accidents."[21] The district court did not address, however, UPS's undisputed evidence that its drivers must operate in situations in which a lack of hearing is most dangerous—i.e., when reliance on visual cues are diminished by the darkness of early morning or night, or inclement weather. The district court also disregarded UPS's evidence that most UPS drivers operate in dense urban and commercial areas, in which deaf drivers are particularly dangerous to bystanders.

In concluding that the district court's decision was not clearly erroneous, the Ninth Circuit reasoned that evidence demonstrating that a hearing driver is "generally safer" than a deaf driver with similar skills and characteristics "still does not address the question of whether there are *some* deaf drivers who are as safe or safer than some or all of the hearing drivers that UPS employs."[22] The court described the concept of risk as individual, rather than aggregate:

> How likely is it that the individual driver will get into an accident? If there is, for example, a one percent chance that hearing drivers who have had two prior accidents will get into an accident, yet UPS hires them, and a one percent chance that deaf drivers generally will get into an accident, it is excluding a subgroup no less safe than another subgroup not excluded, and is therefore discriminatory.[23]

The court likewise upheld as not clearly erroneous the district court's findings on the second prong of the *Morton* test—that UPS had failed to prove that it could not modify its existing training and assessment program to determine which deaf drivers are safe. UPS had cited the Supreme Court's holding in *Western Airlines, Inc. v. Criswell*, that if an employer demonstrates a "credible basis in the record" for its safety standard the trier-of-fact should defer to that judgment in a close case, due to the reasonable need to err on the side of caution.[24]

In this case the plaintiffs' expert testified that "there is no evidence available at this point that can point to characteristics among individuals who are deaf or hearing impaired that say this one may be more likely to crash because of the hearing-impairment than another one."[25] The district court had found this testimony non-dispositive, and observed that UPS had failed to consider "obvious" criteria such as whether the deaf driver had completed rehabilitative driver training, possessed a good driving record, previously driven commercial vehicles successfully, or passed a supplemental driving test.

In supporting the district court's analysis in this regard, the court emphasized that its holding turned upon "UPS's failure to adduce any persuasive proof suggesting that its standard is job-related and consistent with business necessity."[26] Rather than evaluating the risks inherent in deaf drivers generally, the court suggested, UPS ought to have evaluated whether it could have developed external procedures for making distinctions on an individual basis.

The District Court's Injunction

The final ADA issue considered by the panel was UPS's challenge to the district court's order requiring that "UPS shall cease using the DOT hearing standard to screen applicants" and stating that if individuals fail the DOT hearing test but meet all other threshold requirements, "UPS shall perform an individualized assessment" of the ability of those individuals, including utilizing "an interactive process designed to identify specific accommodations that would enable the deaf individual to obtain driving work" in non-DOT regulated cars. The court rejected UPS's argument that the DOT standard was the only proven means of screening deaf drivers who "present a genuine risk to safety," stating it had already upheld the district court's finding of facts to the contrary. The court also rejected the argument that the injunction required UPS to use a "specially designed" test "invented by the court," characterizing it as requiring merely *some* form of individual assessment in lieu of categorical exclusion. The court thus concluded the injunction "intruded into UPS's business practices and discretion to the least degree possible under the ADA."

Analysis and Conclusions

The Court's Holding on "Qualification"

In attempting to carve out an exception to the well-established requirement that an ADA plaintiff bears the burden of proving that he is qualified to perform the essential functions of the job he seeks,[27] the court blithely substituted a debatable grammatical conclusion for the straightforward language of two provisions of the statute. Section 12112(a) states: "No covered entity shall discriminate against a *qualified individual* with a disability because of the disability of such individual" (emphasis added). Under the heading "Construction," § 12112(b) states "*As used in subsection (a)*, the term 'discriminate' includes" conduct in the following list. The list includes § 12112(b)(6)(A), which the court characterizes as "stand-alone" but which is, per the clear words of the statute itself, simply one of many forms of conduct which constitute discrimination prohibited by § 12112(a): "utilizing standards, criteria, or methods of administration… that have the effect of discrimination on the basis of disability." The sole function of the provision—like all of the others in § 12112(b)—is to define the discrimination that is prohibited *against qualified individuals.* Thus, a standard discriminating against *unqualified* individuals, would not be prohibited under § 12112(a), and the plaintiffs should have had the same burden of proving qualification imposed by the case law under other provisions of § 12112.

The grammatical contention upon which the court base its interpretation—that another subsection, § 12112(b)(4), would make no sense if it were deemed to be governed by the rule of § 12112(a)—seems almost disingenuous. Section 12112(b)(4) lists as a form of discrimination under § 12112(a) "excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association." This provision simply protects the disabled individual's interest in his associational rights, which would be adversely affected if his associates or relatives were denied employment opportunities on the basis of his disability. Section 12112(b)(4) is no more "stand alone" than the court claims § 12112(b)(6) to be: it simply articulates another form of discrimination against a disabled person, in a situation where a non-disabled person could be the qualified individual actually excluded.

Furthermore, other provisions in the ADA reveal no intention to set § 12112(b)(6) apart from the other definitional

provisions so as to give standing even to non-qualified employees. 42 USC § 12111(8) provides that "for the purposes of this title, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job." Thus, the statutory language itself urges here that UPS's written standards requiring that all applicants for package-car driving positions pass the DOT physical should be considered *as evidence* of what constitutes qualification, not a unique form of discrimination requiring broader protections.

The Court's Holding on UPS's Business Necessity Defense

The second part of the panel's decision is of greater concern, due in part to the statistics it cites which draw attention to the danger the holding could impose on the public. In *Criswell*, the Supreme Court stated "[w]hen an employer establishes that a job qualification has been carefully formulated to respond to documented concerns for public safety, *it will not be overly burdensome* to persuade a trier of fact that the qualification is reasonably necessary to safe operation of the business. The uncertainty implicit in the concept of managing safety risks always makes it 'reasonably necessary' to err on the side of caution in a close case."[28] Here, UPS responded to no less documented a concern than the Department of Transportation's own standards requiring drivers of commercial vehicles be able to hear, codifying the recognition that driver of a large vehicle, with correspondingly large blind spots and the ability to do significantly more damage than a private car, must be able to react instantly to audio signs of danger, such as horn blasts.

In this case, the experts for both the plaintiffs and the defendant testified that no means of distinguishing between "safe" and "unsafe" deaf drivers existed that would not create ethical or safety concerns by requiring on-road experiments. The panel flouted the precedent instructing courts to err on the side of safety by proposing its own series of hypothetical "individualized" screening tests, which even the plaintiffs' expert did not recognize as safe or effective. The panel's almost cavalier dismissal of statistical evidence that deaf male drivers are nearly twice as likely to get into accidents as hearing male drivers (on the grounds that a lack of similar statistics regarding females undercuts its reliability; although the majority of UPS drivers, and truck drivers generally, are male) has caused concern. The first prong of the *Morton* test only requires a showing—made in this case by the study of male drivers—that "substantially all" deaf drivers present a higher risk than hearing drivers.[29] The new burden imposed by the court here—that the defendants prove there are not "*some* deaf drivers who are as safe or safer than some or all of the hearing drivers" has no basis in precedent.[30]

The *Bates* holding—contrary to the Supreme Court's direction in *Criswell* and the Ninth Circuit's holding in *Morton*—creates a situation in which essentially no physical qualification standard imposed by an entity out of concern for the public safety will suffice to meet either prong of the *Morton* test. In practice, *Bates* demands a case-by-case scrutiny based upon each individual applicant, to prevent the exclusion from employment of even a single member of a disabled class who is capable of passing some sort of screening test. This requires that businesses undertake safety and medical analyses for which they are not qualified, and assume the risk of harming innocent parties—including the applicants themselves—in the process.

Endnotes

1 Bates v. United Parcel Service, Inc., No. CV-99-02216, slip op. at 17480 (9th Cir. Oct. 10, 2006).

2 49 C.F.R. § 391.41(b)(11).

3 49 U.S.C. § 31132(1)(A); 49 C.F.R. § 391.21.

4 Bates v. United Parcel Service, Inc., No. C99-2216, 2004 U.S. Dist. LEXIS 21062 at *8 (Oct. 21, 2004 N. D. Cal.).

5 Cal. Gov't Code §§ 12900-12996.

6 Cal. Civ. Code § 51.

7 42 U.S.C. § 1211(8).

8 *Supra* note 1, at 17485.

9 Lujan v. Defenders of Wildlife, 504 U.S. 535, 560-61 (1992).

10 Melendez v. Ill. Bell Tel. Co., 79 F.3d 661, 668 (7th Cir. 1996).

11 *Supra* note 1, at 17489.

12 *Id.* at 17493.

13 90 F.3d 1477, 1480-81 (9th Cir. 1996).

14 *Supra* note 1, at 17495.

15 *Id.* at 17496.

16 42 U.S.C. 12112(b)(6)

17 272 F.3d 1249, 1263 (9th Cir. 2001).

18 *Supra* note 4, at *90.

19 *Id.*

20 *Id.* at *80.

21 *Id.*

22 *Supra* note 1, at 17508.

23 *Supra* note 4, at *79 (citing *Morton v. UPS*, 272 F.3d 1249, 1264 (9th Cir. 2001)) (citations omitted).

24 472 U.S. 400, 419-20 (1985).

25 Appellant's Br. 39.

26 *Supra* note 23, at 1263.

27 *See, e.g.*, Cripe v. City of San Jose, 261 F.3d 877, 884-85 (9th Cir. 2001)("If a disabled person cannot perform a job's 'essential functions' (even with a reasonable accommodation) then the ADA's employment protections do not apply.); *Zukle v. Regents of the Univ. of Cal.*, 166 F.3d 1041, 1046 (9th Cir. 1999); *Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1480-81 (9th Cir. 1996)(In order to prevail on an… ADA [claim], a plaintiff must establish [among other things]… that he is qualified, that is, with or without reasonable accommodation (which he must describe), he is able to perform the essential functions of the job").

28 Western Airlines, Inc. v. Criswell, 472 U.S. at 419 (emphasis added).

29 *Supra* note 23, at 1263.

30 *Supra* note 1, at 17507-08 (emphasis original).

Litigation

Thoughts on the E-Discovery Amendments to Federal Rules of Procedure

*By Donald A. Daugherty, Jr.**

On December 1, 2006, amendments to the Federal Rules of Civil Procedure, addressing the discovery of electronically stored information ("ESI"), took effect. The amendments followed six years of work by the Committee on Rules of Practice and Procedure of the U.S. Judicial Conference to minimize the difficulties of applying to ESI—the most common form of data storage today—rules that were originally designed for information stored on paper.

The amendments address five related areas: the discussion of "e-discovery" issues early in a lawsuit (Rules 16(b) and 26(f) and Form 35); the form of production, including the definition of what constitutes a "document" (Rules 26(a), 33, 34(a) & (b), and 45); who bears the burden of retrieving, reviewing and producing ESI that is rarely or never used and difficult to access (Rule 26(b)(2)); how to deal with the inadvertent disclosure of privileged ESI (Rule 26(b)(5)); and the creation of a "safe harbor" from sanctions when discoverable ESI is destroyed (Rule 37(f)).

There exists, besides the various committee notes and comments to the new rules, an abundance of articles discussing these matters already. Thus, with the land well-plowed, this article tries to offer some fresh observations, having written and spoken about the new rules since they were initially contemplated several years ago.[1]

Although the rules of civil procedure, and especially those relating to discovery, are usually arcana left for outside litigators, in-house attorneys are a primary audience for the amendments. Often, well before outside counsel is aware of a dispute, a company should reasonably anticipate a lawsuit, thereby triggering its duty to preserve potentially discoverable information. Thus, in-house counsel will be the first line of defense against the spoliation of ESI. Similarly, the Rule 37 safe harbor anticipates that a party will have effective document retention and management policies and programs in place, and a company cannot access the safe harbor if it first implements and follows such policies after the prospect of litigation arises. Thus, in-house counsel cannot wait until a lawsuit appears on the horizon, but must proactively take steps to make sure that ESI considerations are incorporated into a company's policies and program.

In fact, an effective document retention and management program depends on actions taken before there is the possibility of a lawsuit. For example, litigation response teams with responsibility for ESI preservation efforts must be identified, and besides in-house counsel, may include representatives from human resources and information technology departments, as well as from the business units involved in a specific lawsuit. Similarly, employees must be trained on the company's data retention policies, and regular internal audits should be conducted to ensure that the employees are complying with those policies. Without these, placing a litigation hold on routine document destruction when there is notice of a lawsuit will be less effective and, perhaps as importantly, less likely to persuade a court that the company acted in good faith to avoid spoliation.

Before the amendments, most sanctions for spoliation of ESI were limited to cases of obstructive behavior or intentional destruction of evidence.[2] In her fifth decision in *Zubulake v. UBS Warburg LLC*, Judge Schira Scheindlin wrote: "The subject of the discovery of electronically stored information is rapidly evolving…. Now that the key issues have been addressed and national standards are developing, *parties and their counsel are fully on notice*…."[3] In light of this statement and the widespread publicity the *Zubulake* cases received in legal circles, attorneys generally, and certainly those appearing before Judge Scheindlein, were charged with knowledge of their ESI duties at least two years ago. Now that the new rules have taken effect, attorneys appearing in all federal courts (and many state courts, as well) will be expected, for example, to have discussed ESI discovery with their adversaries early in the case as required by Rule 26(f) and advised the court whether its Rule 16 order should include specific direction on ESI-related issues, such as providing for the "clawback" under Rule 26(b)(5) of privileged information that is produced inadvertently. Courts will have little tolerance for litigants who do not have adequate document retention and management policies that address ESI issues and provide for the placement of effective litigation holds.

The use of an adversary's spoliation of ESI as a tactic for gaining advantage in a lawsuit has mostly occurred in cases of "asymmetrical warfare." That is, in litigation against a larger business organization possessing many terabytes of ESI, an individual can demand that his or her adversary strictly comply with their discovery responsibilities, knowing that it will be relatively easy to comply with his or her own responsibilities because the amount of ESI generated by one person is much more manageable. Cases like *Zubulake* seem to reflect this.[4] By contrast, in litigation between business organizations, an element of "mutually assured destruction" has existed; if one party made unreasonably burdensome ESI request on the other, it would be certain to be asked to do likewise.

However, even before the amendments took effect, many organizations with recurring types of litigation (e.g., product liability) already had implemented meaningful ESI retention and management programs.[5] Now, with the amendments spurring them on, many, if not most, larger businesses will likely appreciate the importance of such programs. A business that lacks effective ESI programs and that becomes a party to a lawsuit will not be able to count on its adversary giving it leeway in complying with its ESI discovery duties.

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Some important terms used in the amendments will need to be further fleshed out by the courts. For example, apart from backup tapes, when is ESI "not reasonably accessible" under Rule 26(b)(2)(B), and what constitutes "good cause" for requiring that inaccessible data be produced? What conditions will a court put on a party when it grants a request "to inspect, copy, test or sample" ESI in an adversary's possession under Rule 34(a)? What are the "exceptional circumstances" under Rule 37 that will close the safe harbor even when ESI is lost due to "the routine, good-faith operation" of a company's information system?

Pre-amendment case law will provide some guidance in interpreting the amendments; in fact, the committee notes to the amendment to Rule 26(b)(2) explicitly cite the seven factors listed by Judge Scheindlin in *Zubulake* for deciding when production expenses should be shifted.[6] However, the holdings of the pre-amendment cases are not uniform and courts will need to consider the different approaches in light of the amendments and choose among them, or clarify the amendments with new case law.[7]

Endnotes

1 *See, e.g.,* Donald A. Daugherty, "Guidance On E-Discovery In The Federal Courts Percolating Out Of The Civil Rules Advisory Committee," 5 Engage 1, 86 (April 2004).

2 *See, e.g.,* PML N. Am., LLL v Hartford Underwriters Ins. Co., No. 05-CV-70404–DT, 2006 WL 3759914 (E.D. Mich. Dec. 20, 2006); Coleman Parent Holdings, Inc. v. Morgan Stanley & Co., No. CA 03-5045 AI, 2005 WL 674885 (Fla. Cir. Ct. March 23, 2005); United States v. Philip Morris USA, Inc., 327 F. Supp.2d 21 (D.D.C. 2004); Mosaid Techs. Inc. v. Samsung, 348 F. Supp.2d 332 (D.N.J. 2004).

3 Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 440 (S.D.N.Y. 2004) (emphasis added).

4 *See also* Wachtel v. Health Net, Inc., No. CIV.01 4183, 2006 WL 3538935 (D.N.J. Dec. 6, 2006); Byers v. Illinois State Police, No. 99 C 8105, 2002 WL 1264004 (N.D. Ill. June 3, 2002); *but see* Minnesota Mining & Mfg. v. Pribyl, 259 F.3d 587 (7th Cir. 2001) (former employee in trade secrets case sanctioned after responsive information on his laptop was destroyed when he downloaded six gigabytes of music onto it).

5 *See, e.g.,* Sue Reisinger, "Bringing It All Back Home,"Corporate Counsel (Dec. 5, 2006), *available at* http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1165244462425.

6 *See* Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 322 (S.D.N.Y. 2003).

7 *See, e.g.,* Hagemeyer N. Am., Inc. v.Gateway Data Scis. Corp., 222 F.R.D. 594 (E.D. Wis. 2004) (discussing different approaches for determining when costs of burdensome e-discovery production should be shifted to requesting party).

Fifth Consecutive State High Court Rejects Medical Monitoring

*By Mark A. Behrens**

Recently, the Mississippi Supreme Court, in *Paz v. Brush Engineered Materials, Inc.*, became the fifth consecutive state court of last resort to reject a cause of action for medical monitoring in the absence of an identifiable injury.[1] The case came to the court on a certified question from the Fifth Circuit Court of Appeals and involved employee claims of beryllium exposure while working at defendants' manufacturing facilities. Class action plaintiffs sought the creation of a court-supervised medical monitoring fund to detect the possible development of Chronic Beryllium Disease, typically a latent disease which impairs the lungs and often causes death. The court held that adoption of a medical monitoring action for asymptomatic plaintiffs "would require an unprecedented and unfounded departure from the long-standing traditional elements of a tort action."[2] The Alabama, Nevada, Kentucky, and Michigan Supreme Courts—the four other courts of last resort to recently consider the issue—have all rejected medical monitoring absent a present physical injury.

Other High Courts

The Alabama Supreme Court in *Hinton v. Monsanto Co.* rejected a medical monitoring claim brought by a claimant exposed to a toxin allegedly released into the environment.[3] The court stated: "To recognize medical monitoring as a distinct cause of action . . . would require this court to completely rewrite Alabama's tort-law system, a task akin to traveling in uncharted waters, without the benefit of a seasoned guide"—a voyage on which the court stated it was "unprepared to embark."[4] After discussing a number of public policy concerns, such as a potential flood of claims that could swamp defendants, the court concluded, "we find it inappropriate . . . to stand Alabama tort law on its head in an attempt to alleviate [plaintiff's] concerns about what *might* occur in the future. . . . That law provides no redress for a plaintiff who has no present injury or illness."[5]

In *Badillo v. American Brands, Inc.*, the Nevada Supreme Court rejected claims by smokers and casino workers who sought a court-supervised medical monitoring program to diagnose alleged tobacco-related illnesses.[6] The court described medical monitoring as "a novel, non-traditional tort and remedy,"[7] and concluded that, "[a]ltering common law rights, creating new causes of action, and providing new remedies, for wrongs is generally a legislative, not a judicial function."[8]

The Kentucky Supreme Court rejected medical monitoring in *Wood v. Wyeth-Ayerst Laboratories*, where plaintiffs sought a court-supervised medical monitoring fund to detect the possible onset of primary pulmonary hypertension from ingesting the "Fen-Phen" diet drug combination.[9] The court stated that, "a cause of action in tort requires a present physical injury to the plaintiff."[10] "To find otherwise would force us to stretch the limits of logic and ignore a long line of legal precedent."[11] The court concluded: "Traditional tort law militates against recognition of such claims, and we are not prepared to step into the legislative role and mutate otherwise sound legal principles."[12]

The Michigan Supreme Court in *Henry v. The Dow Chemical Co*. rejected a request to establish a medical screening program for possible negative effects from dioxin exposure.[13] The court said that adoption of a medical monitoring cause of action would create a "potentially limitless pool of plaintiffs" and "could drain resources needed to compensate those with manifest physical injuries and a more immediate need for medical care."[14] The court concluded that recognition of medical monitoring was not suitable for resolution by the judicial branch.[15]

The U.S. Supreme Court Position

These decisions draw support from the United States Supreme Court's decision in *Metro-North Commuter R.R. Co. v. Buckley*, where the Court rejected a medical monitoring claim under the Federal Employers' Liability Act.[16] The *Metro-North* Court explained that serious policy concerns militate against adoption of "a new, full-blown tort law cause of action."[17] These policy concerns include the difficulty of identifying which medical monitoring costs exceed the preventative medicine ordinarily recommended for everyone, conflicting testimony from medical professionals as to the benefit and appropriate timing of particular tests or treatments, and each plaintiff's unique medical needs.[18] The Court also considered that defendants would be subject to unlimited liability and a "flood of less important cases" would drain the pool of resources available for meritorious claims by plaintiffs with serious, present injury.[19] Finally, the Court rejected the argument that medical monitoring awards are not costly and feared that allowing medical monitoring claims could create double recoveries because alternative sources of monitoring are often available, such as employer-provided health plans.[20]

CONCLUSION

A fundamental tort law principle has been that a plaintiff must have an identifiable injury to obtain a recovery. The courts have developed this filter to prevent a flood of claims, provide faster access to courts for those with legitimate and serious claims, and ensure that defendants are held liable only for genuine harm. Medical monitoring claims brought by asymptomatic plaintiffs conflict with the traditional rule.[21] Judicial adoption of medical monitoring claims also would be likely to foster litigation.[22] Almost everyone comes into contact with a potentially limitless number of materials that could be argued to warrant medical monitoring relief. Courts would be

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forced to decide claims that are premature (because there is not yet any physical injury) or actually meritless (because there never will be). The truly injured might be adversely impacted by a diversion of resources to the non-sick, and courts would face the difficult and time-consuming task of developing a system for the administration of medical monitoring claims. More courts will be asked to decide medical monitoring claims in the future. They may follow the Supreme Court and the numerous state courts that have recently declined to adopt these novel claims.

Endnotes

1 2007 WL 14891 (Miss. Jan. 4, 2007).

2 *Id*. at *4.

3 813 So. 2d 827 (Ala. 2001).

4 *Id.* at 830.

5 *Id*. at 831-32.

6 16 P.3d 435 (Nev. 2001).

7 *Id.* at 441.

8 *Id.* at 440.

9 82 S.W.3d 849 (Ky. 2002).

10 *Id*. at 852.

11 *Id*. at 853-54.

12 *Id.* at 859.

13 701 N.W.2d 684 (Mich. 2005).

14 *Id.* at 689.

15 *See id.* at 694-95.

16 521 U.S. 424 (1997).

17 *Id.* at 440.

18 *See id.* at 441-42.

19 *Id*. at 442.

20 *See id.* at 443-44.

21 *See* Victor E. Schwartz et al., *Medical Monitoring—Should Tort Law Say Yes?*, 34 Wake Forest L. Rev. 1057 (1999); Victor E. Schwartz et al., *Medical Monitoring: The Right Way and the Wrong Way*, 70 Mo. L. Rev. 349 (2005).

22 *See* James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring,* 53 S.C. L. Rev. 815 (2002).

Professional Responsibility & Legal Education

Mass Fraud in Mass Tort Litigation?

*By Lester Brickman**

Last year, a U.S. District Court Judge, Janis Jack, described by National Public Radio as "a bridge-playing, whiskey drinking Clinton appointee who is a former nurse," fired a shot that is still reverberating throughout the mass tort world. Judge Jack was presiding over 10,000 claims of injury from exposure to silica dusts—claims which had been removed from state court to federal court and then assembled into an multidistrict litigation (MDL) proceeding. The genesis of this MDL was a deliberate if not brilliant strategy undertaken by the defendants. Judge Jack issued a report documenting pervasive fraud in the production of medical evidence.[1] This fraud was discovered when Judge Jack permitted defendant manufacturers to extensively question the doctors who had diagnosed the alleged injuries and ordered the production of extensive records. While this sounds like standard operating procedure, most judges would not have permitted the extensive discovery she allowed. Indeed, this massive fraud would never have come to public attention but for a courageous judge willing to, in effect, put the tort system on trial. Judge Jack's report highlighted a glaring defect in our civil justice system: the use of fraudulent medical diagnoses and scientific testimony in mass tort litigation and the lack of any effective mechanism to punish the fraudsters and thereby deter future instances of fraud.

In her report, Judge Jack largely corroborated findings that I published of fraudulent production of medical evidence used in asbestos litigation.[2] Here, litigants are recruited at mass screenings sponsored by lawyers. Mobile X-ray vans churn out hundreds of thousands of X-rays on an assembly line basis, which are read by a handful of doctors called B Readers, who are selected by plaintiffs' lawyers. The "product" that most of these doctors appear to be selling to lawyers, in exchange for millions of dollars a year in fees, is a *predetermined* percentage of findings of disease ranging from 40-90% for the thousands of persons X-rayed.[3] But independent medical doctors conclude that upwards of 90% of these findings of disease are misdiagnoses, which is consistent with the outcome of most medical studies that the prevalence of asbestosis, a lung disease resulting from extensive exposure to asbestos, is, at most, in the 1-4% range. When these doctors are subpoenaed to produce records of *all* of their X-ray readings or diagnoses done for the lawyers, that is, both the number of positive-for-disease and negative findings, which would thereby reveal their "signature" percentages of positive findings, they refuse to do so. The reason is pretty apparent. It is that this data amounts to "smoking gun" evidence of fraud. Some plead the Fifth Amendment when asked about their diagnoses.

Among the evidence of fraud that led Judge Jack to do what no other judge had ever permitted was the revelation that almost 70% of the 10,000 silica claimants had previously filed asbestosis claims which had been retreaded as silicosis claims, sometimes by the same doctor who had found asbestosis. When the X-rays that were previously read as indicating asbestosis were reviewed specifically for silicosis per the direct instruction of plaintiffs' lawyers, there were no findings of asbestosis. It is as if the silicosis cured the asbestosis. Having both diseases is a phenomenon so rare that most pulmonologists have never seen a single such case. But almost 7,000 dual disease claimants were appearing before Judge Jack.

Judge Jack concluded that "it is apparent that truth and justice had very little to do with these diagnoses . . . [Indeed] it is clear that the lawyers, doctors and screening companies were all willing participants" in a scheme to "manufacture. . . [diagnoses] for money."[4] This is the equivalent of a finding of fraud.

Substantially the same practices used to generate medical evidence for asbestos and silica litigations have been replicated in other mass tort litigations.

Several law firms and about ten entrepreneurial echocardiogram companies spent millions of dollars to set up makeshift "echo mills" in hotel rooms and elsewhere to administer echocardiograms to users of the diet drug "fen-phen." Approximately a few thousand users suffered heart valve injuries, but tens of thousands responded to advertisements for screenings to find out whether they qualified for compensation. To process these thousands of claims, a few cardiologists began mass producing diagnoses in much the same way as is done for asbestos litigation. A prominent Duke cardiologist and a panel of medical experts reviewed 968 sets of echocardiograms that had *passed* an audit procedure instituted when it became apparent that thousands of bogus claims were being paid millions of dollars. They concluded that 70% of these "approved" echocardiograms were either fraudulently administered or altered after the fact in order to show evidence of injury that was not there.[5] This is why it has been estimated that $6 billion, which amounts to 70% of the money paid for the most serious claims, were fraudulent or in error and went to claimants who were not sick, and their lawyers.

Screenings were also used by lawyers in silicone breast implant litigation to gin up tens of thousands of claims of connective tissue and rheumatoid diseases that were supported by specious diagnoses by a few dozen doctors who were mostly referred by the lawyers. Cursory examinations, sometimes in lawyers' offices that doubled as examining rooms, were done on an assembly line basis by cardiologists charging as much as $6,000 per examination and diagnosing more than 90% of the women with symptoms that would make them eligible for compensation. However, the National Academy of Sciences' Institute of Medicine concluded that "there is no evidence that silicone breast implants contribute to an increase in

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autoimmune (connective tissue) diseases… and [there is] no link between implants and connective disease or rheumatic conditions." Nonetheless, more than $4 billion has been paid by the manufacturers for connective tissue and autoimmune disease claims.

Mold litigation is another example of a mass tort infected with large scale generation of fraudulent medical and scientific evidence. Mold is a ubiquitous fungus to which everyone is exposed. According to the American College of Occupational and Environmental Medicine, current scientific evidence does not support the proposition that molds or the mycotoxins produced by molds, whether inhaled in home, school, or office environments, adversely affect human health.[6] The scientific evidence notwithstanding, mold litigation, a multi-billion dollar industry, proceeds because a small number of experts paid fees of as much as $10,000 a day regularly testify that mold causes a terrifying array of diseases from lung cancer to cirrhosis of the liver.

The lesson to be drawn from these observations is that fraud works in these mass tort litigations. While there are ongoing federal investigations of silica and asbestos litigation in New York and of fen-phen litigation in Philadelphia, it does not appear that federal prosecutors are prepared to step into the breach by indicting the doctors and scientific experts. This appears to be so because "reasonable doubt" is virtually inherent in a process that relies on a "battle of the experts" for evidence of fraud. Doctors and scientific experts are obviously well aware of their effective immunity from prosecution. They do not need a "get out of jail free" card because they already have a "never go to jail" card.

Part of the solution is for judges to approach mass tort litigation with a healthy skepticism when mass claims have been generated by the type of litigation screenings used in asbestos, silica, fen-phen and breast implant litigations. Integral to these litigation screenings are mass-produced medical services which are manufactured for money—practices which flourish when courts insulate them from the extensive discovery presided over by Judge Jack—as some courts continue to do. Another response is to enact federal legislation to allow defendants in mass toxic tort litigations to petition the federal courts to bring together thousands of individual claims filed in state and federal courts, into an MDL proceeding to examine the medical evidence in support of the claims of disease and the medical/scientific evidence on causation, that is, the evidence linking the product to the disease.

But still more is necessary to curb fraud. State and federal legislation is needed to empower prosecutors to pierce doctors' and scientific experts' effective immunity from criminal prosecution. Drafting such legislation to distinguish between legitimately disputed diagnoses or theories of causation and manufacturing medical or scientific evidence for money is a daunting task but one that we must undertake.

Endnotes

1 *In re Silica Prods. Liab. Litig.*, No. MDL 1553, 398 F.Supp. 2d 563 (S.D. Tex. 2005) (*hereinafter* MDL 1553).

2 See Lester Brickman, *On The Theory Class's Theory of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 Pepp. L.Rev. 33 (2004).

3 *Id.*, at 86. *See also* MDL 1553at 607-08(noting that one B reader, Dr. Ray Harron found lung opacities consistent with silicosis in 99.6% of the 6,350 B reads performed for plaintiffs in the MDL case, and that, for the 1, 807 of the same plaintiffs whom he had previously screened for asbestos exposure, Harron found opacities consistent with asbestosis, but not silicosis, in 99.1% of the examinees).

4 MDL at 635 (referring specifically to Dr. Harron).

5 *See* Report of Dr. Joseph Kisslo, M.D., On the Integrity of Pre-Stay PADL Matrix Claims at 1, 5, 21, Nov. 9, 2004, In re: Diet Drugs Prods. Liab. Litig., MDL No. 1203 (E.D. Pa.).

6 *See generally* Adverse Human Health Effects Associated with Molds in the Indoor Environment, American College of Occupational and Environmental Medicine (2002), *available at* http://www.acoem.org/position/results.asp?CATA_ID=52.

Morality, Professionalism, and Happiness

*By Benjamin P. Hayek**

Not long ago, with the practice of law came prestige, respect, and personal fulfillment.[1] Not long ago, American lawyers viewed their highest goal to be "the attainment of wisdom that lies beyond technique—a wisdom about human beings and their tangled affairs that anyone who wishes to provide real deliberative counsel must possess."[2] Not long ago, lawyers understood that the best among them became not only an expert in the law, but a person of sound practical judgment.[3] Not long ago, lawyers were "figure[s] of wisdom and judgment, zealously representing clients but always respecting the dignity of the truth."[4] Not long ago, but no longer.

Now, lawyers find it increasingly difficult to believe that their work provides them intrinsic fulfillment of any kind.[5] "Polls have found that public respect for lawyers is close to an all time low."[6] They are often viewed by non-lawyers as "manipulative and deceitful."[7] Recent studies suggest that lawyers are two to three times more likely to suffer from depression than society as a whole,[8] and suffer a higher incidence of depression than any other occupation in the United States.[9] Some questioned whether incoming law students simply brought their depression with them,[10] but subsequent research showed that incoming students suffer from depression at approximately the same rate as the general population.[11] The implication seems obvious: the source of lawyers' unhappiness is the one thing they all have in common—lawyering.[12]

One place to begin looking for solutions to the problem is the modern law school experience. As everyone who has graduated from law school in the last quarter-century well knows, what occurs between the first day of class and graduation is not only a transformation of mind but, all too often, spirit.[13] In varying degrees students are forced to set aside their prior identities,[14] and to adopt the so-called zealous "neutral partisan" ideal: entailing that "one . . . does whatever possible, within the bounds of the law, to serve her client's interests regardless of what the lawyer herself thinks of the client's ends."[15] "Many students become convinced that professionalism means being willing to pursue the ends of others[] irrespective of the means."[16] Hence, many of today's embryonic lawyers wander the halls of law schools "demoralized, dispirited, and profoundly disengaged from the [traditional] law school experience."[17]

As a result, a significant number of law school graduates enter the legal world armed with the weapons of advocacy but also the delusion that they can completely separate their personal from their professional lives and, in turn, their personal from their professional moralities.[18] Perhaps not surprisingly, then, many new lawyers find their initial foray into the legal world an unhappy one:

> [T]he new attorney may begin her professional career with the values and convictions that once guided her life in shambles. Today's post-realist teachers are often masters at showing students that their most cherished beliefs are simply a matter of opinion or supportable only by some more or less plausible arguments that could be countered by other more or less plausible arguments. By making every position respectable, law school can destroy a student's sense of integrity and personal self-worth, and leave her with the feeling of being unmoored with no secure convictions and hence no identity at all.[19]

Dean Kronman refers to these problems as aspects of the collapse of the "lawyer-statesman" ideal, which "is, in essence, a crisis of morale," and has created "a crisis of identity in the legal profession.[20] It has raised doubts about whether the practice of law can continue to be an intrinsically satisfying pursuit that offers deep personal meaning to those in it."[21] This spiritual crisis, his argument continues, has "been brought about by the demise of an older set of values that until quite recently played a vital role in defining the aspirations of American lawyers."[22] Even worse,

> the demise of the lawyer-statesman ideal means that the lawyers who lead the country will on the whole be less qualified to do so than before. They will be less likely to possess the traits of character—the prudence of practical wisdom—that made them good leaders in the past. Like ripples on a pond, the crises of values that has overtaken the legal profession in the last twenty-five years must thus in time spread through the whole of our political life with destructive implications for lawyers and nonlawyers alike.[23]

Leaving for another day an exploration into the intellectual motivation behind purging the lawyer-statesman ideal from legal education and society, this brief article assumes that the *primary* reason for the prevalence of depression among lawyers is based on low-levels of job satisfaction directly attributable to the consequences of the purge.[24] This is by no means a novel thesis, but one that deserves continued attention.[25] This article assumes that personal morality, and its objective manifestation, professionalism, come part-and-parcel with job-satisfaction. The implication of the foregoing is that the ethical lawyer is the happy lawyer; the happy lawyer is the lawyer that aspires to the lawyer-statesman ideal.

A Solution: Aspiring to the Lawyer-Statesman Ideal

At the heart of the lawyer-statesman ideal was the fundamental belief that the archetypical lawyer was the lawyer who possessed not only superior jurisprudential and tactical skill, but also an abundance of practical wisdom.[26] Within this lawyer's grasp was "a wisdom that lies beyond technique—a wisdom about human beings and their tangled affairs that anyone who wished to provide real deliberative counsel must possess."[27] Hence, the ideal lawyer-statesman was one who possessed great practical wisdom and exceptional persuasive powers, one who was devoted to the public good but yet "keenly aware of the limitations of human beings and their political arrangements."[28] Recognizing that sound legal advice

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and legal judgments are rarely far removed from morality, lawyer-statesmen face the inevitable moral questions that arise seriously.[29] They possess a devotion to the facts of a case and the reality they reflect, and will respect that reality in the courtroom and counseling room.[30] These lawyers also exemplify self-governance and individuality; universal, holistic thinking; an undistorted perception of reality; a superior awareness of truth; are service-oriented and carry a deep awareness and desire for the good; and possess a highly democratic personality.[31]

As Professor Krieger observes, the "values and motivations that promote or attend professionalism have been empirically shown to correlate with well being and life satisfaction, while those that undermine or discourage professionalism empirically correlate with distress and dissatisfaction."[32] This should come as no surprise, since such wisdom was dispensed over two thousand years ago by Aristotle: "[happiness] results from virtue and some sort of learning or cultivation."[33] For Aristotle, happiness can only be cultivated by activities in accord with virtue, while, as the empirical evidence (cited above) shows, "the contrary activities control its contrary."[34]

To be sure, empirical research has consistently shown that when intrinsic values motivate choices, as opposed to extrinsic values (such as money or publicity),[35] one tends to experience greater life-satisfaction, happiness, and overall well-being.[36] Hence, the happy person is also the intrinsically motivated person, the person who chooses self-directed action from which he derives genuine enjoyment or that furthers a fundamental life purpose.[37] The research also shows that the lawyer who chooses her career path for intrinsic reasons will generate better work-product and consistently be happier at work, which in turn has positive effects upon clients, adverse counsel, and court personnel.[38]

Consequently, a new wave of scholarship suggests that ethical lawyering involves not the *suspension* of moral judgment but rather *the conscious exercise of it*, to determine what justice requires and thus the confines of right action within the context of what one ought or ought not do on behalf of a client.[39] Much of this scholarship is premised upon the notion that any model of lawyering lacking a dimension of moral character will be necessarily incomplete.[40] This notion rests on the fundamental idea that our professional identities as lawyers are *inseparably linked* to our personal moralities.[41] As a result, "[y]ou cannot be a bad person and a good lawyer, nor can you be a good person and a lawyer with sharp practices. A lawyer who behaves like a jerk in court is not an 'aggressive advocate' with an 'assertive strategy,' but a jerk."[42] Hence, everyday practice decisions ultimately reflect character traits, which in turn either nurture or undermine not only each individual lawyer's reputation but the reputation of the profession as a whole.

CONCLUSION

In composing the *Nicomachean Ethics*, Aristotle sought to provide his readers with an understanding of how we can cultivate happiness: by living an ethical life within society.[43] Perhaps Albert Einstein thought of Aristotle when he wrote that "[t]he most important human endeavor is the striving for morality in our actions. Our inner balance and even our very existence depend on it. Only morality in our actions can give beauty and dignity to life."[44] Quite obviously, none of this is new. Rather, both Aristotle and Einstein saw clearly, in order to achieve personal happiness and fulfillment, one must be versed in the "culture of right-doing;" that is, one must be thoughtful, analytical, driven by principle, and grounded by a moral vision of the good.[45]

As lawyers, we can and ought to cultivate happiness within our profession by holding ourselves to the highest moral standards not just of the *profession*—which is almost certainly part of the current problem—but of *humanity*. Doing so will simultaneously satisfy the *egoist* within (by enhancing personal happiness) and the inner *altruist* (by enhancing the happiness of others). In striving towards professionalism, let us do what we can to enhance both.

Endnotes

1 *See* Anthony T. Kronman, The Lost Lawyer: Failing Ideals of the Legal Profession 2 (1993).

2 *Id.*

3 *Id.*

4 Kenneth W. Starr, *Truth and Truth-Telling*, 30 Tex. L. Rev. 901, 902 (1999).

5 *See* Kronman, *supra* note 1 at 3.

6 Starr, *supra* note 4 at 901.

7 Kenneth W. Starr, *Christian Life in the Law*, 27 Tex. Tech. L. Rev. 1359, 1359 (1996).

8 Gabriel Lerner, *How Teaching Political and Ethical Theory Could Help Solve Two of the Legal Profession's Biggest Problems*, 19 Geo. J. Legal Ethics 781 (2006) (citations omitted). *See also* Mary Ann Glendon, A Nation Under Lawyers: How the Crisis In the Legal Profession is Transforming American Society 85-91 (1994).

9 Lawrence S. Krieger, *The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity and Happiness*, 11 Clinical L. Rev. 425, 426 (2005) (citation omitted).

10 Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 Van. L. Rev. 870, 874 (1999) (citation omitted).

11 *Id.* at 875.

12 *Id.* at 881.

13 *See* Daniel R. Coquillette, Lawyers and Fundamental Moral Responsibility 1 (1995) ("legal education can be a narrowing experience that displaces the moral vision and perspective gained over a lifetime.").

14 Harvard Law Review Association, *Making Docile Lawyers: An Essay on the Pacification of Law Students*, 111 Harv. L. Rev. 2027, 2044 (2006).

15 Sharon Dolovich, *Ethical Lawyering and the Possibility of Integrity*, 70 Fordham L. Rev. 1629 (2002) (citing William Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 Wis. L. Rev. 29 (1978)).

16 Coquillette, *supra* note 13 at 2.

17 Harvard Law Review Association, *supra* note 14 at 2027.

18 Daniel R. Coquilette, *Professionalism: The Deep Theory*, 72 N.C.L.Rev. 1271, 1272 (1994).

19 Patrick J. Schiltz, *Legal Ethics in Decline*, 82 Minn. L. Rev. 705, 723 (1998) (quotations omitted) (citations omitted).

20 Kronman, *supra* note 1 at 2-3, 38.

21 *Id.*

22 *Id*. at 2.

23 *Id*. at 14.

24 *See, e.g.,* David Lyons, Ethics and the Rule of Law 3-35 (Cambridge 1984); Coquillette *supra* at 2.

25 *See generally* Krieger, *supra* note 9; Kronman, *supra* note 1.

26 Kronman, *supra* note 1 at 4.

27 *Id.*

28 Kronman at 3; Starr, *supra* note 7 at 1360 ("Seeking wisdom is a way of re-expressing one's own limitations.").

29 Starr, *supra* note 7 at 1359.

30 *Id*. at 1360.

31 *See* Krieger, *supra* note 9 at 428.

32 *Id.* at 427.

33 Aristotle, Nicomachean Ethics Book I, Chapter 9 §3.

34 *Id*. at Book I, Chapter 10 §9.

35 *See* Kenneth W. Starr, Morality, *Community, and the Legal Profession*, 5 Wyo. L. Rev. 403, 403 (2005) ("Moral judgments seem terribly clouded by ancient vices, especially avarice, one of the great sins of humanity, and the narcissistic desire for fame and notoriety.").

36 *See* Krieger, *supra* note 9 at 429.

37 *See id*.

38 *See id.* at 430.

39 *See* Dolovich, *supra* note 15 at 1630-31.

40 *See id*. at 1630-31.

41 *See* Coquilette, *supra* note 12 at 1272. *See also* Deborah L. Rhode, In the Interests of Justice: Reforming the Legal Profession 17 (2000).

42 Coquilette, *supra* note 18 at 1272; Starr, *supra* note 7 at 1360 ("Turning the other cheek translates into not stooping to engage in sharp or questionable practices.")

43 Jonathan Lear, Aristotle: The Desire to Understand 154 (1988).

44 The Quotable Einstein 209 (Alice Calaprice, ed., 1996).

45 Starr, *supra* note 34 at 414.

Religious Liberties

The Blaine Amendment of 1876: Harbinger of Secularism?

*By Gerard V. Bradley**

In August 1876, both houses of Congress voted on a series of proposals to amend the United States Constitution. These related proposals were united by their aim to prohibit *states* from giving financial aid to "sectarian" schools and came to be known collectively as "the Blaine Amendment," named after one of their foremost proponents.[1] The House of Representatives passed one such proposal by an overwhelming majority, but in the Senate, the proposal failed to obtain the two-thirds approval necessary to present an amendment to the states for ratification.

The Senate version which so nearly passed also included a disclaimer: "This article shall not be construed to prohibit the reading of the Bible in any school or institution." The disclaimer supports an argument I make later in the paper; namely, that the Blaine Amendment's aim was to make public schools "non-sectarian," *not* to secularize them.

The idea for a constitutional treatment of the "schools question" originated with President Ulysses S. Grant. In September 1875 he gave a speech to Union Army veterans assembled at Des Moines, in which he decried the looming threats of "ignorance and superstition" to the Republic. President Grant warned that these evils had to be met with the same decisiveness and force with which the veterans he addressed had met the slavepower a half-score and more years earlier. Then, of course, Grant was at their head, as he endeavored to be now, for Grant wanted an unprecedented third term in the White House.

Political events later that autumn burnished the credentials of Grant's idea. Ohio's gubernatorial contest between Democrat warhorse William Allen and Republican Rutherford Hayes tested the political potential of the Catholic schools issue. In those days Hayes and other Republicans were pessimistic about the party's electoral fortunes, given the corruption of the incumbent Presidential administration, the unpopularity of the Party's "hard money" stand in times of economic recession, and the waning appeal of the "bloody shirt."[2] Hayes sought to energize his base and to attract available Protestants to the GOP by warning of the Catholic Church's resistance to, and even rejection of, the "common" school, in favor of their own school system. Hayes won the Governor's office, and he attributed his victory to the "schools question."

Within a month or so of Hayes' gubernatorial victory, Grant elaborated upon his Des Moines speech in the annual message to Congress, on December 7, 1875:

> We are a republic whereof one man is as good as another before the law. Under such a form of government it is of the greatest importance that all should be possessed of education and intelligence enough to cast a vote with a right understanding of its meaning. A large association of ignorant men cannot for any considerable period oppose successful resistance to tyranny and oppression from the educated few, but will inevitably sink into acquiescence to the will of intelligence, whether directed by the demagogue or by priestcraft.[3]

Grant called for a constitutional amendment that required each state to establish and maintain free public schools to instruct all children "irrespective of sex, color, birthplace, or religions."[4] In these schools no "religious doctrines" could be taught, nor could schools in which such doctrines were taught receive public money. It was widely said that by this salvo Grant launched his bid for a third term.

The "Blaine Amendment" owed its name to its House sponsor, Representative James Gillespie Blaine of Maine, who introduced it on December 14, 1875.[5] Almost everyone at the time understood Blaine's proposal to be part and parcel of his own quest for the Republican presidential nomination. Hayes was the eventual party nominee, but in late 1875 he was a dark-horse possibility for compromise at a deadlocked convention. There were at least five party heavyweights running ahead of him: Blaine, Grant, Indiana Senator Oliver Morton, New York Senator Roscoe Conkling, and Treasury Secretary Benjamin Bristow.

Earlier that year during Hayes's gubernatorial campaign Blaine wrote to one prominent Ohio Republican (not Hayes) of the lessons to be learned from that state's canvass: "The issue forced [sic] upon you in regard to the public schools … may yet have more far-reaching consequences."[6] Blaine wrote to his Ohio correspondent that a republican (small "r") form of government required "free" schools, "free" from "the bitterest of all strifes"—the strife between religious sects. Taking next a wider look, Blaine asserted that "[w]e must have absolute religious toleration, and toleration can only be maintained by general intelligence." In fact, "[t]hose who would abolish the non-sectarian school necessarily breed ignorance—and ignorance is the parent of intolerance and bigotry."[7]

Interestingly, Blaine's mother was a devout Catholic. Several of his siblings were baptized in the Catholic Church. There were also rumors afoot in 1876 that Blaine, too, had been baptized a Catholic, and also that he remained a crypto-Catholic up to the day. (There was no dispute that Blaine, circa 1876, held himself out as a Protestant and attended Protestant services.) We would today describe Blaine's situation as being open to charges of being "soft" on Catholicism, a Catholic "sympathizer." Blaine's position was unenviable: Protestants would be incensed by his "softness," while Catholics would resent his unwillingness to stand tall for the faith (by hypothesis, the faith of his childhood), indeed resent his apostasy. As a matter of fact, the adult Blaine retained throughout his life a genuine affection and respect for the Catholic faith of his mother.[8] It is nonetheless plausible to view Blaine's activism on the schools issue as the stone with which he put to rest rumors of his own Catholicity and skillfully advanced his presidential prospects.

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Blaine's Resolution (the "Blaine Amendment") was the first one offered in the House of Representatives for the session which began in December of 1875. It was "H.R. 1." Blaine excised from Grant's omnibus proposal any mention of color, gender or birthplace. H.R. 1 said nothing about requiring the establishment of public schools. Blaine's amendment would have prevented any state from establishing a religion or prohibiting its free exercise; further: "no money raised by taxation in any state for the support of any public schools or derived from any public fund therefore, nor any public lands devoted thereto, shall ever be under the control of any religious sect."[9] This was the text which, with one alteration making clear that Congress received no new power therefrom, passed overwhelmingly in the House during August 1876.

Republican Senators quickly pointed out that the prohibition could be easily evaded by channeling public money raised for some *other*—that is, non-school—purpose to institutions controlled by religious sects. These Senators also pointed out that, to have any real effect, the amendment's prohibitions needed Congressional clout behind them. Republicans in the Senate added to the House version an "enforcement" clause like those attached to the three Reconstruction amendments to the Blaine text ("Congress shall have the power to enforce this article by appropriate legislation"). These Senators also expanded the substantive norm forbidding public support of sectarian institutions to include *all* public monies. This more formidable text was defeated by the party-line vote in the Senate during the wee hours of August 15.

Before turning to what the Blaine Amendment episode does (and does not) tell us about the secularization of public life in American history, let me first make four preliminary observations about its significance in other respects.

First: Despite the failure of the Blaine Amendment as a proposed federal constitutional amendment, the proposal nevertheless garnered significant congressional support. The proposal failed in 1876 to pass Congress by the required two-thirds majority in both Houses, but attracted overwhelming majority votes. (The vote in the House was 180 to 7 with 98 abstaining, and the vote in the Senate was 28 to 16 with 27 abstaining.) Similar proposals were introduced in Congress about twenty times by 1929,[10] although none of the subsequent proposals made it to the floor for a vote.

Despite the failure of these attempts to amend the federal Constitution, Congress nonetheless imposed Blaine-like restraints on many states. Starting in 1876, Congress made it a condition of admission for new states to the Union that the proposed state constitution ban public aid to "sectarian" schools. The congressional enabling act for Washington, for instance, required that the state constitution include a provision for the establishment of public schools that would be "free from sectarian control."[11] State constitutional provisions of this sort are often called "baby-Blaines," implying that our topic is, I suppose, "Daddy Blaine."

Second: The Blaine Amendment is often thought to be a telling episode in the "incorporation" saga. "Incorporation" refers here not to business associations but to the application of the Bill of Rights (the first ten Amendments, really) to the states. The Supreme Court early on confirmed that these norms constrained only the acts of the national government. In *Barron v. Baltimore*,[12] Chief Justice Marshall wrote that this question, of whether the Bill of Rights applied to the states, was one "of great importance, but not of much difficulty."[13] He explained that, "in a constitution framed by the people of the United States, for the government of all, no limitation . . . would apply to the state government, unless expressed in terms."[14]

Curiously (or boldly, I suppose) the Court began its "incorporationist" line of decisions with the First Amendment, the only provision that unequivocally limits its address to the national government ("*Congress* shall make no law…").[15] The Court has most often relied upon history to justify "incorporation." The "incorporationist" argument of the Court has been mostly historical, although not based on the history of the Founding but on the historyof the Fourteenth Amendment. (*Barron* got that right: the near-universal original understanding was that the Founders bound only the national government created by the Constitution.) Stated in pure form by Justice Black in the 1947 case *Adamson v. California:*

> My study of the historical events that culminated in the Fourteenth Amendment, and the expressions of those who sponsored and favored, as well as those who opposed its submission and passage, persuades me that one of the chief objects that the provisions of the Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights applicable to the states.[16]

What light does the Blaine Amendment shed on the rectitude of the Court's "incorporation" decisions? Well, the Blaine Amendment in all its versions took over the no-establishment and free exercise language of the First Amendment, saying (in paraphrase here): "No state shall make a law respecting an establishment of religion or abridging its free exercise." The argument against Justice Black and the incorporation position the Court adopted, then, is that just a few years after ratification of the Fourteenth Amendment, Congress evidently did *not* think that the Fourteenth Amendment "incorporated" the First Amendment. Otherwise, those who supported the Blaine Amendment supported a redundancy, and those opposed could have opposed it on the same grounds. None of the opponents did so. Nor did any of Blaine's supporters (as far as I have been able to discover) mention its possible redundancy.

Third: The Blaine Amendment was as much a *political* creature as it was an effort at constitutional change. Maybe it was *more* political than constitutional. What I mean is that Democrats tagged the proposal a Republican election-time gimmick, meant to stir up the Republican base by awakening and inflaming anti-Catholic fears. The Democrats were right: the Blaine Amendment was an election-year political tool. The leading historian of the 1876 Presidential contest writes:

> During the closing days of the Congressional session, Republicans in both houses, hoping to capitalize on anti-Catholic sentiment, pushed unsuccessfully for a constitutional amendment to prohibit the use of public funds by parochial schools. [Presidential nominee Rutherford] Hayes vigorously supported the proposal and counseled Senator John Sherman on ways to strengthen it.[17]

The very raw Senate debate over the Pope's infallibility and the Catholic Church's retrograde social philosophy, among a superabundance of other evidence, amply supports this reading. The Blaine Amendment was, more than anything else, an episode of Catholic-baiting.

The Blaine Amendment was, in part, a political gimmick: about party politics as well as about constitutional substance. Like the recent U.S. Senate vote on a marriage protection amendment, the main idea was to distinguish the two parties by making everyone *vote* on the issue. But also like the marriage amendment, the Blaine Amendment crystallized and gave expression to deep concerns clustered around convictions on fundamental matters affecting the common good of American society.

The Democrats sought to neutralize Republican charges about their subservience to the Roman Church by going along with the proposal, and the vast majority of House Democrats voted in favor of the Blaine Amendment. The *New York Times* reported:

> There has been a great deal of anxiety on the part of Democrats in forecasting the political future on account of the prominence of the school question. They see but one way out of the trouble, and that is for the party to agree to the Blaine Amendment, as it is called, and to bring the Catholic Church itself to the support of it.[18]

The *New York Herald* two weeks earlier offered the same advice to troubled Democrats, noting in addition that the common schools were one of two subjects "on which the people of the Northern states are quite capable of becoming crazy."[19] (The other was "the rights and lives of southern Negroes."[20])

On the day after the House vote, the *New York Times* correctly reported it as "part of the Democratic policy mapped out by [Presidential nominee] Tilden, and [] designed to take the Catholic question out of politics."[21] Professor O'Brien reports correctly, too, that "not a single member of the House rose to oppose the amendment as such."[22] It surely seems, then, that the political necessities felt of the day required anyone with political ambition to avoid being labeled "pro-Catholic." Someone with political ambition could safely be anti-Catholic, and many successful politicians were so. One could also be, as some Senators were that August, "anti"anti-Catholic. But could someone with political ambitions be "pro-Catholic"? No.

Fourth: Given what was just said about the political context, how could so many Senators safely resist the anti-Catholic tide pushed along by Blaine-backers? Because, *fourth,* the matters *in addition* to the central ban on public aid to Catholic schools in the ultimate Senate version offered a safe harbor. The central aim of the Senate proposal, as well as the House, was to prohibit *states* from giving financial aid to "sectarian" schools, but the many formulations debated (several in the Senate alone) diverged over, for example, whether the *federal* government should be so hamstrung, too, whether all tax revenues and other public resources should be placed within the prohibition (not just moneys raised precisely to support the public schools), and whether Congress should be given explicit enforcement power, as had been done with the three Reconstruction Amendments.

Opposition to a much enlarged Senate proposal was *said* by its Democratic opponents to be rooted a variety of concerns not directly related to the Catholic question. For example, some Democrats raised federalism concerns, asserting that elementary education as such was entirely a state matter. Others offered variations on the theme, "if it ain't broke don't try to fix it;" meaning that there was no evidence of a movement to divert state school funds to Catholic schools. Some saw opposition to the Blaine Amendment as a refusal to be made party to Republican demagoguery. For example, Democratic Senator Eli Saulsbury (Delaware) said that the amendment was nothing more than an appeal to "the fear which had been raised throughout the country for political purposes" of the Catholic Church's political ambitions and resistance to true American spirit.[23] Finally, some Democrats opposed the Senate's ambitious proposal as simple overkill. Now, let me explain.

The most ambitious versions of the proposed amendment, including the version that the Senators voted upon, went way beyond cutting off aid to certain "schools." The reach of the final Senate draft extended to all "other institutions, under the control of any religious or anti-religious sect, organization, or denomination, or wherein the particular creed or tenets of any religious or anti-religious sect . . . shall be read or taught." Leading Democrats seized this political gift and made strategic use of it. New York Senator Francis Kernan pointed out that "sectarian" orphanages, asylums, and hospitals would thus be cut off from public contracts. And not just Catholic institutions; for, while the number of non-Catholic schools was relatively minor in this era of heavy Protestant influence upon public education, there were many non-Catholic hospitals and other charitable works. The Republicans' overreach permitted Democrats to stand opposed, then, on neutral—that is, not entirely Catholic—grounds.

Democrats outside Congress resisted the Blaine Amendment by exploiting (and, perhaps, by instigating) a rumor that the Republican nominee Rutherford Hayes was a member of the American Alliance, a nativist organization opposed to the voting rights of all foreign-born residents of America. In other words, the Democrats tried to make *nativism*—and not Catholicism—the issue. The effect of this rumor was to turn the Republican attack against *some* immigrants—those who were Catholic and, most especially, Irish-Catholics—into an attack upon *all* newcomers, especially German Protestants who were bulwarks of the Republican party. This strategy recognized that, while the Irish Catholic vote was essential to the Democratic coalition, there was no chance that Irish-Catholics would vote Republican—*and* that the immigrant Germans who voted Republican could be shorn away from the GOP. That the Democrats were "wet" (opposed to Prohibitionist measures) and the Republicans "dry" also promised Democrat dividends among the supposed beer-loving Germans.[24]

The Democrats' strategy worked. The Blaine Amendment failed in Congress, and the "schools" issue petered out during the fall presidential canvass. At least, it certainly played nowhere near the critical role that Republican operatives predicted for it in the late autumn of 1985.[25] That the Blaine Amendment was a political production and that it flopped in the end does not imply, though, that it had no bottom, no substance, that it was

purely symbolic or that it was solely about what we call "status politics." After all, even demagogues, race-baiters and fomenters of ethnic or religious hostility included, have a foot (or two) in reality. One remarkable thing about the Blaine Amendment is that it repays careful study for what it reveals *substantively* about American identity and secularism.

To that I now turn.

What does the Blaine Amendment episode tell us about secularism in the Gilded Age? Even within the partisan politics and bruising rhetoric, we can see the animating insight of substance: a growing and increasingly panicky conviction that (in the words of the *New York Times)* "the safety of the Republic depends upon the intelligence as well as the virtue of its citizens."[26] This was a war cry for the Republican party. "Intelligence" was defined in contrast to "ignorance" and "superstition." Both terms were obvious references to the Irish Catholic immigrants then crowding cities and voting—Republicans said—according to the orders of bosses and priests. "Intelligence" soon became a commodious synonym for what free common schools, and *only* free common schools, cultivated in the average youth. The common school delivered goods unavailable, and even subverted, in "sectarian" classrooms. The common school became the "bulwark of the republic."

The most systematic and revealing elaboration of this close-knit set of ideas appeared a few years before our main story—in *The Atlantic Monthly*, in January, 1871, in a piece entitled "New Departure for the Republican Party." The author was nationally prominent Republican Massachusetts Senator Henry Wilson.[27]

Wilson's main point was that, with the slaveholding aristocracy recently put out of business by force of arms, the great threat to American democracy was now the *demos,* the people, the citizenry. They were, in a word, *unfit* for the job placed before them by the Constitution, the job of self-government. Wilson observed what the Founders had long ago observed: republican government required a certain measure of virtue in its citizens. There was nothing "new" in Wilson's "departure" so far. Then Wilson identified another essential quality in democratic citizens. He called it "intelligence." To my knowledge the Founders never identified this quality as a prerequisite of republican government. I hesitate to say that the Founders were somehow were O.K. with stupidity. But while they stressed over and again the moral virtues inculcated by traditional religion, they rarely (if ever) spoke of intelligence as a prerequisite of the political institutions they created. Public education was not the "bulwark" of *their* Republic (for, there was very little of it). For the Founders, traditional religion, which characteristically inculcated sound morality, was the Republic's safeguard.

Wilson thought both qualities—virtue *and* intelligence—were lacking in the newly freed slaves *and* in the rising tide of mostly Catholic immigrants. He admitted that there was hope for the freedman. After all, his degraded condition had been imposed upon him by the southern master class, the slavocracy had been smashed at Appomattox, and the Thirteenth Amendment outlawed its rebirth by freeing the slaves. With good schooling perhaps the freedman could yet be made fit to bear the yoke of democratic responsibility.

The immigrant case was different. Some of the immigrants' shortcomings might be explained by their poverty or their incomprehension of American traditions, but the problem, as Wilson saw it, was that these shortcomings were a corollary of faith. It was their *Catholicity* that made them inferior Americans. To illustrate his point Wilson chose France, "fair and fertile," possessed of a brilliant military record, "[b]ut with a population ignorant, priest-ridden, and emasculated of their manhood," France "lies beaten on every field and helpless at the conqueror's foot." *Atlantic Monthly* readers (who were the "best men" of their time, and very largely WASP) knew what to infer: political bosses allied to an oppressive clergy flourished by keeping the Catholic underclass down.

Wilson knew that America's priests and bosses could not simply be put out of business, as were the slave owners. The First Amendment protected the Catholic church from annihilation (even if one could wish it a slow death). The whole Constitution effectively protected local politics, boss-ridden as it was in some cities. In these "new" circumstances, Wilson tellingly argued, "voluntary" efforts within civil society to shape citizens for civic responsibilities were inadequate. Of these "humble Christian toilers" and their "voluntary" efforts Wilson had nothing but good things to say. But their day had passed; the task at hand far outstripped their resources and abilities. Wilson said that the "work is outgrowing the workers." "It is becoming a question in the minds of many whether the government should not here recognize a responsibility of its own which it has heretofore left entirely to others."

Wilson left no doubt as to the answer. The great necessities of the day were, as he expressed it, "unification" and "education," though his message more transparently rendered would be "unification *through* education." Wilson declared, "[t]here can *no question* either of the necessity or legitimacy of *legislation"* to those ends. He called for a national system of compulsory public education; the public schools to shape each and every child into a sturdy American citizen.

In terms more familiar to us: the Founders and Wilson agreed that a lot of socializing was necessary to make free government work. Wilson differed from the Founders, in part, on what actually was the necessary republican equipment. The Founders aimed to promote the institutions of civil society to achieve the necessary socialization, and could scarcely imagine—and surely did not countenance—direct *government* cultivation of republican "virtue." Wilson did. In fact, he thought such hands-on work essential.

The Catholic riposte was left to Orestes A. Brownson. Not quite a philosopher, but an extraordinarily learned and vigorous man of letters, Brownson was nineteenth century America's leading Catholic polemicist, a "public intellectual" insofar as a strident Catholic could be at the time. Brownson was neither an immigrant nor a cradle Catholic. He was raised in Vermont by guardians; his father's death and his mother's poverty made it impossible for him and his siblings to remain at home together. He was baptized at age nineteen in an upstate New York Presbyterian church. After sampling many American Protestant flavors, Brownson was finally received into the Catholic Church in 1844 when he was forty-one. At first what

then counted as a "liberal" Catholic (though still conservative by today's standards) Brownson was, by the time he took issue with Henry Wilson, a deeply traditional-minded Roman Catholic. It is thus hard to say that his response to Wilson "typified" American Catholic thought, or, for that matter, anything else. But Brownson captured enough of the view Wilson had in his sights, and enough of the prevailing Catholic "dissent" from Wilsonian orthodoxy, to make it worth a look at his riposte.

In an article written for *The Catholic World*, Brownson held that "state, or secular society, does not and cannot suffice for itself, and is unable to discharge its own proper functions without the cooperation and aid of the spiritual society."[28] The Founders would have said "state" or, better, and more commonly, "republican institutions" (the term "secular society" does not appear in leading writings), but it is enough to say they share with Brownson for company. "Of all the dispositions and habits which lead to political prosperity, Religion and Morality are indispensable supports." So Washington said in his Farewell Address. In the Northwest Ordinance, Congress wrote that religion (along with morality and knowledge) is "essential to good government and the happiness of mankind." Washington (again) said: "[L]et us with caution indulge the supposition, that morality can be maintained without Religion. Whatever may be conceded of the influence of refined education on minds of peculiar structure; reason and experience forbid us to expect that national morality can prevail in exclusion of religious principle."

Madison asked in *Federalist* 55, Are "nothing less than the chains of despotism" required to "restrain [men] from destroying and devouring one another?" His answer was no, or at least, not necessarily. Madison allowed that republican government presupposed the existence of virtuous qualities in men "in a higher degree than any other form" of government. But a free society's government was limited in its authority to cultivate these virtuous qualities; this limitation was a distinguishing feature of that government's *free* character. For Madison even the serious problem of religious divisions ("faction") must never be resolved by trying to force the same religious opinions and habits.

As far as I know, the Founders did not use the term "civil society," or the word "culture." But they surely referred to those complex realities, albeit by different names. Invariably they spoke about "religion," "morality" or that composite term, "virtue". More importantly, they all believed you could not have one without the other. My judgment, then, is that Brownson so far considered rightly called out Wilson for proposing a radical "new" departure in American constitutional (small "c") thinking on the relationship between government and civil society. Wilson would have authorized the government to mold or make the citizens it needed for successful operation of political life.

Returning to the *Catholic World* we can now see the target at which Brownson aimed: an officious hyper-moralism. Brownson denounced in the *Catholic World*, "Evangelicals, their Unitarian offshoots, and their humanitarian allies, [all] busy bodies who fancy they are the Atlas who upholds the world, and that they are disputed to take charge of everybody's affairs, and put them to rights." For these "intolerant zeal[ots]," he prescribed a "just and equitable system of public schools" along the denominational model of Prussia: state funded and chartered, but run by religious bodies. For Brownson, such a model respected the primordial rights of parents and religious liberty. And it secured for the body politic the rightly formed citizenry it presupposed.

Brownson saw clearly what the Evangelicals of his day were up to; they sought "to make the public schools an instrument for securing the national, social, and religious unification of the country," which would eventually "extirpate Catholicity from American soil." The "Evangelicals" aspired to take over civil society. And they would, according to Brownson, "mould[] the whole American population into one homogeneous people," modeled after the New England Evangelical. Plainly put, he was opposed to the proposition that only Protestants could be genuine Americans, and to the project of using compulsory schooling to make all Americans into (at least) small "p" Protestants. If Brownson is guilty of exaggeration (and he is) it is probably of the misdemeanor, not the felony, kind. He went too far in extending and then generalizing from the Protestant (capital "P") principle of private religious judgment. But he was basically on track.

Brownson's indictment of the "Evangelical" model surely has enough truth in it to forestall any characterization of the Blaine Amendment as, simply, a secularizing agent. For Brownson and, I think, anyone who then (or now) saw the episode clearly, it had nothing to do with secularism. The Amendment was, in part, a political gambit meant to capitalize on deep Protestant anxiety about how America would retain its distinctive character, which meant (in part) its special Protestant character. Seeing Blaine this way allows us to make sense of the Senate version, which retained Bible reading in schools. If Blaine were an agent of secularism, this retention would be unintelligible.

How do the Founders factor into the picture *now*? Was Wilson's "new departure" an aberration, an exogenous growth on our constitutional order? Or were the Founders somehow complicit in the "New England conspiracy" Brownson described? What can we say about the *radicalism* of Wilson's call for legally compelled character formation for all in public schools? How should we respond to this character formation that somehow straddled the Evangelical's idea of truth and the statesman's need of citizen raw material?

Wilson exploited an equivocation or uncertainty or tension in the Founders' thinking on church and state. He was willing to sacrifice the independence of civil society from state, if that secured enough raw material to make democracy work. Brownson forsook Wilson's "new departure," proposing instead to tweak the Founders' approach, to generate the right kind of American citizen. He called for a modest revision of the traditional partnership between the state and America's religious and civil institutions, each side working for the common good of the polity (though with the churches retaining an additional important, distinctive mission). It is perhaps strange to describe a partnership between church and state as an arrangement of equals, but in an important sense it was, in the Founders'

vision, such a collaboration; each had the resources to take care of itself and to negotiate with the other. Still, without either force, American destiny and identity was incomplete. This arrangement is all the more remarkable because American religion has been, well… free. In that important way, America's *political* identity and fortunes were in the hands of the Spirit which, according to Christian belief, blows where it will.

Precisely this partnership was under fire in the Blaine imbroglio. William T. Harris captured the stakes exactly in the *Atlantic Monthly* shortly after the congressional debate.[29] Congressional Republicans did not always speak as candidly or as clearly as he, but his article thematized and cogently expressed what they maintained. Arguing that Grant's December 1875 Message "makes an epoch in our political history," he wrote, "we have just now come upon a crisis in the development of our political theory." The crisis was the "first practical collision" of the state "with the ecclesiastical organization of the people". Heretofore it had been *laissez faire;* the state and the church roamed freely; the latter in "civil society" (Harris's term), the state in the realm of law and politics. But now there is a "disputed province," an arena of overlapping interest where the two conflict: "secular education in the conventionalities of intelligence." "Civil society claims this province by right of eminent domain, taking from the family or the individual what it finds necessary for the benefits of the community at large." This was Wilson's view and the view of the Gilded Age Republican Party. The Blaine Amendment makes it clear that the state (the polity, the political community) held an inalienable mortgage upon citizens' "virtue" and "intelligence" (and anything else you wish to list), a lien which could be called in at will.

CONCLUSION

The Blaine Amendment heralded a two-fold shift in Americans' understanding of their political institution's relationship to citizens' character. The shifts were, first, to "intelligence" as the distinguishing feature of "virtuous" citizens rather than religious morality, and second, to the state as bearer of ultimate moral responsibility and political authority for cultivating "intelligent" citizens. The Blaine Amendment was not itself a herald of secularism. Nor was it meant to be in the minds of its sponsors. Nonetheless, each of the two shifts—to "intelligence" as bulwark of the Republic and to the state as cultivator of "intelligence"—is intimately related to the eventual emergence of secularism in constitutional law, educational theory, and elite thinking by mid-twentieth century.

Endnotes

1 The best account of the Congressional career of the Blaine Amendment is F O'Brien, *The Blaine Amendment of 1875- 1876*, 16 Detroit L. J. 137 (1963). The best treatment from a wider historical perspective is (Sister) M. Klinkhamer, *The Blaine Amendment of 1875: Private Motives for Political Action*, 42 Cath. Hist. Rev. 15 (1957). *Hereinafter* "Klinkhamer."

2 The "bloody shirt" meant appeals to the northern electorate to retain their party—Lincoln's party—in power so as not to jeopardize the fruits of victory in the Civil War.

3 Cong. Rec. 44th Cong., 1st session, 175.

4 *Id.*

5 In the event, Blaine played no role in the House debate of his proposal because by the time it reached the House floor in August 1876, he had resigned his seat, accepting an appointment to fill out deceased Senator Lot Morrill's term. Because Blaine did not take his Senate seat until December 1876, he missed the Senate debate too.

6 Blaine to Wikoff, Oct. 29, 1875, quoted in Klinkhamer at 2. Klinkhamer opines that Blaine was already tipping his hand about the coming Congressional session in which he would introduce his amendment.

7 *Id.*

8 *See generally* Klinkhamer at 8-12.

9 *Id.* at 205, Dec. 14, 1875.

10 See E. Corwin, *The Supreme Court as National School Board*, 14 J. Law & Contemp. Problems 3, 12 (1949).

11 Wash. Const. art. XXVI. Washington's "baby-Blaine" was recently challenged in the Supreme Court as violating (at least as-applied) the Free Exercise Clause. *See* Locke v. Davey, 124 S. Ct. 1307 (2004). The Supreme Court rejected the challenge.

12 32 U.S. (7 Pet.) 243 (1833).

13 *Id.* at 247.

14 *Id.* at 248-49.

15 U.S. Const. amend. I (emphasis added). The rest, with one exception, state unaddressed norms of government conduct which, strictly as a matter of language, could apply to the states. The exception is that the Seventh Amendment's civil jury trial guarantee refers to courts *of* the United States, importantly not to courts *in* the United States. *Id.*. amend. VII.

16 332 U.S 46, 71-72 (1947) (Black, J., dissenting).

17 K. Polakoff, The Politics of Inertia, 115 (1973).

18 N.Y. Times, Jan. 4, 1876 at 1.

19 N.Y. Herald, Dec. 23, 1875

20 *Id.*

21 August 5, 1876, 5.

22 *Supra* note 1, at 159.

23 4 Cong. Rec. 5246 (1876).

24 The Congressional debate and the surrounding political commentary were mostly about common schools as cultivators of "intelligence" and how Catholics resisted the invitation to become as "intelligent" as native Americans. There was also considerable concern expressed for the plight of "ignorant" freedmen, and praise for the medicinal properties of free public education in the South. These important and lasting concerns were, however, secondary to the Catholic issue.

25 See the discussion at 139-141, *infra*.

26 N.Y. Times, 1, 1876, at 1.

27 Henry Wilson, *New Departure for the Republican Party*, Atlantic Monthly, Jan. 1871, at __.

28 Orestes A. Brownson, *Unification and Education*, The Catholic World, Apr. 1871, at 1.

29 William T. Harris, *The Division of School Funds for Religious Purposes*, Atlantic Monthly, August 1876, at __.

Telecommunications & Electronic Media

Whither Universal Service in the Digital Age?

*By Chris Moore**

Last year marked the tenth anniversary of the Telecommunications Act ("the Act").[1] Since its passage, the only thing that has remained constant in the communications industry is change—the development of new technologies, industry consolidation and convergence, product bundling, etc.[2] These radical transformations have resulted in recent efforts to reform communications laws and policies.[3] One of the central issues of the debate on communications policy has been the reform of "universal service," a policy that stands for the principle that all Americans should have access to quality telephone service at reasonable rates regardless of where they live and their level of income.

While some have recently questioned the commitment to the universal service concept, given the advent of competition in the communications marketplace, the system that has been implemented over the years to achieve the goal of universal service remains intact. Recently, however, several developments in the communications industry have adversely impacted the universal service system. One of the most significant issues is the "significant strain" that funding the system has caused.[4] Since enactment in 1996, spending for universal service programs has steadily increased, while the revenue base assessed for funding has eroded. For these reasons, there is a growing consensus that the system, as presently designed, is no longer sustainable and, therefore, that universal service policies are under threat of death without significant reform.

The current policy debate on securing the viability of universal service financing has focused mainly on the contribution and distribution parts of the system. Specific issues include: who should contribute to, and what methodology should be used to fund universal service policies; the criteria for who should receive universal service funds; and what services should be included in the definition of universal service. This article provides an overview of the policies and problems in light of the recent fundamental changes in the industry.

Overview of Universal Service

Universal service has been a fundamental goal of telecommunications policy in the United States since the enactment of the Communications Act in 1934.[5] Historically, the universal service concept has basically stood for the principle that all Americans should have access to high-quality telephone service at affordable rates, including those living in rural and high cost areas and low-income consumers.[6] Acknowledging the diverse American landscape, universal service recognizes that the costs of providing telephone service to all corners of the United States vary widely, but that the nation as a whole benefits from a national network.

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Although the commitment to universal service has been real since 1934, the policy was not codified until the 1996 Act.[7] That Act reaffirmed and expanded federal policy regarding universal service.[8] In Section 254, Congress set forth the statutory framework for the universal service system.[9] One of the core principles of the Act was its preservation and advancement.[10] Congress identified reform of the system as one of the main goals so that it be preserved and advanced as the local telephone markets moved from monopoly to competition, and directed the Federal Communications Commission (FCC) and the states to take the steps necessary to establish support mechanisms to achieve this goal.[11]

The Act expanded universal service policy by directing that universal service support be made available to schools and libraries qualifying for telephone service, Internet access, and internal network wiring; and to public and non-profit rural health care providers for telecommunications services, installations and Internet connections.[12] The Act also laid the groundwork for other carriers entering the local telephone markets to compete with incumbent service providers over eligibility to receive universal support—referred to as competitive eligible telecommunications carriers (ETCs).[13]

FCC and court decisions over the years have shaped the system of funding for universal service. The current universal service system is a complex "patchwork" of implicit and explicit subsidies.[14] In order to achieve the goal of universal service, in many instances rates for certain telecommunications services were set above the cost of providing those services, to generate a subsidy that could be used to reduce the rates for local telephone service provided to residential customers. Specifically, some rates for interstate access charges and other service charges, particularly those of some rural carriers, were set at a level above cost in order to contribute to universal service.

The FCC has also established a federal universal service fund ("USF" or "Fund"). Section 254(b) of the Act directs it to establish universal service support mechanisms with the goal of ensuring the delivery of affordable telecommunications services to all Americans.[15] It provides that universal service policies be based, in part, on the principle that contributions be equitable and nondiscriminatory, and support mechanisms "specific, predictable and sufficient."[16]

Section 254(d) provides that every carrier providing interstate telecommunications service contribute to funding universal service. Thus, the Fund is supported by mandatory contributions from all carriers that provide interstate and international telecommunications services. USF contributions are based on a percentage of telecommunications providers' interstate and international revenues from providing those services. This percentage, or "contribution factor," is calculated by the FCC on a quarterly basis and varies depending on the anticipated funding needs for a program.

For carriers that could not easily identify the amount of revenues that are interstate as opposed to intrastate, such

as wireless providers, the FCC provided a so-called "safe harbor" percentage.[17] Under this method the FCC establishes percentages to approximate the percentage of interstate revenue generated by the wireless service provider. These percentages are for guidance only, and a wireless carrier can report a percentage less than the safe harbor with proper backup documentation.

Some states have also created universal service funds financed by assessments on certain telecommunications revenues. Also, most states maintain some intrastate rates, in particular the intrastate access charges imposed by rural carriers, above cost to contribute to universal service.

The USF supports four primary programs designed to help achieve the goal of universal service. Those components are the High Cost Program (access to telecommunications services in rural or high cost areas at rates comparable to urban areas), Low Income Program (support for low-income customers), the Schools and Libraries Program (discounted communications service for schools and libraries), and the Rural Health Care Program (discounted communications service for rural health care facilities). Spending on USF programs was $6.5 billion in fiscal year 2005.[18] Disbursements among the four universal service programs in 2005 were 58.7% for high-cost support, 28.6% for schools and libraries support, 12.4% for low-income support, and 0.4% for rural health care support.[19]

USF funds are given directly to the telephone service provider who qualifies as an ETC—not the end user of the service. The FCC has overall responsibility for the USF—which, in conjunction with state utility regulators determines the level of spending necessary to meet universal service obligations. The Universal Service Administrative Company (USAC), a non-profit corporation regulated by the FCC, manages the specific USF programs, collects the funds necessary to finance those programs, and dispenses the payments to ETCs.

USF and the Changing Communications Marketplace

Over the years the amount of spending on USF programs has increased, and it continues to grow. Outlays from the Fund grew from $3.3 billion in fiscal year 1999 to $6.5 billion in fiscal year 2005.[20] Total high-cost support increased from about $1.7 billion in 1999 to about 3.8 billion in 2005.[21] Total low-income support increased from about $500 million in 1999 to $804 million in 2005. Support for schools and libraries has increased from around $1 billion in 1999 to about $2 billion in 2005.[22] The demand for rural health care support has not changed much since 1999, with disbursements at about $25 million in 2005.[23]

The increase in USF spending can be traced to several factors: steadily growing costs associated with delivering telephone services to high-cost areas and low-income people; previously uncounted intercarrier compensation that is now included in USF spending totals;[24] the expansion of USF to include the new programs for schools, libraries and rural health care providers; and finally, the increase in the number of competitive ETCs[25] The overall growth of the Fund is expected to increase further. The amount of support for competitive ETCs has been growing and is likely to continue under current ETC guidelines.[26] If reform of intercarrier compensation between carriers results in lower access charges, these amounts may also be included in future USF outlays. Too, any expansion of the definition of universal service to include broadband Internet connections would expand the Fund.

While USF spending is rising, since 2000 the contribution base that funds the USF has been decreasing—falling by 5 percent between 2000 and 2003.[27] This decrease is due mainly to a decline in long distance prices and revenues due to increased competition in the long distance market.[28] Total end-user interstate and international telecommunications service revenues reached a peak of $81.7 billion in 2000 and fell to an estimated $77.9 billion in 2005.[29] The development of new and advanced communications technologies has also added to the decline in revenue base. Consumers are substituting E-mail or Internet telephony, i.e., voice over Internet protocol (VoIP), services for interstate and international calls.

Another problem is that it has become increasingly difficult to identify precisely which are interstate and international telecommunications service revenues because the carriers are offering these services to customers as part of bundled packages that include other services. Wireless carriers, for example, often bundle interstate calls in their service plans. While stand-alone long distance revenues have been declining, wireless services and Internet telephone services "have been growing dramatically."[30] Separately but also contributing to the decrease, the FCC changed the classification of DSL broadband Internet service[31] from a telecommunications service to an information service—thus not subject to USF contributions.[32]

In sum, the growth of competition in the communications marketplace, coupled with advances in technology, have had a negative impact on the health and viability of the USF as presently designed. These changes have led to an increasing disparity between the carriers and revenue source contributing to the Fund and the growth in the entities and programs eligible to receive funding. The universal service system is requiring significantly higher amounts of funding for new programs (schools, libraries and rural health care), offsets for lower access rates, and an increasing number of competitive ETCs. At the same time, the sources of funding (long-distance and international revenues) are shrinking. Calls for USF reform focus around the shrinking of the contribution base and the growth in distributions of the overall Fund.

USF Contribution Methodology Issues

Due to the increasingly competitive telecommunications marketplace, the FCC has been reviewing the universal service contribution methodology.[33] Since 2001, it has taken various actions to ensure the stability and sufficiency of the USF.[34] Most recently, in response to the shrinking contribution base, it adopted two modifications to the existing approach for assessing contributions to the USF.[35] First, the FCC raised the existing wireless "safe harbor" percentage used to estimate interstate revenue to better reflect growing demand for wireless services.[36] Second, it expanded the base of USF contributions by extending universal service contribution obligations to providers of interconnected voice over Internet Protocol, or VoIP, service. Similar to wireless carriers, for these VoIP providers the FCC established a safe harbor percentage to estimate interstate revenue.[37]

The measures taken by the FCC are interim and not intended to fully address the fundamental concerns regarding the long term viability of the current revenue-based system.[38] It continues to examine more comprehensive reform of the contribution methodology. In conjunction with the interim order, a proceeding was initiated to consider connection-based methodologies that would assess carriers based on their provision of connectivity to interstate networks, regardless of the volume in minutes-of-use or the amount of revenues derived from a connection.

Several options have been proposed to fundamentally reform the financing of universal service. One option is to expand the contribution base of the current system to include total telecommunications revenue other than interstate and international revenue. Currently only about $80 billion of the roughly $230 billion in total telecommunications revenues are eligible to be counted in the USF contribution base.[39] Before the FCC could include intrastate revenues in the assessment base, Congress would have to modify the Communications Act of 1934—since Section 254(d) expressly identifies interstate providers and a court decision confirms that the FCC is prohibited from assessing intrastate revenues.[40] A related alternative is to include revenue from other categories of services, most notably revenue from broadband Internet service in addition to all telecommunications services. This option would also likely require modification of the Communications Act of 1934 before the FCC could include all these revenues in the assessment base. Another option is to move away from a revenues-based approach and instead move to a numbers-, or connections-based methodology. Under this option generally carriers could be assessed based on each telephone number assigned to a customer or on the basis of the capacity of the telephone lines that the carriers provide to the customers.

The FCC has noted that a consensus approach to contribution methodology reform has not materialized.[41] Commentators there have "generally supported telephone number-based proposals or hybrid proposals that would combine a telephone numbers system with a revenue- or connection-based component."[42] Other parties have advocated retaining a revenue-based approach and broadening the base of contributors.[43] Many colleges and universities, as well as certain low income, low volume consumers, oppose non-revenue-based proposals claiming they would experience increases in USF obligations.[44]

USF Distribution Issues

The size of the USF has been a major concern for some policy-makers and for carriers that pay into the Fund. As discussed earlier, outlays flowing from the USF have grown substantially over the years; and the overall growth of the Fund is expected to increase even further. These potential sources of future spending growth will be examined now individually.

Competitive ETCs

Following the 1996 Act, the FCC determined that federal universal support should be made available, or "portable," to all ETCs that provide supported services, regardless of the technology used.[45] This increased the number of telephone carriers eligible to receive universal service subsidies. Over the years an increasing number of carriers have applied for ETC status, predominantly wireless providers. Since 2000, the number of has grown from two to 263, and is likely to continue under current ETC guidelines.[46] Since wireline, wireless, and cable companies may each offer local telephone service in a particular high cost area, all three can potentially qualify as ETCs in that service area and receive universal service funds. The competing carriers only receive funds for those customers they capture; but since a customer can elect to obtain service from more than one carrier at the same time, more than one carrier can receive universal service funding for servicing that customer.[47] These scenarios increase the total size of the Fund.

In recent years, the increase in the high-cost support component of USF has been due mainly to support for competitive ETCs. USF support to competitive ETCs grew from an estimated $130 million in 2003 to an estimated $640 million in 2005. From 2004 to 2005, the amount of competitive ETC support doubled.[48]

The growth in competitive ETC payments, and potential expansion in the next few years, has been a major concern for some. Some analysts have criticized Fund payments to competitive ETCs, contending that it "creates businesses that are founded on 'regulatory revenues' rather than on regulatory formulas tied to investment levels (allowed rates of return), and possibly damage[s] the incumbent carriers as customers are siphoned away in already-sparse service areas."[49]

One of the fundamental questions of USF reform is how to apply discipline to the system of competitive ETCs applying for USF payments. This issue has become politically charged by the competitive carriers, who are vigorously defending the funds that they are receiving or would like to receive. The FCC has recognized this potential problem and is currently examining the issue. The FCC and the Federal-State Joint Board on Universal Service (Joint Board)[50] over the past few years has increasingly favored stricter standards for ETC designations.[51] In March 2005, the FCC released an order imposing additional requirements to its existing framework, for the resolution of ETC designation requests. The FCC's order encourages, but does not require, states to use these same guidelines in resolving ETC petitions filed with the States.[52] Other issues currently being discussed include whether payments should be made for second lines, what methodology should be used for calculating support, and how to further refine the system for designating ETCs.[53]

One of the arguments put forth by the incumbent local telephone carriers for why they should enjoy superior, or even exclusive, access to the universal service subsidy is that they have "carrier of last resort" responsibility and serve every customer in their service area. Some states that have awarded ETC status to other carriers have tended to require such a commitment from those carriers as well (though there may remain issues of the geographic reach of ETC's services).

In August 2005, the Joint Board put forth a proposal to use a "reverse auction" to assign universal service funding for high cost areas. The idea is to award high-cost funding to the carrier bidding to offer service at the lowest cost. Under the

proposal, two carriers serving in each service area might win. Both would be required to provide wireless service, while the other would be required to provide broadband connectivity. Proponents contend that it will provide an incentive to carriers that can deliver service more efficiently.

Intercarrier Compensation Reform

The FCC has been conducting an ongoing examination of intercarrier compensation to develop a more unified regime governing payment flows among telecommunications carriers.[54] Over the years, the FCC has issued various orders addressing issues related to intercarrier compensation. Most recently, it has been reviewing the reform plan filed by the National Association of Regulatory Utility Commissioners' (NARUC's) Task Force on Intercarrier Compensation known as the Missoula Plan.[55] Uncertainty remains regarding USF and intercarrier compensation reform, particularly as the FCC is currently reviewing the Missoula Plan. Changes to intercarrier compensation could result in a proposal to raise the level of USF to compensate for reductions in funds currently received from access charges.

Broadband Internet Service

Historically, universal service has been limited to basic telephone service. Under current regulations, only schools, libraries and rural health care facilities are eligible to receive universal service support, explicitly for broadband Internet services. Recently, there has been discussion on whether to include broadband services among those that should be subsidized to achieve universal service. The Telecommunications Act does not expressly include access to a broadband network in the definition of universal service; however, one of the principles instructing the FCC and the Joint Board to base policies for the preservation and advancement of universal service does refer to broadband services specifically. The principle reads: "Access to advanced telecommunications and information services should be provided in all regions of the Nation."[56] The Act does not spell out how this should be accomplished. Congress meant for universal service to be flexible in its ability to encourage growth and adoption of broadband technologies. Section 254 states: "Universal service is an evolving level of telecommunications services that the [FCC] shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services."[57] To date, the Joint Board and the FCC have not included advanced services in the definition of universal service. Several legislative proposals extending universal service to broadband service have surfaced recently in Congress.

One of the arguments for including access to a broadband network in the USF holds that, while market demand appears to be sufficient to generate deployment of broadband service in many urban areas, without government intervention that may not be possible in rural or other high-cost areas. In those areas, high costs and/or limited demand may render it economically infeasible to deploy multiple broadband networks, or even a single network, without government intervention.

Expansion of the scope of universal service to include universal access to a broadband Internet service at affordable rates raises several issues. Most fundamentally, what is the level of broadband Internet service that should be provided as part of universal service? Is it reasonable to develop a universal service program that subsidizes multiple services and competitors to serve areas in which costs are prohibitively expensive for even one carrier? One concern is the potential growth in the size of the USF might be exacerbated if the scope of universal service were expanded to include broadband service, since customers would be able to subscribe for services from multiple carriers, with more than one of those carriers becoming eligible for universal service payments. This situation currently exists in high-cost areas served by both wireline and wireless carriers. In addition, some policy makers may object to the goal of universal service providing a choice of broadband providers in high cost rural areas. Many believe this is inconsistent with the main goal of the universal service program to ensure that all consumers, including those in high cost areas, have access to affordable rates for basic local telephone service.

Concluding Thoughts: Congressional USF Reform

A consensus is forming that Congressional legislation will likely be needed to fully address the modifications needed to, not only ensure the viability of universal service, but also address the myriad issues surrounding universal service reform. Members in both the House and the Senate have expressed a desire to address this issue, and it is likely that USF reform will play a key role in any reform policy debate.

The 109th Congress made an attempt to update the nation's communications laws, including universal service in 2005. Members in both the House and Senate proposed legislation reforming USF. Ultimately none of the bills ended up passing both houses. The House passed its communications reform bill, H.R. 5252, on June 8, 2006. Soon after, on June 28th, 2006, the Senate passed its version, S. 2686, to move to the Senate floor. However, it was too controversial to receive time for consideration on the Senate floor and was thus passed over. Congress adjourned for the year without any Senate action on the bill, which effectively killed it and, for a time, universal service reform too. But a bill to reform USF has already been introduced in the 110th session, and more are expected from both House and Senate members.[58] Reform that addresses distribution issues, however, will be difficult. The fact that any reduction of Fund distributions may adversely impact the current recipients of the funds—namely rural carriers—is a political reality that must be taken into account—particularly as the political power of rural Senators is quite high. Still, Congressional action may be needed for some of the reform options under consideration.

Endnotes

1 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 "Telecom Act of 1996").

2 The pace of technological change has been astounding. "Blackberries" are no longer just fruit, and "hot spots" aren't just popular clubs. We have a plethora

of new technologies including WiFi and WiMax for wireless Internet access, Voice-over-Internet-Protocol (VoIP) for telephone service using the Internet, and Broadband Over Powerline (BPL) for Internet access via electric lines.

3 In the current debate on communications policy central issues include reform of the universal service, reform of intercarrier compensation, franchising issues for video providers, and net neutrality, along with a whole host of others.

4 *IMO Universal Service Contribution Methodology*, WC Docket No. 06-122 (rel. June 27, 2006).

5 The Communications Act of 1934, as amended, is codified 47 U.S.C. §§ 151 *et seq*.

6 *See* 47 U.S.C. § 151 ("One of Congress's primary purposes in establishing the Federal Communications Commission was to "make available… to all the people of the United States… a rapid, efficient, Nation-wide… communications service with adequate facilities at reasonable charges.").

7 47 U.S.C. § 254.

8 *Id.*

9 *Id.*

10 *Id*.

11 See 47 U.S.C. § 254(d).

12 This program is commonly known as the "E-rate program."

13 Since wireline, wireless, and cable companies all may offer local telephone service in a particular high cost area, all three can potentially qualify as "eligible telecommunications carriers" ("ETCs") in that area and receive universal service funds.

14 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996).

15 47 U.S.C. § 254(b).

16 47 U.S.C. § 254(b)(4), (5).

17 *See Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 21252, 21255, para. 6 (1998).

18 *IMO Universal Service Contribution Methodology*, WC Docket No. 06-122 (rel. June 27, 2006); *See Financing Universal Telephone Service: A CBO Paper* (Congressional Budget Office, March 2005).

19 *Federal-State Joint Board on Universal Service Monitoring Report on Universal Service,* CC Docket 98-202, December 2006 [http://www.fcc.gov/wcb/stats].

20 *IMO Universal Service Contribution Methodology*, WC Docket No. 06-122 (rel. June 27, 2006); *See Financing Universal Telephone Service: A CBO Paper* (Congressional Budget Office, March 2005).

21 *See Financing Universal Telephone Service: A CBO Paper* (Congressional Budget Office, March 2005); *See Federal-State Joint Board on Universal Service Monitoring Report on Universal Service*, CC Docket 98-202, December 2006, *at* http://www.fcc.gov/wcb/stats.

22 *Id.*

23 *Id.*

24 *See* 44 U.S.C. § 254(e). The 1996 Act mandated that universal service support be explicit, thus requiring that many implicit cross-subsidies be recovered through the USF instead.

25 In recent years the increase in the high-cost support component of USF is due to support to competitive ETCs. USF support to competitive ETCs grew from an estimated $130 million in 2003 to an estimated $640 million in 2005. From 2004 to 2005 the amount of support doubled. *See Factors That May Increase Future Spending from the Universal Service Fund: A CBO Paper* at ix (Congressional Budget Office, June 2006). *See Federal-State Joint Board on Universal Service Monitoring Report on Universal Service*, CC Docket 98-202, December 2006, *at* http://www.fcc.gov/wcb/stats.

26 *Id.*

27 *Financing Universal Telephone Service: A CBO Paper* (Congressional Budget Office, March 2005).

28 This downward trend is expected to continue due to increased competition from voice over Internet protocol (VoIP) service, continued substitution of e-mail and other Internet applications for long distance service.

29 *See December 2006 Monitoring Report, Federal/State Joint Board on Universal Service*, Table 1.1, total Telecommunications Industry Revenues, at p. 1-13, released December 5, 2006, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-262986A3.pdf.

30 *IMO Universal Service Contribution Methodology*, WC Docket No. 06-122 (rel. June 27, 2006); See *Financing Universal Telephone Service: A CBO Paper* (Congressional Budget Office, March 2005).

31 Digital Subscriber Line Service is the high-speed Internet service offered by local phone companies.

32 To prevent a disruption of markets, the FCC created a 270 day transition period during which the DSL revenues would continue to be treated as interstate telecommunications service revenues for the purposes of funding universal service. In addition, because blanket re-classification of DSL to information service would, under current rules relating to National Exchange Carrier Association (NECA) tariffs and pools that help fund universal service, reduce the universal service support available to certain rural telephone companies for the provision of DSL services, those carriers were given the option of continuing to treat DSL as a common carrier (telecommunications) service.

33 *See generally 2001 Notice*, 16 FCC Rcd 9892.

34 *See generally First Further Notice*, 17 FCC Rcd. 3752; *Second Wireless Safe Harbor Order*, 17 FCC Rcd at 24983-95; *Commission Seeks Comment on Staff Study Regarding Alternative Contribution Methodologies*, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, 98-170, Public Notice, 18 FCC Rcd 3006 (2003).

35 *IMO Universal Service Contribution Methodology*, WC Docket No. 06-122, at 4 (rel. June 27, 2006).

36 *Id.* The FCC raised the wireless safe harbor percentage from 28.5 percent to 37.1 percent of total end-user telecommunications revenue. This interim wireless safe harbor was last updated in 2002. Wireless carriers continue to retain the option to base contributions on their actual revenues or on traffic studies that estimate their actual interstate revenues.

37 *Id.* The FCC established a safe harbor percentage of interstate revenue at 64.9 percent of total VoIP service revenue. Interconnected VoIP providers may also calculate their interstate revenues based on their actual revenues or by using traffic studies.

38 *IMO Universal Service Contribution Methodology*, WC Docket No. 06-122, at 4 (rel. June 27, 2006).

39 *Financing Universal Telephone Service: A CBO Paper* (Congressional Budget Office, March 2005).

40 In *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999), cert. denied, 120 S. Ct. 2212 (2000).

41 Federal Communications Comm'n, *Report and Order and Notice of Proposed Rulemaking*, FCC 06-94, adopted June 21, 2006, at 14.

42 *Id*.

43 *Id.*

44 *Id*. at 13-14.

45 *Procedures for FCC Designation of Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act*, Public Notice, 12 FCC Rcd 22946 (1997); *Promoting Deployment and Subscribership in Unserved Areas, Including Tribal and Insular Areas*, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, CC Docket No. 96-45, 15 FCC Rcd 12208 (2000).

46 *See Factors That May Increase Future Spending from the Universal Service Fund: A CBO Paper* at ix (Congressional Budget Office, June 2006).

47 Typically, customers do not receive basic telephone service from both the local telephone company and the local cable operator, so it is unlikely that those two carriers would each receive universal service funds for serving the same customer. But many customers do receive both wireline service (from a telephone company or a cable operator) and wireless service, and in that case,

both the wireline and the wireless service provider would receive the universal service subsidy.

48 *See Factors That May Increase Future Spending from the Universal Service Fund: A CBO Paper* at ix (Congressional Budget Office, June 2006). *See Federal-State Joint Board on Universal Service Monitoring Report on Universal Service*, CC Docket 98-202, December 2006, *at* http://www.fcc.gov/wcb/stats.

49 *Universal Service Financial Analysis,* Legg Mason, June 25, 2004, at 7.

50 The Federal-State Joint Board on Universal Service was established in March 1996, to make recommendations to implement the universal service provisions of the 1996 Act. This Joint Board is comprised of FCC Commissioners, State Utility Commissioners, and a consumer advocate representative.

51 *Federal-State Joint Board on Universal Service,* Report and Order, CC Docket No. 96-45, 20 FCC Rcd 6371 (2005).

52 *Id.* Competitors must obtain ETC status from the relevant State Commission (or the FCC in cases where the State commission lacks jurisdiction to make the ETC designation). Section 214(e)(6) of the Communications Act of 1934, as amended permits the FCC to designate a carrier as eligible to receive federal universal service support under section 214(e)(1) if the carrier is not subject to the State Commission's jurisdiction.

53 *Id.*

54 The term "intercarrier compensation" refers to the charges that one carrier pays to another carrier to originate, transport, and/or terminate telecommunications traffic.

55 *See Comment Sought on Missoula Intercarrier Compensation Reform Plan*, CC Docket No. 01-92, Public Notice (July 25, 2006).

56 47 U.S.C. § 254.

57 *Id.*

58 Senator Ted Stevens (R-AK) introduced S.101, the Universal Service for Americans Act on January 5, 2007. Reps. Rick Boucher (D-VA) and Lee Terry (R-NE) are expected to reintroduce this year an updated version of the USF reform bill they filed last session.

Remarks by Governor John Engler to the Federalist Society

*Washington, D.C., May 3, 2006**

Thank you for the invitation to join this Federalist Society conference on telecommunications. This is an area of vital interest to manufacturers, profoundly affecting their ability to compete in the dynamic global market—a marketplace in which U.S. capacities have been slipping. I welcome the opportunity to outline the National Association of Manufacturers' perspective on these issues.

First, let me congratulate the Federalist Society for promoting vigorous, honest and fair-minded debate on the prominent legal and policy issues that shape our nation. Speaking as a Federalist Society member and former Governor, who appointed people to the state courts, I know the Federalist Society works with little public or media attention until it comes time to make judicial appointments. Then the shouting starts. I have never worried all too much about the shouting. However, it is unfortunate that the political eruptions overshadow the rest of the work the Federalist Society does in promoting a deeper, more balanced understanding of important legal and policy issues… issues like telecommunications.

For example, the Society has organized a "Back to Basics" conference later this month on intellectual property. The NAM follows this issue with great interest. Our research arm, The Manufacturing Institute, just released a study, "Intellectual Property for the Technological Age," whose author, University of Chicago's Richard Epstein, is a member of the Society, of course. We believe protecting intellectual property is essential to encouraging innovation in manufacturing and other realms. As Epstein says, "No one can assume that valuable innovations will pop up magically in the public domain if their inventors received no reward for their labor and capital." For that reason, at the National Association of Manufacturers, we support policies that encourage innovation and rewards in the telecommunications sector, an area where the United States has not kept pace with the rest of the world.

How can the U.S. do better? Competition. The NAM is working on behalf of policies that foster competition in telecommunications, particularly in the area of broadband—the high-speed transmission of data, voice and video, a topic I will focus on today. End-customers—including manufacturers—will benefit from a vigorous battle in the marketplace among wire, wireless, cable and satellite providers—those who can offer on-demand TV programming, very high speed Internet access, telephone and a host of other digital services.

Lack of investment is a major reason the United States, historically a leader in telecommunications, has fallen behind. We now stand sixteenth in the world in per capita subscribers to broadband, down from fifth place in 2000. Other countries are moving ahead at a rapid pace, while the U.S. trudges ahead, slowly.

According to an annual report released just last week by *The Economist* and IBM, the "digital divide" between developed and developing countries has narrowed. Within China and India, some regions (Shanghai and Bangalore) have almost the same level of Internet and mobile phone connections as developed countries. These countries already benefit from low labor costs, and their advances in telecommunications will make them even more competitive.

A lagging United States carries far-reaching implications for manufacturing. NAM's membership includes several major carriers, as well as hundreds of members who make telecommunications equipment. Every single one of these members depend upon telecommunications services, which have become an integral part of all stages of manufacturing, from design and production to shipping and marketing. There can be no "just-in-time" manufacturing, with invoices and inventory systems spread across six continents, unless companies can communicate to one another immediately... without interruption.

Geography and population densities play a part in our trailing status in broadband penetration; it is obviously easier to connect South Korea or Hong Kong than a country that spans a continent. But there are government barriers, too, which have hindered development, access and affordability for these telecommunication services. I am speaking specifically of local franchising laws, which have walled off tens of thousands of communities and companies from effective competition for broadband services. To enter a market served by a local cable provider under a municipal franchise, a new provider must engage in unique, costly and time-consuming negotiations. To achieve any level of economies of scale, it must then do so again, and again. And again. Talk about a barrier to competition! One carrier has had a team of 100 lawyers working on local video franchises for the last several years. But by the end of 2005, it had won approval to serve only forty of its 10,000 service areas.

As a former legislator, I am sensitive to the value of local control, the ability of communities to determine local matters, especially in such things as digging trenches and laying lines. I understand a town's intense interest in preserving its franchise fees. But telecommunication services are national, international, global! And so is competition in manufacturing.

Born of 1960s and '70s technology and contemporaneous governing practices, municipal franchising does not take into account the technological advances that power our economy. Lily Tomlin sitting at a switchboard, plugging in this call or that while she eavesdrops on conversations? That day is long gone. Today, telecommunications means four engineering offices in four different states, connecting in real time to one another as they design their latest product. It means students in six different classrooms in rural Montana studying science or downloading the latest tutorial to work on at home. It means manufacturers managing a supply chain with scores of companies, or catching up on the latest news from NAM's blog at www.shopfloor.org.

** John Engler is the former Governor of Michigan, and President and CEO of the National Association of Manufacturers.*

The current arrangement no longer works. It cannot accommodate the global marketplace. Several states have passed legislation to create statewide video franchising, so companies can negotiate each and every municipal agreement. The results are extremely promising, demonstrating the potential for rapid progress if Congress passes a national franchising law. Texas enacted its law in 2005, and the incumbent cable company dropped its prices for expanded video and Internet services in every community where a new competitor entered the market. Studies show that consumers quickly became aware of their expanded options and benefited from the lower cost. Consumers can handle the challenge of informing themselves and making a decision in the marketplace.

In March, Governor Mitch Daniels of Indiana signed a major telecommunications law, including a statewide franchise process for video telecommunications. The measure also got the Indiana Utility Regulatory Commission out of the business of regulating broadband and commercial mobile services. Indiana is the most manufacturing-intensive state in the country, and Governor Daniels argued for the legislation on competitive grounds. The interesting thing is that in contrast to previous years, the bill passed both houses of the state legislature by large margins. The political landscape is shifting toward telecommunications reform as more people realize how critical it is for American competitiveness. Support is bipartisan, and growing, in states and in Congress.

A week ago, the House Energy and Commerce Committee passed out its bill with nationwide video franchise language on a 41-12 vote. Some jurisdictional issues with the Judiciary Committee have arisen, but Chairman Barton said yesterday he still expects the bill to come to a full vote by next week. The NAM strongly supports this legislation (the Communications Opportunity, Promotions and Enhancements Act of 2006) and we are pushing for its enactment this year. We were also pleased to see that Committee rejected amendments that would have institutionalized a vague concept known as "net neutrality." Senator Stevens also thankfully steered clear of "net neutrality" when he introduced his broad telecommunications bill on Monday.

"Net neutrality" is a smart public-relations term; what it really means is the regulation of traffic flow, service and pricing structures offered by broadband carriers—the kind of services that broadband companies should be able to package together and offer to a willing buyer. We need to lift the barriers to competition—not impose new rules and guidelines in an effort to mandate an ill-defined "fairness." Once established, a regulatory regime tends to grow in scope and interference. Or tries to get rid of it all together! The better approach is to let the consumer decide. Investment will follow. According to a 2004 study, deregulatory policy measures (the FCC has already enacted many) could increase telecommunications investment by up to $60 billion over five years, create several hundred thousand new U.S. jobs and add up to $634 billion to the national GDP.

I have focused today on broadband and the need for national video franchising because that is the place where we can make a big difference, right away, with Congressional action. But there are other issues and venues where the NAM is active. At the Federal Communications Commission, we have consistently urged the commissioners to remove excessive regulations that hinder broadband deployment. The NAM also supports keeping Internet-based services unregulated. The U.S. telecommunications network now carries more data than voice traffic, and the transition to what will ultimately be an all-Internet Protocol network is well underway. Minnesota's Public Utilities Commission has sought to regulate Voice Over Internet Protocol (VOIP) services like traditional telephony. The FCC has taken the opposite approach, ruling that the services are interstate and not subject to state regulation. The NAM has joined other members of the High-Tech Broadband Coalition in defending the FCC's ruling against Minnesota's challenge.

I still believe that the American people would be ill-served by allowing the separate states to over-regulate the telecommunications system. Today, an across-town call in Chicago may be routed through California or Florida, or even leave the country, before reaching its ultimate destination. Imagine a fifty-state regulatory system trying to handle that!

The states do have a useful role to play. Through their public utilities commissioners or through other agencies, they are responsibility for enforcing commissioner protections. With local authorities, they can manage emergency response services. States can also help by removing regulatory barriers. During my tenure as governor, Michigan adopted the first state law establishing uniform process and free structure for companies needing to dig trenches to lay Internet cable. We also provided for tax-exempt bonds and a new broadband development authority to encourage small telecommunications companies to offer high-speed access to rural areas. The state did the right thing by eliminating red tape, and the result was more access to broad-band: improved distance-learning for rural residents, improved supply-chain management for small business, and powerful efficiency gains in the healthcare sector that lowered costs.

My first speech as the NAM's new President and CEO was in October 2004 out in Las Vegas, given to the United States Telecom Association. The country was just coming out of a recession that had hit telecommunication manufacturers especially hard, and I wanted to make sure the telecom sector knew that NAM was intent on working on these issues. And we have. The NAM remains committed to achieving a competitive environment that fosters innovation and investment. Telecommunications provides the conduit for information that must be kept free and open—as the foundation for a healthy manufacturing sector, a strong economy, and a vital public sphere of ideas… a sphere of ideas the Federalist Society fosters through its work and dedicated membership.

Thank you and my thanks for inviting me to speak today.

Book Reviews

Not a Suicide Pact: The Constitution in a Time of National Emergency

BY RICHARD A. POSNER

*Reviewed by Margaret D. Stock**

Judge Richard A. Posner of the Seventh Circuit Court of Appeals is perhaps the most prolific writer among sitting federal judges today. An ardent advocate of cost-benefit analysis, he has often used a law-and-economics approach to shed new light on a variety of subjects. In *Not a Suicide Pact,* Judge Posner brings a similar approach to national security issues, arguing that cost-benefit analysis should also be applied to thorny questions of civil liberties and constitutional rights in the current global terrorism conflict.

Applying such analysis to anti-terrorism measures is a worthy undertaking, but Judge Posner's latest book will likely frustrate many conservatives and libertarians—even those who are fans of the law and economics approach. Posner does not provide sources for many of his more controversial assertions, and the book is devoid of citations and footnotes (it has a brief bibliography). In offering a sketchy yet lively defense of many of the Bush Administration's initiatives in the war on terrorism, Judge Posner also seemingly embraces the idea of a "living Constitution," rejects out-of-hand the arguments of civil libertarians on both sides of the aisle, and—without citing much evidence—argues that in the war on terrorism, cost-benefit analysis almost always favors the Government's preferred approach. Explaining this short shrift, Posner opines that the costs and benefits of a trade-off between liberty and security can rarely be quantified, calling them "imponderables" that must be left to the "subjective" judgment of judges. Surely, however, liberty and security are no more difficult to analyze in this fashion than marriage, sex, crime, or torts—and Judge Posner has shown no hesitation there. Without sufficient explanation of the rationale for disregarding hard analysis of national security issues, the reader is left unpersuaded.

The title, of course, recalls Abraham Lincoln, but actually comes from a quote from Justice Robert H. Jackson in his dissent in *Terminiello v. Chicago. Terminiello* was a free speech case in which the United States Supreme Court reversed a disorderly conduct conviction arising out of a meeting of the Christian Veterans of America (the defendant had provoked the listening crowd to violence by making racially offensive remarks). In dissenting from the Court's decision to overturn the conviction, Justice Jackson opined that "[t]he choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact." Posner's title implies that he will argue that longstanding constitutional restrictions on the power of the federal government in favor of individual liberty must yield to security-related demands in the current war. And indeed, Judge Posner affirms this view repeatedly throughout the book.

He describes this "pragmatic" approach as "the usual way that practical people make decisions: on the basis of anticipated consequences refracted through life experiences and other personal factors." The question becomes "whether a particular security measure harms liberty more or less than it promotes safety." This approach sounds much like the *Mathews v. Eldridge* procedural due process balancing test created by the Burger Court and applied most recently by Justice Sandra Day O'Connor in *Hamdi v. Rumsfeld*. Judge Posner does not discuss the *Mathews v. Eldridge* test explicitly, but he does favor a cost-benefit analysis that considers the private interest (civil liberties) of the affected individual, the public interest (national security), and the risk of error for both.

Where he departs from the usual *Mathews* approach is in viewing the public interest as nearly always overriding the individual's interest—at least in cases involving Islamic terrorists (he specifically excludes other types of terrorists). His main justification is that the current Islamic terrorist threat is unique. He argues that because modern Islamic terrorists fall within a gray area, as between criminals and legitimate international warfighters, modifying traditional constitutional doctrine to defeat them is justified. Critics will respond that global terrorism and weapons of mass destruction have been around for more than fifty years—what is new today is the decentralized, stateless, and self-destructive nature of the current terrorist threat, which makes it difficult to contain many modern terrorists through the traditional mechanisms of law enforcement, diplomacy, and war. While those mechanisms may need updating or alteration, it is not so evident, as Judge Posner assumes, that the current threat is altogether different from past ones (e.g., a fanatic, nuclear-armed Soviet Union), such that traditional methods of interpreting the Constitution are obsolete. The Constitution was able to deal with these old threats; why not this one? Posner does not explain the incomparable contrast.

There are some limits and exceptions to his mostly pro-Government stance, however. Posner does disagree with the Administration's assessment of its ability to decide the initial fate of unlawful enemy combatants, arguing that such persons should be permitted to have their status determined by a civilian tribunal. He also goes after former Justice Department attorney and now Berkeley law professor John Yoo's views of presidential war powers, "an extravagant interpretation of Presidential authority [that] confuses commanding the armed forces with exercising dictatorial control over the waging of war, the kind of control exercised by a Napoleon or a Hitler or a Stalin, or by dictators in the Roman Republic…." Such qualifications and characterization of other strong federal power advocates, however, are hard to square with the book's main thrust.

One is, of course, hard-pressed to argue with Judge Posner's basic premise that cost-benefit analysis should be applied to the war on terrorism. Surely, in most cases, the Government should be forced to so justify its decisions. Where most rational people disagree, however, is in the details—the

** Margaret D. Stock's Author Note appears in the lead article of the International & National Security Law section of this issue.*

actual calculation of costs and benefits. Here, Judge Posner rarely gets down to specifics, assuming for the most part, again, that the Government's assessment of the benefits of a given "national security" measure *must* be accurate. But it is exactly here that many people—including many conservatives—would disagree with him. How do we know that the Government's assessment of the benefit of a particular policy is correct? The Government has repeatedly mistaken the benefits of particular security policies—witness the miscalculations in Iraq, the U.S. VISIT entry-exit program for foreigners, or even the imprisonment of U.S. citizens Brandon Mayfield and Donald Vance. How do we know whether the Government's assessment is accurate unless the Government is forced to make its case publicly? Or at least in camera, in an adversarial court setting (perhaps under the tried-and-true methods of the Classified Intelligence Procedures Act)? Posner favors the Government's position because he doubts the ability of judges to "bone up" on modern terrorism, but he understates the case when he says that "the judiciary… has no machinery for systematic study of a problem [like terrorism]." In fact, the adversarial system is such a problem-solving process—one that is used successfully to solve new and complex problems every day.

Early in the book, Posner briefly discusses his theory of constitutional decision-making; then turns to the individual topics of detention, interrogation, electronic surveillance, free speech, and profiling. In very cursory treatments of these complex topics, he raises many questions, but rarely brings the discussion to a satisfying conclusion. He dismisses, for example, the idea of an alternative to traditional habeas corpus proceedings for suspected terrorists, arguing that civilian courts should decide in the first instance whether someone is an enemy combatant subject to a trial by military tribunal. Why are civilian courts better able to decide whether a person captured on the battlefield is a combatant? We are not told. Posner does not mention the traditional forum for such decisions—the Article 5 hearings authorized by the Uniform Code of Military Justice.

It is perhaps Judge Posner's chapter on constitutional and judicial decision-making that will cause the most angst for conservative readers. Rejecting such venerable theories as Originalism and deference to precedent, Judge Posner argues that constitutional rights are not created by the constitutional text; rather, "the principal creators are . . . the justices of the Supreme Court… heavily influenced by the perceived practical consequences of their decisions rather than [] straitjacketed by legal logic." This statement appears to be a plug for result-oriented jurisprudence, which may not be a comfort to those who prefer less "subjective" approaches. Judge Posner's statement that "constitutional law is fluid, protean, and responsive to the flux and pressure of contemporary events" sounds much like Justice William Brennan's constitutional philosophy.

Posner's stance on other controversial issues is perhaps worthy of the label "pragmatic," but not comforting to those who prefer clear rules. He seemingly favors coercive interrogation techniques and torture when "necessity" requires it—but unlike Alan Dershowitz, who has famously argued that courts should ratify this use in advance, prefers the approach taken by Jack Bauer of "24"—act first and ask the lawyers later. Judge Posner approvingly terms this kind of "pragmatic" approach to obtaining information "civil disobedience." (Query whether sitting federal judges should be hinting that it is acceptable for federal officials to break the law in this fashion.)

There are other highly tendentious assertions in the book. Posner states, for instance, that "[a]lthough there is a history of misuse by the FBI, the CIA, and local police forces of personal information collected ostensibly for law enforcement and intelligence purposes, it is not a recent history." In fact, such misuse is relatively common and growing as database-sharing increases and more government agents have access to valuable personal information. Government employees are no more trustworthy today than in the past. Convicted FBI Special Agent Robert Phillip Hanssen, one of the national security professionals Judge Posner trusts to make better decisions than federal judges, was not a product of the World War II era but the modern era of computers and the Internet.

The most interesting part of the book for those desiring a substantive discussion of emergency powers is actually the conclusion, wherein Judge Posner races through several theories of how democracies (and Constitutions) should handle the problem of national emergencies. The brevity of the discussion, however, leaves the reader wishing this section were larger, not relegated to an abbreviated conclusion.

Is it always true that one must trade liberty for security? Or are there security benefits to civil liberties? In the end, Judge Posner never confronts this argument. He hints at the idea ("Civil liberties can even be thought of as weapons of national security, since the government, with its enormous force, is, just like a foreign state, a potential enemy of the people."), but throughout the book fails to confront the matter squarely. In fact, there is a growing body of evidence that there are substantial security benefits to maintaining civil liberties, and that these benefits are overlooked by those who adopt a narrow view of security. Despite these drawbacks, it must be said, *Not a Suicide Pact* is provocative and eminently readable. It has the flavor of a stimulating and timely dinner conversation with one of America's leading intellectuals. And that Judge Posner is.

The Chosen: The Hidden History of Admission and Exclusion at Harvard

BY JEROME KARABEL

*Reviewed by Gail Heriot**

The modern university got its start on September 2, 1945, on the decks of the U.S.S. Missouri, when representatives of Emperor Hirohito and the Imperial Japanese Army unconditionally surrendered to the Allied Forces. The end of the war meant that millions of American men and women would be coming home to resume lives that had been interrupted by war. Many hoped to enter college. Thanks to the G.I. Bill, signed into law a year earlier by President Franklin Delano Roosevelt, their hopes were within reach.

Some observers worried that America's colleges and universities would be overcrowded. These worries were, of

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course, borne out. Desks and chairs were in short supply; classes in Quonset huts were common. But everyone understood this problem to be temporary. New lecture halls would be built, furniture moved in, bookshelves stocked. It was just a matter of time. Others worried that academic standards at the prestigious schools would deteriorate. This concern proved unfounded and in retrospect almost laughable. With the larger pool of applicants to draw from, selective colleges and universities could afford to be even more selective. Average academic credentials of college freshmen began their inexorable climb.

Intentionally or not, higher education was transformed. No longer was it largely the province of established social elites; it became available to the great and growing middle class. And this went beyond the initial G.I. influx. As veterans headed for college, so did their sisters, brothers and, eventually, children. The legacy of the G.I. Bill was to make a college education an ordinary part of middle-class American life.

In years past, many had regarded prestigious institutions like Harvard, Princeton and Yale to be essentially gentlemen's finishing schools; (in some cases, ladies' finishing schools). Gaining entry was not overwhelmingly difficult for those who had completed the required course work, had the money, and, at least at many schools, were not too ... uh ... Jewish. Once admitted, outside of a few special programs, Ivy Leaguers were not expected to burn the midnight oil on academic pursuits too often. There was little need. A "gentleman's C" would still open doors after graduation. Long-time University President Francis Landey Patton referred to his beloved Princeton as "the finest country club in America."

By the end of World War II, this was changing. Admission to the top schools was more and more often awarded to the most academically promising students. As these institutions became less dependent upon alumni largesse, and dependent instead on government largesse, fewer children of wealthy alumni could expect a reserved seat simply by virtue of "legacy." Most were going to have to work for it. Although family preferences did not entirely disappear, they receded in importance, and began to be viewed as anachronistic. It was more important for schools to please the government than it was to please their wealthy alumni.

Standardized tests like the SAT had a special role to play in this story. They provided the common yardstick against which all applicants could be measured. The results helped disprove the notion that even the least graduate of a fancy private school was better college material than a public school graduate. More than one Idaho farm girl or son of a Flatbush deli owner was able to beat out a scion of wealth and privilege precisely because of these tests, making the Number 2 pencil as mighty a weapon for the destruction of class privilege as Americans had ever seen.

Were these rising standards a good thing? Some saw the new order in higher education as a matter of justice, the victory of Thomas Jefferson's "natural aristocracy among men," "virtue and talents" triumphing over the "artificial aristocracy, founded on wealth and birth." This view may have been overly romantic. But the new order did have a great deal to do with talent—at least academic talent. In general, Americans liked that. Yes, they might disagree over how to best measure such things, but few questioned the idea of meritocracy. The various downsides to such a system, not all of which are fully appreciated today even, were thought to be (and are still thought by many to be) vastly outweighed by its benefits. Most important, the competitive environment created by these high standards—and accelerated by Sputnik in 1957 and the Civil Rights Act in 1964—caused prestigious schools to actually earn their prestige with academic excellence. To be sure, some changes occurred only slowly, and some of the problems that beset higher education today were already in evidence. But the twenty-year period after World War II was nevertheless a time of justifiable optimism.

Berkeley sociologist Jerome Karabel tells part of this story in *The Chosen*, but much of it gets lost in this very detailed volume. And Karabel has a different story to tell. Most of his book is devoted to describing how these three schools went from discriminating against Jews to discriminating in favor of African Americans, American Indians, and Hispanics. A stalwart defender of race-based admissions during the 1996 campaign for California's Proposition 209, he regards this as significant progress. The story of the G.I. Bill and the simultaneous rise of academically-based admissions is sandwiched awkwardly in-between—a mere transition period, hardly worth dwelling upon, except to point out its shortcomings.

It is not that Karabel does not recognize the powerful attraction that non-discriminatory, academically-based admissions have for Americans. Indeed, at times they seem to have a powerful attraction for him. For the most part, however, this is a book about the dark side of Ivy League admissions. It is calculated to leave the impression that admissions decisions have long been like sausages—the kind of things you will feel better about if you are not told what went into them. Karabel suggests that we should not be concerned that admissions policies remain somewhat sausage-like today, especially since administrators seem to have quite accidentally hit upon a policy of minority inclusion that is in the public interest.

What Karabel seems to be implicitly asking is: If no one has ever been admitted to the Ivy League based solely on academic criteria, why should anyone demand that be the criterion today? Why should academic standards not be lowered to admit more African Americans, American Indians, and Hispanics? Why should we not extend such preference to low-income students too, since that too would be in the public interest?

Karabel begins his story with Charles W. Eliot, President of Harvard from 1869 to 1909, (well before the days of Jewish quotas). Much of his life was dedicated to ensuring that a Harvard education would be available to all who met the school's academic standards. In his inaugural address, he stated, "The poorest and the richest students are equally welcome here, provided that with their poverty or their wealth they bring capacity, ambition, and purity." Under his watch, Harvard offered more scholarships than any other school in the nation.

Eliot was hardly an enemy of wealth and property: "The children of a democratic society should ... be taught at school, with the utmost explicitness, and with vivid illustrations," he wrote, "that inequalities of condition are a necessary result of freedom." But like many today, he believed that education

was special—without equal educational opportunity and the social mobility that results from it, the legitimacy of any free and democratic society would be suspect. That did not mean that Eliot believed everyone should be entitled to a Harvard education. Writing to Charles Francis Adams, son of John Quincy, and a member of the Harvard Board of Overseers who often opposed his efforts to keep tuition affordable, Eliot clarified:

> You said at the start of this discussion about raising the College fee that you wanted the College open to young men who had either money or brains. The gist of our difference lies, I think, in this restricted alternative. I want to have the College open equally to men with much money, little money, or no money, provided that they all have brains. I care [not]... for young men who have no capacity for an intellectual life. They are not fit subjects for a college, whether their parents have money or not.

Many today are surprised to learn that for most of their history admission to Ivy League schools was by entrance examination. All who passed the test—and a few who did not—were welcome to register, often regardless of race or religion. (Harvard had a reputation for openness to African Americans; nevertheless even at Harvard, their numbers were small, perhaps as few as 165 total between 1871 and 1941. At Princeton, the least friendly to racial minorities of the three, African Americans occasionally attended in the 18th and 19th centuries, but not a single African American attended in the 20th century until 1945, and at least one was actively discouraged from enrolling.) Applicants who failed the exam could try again, and the bar was not set particularly high. Class size was thus not artificially limited. If a larger number of students than usual passed the exam, the class would be larger than usual. In significant part, as a result of these entrance examinations, the number of Jews in Ivy League schools skyrocketed during the 1910s, radically altering the composition of classes that had previously been overwhelmingly made up of the sons of prosperous Protestants. By 1923, Harvard's entering class was nearly 25% Jewish, Yale's was 13.3% and Princeton's almost 4%. Columbia's figure may have been as high as 40%, and the University of Pennsylvania's was similar. Most of these students were from families that had recently come to America.

None of this was particularly distressing to Eliot, who was still active on campus despite his retirement as president. It was a serious cause for concern, however, for Harvard's then-President A. Lawrence Lowell, who as a vice president of the Immigration Restriction League, an organization steeped in the new scientific racism, was very much a part of the anti-immigration tide in America. Lowell set out to do something about the "problem."

In her 1979 book, *The Half-Opened Door: Discrimination and Admissions at Harvard, Yale and Princeton*, Marcia Graham Synott documented the efforts to exclude Jews at those institutions in great detail. If anyone had been naive enough to believe that the sudden reduction in Jewish students in the Ivy League in the 1920s had been an unintended consequence of some otherwise legitimate admissions policy, Synott surely dispelled that belief. Karabel adds further detail to Synott's already extensive documentation.

Some of the pressure to limit Jewish enrollment came from alumni. One extreme case from an alumnus who had recently attended a Harvard-Yale game:

> Naturally, after twenty-five years, one expects to find many changes but to find that one's University had become so Hebrewized was a fea[r]ful shock. There were Jews to the right of me, Jews to the left of me, in fact they were so obviously everywhere that instead of leaving the Yard with pleasant memories of the past I left with a feeling of utter disgust of the present and grave doubts about the future of my Alma Mater.

Like any college president, Lowell had to worry about the effect that such bitter feelings would have on fundraising Alumni were the top donors; if they thought the beneficiaries of their generosity would be strangers rather than their children, they might become less generous. If students shared the alumni's bitter feelings, that too could cause problems. Lowell warned:

> The summer hotel that is ruined by admitting Jews meets its fate, not because the Jews it admits are of bad character, but because they drive away the Gentiles, and then after the Gentiles have left, they leave also. This happened to a friend of mine with a school in New York, who thought, on principle, that he ought to admit Jews, but who discovered in a few years that he had no school at all.

It is unclear whether these fears were well-founded. Lowell's involvement in the Immigration Restriction League suggests that he may have had such feelings himself and, hence, over-estimated their hold on others. Lowell admitted that "the Hebrew problem," as he called it, was not that Jewish students who passed the entrance examination had character defects, as that term is conventionally defined. Their problem appears to be simply that they were Jewish, and usually members of the working class. They did not fit in among the polished sons of the established social elite. A common complaint was that they were "grinds," "greasy grinds" (in more familiar terms: "nerds").

Lowell wanted to deal with the problem in the way he wanted to deal with immigration—by publicly adopting a ceiling on Jewish enrollment. But he encountered fierce opposition he had not expected. Boston Mayor James Michael Curley declared, "If the Jew is barred today, the Italian will be tomorrow, then the Spaniard and the Pole, and at some future date the Irish." Samuel Gompers condemned the scheme on behalf of the American Federation of Labor. Newspapers across the country editorialized against it. And a frail Eliot fought it with all the energy he had left in his nearly ninety-year-old body. Obviously, many Americans, perhaps even a majority, strongly favored non-discriminatory admissions policies. To its credit, the Harvard faculty rejected Lowell's plan.

Lowell needed a Plan B. And he had one—a disingenuous one. Instead of an explicit quota, he argued for a character assessment of each applicant—a test that he had previously suggested "should not be supposed by anyone to be passed as a measurement of character really applicable to Jews and Gentiles alike." It was not that he thought the entrance examination system was not a good one. Indeed, he admitted that "apart from the Jews," there was no "real problem of selection, the present method of examination giving us, for the Gentile, a satisfactory result." He nevertheless wrote:

> To prevent a dangerous increase in the proportion of Jews, I know at present only one way which is at the same time straightforward and effective, and that is a selection by a personal estimate of character on the part of the Admission authorities, based upon the probable value to the candidate, to the college and to the community of his admission.

Lowell knew that such a plan would have superficial appeal to traditional Ivy Leaguers. Indeed, Princeton and Yale were already quietly imposing such a plan. Even Eliot had emphasized the importance of good character and leadership ability in students—(though his administration did not take on the daunting task of deciding which applicants possessed those traits and which did not). Why not explicitly take them into account in the admissions process?

The problem, of course, was that, it required self-deception to believe that admissions officers would try to measure good character fairly and honestly. Further, it is devilishly difficult to do so. Efforts to employ objective measures can always be circumvented. Subjective measures will become too subjective, as admissions officers pick their personal favorites. In practice, "good character" at the Ivy League of the 1920s meant a diploma from one of the "right" prep schools and letters of recommendation from the "right" people. It meant being good with a football; even being tall and handsome. Most of all, it meant not being Jewish.

Lowell's plan was nevertheless adopted at Harvard in 1926–the year of Eliot's death. Shortly thereafter, Yale's Dean Clarence W. Mendell paid a visit to Harvard's admissions director. He reported that Harvard was "now going to limit the Freshman Class to 1,000.... They are also going to reduce their 25% Hebrew total to 15% or less by simply rejecting without detailed explanation. They are giving no details to any candidate any longer." Lowell had finally gotten his quota.

The Jewish quotas lasted many years, and remnants of their existence—letters of recommendation, emphasis on sports and, to a lesser degree, other extracurricular activities—are still in place today. Once instituted, such requirements are difficult to terminate. By the late 1960s, the urge to create racial standards re-emerged. This time, however, the goal was to increase the number of African Americans (later, American Indians and Hispanics)—a change Karabel considers benign—though any "inclusion" necessitates another's exclusion, and Jews have conspicuously lost in both scenarios.

The similarities in principle between the Ivy League of the 1920s and the University of California of present seem conspicuous. Just as Lowell was forbidden by his faculty and fear of bad publicity from engaging in explicit discrimination, University of California administrators are so forbidden by Proposition 209. And yet, the problem of "too many Asians and whites" remains. The solution—like Lowell's—has been to institute what is called "comprehensive review" in undergraduate admissions.

Karabel does not engage in the debate over modern race-based admissions, noting that the need for racial diversity in higher education is something, he thinks, "we now take for granted." Moreover, he contends, "The history of admissions at the Big Three has ... been, fundamentally, a history of recurrent struggles over the meaning of 'merit.'" For Karabel, this is the central issue. The definition of merit, he believes, "is fluid and tends to reflect the values and interests of those who have the power to impose their particular cultural ideals." Affirmative action was born of "the political and social upheavals of the [1960s]," which changed the definition of merit "yet again, provoking a seismic cultural shift that elevated the values of 'diversity' and 'inclusion' to a central place in [Ivy League] selection policies"

But the the meaning of merit has not shifted; rather, the willingness to base admissions on merit has. Indeed, Karabel implicitly acknowledges this himself when, towards the end of the book, he drifts back into using the word "merit" in its conventional idiom. Once the semantics are cleared, the observation splits apart. Of course, the people who are in a position to influence admissions policy will tend to impose their own values and cultural ideals—who else's would they impose? The question is not whether people tend to impose their own values and cultural ideals when making decisions, *but whether those decisions are consistent with the public interest*. And if not, what should be done about it. The "power relations" argument is a important one, however. During the campaign to pass Proposition 209, Karabel and fellow opponents of the measure frequently argued that admissions policies should be set by academics—not voters or elected officials. They held that state universities need to be insulated from politics, in order to perform the important task of educating. Their view had something in common with Justice O'Connor's position in *Grutter v. Bollinger*, deferring judgment to the University of Michigan in deciding whether the need for racial diversity was a "compelling purpose" sufficient to justify racial discrimination. In a sense, that opinion insulated state universities from otherwise-applicable law. But if these policies are mere reflections of "power relations," is such deference defensible?

Karabel describes Harvard, Princeton and Yale as "deeply conservative," "surprisingly insecure about their status" and "intensely preoccupied with maintaining their close ties to the privileged." Many of their actions, he believes—including the adoption of race-based admissions—are best understood as efforts to deal with "threats" to "the preservation of the larger social order of which they were an integral—and privileged—part." According to Karabel, "the adoption ... in the late 1960s of vigorous race-based affirmative action" was "a decision made less in response to the moral claims of the civil rights movement (which after all, had been active since the mid-1950s) than to the palpable threat of social breakdown in the wake of the massive race riots of 1965-1968."

On this point, I find myself much in agreement; (though, preservation of the social order is not, I think, a sinister goal). For all the talk of the benefits of diversity on campus, the adoption of race preferences was not motivated by such lofty ideals. Preferences were instituted in haste by administrators whose first priority was the prevention of future riots. But all of this starts sounding an awful lot like politics. And if it is all just politics, why should the decision-making authority not be vested in the democratic process?

Never Again: Securing America and Restoring Justice

By John Ashcroft

*Reviewed by Christopher Wray & Robert Hur**

One senior administration official described my role in President George W. Bush's administration as one of 'spear-catcher.' Every spear caught is injury avoided; the ones you don't catch—the ones that catch you—are the ones that really hurt. John Ashcroft

This quote from John Ashcroft's new book, *Never Again*, conveys much about the task of serving as Attorney General during a period (2001 to 2005) marked by the largest and most devastating terrorist attacks in American history. The metaphor of catching spears is an aptly martial one, for Ashcroft served as a member of a war Cabinet. Early in his tenure, the country was wrenched into a state of war by the attacks of September 11. Haunted, like all Americans, by images of hijacked airplanes and burning buildings, he immediately set about his duty of re-orienting the Justice Department toward the terrorist threat and ensuring that the Department did everything in its power to prevent further attacks. As September 11 made all too clear, the front lines of this war are not only those manned by our soldiers in faraway lands; our enemies have brought the conflict to us, and law enforcement agents and prosecutors confront them on our own soil.

This task, already a Herculean one, was further complicated by the heated criticism of the Bush Administration's response to September 11. By virtue of his position as the nation's top law enforcement officer, charged by the President himself with preventing further terrorist attacks, Ashcroft became the face that Americans associated with many of the Administration's most high-profile and controversial methods for grappling with the terrorist threat. To be the President's spear-catcher, Ashcroft needed—and had in full measure—a steady willingness to weather the heavy blows of those who disagreed with him.

Those of us who served with him in the Justice Department during this time saw him face this situation with remarkable calm and resolve, borne of the conviction that he and the Administration were fulfilling their obligation to do everything within their lawful authority to protect the American people from further attacks. In the best tradition of leaders in times of crisis, once he determined what he believed was the right thing to do, he went forward without flinching from the political or personal harm he might suffer as a result. Hence, as he says, he "may have been the most controversial attorney general in modern American history. . . . People love me or hate me. Few are indifferent."

Readers of Ashcroft's book will detect neither hand-wringing over the size of his "hate" camp nor fire-breathing rhetoric intended to galvanize those in his "love" camp. Rather, they will find a straightforward, clear-eyed account of the staggering challenges that confronted the nation during Ashcroft's service as Attorney General and his efforts to confront those challenges and prevent further loss of American life. While his role was an intensely public one, Ashcroft's book provides revealing background details that bring to light his character and the deliberations and decisions made in the wake of the September 11 attacks. Ashcroft's writing often humanizes him—for example, in the weeks after September 11, he exhibits the all-too-human reactions of anger, frustration and fatigue—and tempers his public caricatures with a welcome measure of truth and sanity. Even those who have thrown spears of their own may find admiration for his dedication to public service, great determination and clarity of purpose.

Never Again begins at a point in Ashcroft's career that has since been eclipsed by his record as Attorney General: his unsuccessful effort in 2000 to win re-election to the U.S. Senate from Missouri. Before he was elected to the Senate, Ashcroft served for two years as Missouri's state auditor, two years as state assistant attorney general, two terms as state attorney general and two more terms as the governor of Missouri—a twenty-year record in state government that showcases his deep commitment to public service. With immense dignity, he declined to contest defeat at the hands of former Missouri Governor Mel Carnahan—who had perished in a plane crash two weeks earlier: "There were already loud, contentious voices shouting and arguing with one another over the Bush-Gore results. We didn't need any more divisiveness."

The book's title is adapted from the instructions Ashcroft received from President Bush on the morning of September 12: "Don't ever let this happen again." Ashcroft adopted the words "Never again" as a personal motto for the remainder of his time as Attorney General. Never again, he resolved, would Americans suffer as they had on September 11.

Like Ashcroft, many Americans remember vivid and personal details of the September 11 attacks: where they were when they heard the news; when they first viewed the horrifying images that became seared into the nation's collective consciousness; whom they telephoned immediately after learning of the tragedy. Ashcroft's own memories are as vivid and pungent as anyone's. He can "still see the doomed leaping from the World Trade Center, and smell the stench of the rubble." His powerful recollections of that day bring back one particularly terrifying aspect of the attacks:

> We did not know whether more attacks were imminent. Four aircraft had crashed—two in New York, one in Washington and one in Pennsylvania—but still others were sending out distress signals. These airplanes' pilots responded that the mayday signals were unintentional, but how were we to know whether or not a terrorist was holding a knife or a gun to the captain's throat as we answered a mayday call? . . . How many other planes were still out there with madmen at or near the controls?

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Ashcroft surveyed the carnage, stricken not only as a citizen, but also as an Attorney General responsible for his fellow citizens' safety.

The most striking aspect of Ashcroft's recollections of September 11, however, is his account of the intense and exhausting weeks to follow. Ashcroft's descriptions of the Government's response to the attacks convey the great extent to which he assumed personal responsibility for the prevention of further terrorist attacks on American soil. He admits that many considered his mission an impossible one. Indeed, a common saying in the Ashcroft Justice Department captured the difficulty of the nation's struggle against terrorism: "The terrorists can succeed if they hit just a single, but we have to hit a home run every day." And while the stakes in the struggle against terrorism could not be higher, the hunt for terrorists is, as Ashcroft writes, a "game of inches"—a painstaking and difficult slog that must continue because "every incremental step matters" and "each tiny bit of information can make a difference."

Lawyers and agents in the Department often saw that Ashcroft's commitment to the American people's interests included a deep and abiding respect for the Constitution. This respect must have made it difficult indeed for him to bear accusations that he was riding roughshod over Americans' civil liberties. Before September 11, he demonstrated his commitment to constitutional principles in the execution of Oklahoma City bomber Timothy McVeigh. When the FBI revealed that more than three thousand pages of documents had not been handed over to McVeigh's defense team, Ashcroft delayed the convicted killer's execution and ordered a methodical sweep of all FBI offices worldwide for any other relevant documents. As painful and embarrassing as the matter was, Ashcroft insisted that "[i]t is not enough that we have a guilty defendant. We must have an innocent system as well." Ashcroft's commitment to the integrity of our constitutional system was never far from the surface, even during the state of extreme pressure and exhaustion that characterized the weeks after September 11. Days after the September 11 attacks, even in the midst of intense discussions of the best way to pursue and apprehend terrorist suspects, he exhorted his team to "think outside the box, *not* outside the Constitution." Echoed long after Ashcroft issued it, this recurring refrain served as a valuable guidepost for the Department's efforts.

Ashcroft would need such intense focus on his goal of "never again" in order to engineer the necessary and fundamental changes in the Justice Department's mission and mindset. The magnitude of change required was daunting. The Department had to fundamentally restructure its counterterrorism operations by building a whole new infrastructure, designed to track and hunt terrorists, arm agents and officers with appropriate technological and legal tools, and instill an unfamiliar culture of prevention.

Making these crucial changes required everyone in the Department to understand that their top priority was now the *prevention* of terrorist attacks. For decades, the FBI and the Department had excelled at determining who had broken the law and prosecuting them for it—after the fact. They now had to move out of their comfort zone. The President's charge to Ashcroft forced them to focus on prevention. Pursuing and prosecuting terrorists *after* an attack obviously remained part of the Department's mission, but it could not be the focus of its efforts. The Department and the Bureau had to become proactive, not reactive. Old models of law enforcement and deterrence would no longer work with adversaries who not only accept but glorify killing themselves in the course of attacking innocent people.

This shift in focus, as simple as it may seem to some readers, represented a significant break with the past. While the protections built into our criminal process guarantee criminal defendants a fair shake, many of these protections are simply inconsistent with a prevention-oriented (as opposed to prosecution-oriented) approach. Ashcroft describes the first meeting of the National Security Council after September 11, at which participants discussed ways to pursue those responsible for the attacks. When the concern was voiced that some of these tactics would impair the Government's ability to prosecute, the group quickly and unanimously agreed that "[p]revention has to be our top priority." Ashcroft and FBI Director Robert Mueller underscored the importance of this mission by meeting face-to-face every morning to discuss current terrorist threats. If anyone within the Department or the Bureau had any doubts as to the emphasis placed on the mission of terrorism prevention, these doubts were quickly dispelled by the fact that the Attorney General and the Director of the FBI deemed it necessary to discuss this one topic, face to face, day in and day out.

An important part of the Department's commitment to prevention was its "spit on the sidewalk" policy. Bobby Kennedy's Justice Department had used a similar approach to crack down on organized crime: If a terrorism suspect ran afoul of the law in any way, even by spitting on the sidewalk, the Government would apprehend and charge him. The Department relied heavily on immigration violations—expired visas, for example—in order to detain and/or deport terrorism suspects lawfully. Ashcroft describes this approach as one that bought valuable time to gather more information, connect dots, and disrupt potential terrorist plots, all in a manner consistent with the Constitution.

Another critical change that vastly improved the Department's ability to thwart terrorist attacks was the elimination of the "wall" between law enforcement and intelligence efforts on international terrorism investigations. Previously, prosecutors and FBI agents conducting criminal terrorism investigations were generally restricted from sharing information with their counterparts in the intelligence community who were keeping terrorists under surveillance. In other words, different parts of the Government's anti-terrorism network were working independently, rather than sharing and leveraging everything they knew about the terrorist threat. After September 11, the Department's leadership recognized the grave dangers of this approach and proposed to Congress that the wall be torn down. Congress agreed, allowing all of the nation's anti-terrorism resources to work hand-in-hand.

In spite of the high stakes involved, and the glaring need for change at the Department, such change did not come easily. Like most large institutions with long and proud histories, the FBI and the Justice Department were slow to embrace change; no matter how urgent the need to turn, large vessels like these

organizations require a firm and determined hand at the helm to commit to a new course. Given the radical re-tooling required, the institutional hurdles present and the time pressure involved, Ashcroft's efforts yielded remarkable results.

The results of all of these efforts after September 11, 2001? During the remainder of Ashcroft's tenure as Attorney General and the service of his successor in that post, the United States has not suffered another terrorist attack on its soil. To be sure, no one can attribute the length of this respite to any single factor, and Ashcroft makes no attempt to take credit for it. Indeed, he provides a sobering reality check by intoning solemnly that we "will suffer more terrorist attacks during this war with al Qaeda. They are fanatical, relentless, and patient. . . . This network will hit us again when they can." Nonetheless, Ashcroft's efforts have surely enabled the nation's antiterrorism network to gain significant ground in the "game of inches."

Ashcroft's memoir accurately conveys to readers the enormous amount of time, energy and resources that the Justice Department devoted to the prevention of further terrorist attacks. What the book does not provide, however—and likely could not provide, given editorial constraints—is a comprehensive depiction of the many other law enforcement priorities that the men and women of the Department continued to tackle after September 11. The Department remains responsible for enforcing the entire gamut of federal criminal law, including corporate fraud, drug trafficking, child exploitation, tax crimes, antitrust violations, intellectual property theft, extraditions and other forms of coordination with foreign law enforcement authorities—the list goes on and on. These efforts had to, and did, continue, and readers would be well served by a fuller portrayal of Ashcroft's tenure as Attorney General.

Ashcroft has given readers much food for thought. His call for "unyielding mental toughness" in the fight against terrorism, his prescriptions for continued advances in our ability to prevent terrorist attacks, and the descriptions of his own efforts to protect our country make for sobering yet inspiring reading.

The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11

By John Yoo

*Reviewed by Will Consovoy**

The idea that the President holds the primary power to manage the foreign affairs of the United States, and retains a substantial degree of autonomy in exercising this constitutional authority, should be uncontroversial. However, recent judicial decisions and the tide of opinion over Bush Administration policies have drawn this principle into question. In *The Powers of War and Peace*, former Justice Department official and current professor of law, John Yoo offers an intriguing view of the Constitution's foreign affairs powers and, in so doing, makes an important contribution to the debate over the proper role of the respective three branches of government in matters of war and peace.

Powers of War starts from the assumption that the Constitution vested the vast majority of foreign affairs powers in the Executive—not in Congress or in the courts. The Framers, Yoo argues, adopted a regime in which the office best suited to respond to the dynamic nature of foreign affairs, the Executive, would have a relatively free hand to confront international crises. At the same time, however, Congress was relied-upon to control appropriations and domestic legislation, to insure against presidential overreach. Thus, the separate and coordinate powers of the President and Congress allow them either "to cooperate" or "to pursue independent and conflicting foreign policies." But, whatever accommodation is eventually struck between the political branches, matters of war and peace are to be free from judicial interference.

Professor Yoo's analysis of text and history constitutes a sharp departure from that of several notable scholars, such as Louis Henkin, Harold Koh, and Michael Glennon. These authors posit a Constitution that demands "equal participation of Congress and the federal judiciary in national security decisionmaking." The notion that Congress and the courts have an equal role in foreign policy matters is belied, Yoo claims, however, by the plain text. Article II of the Constitution vests "the Executive power" in the President and declares that the "President shall be Commander in Chief of the Army and Navy of the United States." This broad grant of authority differs sharply from the enumerated legislative grant—i.e., the powers "herein granted"—to Congress in Article I of the Constitution. Thus, Professor Yoo holds, the foreign affairs powers allocated to the legislative branch, such as the Senate's role in treaty-making, are exceptions from the general grant of executive authority.

This means, again, that the Constitution does not provide a "fixed process for foreign relations decisionmaking." Rather, in "allocate[ing] different powers to the president, Senate, and Congress, [it] allows them to shape different processes depending on the international system at the time and the relative political positions of the different branches." The Constitution, according to Professor Yoo, thus sets forth a "flexible system for making foreign policy in which the political branches could opt to cooperate or compete. The Constitution did not intend to institute a fixed, legalistic process for the making of war or treaties." Viewed through this lens, the historical practice of the federal government with respect to foreign affairs, according to Yoo, "generally falls within the range of permissible outcomes allowed by the Constitution." *Powers of War* thus espouses a view of separation of powers in the area of foreign affairs that is political in nature—conflict and compromise between the political branches occurs in a power struggle largely without a judicial referee.

With this interpretation of text established, *Powers of War* takes up the spirit of the letter, delving into several contemporary foreign policy disputes; chief among them "whether the Constitution requires congressional approval of war or whether the president has the discretion to initiate

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military hostilities." In Professor Yoo's view, the flexible nature of foreign policy decision-making undermines the idea that there is a single, correct means of waging war. Indeed, according to the author, the President is not obliged to obtain a declaration of war from Congress before committing our armed forces into a foreign conflict. The declaration—"a legalistic function that defines relationships and status under international law"—was not intended by the Framers as a legislative check on unilateral executive action. Rather, a legislative check on the Executive's war powers exists in that the President could never wage war successfully "without Congress's active cooperation in funding and raising a military[.]"

History, according to the author, supports this reading of the role of war declarations in validating the projection of force abroad. The United States has only declared war five times, but has committed troops to foreign battle over 125 times, including the Vietnam, Korean and Persian Gulf Wars and the recent military actions in Afghanistan and Iraq. As Professor Yoo sees it, "[t]hese examples suggest that the branches of government have established a stable, working system of war powers. The President has taken the primary role in deciding when and how to initiate hostilities. Congress has allowed the executive branch to assume the leadership and initiative in war, and has chosen for itself the role of approving military actions after the fact by declarations of support and appropriations."

True to its title, *Powers of War* does not conclude with this examination of war powers, thorough though it is, but engages in a discussion of peace-making powers as well, particularly in Professor Yoo's detailed analysis of the issue of treaties. As Yoo explains, questions concerning the Constitution's allocation of control over treaties arise in several dimensions. One question addressed is the extent to which the Senate's advice and consent authority grants to it a meaningful role in evaluating the wisdom of entering into a treaty or whether the Senate should defer to the President's judgment as to the merit of a given international agreement. According to Yoo, history reveals that this idea of deference to the Executive's judgment "has never held much sway," as "[q]uestions about whether the Senate can exercise its own independent judgment on treaties seem to have been long settled by the political system." While the role of the Senate in interpreting treaties has proven far more controversial, Yoo finds that historical practice has granted the President the leading role. Whether this is due to the intentional design of the Constitution by the Framers, or the inherent structural advantages of the executive branch, "executive dominance of treaty interpretation has become a fact of life."

Last, as to the domestic effect of treaties, Professor Yoo finds that "the branches have developed a settled practice that emphasizes flexibility." Indeed, according to Yoo, Congress' decision to render certain treaties "nullities as a matter of domestic law" is "a vital means whereby the Congress can check the executive branch. By preventing the nation from carrying out the legislative elements of international obligations, Congress can check efforts by the executive branch to achieve a certain treaty-based foreign policy." This is one important insight among many in this work. Adopting a broad view of "self execution"—a recently fashionable argument regarding the Geneva Conventions—the courts actually shift legislative power from the full Congress to the President, with a limited consent role for the Senate. As Yoo explains, "[n]on-self-executing has the virtue of leaving foreign affairs in the hands of the political branches, keeping the judiciary out of a policymaking role, and providing the national government with the constitutional flexibility to determine how best to live up to our international obligations."

A must-read for anyone interested in a deeper understanding of these timely and important issues, *The Powers of War and Peace* makes a valuable, if to some controversial, addition to the ongoing debate on this topic—sure, not to go away.

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