E n g a g e

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Letter from the Editor...

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

Volume 3, Issue 3 is dedicated almost exclusively to original articles produced by Society members and friends. Current events have provided a wide range of legal and public policy topics inspiring our contributors to put pen to paper. Some topics you'll find addressed in this issue are the continued military action against Iraq, Sarbanes-Oxley, the USA PATRIOT Act, and class action reform. *Verizon v. FCC*, *Zelman v. Simmons-Harris*, *United States v. Craft*, and *The Republican Party of Minnesota v. White* are only a sampling of those Supreme Court cases commented on in the pages that follow.

In fact, so much material was compiled for this issue that we have been forced to expand into a special online supplement which contains transcribed briefings from many of the Federalist Society's conferences and events in order to make room between these covers for the original work. Please be certain to browse the online supplement at www.fed-soc.org.

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

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Administrative Law & Regulation

Restoring Congress' Proper Role in Oversight of Covert Intelligence Operations

*By James E. Gauch**

One former director of central intelligence has called the terrorist attacks on the World Trade Center and the Pentagon "the largest intelligence and law enforcement failure in U.S. history." Because the Central Intelligence Agency was born out of another deadly intelligence failure, the Pearl Harbor attack, it is a particularly fitting time to reconsider how best to equip the CIA to help fight the war on terrorism. History will judge what more, if anything, the intelligence community might have done to prevent al Qaeda's heinous attacks. This paper instead examines one facet of the CIA's role going forward: the structural restraints on covert operations abroad.[1]

There are, of course, a host of other factors that affect the CIA's ability to fight the war on terrorism, and this paper is not meant to suggest changing restrictions on covert operations as a panacea. Among other things, historic reductions in staffing and funding at the CIA and other intelligence agencies and an emphasis on intelligence sources having "clean hands"[2] may have an equally or more significant role. But the culture of suspicion that has arisen around covert intelligence activities certainly makes using such operations in the fight on terrorism more difficult. Restoring the appropriate constitutional balance would help the Executive Branch to coordinate all of its assets – military, intelligence and law enforcement – in the unconventional war we now face and would give the President maximum flexibility to work with foreign governments, as the Constitution intended, to protect America's interests.

I. A Brief History of Congressional Oversight Over Covert Operations

The National Security Act of 1947 established the Central Intelligence Agency under the authority of the National Security Council and authorized the Director of Central Intelligence to coordinate the United States' far flung intelligence activities.[3] The move was in part motivated by the intelligence failures that led to the lack of warning of the Japanese attack on Pearl Harbor.

The National Security Act did not expressly authorize the conduct of covert operations apart from intelligence gathering, and critics have debated to what extent such operations were contemplated. It did, however, authorize the Central Intelligence Agency to "perform such other functions" as the NSC may direct,[4] which is sometimes cited as authority for covert operations. During the CIA's first 25 years, even after the famously disastrous Bay of Pigs affair, Congress took little interest in formal oversight of covert operations. Appropriations that were used for covert operations were generally concealed within those of other agencies, such as the Department of Defense. That changed, however, in the Watergate era.

Beginning in 1974 and 1975, a series of congressional investigations, most notably those led by Senator Frank Church and Representative Otis Pike, raised questions about the Executive Branch's conduct of covert operations. Intense partisan divisions over the Vietnam War and Watergate, coupled with revelations about CIA covert operations abroad and at home, prompted calls for a more active congressional role. Among the most controversial foreign operations were those that attempted to destabilize or overthrow the governments of Chile and other countries and plots to assassinate foreign leaders such as Fidel Castro.[5] Revelations about the CIA's connections with domestic groups generated additional controversy.[6]

Congress's first major step was the Hughes-Ryan Amendment in 1974,[7] which for the first time imposed substantive and procedural restrictions on the conduct of covert operations. The Hughes-Ryan Amendment forbid the expenditure of funds by or on behalf of the CIA for covert operations – that is, CIA operations in foreign countries "other than activities intended solely for obtaining necessary intelligence" – unless the President first determined that the "operation is important to the national security of the United States." The Amendment further required the President to report "in a timely fashion, a description and scope of such operation to the appropriate committees of Congress."

Next, Congress created new oversight structures that served to institutionalize congressional suspicion of covert activities. The work of the Church and Pike Committees was continued with the creation of the Senate and House Select Committees on Intelligence in 1976 and 1977, respectively. Then in 1978, Congress placed intelligence agencies on the same authorization and appropriation process as other executive agencies.[8] More comprehensive changes to the reporting regime followed in 1980.

Although the CIA was already obligated to provide notice of its covert activities "in a timely fashion," in 1980, Congress extended the reporting obligation to any agency conducting intelligence operations and, more importantly, specified that the intelligence committees were to be "fully and currently informed of all intelligence activities . . . including any significant anticipated intelligence activity."[9] The 1980 Act also specified that notification was to be in advance except when the President determined that "it is essential to limit prior notice to meet extraordinary circumstances affecting vital interests of the United States."[10] Even then, the President was to report to the so-called "gang of eight" – the senior leaders of the House and Senate and of the intelligence committees. Moreover, if prior notice was not given, the President was to notify the intelligence committees, again "in a timely fashion," about the operation and the reasons for not notifying them in advance.[11]

What constitutes notification in "a timely fashion" became a flash point during the Iran-Contra affair in 1985-

1986. There, although President Reagan made the required findings to support Iranian arms sales, he ordered the CIA not to report the operations immediately to Congress, which did not learn about the operation until months later. The Department of Justice defended the President's decision not to immediately notify Congress based not only on the terms of the statute but also on the President's constitutional authority: The vague phrase 'in a timely fashion' should be construed to leave the President wide discretion to choose a reasonable moment for notifying Congress. This discretion, which is rooted at least as firmly in the President's constitutional authority and duties as in the terms of any statute, must be especially broad in the case of a delicate and ongoing operation whose chances for success could be diminished as much by disclosure while it was being conducted as by disclosure prior to its being undertaken.[12]

The opinion concluded that "the 'timely fashion' language should be read to leave the President with virtually unfettered discretion to choose the right moment for making the required notification."[13] Congress vehemently disagreed with that interpretation and so amended the reporting requirements again in 1991.[14]

In 1991, although Congress left the vague "timely fashion" language unchanged, it stiffened other requirements to inject itself more firmly into the planning and approval of covert operations.[15] Congress made three key changes. First, to the requirement that any covert operation be important to U.S. national security interests, Congress added the requirement that the President find that it is "necessary to support identifiable foreign policy objectives."[16] Second, Congress required that the finding be in writing or, if made orally, that it be reduced to writing within 48 hours, and expressly prohibited retroactive findings.[17] Third, Congress specified that the President must report that finding "as soon as possible" and "before initiation of the covert operation."[18] Congress also made clear that the covert operations of all government agencies, not just the CIA, were covered by these restrictions.[19] It did, however, expressly exclude "traditional military operations" from the requirements.[20]

With respect to the hotly debated issue of timely notice, Congress extracted from President Bush the commitment that "in almost all instances, prior notice will be possible," and that "[i]n those rare instances where prior notice is not provided, I anticipate that notice will be provided within a few days."[21] That position was largely consistent with the Reagan Administration's policy of providing notice within two working days unless the President expressly directed otherwise.[22] While committing to provide prompt notice in almost all cases, however, President Bush carefully preserved the full measure of his constitutional authority: "Any withholding beyond this period will be based upon my assertion of authorities granted this office by the Constitution." The committee report grudgingly accepted the "in a few days" interpretation, and while it noted its disagreement on the extent of the President's constitutional authority, it acknowledged that "Congress cannot diminish by statute powers that are granted by the Constitution."[23]

II. Understanding Constitutional Authority Over Foreign Affairs

The conflicts between the two branches ultimately stem from fundamentally different views of Congress's role in foreign affairs. The Executive Branch has long adhered to the principle of executive primacy in foreign affairs, subject to Congress's limited, express powers in that regard. Since at least the 1970s in this context, however, Congress has instead pushed a view of "shared powers" in foreign affairs that warrant it engaging in advice and discussion with the Executive Branch on covert operations.

Article II, section 1's grant of "executive power" is the principal source of President's broad power in foreign affairs.[24] Unlike Congress's enumerated powers, the President's executive power is plenary. Article II provides broadly that "[t]he executive Power shall be vested in a President of the United States of America." Article I, on the other hand, limits Congress to "[a]ll legislative Powers herein granted." Congress possesses a number of powers that touch on foreign affairs, including the authority to declare war, to grant letters of marque and reprisal, to raise armies and navies, and to provide for the calling forth of the militia to execute the law, suppress insurrection, and repel invasion, as well as the Senate's veto over ambassadors and treaties. But these are express powers that do not, by their terms, give Congress a greater role in matters left to the President. Thus, while the Senate has a role in making treaties through its advice and consent function, it has no role whatsoever in the negotiation of treaties; each has specific, defined functions.[25]

The Founders generally considered the conduct of foreign affairs a natural part of executive power.[26] Thomas Jefferson, for example, wrote that "[t]he transaction of business with foreign nations is executive altogether; it belongs, then, to the head of that department, except as to such portions of it as are specially submitted to the senate. Exceptions are strictly to be construed. . . ."[27] Similarly, if more elliptically, Alexander Hamilton explained that "[t]he essence of the legislative authority is to enact laws, ... [w]hile the execution of the laws and the employment of the common strength, either for this purpose or for the common defence, seem to comprise all the functions of the executive magistrate."[28] While acknowledging the Senate's role in approving treaties, John Jay noted that under the Constitution the President "will be able to manage the business of intelligence in such manner as prudence may suggest."[29] In 1800, future Chief Justice John Marshall declared that "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."[30]

Although the Supreme Court has had little occasion to address these issues, the guidance it has provided also supports this view of the President's broad and largely exclusive powers in foreign affairs. The Court has acknowledged that beyond whatever powers Congress confers by statute, the President also possesses "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations – a power which does not require as a basis for its exercise an act of Congress."[31] The Court has emphasized that the constitutional division of power

and responsibility was much different in the foreign than the domestic realm: "Not only . . . is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation." Id. at 319. Following these principles, the Department of Justice has on several occasions opined that various notification requirements would be unconstitutional, including a proposed requirement of prior notice for operations funded out of CIA contingency fund and a mandatory requirement of 48-hours notice for all covert activities.[32]

Congress, on the other hand, has, like some scholars, rejected this understanding of its role in foreign affairs in favor of the notion that it has shared powers and responsibilities for foreign affairs.[33] As noted above, Congress's powers in that regard are expressly enumerated in Article I. The Constitution does not give it a share of any residual foreign affairs power. The Constitution does give Congress the power to appropriate money for the government's activities, presumably including intelligence operations. That does not, however, as the intelligence committees have claimed, give Congress carte blanche to "restrict or condition the use of appropriated funds."[34] Congress may not do indirectly through appropriations what it cannot do directly: Congress cannot "us[e] its power over the appropriation of public funds to attach conditions to executive branch appropriations requiring the President to relinquish his constitutional discretion in foreign affairs."[35]

Congress also has broad oversight and investigatory powers. But that power "is not unlimited. . . . No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of Congress."[36] Therefore, exercises of oversight power must relate to a specific legislative function, not merely an attempt to intrude on executive power. As the Supreme Court noted in *Bowsher v. Synar*, "[t]he Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts."[37] Under current reporting requirements, however, that is exactly the role Congress has taken. In the 1980s, then-Deputy Director of Central Intelligence Robert Gates observed that "[t]he oversight process has also given Congress – especially the two intelligence committees – far greater knowledge of and influence over the way the CIA and other intelligence agencies spend their money than anyone in the executive branch would dream of exercising."[38] Similarly, former White House Counsel Boyden Gray noted that during Iran-Contra the intelligence committee staff met with the CIA's general counsel and other CIA staff "on a weekly or monthly basis . . . and actually oversaw what was going on in Central America."[39] Although issues have arisen about what the Executive Branch failed to disclose, it cannot be denied that Congress's overall scrutiny of covert operations goes far beyond the oversight to which executive branch officials are normally subject. The Senate Intelligence Committee has conceded as much:

> [T]he primary purpose of prior notice is to permit the intelligence committees, on behalf of Congress, to offer advice to the President. . . . It is important to remember that discussion with and advice from the intelligence committees must, in the case of covert actions, substitute for the public and congressional debate which normally precedes major foreign policy actions of the U.S. Government.[40]

This is not, however, a function that is either expressly or implicitly assigned to Congress by the Constitution.

III. Problems With the Current Reporting Regime

For the reasons summarized above and addressed more comprehensively in other sources, Congress's continuing encroachment into the conduct of covert operations raises serious constitutional concerns. It also, however, presents a number of important practical problems that directly impact on the CIA's role in the war on terrorism. Among them are the way in which the current regime: (1) creates an effective legislative veto in some cases; (2) heightens the risk to secrecy; (3) impairs the ability to secure the cooperation of foreign governments; and (4) impairs coordination with the military and skews the CIA's own choice of tactics.

Potential Legislative Veto. As explained above, Congress has consciously adopted prior notice requirements in order to offer the President "advice" on covert operations and to substitute for public discussion or debate on such matters. Requiring advanced or contemporaneous notice of such activities seems particularly calculated not to assist Congress in its legislative function but to actively supervise the conduct of executive officers, in a way *Bowsher* said the Constitution does not contemplate. It also creates a situation in which members of the intelligence committees can effectively veto planned covert missions with which they do not agree simply by threatening to disclose them. Although the statute states that congressional approval is not required,[41] requiring notice "before initiation of the covert operation" serves no other purpose but to give the members of the intelligence committees an opportunity to prevent them. There is no proper legislative function that would depend on notice prior to initiation of the action. By threatening to disclose or by actually disclosing the plan, members of the committee can stop a particular mission as effectively as if they voted it down in committee.

This is not a fanciful scenario. Professor Turner reports one incident in 1985 in which the chairman and vice chairman of the Senate Intelligence Committee threatened to go public on an anti-terrorism operation against Qadaffi that they opposed. The operation leaked to the press shortly thereafter, after which it could not go forward because other countries refused to participate.[42] Similarly, intelligence committee member Joseph Biden reportedly "boasted that he had twice threatened to disclose covert action plans by the Reagan administration that were 'hairbrained' [sic]."[43]

Increased Risk of Disclosure. Apart from intentional disclosures done specifically to scuttle particular operations, extensive reporting requirements, especially when emphasis is placed on contemporaneous reporting in all circumstances, creates a greatly increased risk of disclosure. The two branches have hotly debated which one of them poses the greater risk of leaks. One study suggests that during the 1980s "a cleared

person in Congress [was] 60 times more likely than his [executive branch] counterparts to engage in unauthorized disclosures."[44] Whether true or not, however, it is undeniable that risk of disclosure grows with wider dissemination, and that reporting to Congress has resulted in leaks in the past.[45] The Founders knew this. In The Federalist, John Jay noted that "there are doubtless many . . . who would rely on the secrecy of the president, but who would not confide in that of the senate, and still less in that of a large popular assembly."[46] When it really counted, the Founders took no chances: After France agreed to provide covert aid during the American Revolution, Benjamin Franklin and Robert Morris agreed that they must "keep it a secret, even from Congress."[47]

Obstacle to Cooperation with Foreign Governments. This secrecy risk, whether real or perceived, also impairs the United States' ability to secure the cooperation of foreign governments – an essential part of successfully waging the war against terrorism. As Secretary of Defense Frank Carlucci explained in testimony before the Senate Intelligence Committee: "Now I can't tell you how much cooperation will be lost. Because we never know. All I could do is cite concerns that have on occasion been expressed to me, both in my intelligence hat and subsequently, that you people in the U.S. Government cannot keep a secret. . . . And if you are going to let our participation be known to the Congress, we don't think we can cooperate. That happens."[48]

A former Chief Counsel of the Senate Intelligence Committee also acknowledged that foreign governments have imposed such conditions: From time to time in particularly sensitive operations when they request our assistance or we request theirs, foreign countries require, as the price of cooperation, no notification be given to anyone outside the Executive Branch agencies necessary to the mission.[49]

More recent changes to the reporting requirements have made that a difficult price to pay. The 1991 Act, for example, includes an express requirement that the President's finding disclose any "third party" who will participate in the operation.[50]

The most famous example of a foreign government refusing to cooperate if Congress were notified occurred at the beginning of the Iranian hostage crisis in 1979. Six Americans took refuge in the Canadian embassy in Tehran, unbeknownst to the Iranians. Working with the Canadians, the U.S. government devised a covert operation to extract them. Fearing that its embassy might be seized and its personnel taken hostage if the Iranians found out, the Canadian government conditioned their cooperation on President Carter's agreement not to disclose the operation to the intelligence committees or congressional leadership.[51] Ultimately, President Carter delayed notifying Congress for three months in order to safely remove the six Americans. Such delay would not be possible under the intelligence committees' interpretation of "timely" notice to mean no more than "a few days." Were this situation to arise again, therefore, the reporting requirements may "ultimately force future Presidents to choose between becoming 'lawbreakers' in the eyes of Congress or abandoning American lives and interests to international terrorists."[52]

Impaired Cooperation Between Intelligence Agencies and the Military. The extensive reporting requirements for covert intelligence operations also impede cooperation with the military, which is generally not subject to such restrictions. Although reporting requirements apply to all agencies, the statute excludes from the definition of covert actions "traditional . . . military activities" and "routine support" for such activities.[53] According to the legislative history, this is meant to "encompass almost every use of uniformed military forces," including military missions to rescue hostages or apprehend terrorists.[54] The line between "routine support" and covert action is less clear. Under the Committee's view, covert actions would include a variety of clandestine operations that might be undertaken to support military operations. The ambiguity creates a problem, because the CIA's support will often provide vital support that is much more clandestine than the logistical support that the committee placed within this exception. It has been reported, for example, that CIA units were the first Americans on the ground in Afghanistan after September 11, even before the Special Forces.[55] The disparate reporting requirements between the military and intelligence services create a powerful incentive for the military to avoid utilizing the CIA in joint operations that may trigger the latter's reporting obligations.

Indeed, even the CIA itself seeks to devise operations that do not require congressional reports. More than two years before the World Trade Center attack, CNN reported that the CIA was using a new strategy against terrorism that involved not direct action against terrorist groups but rather indirect efforts to "disrupt" their operations, often by providing evidence to foreign governments to enable them to make arrests. That approach was perceived as having "the advantage of utmost secrecy, hiding the hand of the United States and avoiding the cumbersome congressional reporting requirements that go with CIA-directed covert operations."[56] Disruption is doubtless an important weapon in the anti-terrorism arsenal, but reporting requirements should not be so onerous that they play a part in determining how the war is fought.

IV. Restoring Appropriate Constitutional Roles

To make the most effective use of our intelligence resources – and especially our covert capabilities – Congress and the Executive Branch should take steps to restore the traditional constitutional balance in the conduct of covert intelligence activities. Despite the structures now in place that institutionalize suspicion of the CIA and other intelligence agencies, the intelligence committees and agencies can make some changes without legislation. Much of the shift over the past several decades stems simply from Congress's greater demands for information and its desire to provide "advice" and facilitate some substitute for public "discussion" on covert intelligence operations. The intelligence committees should instead view their role in the context of normal legislative oversight. They should focus on general matters of intelligence policy rather than becoming involved in operational details. A useful guide is the degree of oversight to which they subject military antiterrorist operations.

The intelligence committees should also recognize that there will be occasions when the safety of those involved in covert operations and the success of the mission depends on absolute secrecy, and they should recognize that in some circumstances it is best for the President and the CIA not to report contemporaneously on the missions it is undertaking. Ideally, the statutory reporting requirements should expressly and unequivocally preserve the President's constitutional authority in this regard, but there is sufficient room in the language of the current statute for the intelligence committees to adopt a more flexible standard. Congress has an important oversight role with regard to intelligence appropriations, but that role should not be allowed to compromise individual missions. Although it may seem facially implausible that "timely notice" could only come weeks or months after the fact, less controversial examples than Iran-Contra demonstrate that immediate notice can entail great risks. There is no better real-world example than that of the six Americans who took refuge in the Canadian embassy, discussed above. Not every covert operation is as controversial as Iran-Contra, and it is dangerous to legislate only for the worst case. Congress should adopt a flexible attitude and ultimately, flexible legislation, that preserves its oversight ability without making it a co-equal branch in the planning and approval of covert operations – a role the Constitution neither contemplates nor permits.

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Footnotes

[1] This paper is restricted to the use of covert operations as distinct from military force. For recent analysis of the President's constitutional authority to use military force against terrorism, see Delahunty and Yoo, *The President's Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations that Harbor or Support Them*, 25 Harv. J. L. & Pub. Pol. 487 (2002), and Robert Turner, The War on Terrorism and the Modern Relevance of the Congressional Power to "Declare War," 25 Harv. J. L. & Pub. Pol. 519 (2002).

[2] For a discussion of CIA recruitment of so-called "dirty assets" and other restraints on specific CIA powers, see Hitz, Unleashing the Rogue Elephant, supra, note 1.

[3] Pub. L. No. 80-253, § 102, 61 Stat. 495, 497-99 (1947).

[4] National Security Act of 1947, § 102(d)(5) (codified at 50 U.S.C. §403 3(d)(5)).

[5] See 120 Cong. Rec. 26432 (1974) (listing various covert activities directed against foreign governments); Covert Action in Chile 1963-1973: Staff Report of the Church Comm., 94th Cong., 1st Sess. (Comm. Print 1975); Alleged Assassination Plots Involving Foreign Leaders: Interim Report of the Church Comm., S. Rep. 465, 94th Cong., 1st Sess. (1975).

[6] See F. Hitz, Unleashing the Rogue Elephant: September 11 and Letting the CIA be the CIA, 25 Harv. J. L. & Pub. Pol. 765, 770 (2002). The National Security Act expressly prohibited the CIA from exercising any "police, subpoena, law-enforcement powers, or internal security functions." NSA, § 102a, 50 U.S.C. § 403.

[7] Foreign Assistance Act of 1974, Pub. L. No. 93-559, §32, 88 Stat. 1804 (1974) (codified at 22 U.S.C. §2422; repealed 1991). For a more comprehensive discussion of history of congressional oversight before and after the Hughes-Ryan Amendment, see Americo Cinquegrana, Dancing in the Dark: Accepting the Initiation to Struggles in the Context of "Covert Action," the Iran-Contra Affair and the Intelligence Oversight Process, 11 Hous. J. Intl. L. 177, 182-205 (1988).

[8] See Pub. L. 95-370, 92 Stat. 626 (1978).

[9] 1980 Intelligence Authorization Act, Pub L. No. 96-450, tit. IV, §407, 94 Stat. 1981 (codified at 22 U.S.C. § 2422 (repealed) and 50 U.S.C. § 413) (emphasis added). The Act streamlined the process in one respect by reducing the number of committees to which such activities were reported from eight to two (i.e., the Intelligence Committees). The Act also increased the quantity of the information provided. § 501(a)(2) (requiring the agencies to provide any information the committees requested).

[10] Id., § 501(a)(1)(B) (codified at 50 U.S.C. § 413).

[11] Id., § 501(b).

[12] The President's Compliance with the "Timely Notification" Requirement of Section 501(b) of the National Security Act, 10 Op. O.L.C. 159, 160 (1986).

[13] Id. at 173-74.

[14] See S. Rep. No. 85, 102nd Cong., 1st Sess. 37-39 (1991) , reprinted in 1991 U.S. Code Cong. & Admin. News 193, 232-34.

[15] See Fiscal Year 1991 Intelligence Authorization Act , Pub. L. No. 102-88, 105 Stat. 429 (codified at 50 U.S.C. §§ 413-413b). The year before, Congress also established an independent Inspector General at the CIA who is subject to Senate confirmation and in some cases reports directly to the Intelligence Committees. See 50 U.S.C. § 403q.

[16] 50 U.S.C. § 413b(a).

[17] Id. § 413b(a)(1)-(2).

[18] Id. § 413b(c)(1). The 1991 Act retained the provision allowing the President to notify only the "gang of eight" if he "determines it is essential to meet extraordinary circumstances affecting vital interests of the United States." 50 U.S.C. § 413(c)(2).

[19] Id., § 413b(a). The 1980 Intelligence Authorization Act had placed its new reporting requirements, which were applicable to all intelligence agencies, in a different title than Hughes-Ryan's substantive restriction on covert operations, which applied only to funds spent "by or on behalf of" the CIA.

[20] Id., § 413b(e)(2). The original Hughes-Ryan Amendment did not include such an exclusion. It did, however, expressly exempt operations undertaken pursuant to a declaration of war or congressional authorization pursuant to the War Powers Resolution. See 22 U.S.C. § 2422(b) (repealed).

[21] Letter from George Bush to Chrmn. of the House Intell. Comm., (Oct. 30, 1989), quoted in Intelligence Authorization Act, Fiscal Year 1991, S. Rep. No. 88, 102nd Cong., 1st Sess. 40 (1991), reprinted in 1991 U.S. Code Cong. & Admin. News 193, 233.

[22] See Approval and Review of Special Activities, National Security Directive 286, (Oct. 15, 1987) (requiring that the Intelligence Committees be notified in advance in all but "extraordinary circumstances," and that in those instances the congressional and committee leadership be notified, and further requiring notification unless President directs otherwise within two working days).

[23] S. Rep. No. 88 at 41, 1991 U.S. Code Cong. & Admin. News at 234.

[24] "Timely Notification," 10 Op. O.L.C. at 160; Constitutionality of Proposed Statutory Provision Requiring Prior Congressional Notification for Certain CIA Covert Actions, 13 Op. O.L.C. 258, 260 (1989); see also Prakash and Ramsey, The Executive Power over Foreign Affairs, 111 Yale L. J. 231 (2001)

[25] See United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936); see also Hearings on H.R. 3822 Before the Subcommittee on Legislation of the House Select Committee on Intelligence, 100th Cong., 2d Sess. 234 (Mar. 10, 1988).

[26] See "Timely Notification," 10 Op. O.L.C. at 160-70; Robert Turner, The Constitution and the Iran-Contra Affair, 11 Hous. J. Int'l L. 83, 93-95 (1988).

[27] 5 Writings of Thomas Jefferson 161 (Ford ed. 1895), quoted in 10 Op. O.L.C. at 161, n.5.

[28] The Federalist No. 75 at 504 (Cooke ed. 1961); see also The Federalist No. 74 at 500 (Hamilton) (Cooke ed. 1961) ("The direction of war implies the direction of the common strength; and the power of directing and employing the common strength, forms an usual and essential part in the definition of the executive authority.").

[29] The Federalist No. 64 at 435 (Cooke ed. 1961); see also *Durand v. Hollins*, 8 F. Cas. 111, 112 (C.C.S.D.N.Y. 1860) (holding that regarding "the interposition of the executive abroad, for the protection of the lives or property of the citizen, the duty must, of necessity, rest in the discretion of the president"). In *Durand*, Justice Samuel Nelson, riding circuit, rejected a claim for damages against a naval officer who bombarded a Nicaraguan port on the order of the President.

[30] Annals of Cong., 6th Cong. 613-14 (1800).

[31] United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-20 (1936).

[32] See Constitutionality of Proposed Statutory Provision Requiring Prior Congressional Notification for Certain CIA Covert Actions, 13 Op. O.L.C. 258, 261 (1989); Letter from John R. Bolton, Assistant Attorney General, Office of Legislative Affairs, to Rep. Matthew F. McHugh (June 8, 1987), reprinted in H.R. 1013, H.R. 1371 and Other Proposals Which Address the Issue of Affording Prior Notice of Covert Actions to the Congress: Hearings Before the Subcomm. on Legislation of the House Permanent Select Comm. on Intelligence, 100th Cong., 1st Sess. 227 (1987).
[33] See S. Rep. No. 276, 100th Cong., 2d Sess. 20 (1988); H.R. Rep. No. 705, 100th Cong., 2d Sess., pt. 1, 16-27 (1988); Final Report of Church Comm., S. Rep. No. 755, 94th Cong. 2d Sess. 289 (1976) ("intelligence activities have undermined the constitutional rights of citizens and . . . they have done so primarily because checks and balances designed by the framers of the Constitution to assure accountability have not been applied").
[34] S. Rep. No. 276, 100th Cong., 2d Sess. 20 (1988).
[35] Constitutionality of Proposed Statutory Provision Requiring Prior Congressional Notification for Certain CIA Covert Actions, 13 Op. O.L.C. 258, 261 (1989); accord Memorandum from Walter Dellinger, AAG, Office of Legal Counsel, to Alan J. Kreczko, Spec. Asst. to the President and Legal Adviser to the NSC, 1996 WL 942457 (O.L.C. May 8, 1996).
[36] *Watkins v. United States*, 354 U.S. 178, 187 (1957); see also President's Compliance with "Timely Notification," 10 Op. O.L.C. at 168 ("Th[e] power of oversight is grounded on Congress' need for information to carry out its legislative function").
[37] 478 U.S. 714, 722 (1986).
[38] Robert M. Gates, The CIA and American Foreign Policy, 66 Foreign Aff. 214, 229 (1988).
[39] C. Boyden Gray, Remarks, 11 Hous. J. Int'l L. 263, 269 (1988).
[40] S. Rep. No. 85, 102nd Cong., 1st Sess. 39 (1991) , reprinted in 1991 U.S. Code Cong. & Admin. News 193, 232.
[41] 50 U.S.C. § 413(a)(3).
[42] Turner, 11 Hous. J. Int'l L. at 85, n.4 (citing Gertz, 2 Senators Threaten to Leak Covert Scheme: Anti-Quaddafi Plan Scuttled After Story is Published, Washington Times A1, A8 (July 21, 1987)).
[43] Bruce Fein, The Constitution and Covert Action, 11 Hous. J. Int'l L. 53, 57 (citing an article in The New Republic)
[44] Report of the Congressional Comm. Investigating the Iran-Contra Affair, S. Rep. No. 216, H. Rep. No. 433, 100th Cong., 1st Sess. 575 (1987) (Minority Report).
[45] See, e.g., incidents discussed in M. Silverberg, The Separation of Powers and Control of the CIA's Cover Operations, 68 Tex. L. Rev. 575, 615-17 (1990).
[46] The Federalist No. 64 at 435 (Cooke ed. 1961).
[47] Turner, 11 Hous. J. Intl. L. at 101 (quoting Sayle, The Historical Underpinnings of the U.S. Intelligence Community, 1 Int'l J. Intelligence and Counterintelligence 5 (1986)).
[48] Proposed Oversight Legislation: Hearings Before the Senate Select Comm. on Intelligence, 100th Cong., 2d Sess. 198-99, 217-18 (1988)
[49] Victoria Toensing, Congressional Oversight: Impeding the Executive Branch and Abusing the Individual, 11 Hous. J. Int'l L. 169, 170 (1988).
[50] See 50 U.S.C. § 413b(a)(5).
[51] See Oversight Legislation, 1987: Hearings on S. 1721 and S. 1818 Before the Senate Select Comm. on Intelligence, 100 Cong., 2d Sess. 209 (1988) (testimony of Secretary of Defense Frank Carlucci, former DDCI under Stansfield Turner) ("the Canadians indicated that if the Congress was to be informed, they wouldn't cooperate"); McClure, A 48-Hour Rule For Covert Operations? No, Wash. Post, Sept. 26, 1988, at A11 (stating that "[t]he Canadians said they would not help unless the administration promised not to notify Congress").
[52] Turner, 11 Hous. J. Intl. L. at 123-24.
[53] 50 U.S.C. § 413b(e)(2).
[54] S. Rep. No. 85, 102nd Cong., 1st Sess. 46-47 (1991) , reprinted in 1991 U.S. Code Cong. & Admin. News 193, 239.
[55] Bob Woodward, Secret CIA Units Playing a Central Combat Role, Wash. Post A1 (Nov. 18, 2001). The CIA maintains a Special Activities Division, previously known as Military Support Program that provides paramilitary support including non-uniformed fighters, pilots, language specialists and the like to the U.S. armed forces as well as to allies such as the Northern Alliance. The CIA's role has been especially important in the unconventional war in Afghanistan because so much of its success depends on accurate intelligence and targeting information. See id.
[56] CIA Tries New Strategy to Deter Terrorism, CNN (Mar. 1, 1999) (available on the internet at http://www.cnn.com/US/9903/01/cia.terrorism) (emphasis added).

Civil Rights

Federal Employment Discrimination

*By Roger Clegg**

There is an astonishing amount of hiring and promotion discrimination on the basis of race, ethnicity, and sex in the federal government. As discussed below, it is (a) legally indefensible, but (b) ubiquitous.

Little Evidence of Antiminority Discrimination or Imbalance in the Federal Workforce

The only legally established way to defend the use of preferences based on race, ethnicity, and sex is to argue that they are needed as a remedial measure. But this defense is almost certainly unavailable to most of the federal government, which has long had a policy of equal employment opportunity—and indeed has been cheerfully discriminating in favor of women and minorities for years.

According to the Office of Personnel Management's current annual report to Congress on the federal government's affirmative action policies, African Americans met or exceeded their "relevant civilian labor force" (RCLF) representation in 16 of the 17 executive-branch departments, and in all 23 independent agencies. The one executive-branch exception was the Interior Department, where blacks were 6.2 percent of workforce, when their RCLF representation was 7.8 percent—hardly a manifest imbalance. Overall, blacks make up 17.7 percent of the federal workforce, but only 11.3 percent of the nation's entire civilian workforce. According to the OPM report, Asians met or exceeded their RCLF representation in 15 of 17 executive-branch departments and 16 of 23 independent agencies. They were never less than 59 percent of their RCLF representation, and overall their percentage in the federal workforce exceeded their percentage in the civilian workforce.

Likewise, Native Americans met or exceeded their RCLF representation in 16 of 17 executive-branch departments, and 10 of 23 independent agencies. Their percentage in the federal workforce was more than double their percentage in the civilian workforce.

Although women met or exceeded their representation in only 7 of 17 executive-branch departments and 9 of 23 independent agencies, they were never less than 69 percent of their RCLF representation, so that overall they made up almost as much of the federal workforce as of the civilian workforce (44.0 percent versus 46.5 percent).

The only ethnic minority group for which a plausible case of "underrepresentation" can be made is Hispanics. According to OPM, even they met or exceeded their RCLF representation in 7 of 17 executive-branch agencies and 6 of 23 independent agencies. Overall, they made up 6.7 percent of the federal workforce and 11.9 percent of the civilian workforce.

But the trouble here is that one is generally ineligible for federal civilian employment unless one is a U.S. citizen. This makes the RCLF number for Hispanics a dubious benchmark for the OPM's comparison, since, relative to the rest of the population, a high percentage of Hispanics are immigrants and either unnaturalized or even undocumented. About 30 percent of all Hispanics in the United States are noncitizens.

And for Hispanics or any other group, "underrepresentation" does not necessarily mean discrimination. It might simply mean that members of certain demographic groups are, on average, less likely to seek federal employment than members of other groups. Or, it might mean that those members of the "underrepresented" group who do apply for federal jobs are, on average, less qualified than the average applicant from the "dominant group." Are these suggestions implausible and racist? Remember that whites are "underrepresented," too. OPM's annual report does not give us figures for whites, but other data supplied by OPM show that whites make up about 72 percent of the civilian workforce versus 69 percent of the federal workforce. Nor is this a recent phenomenon. Whites have been underrepresented every year since at least 1984, the earliest year for which OPM has provided figures.

To be sure, the figures reported by OPM are mostly aggregated data, so there may be particular enclaves in which, say, blacks are still underrepresented. It may also be the case that in some sectors the overrepresentation of minorities is at the bottom of the pay-scale. But the data remain quite damning, and in a lawsuit courts are likely to weigh the big picture at least as heavily as a tiny one. Moreover, one suspects that the proponents of affirmative action would not be happy if the government suddenly halted its practice of affirmative action hiring for low-level jobs, since this would hurt minorities there and would shrink the needed pool of minorities for promotions to the top.

It is simply not plausible, in light of its long history of affirmative action and its obvious willingness to hire minorities and women, for the federal government to claim a remedial justification for its discrimination.

"Diversity" Doesn't Justify Employment Discrimination

So perhaps it's not surprising that you don't hear much from the federal government these days about using affirmative action to remedy or prevent discrimination. Rather, the government—like the private sector and academia—defends preferences as part of a celebration of "diversity." Having a federal workforce that "looks like America" is asserted to serve some greater good, justifying it even without a connection to old discrimination and in spite of the new discrimination undertaken to achieve it.

The general public and even some government officials may assume that the diversity rationale in hiring and promotions will stand or fall with the legality of such preferences in

university admissions, but this is not true. The fact is that the legal justifications for employment discrimination are much weaker. Even if the Supreme Court were to allow admissions preferences under the diversity rationale—and it probably won't—it would be unlikely to allow preferences in employment. Current statutory and case law weigh even more strongly against the latter than the former, and for a number of reasons agencies that employ such preferences are asking for legal trouble.

The primary reason for agencies' heightened vulnerability is that the legality of racial and ethnic preferences in student admission decisions is, for the most part, governed by Title VI of the Civil Rights Act of 1964, while hiring and promotion decisions are more directly addressed by Title VII of that law. The courts have interpreted the two statutes differently, so that what is permissible under Title VI is not necessarily permissible under Title VII.

Title VI prohibits "discrimination" on the basis of "race, color, or national origin" in "any program or activity receiving Federal financial assistance." While the statute's text admits to no exceptions, the Supreme Court has interpreted it as coextensive with the ban on discrimination under the less sharply worded Equal Protection Clause of the Constitution's Fourteenth Amendment.

Title VII also contains a categorical ban, forbidding any employer to "discriminate" on the basis of "race, color, religion, sex, or national origin" in hiring, firing, or "otherwise … with respect to [an employee's] compensation, terms, conditions, or privileges of employment." But the Court has not conflated Title VII with the Equal Protection Clause, and, thus, the diversity rationale, articulated by Justice Powell in his *Bakke* opinion—joined, in any event by no other justice—is inapplicable in employment cases.

Will other courts nonetheless create a "diversity" exception to Title VII's prohibition of racial and ethnic discrimination? That is very unlikely.

The statute, again, admits to no exceptions. To be sure, the Court did allow racial preferences in *United Steelworkers v. Weber*, handed down in 1979, and preferences on the basis of sex in *Johnson v. Santa Clara Transportation Agency*, a 1987 decision. But the rationale the Court approved in these two cases was not based on "diversity" but on "remedying" or "redressing" past employment practices. It is one thing to say that an antidiscrimination statute allows preferences in order to remedy discrimination; it is very different to say that such a statute allows discrimination so long as the employer and the courts think there is a good reason for it. There is simply no way to reconcile the latter "interpretation" with the words of the statute.[1]

If courts in fact create a "diversity" exception to Title VII , it is hard to see why other exceptions might not also apply. Yet Congress explicitly declined to create even a "bona fide occupational qualification" exception to the statute for race, even as it did so for sex, religion, and national origin. Furthermore, the diversity rationale could be—and frequently is—used to support discrimination *against* members of racial, religious, and ethnic minority groups and women. If the federal government's aim is greater "diversity" and less "underrepresentation" in its workforce, this means that any group that is "overrepresented" will be on the short end of any preferential hiring or promotion. That means that, in general, African Americans, Asian Americans, and Native Americans will all lose out, since the only underrepresented groups in the government are whites and (maybe) Hispanics.

It is not surprising that the two federal appellate courts to be presented with the diversity rationale in Title VII cases have refused to accept it. In *Taxman v. Piscataway Township Board of Education* (1996), the en banc U.S. Court of Appeals for the Third Circuit ruled in favor of a white schoolteacher who was laid off because of her race and the desire of a high school to have a more "diverse" business-education department. In *Messer v. Meno* (1997), the U.S. Court of Appeals for the Fifth Circuit ruled against the Texas Education Agency, which "aspired to 'balance' its workforce according to the gender and racial balance of the state." The court stated that diversity programs are not permissible "absent a specific showing of prior discrimination."

The Supreme Court itself has not yet ruled on the issue, but it is unlikely to carve out a "diversity" exception to Title VII. A majority of the Court takes statutory text very seriously; the same majority is especially unlikely to bend the words of a law in order to facilitate the use of racial and ethnic preferences, which it clearly has little use for. Conservatives are not alone in this prediction. In 1997, when the Court had granted review in the *Piscataway* case, the civil rights establishment was so afraid of losing on this issue that it raised enough money to pay off the claims of the plaintiff and the fees of her lawyer.

Finally, the U.S. Court of Appeals for the District of Columbia Circuit—the most relevant circuit for the federal government as employer—has rejected the diversity justification as insufficiently compelling *as a constitutional matter* in the employment context. This decision, *Lutheran Church–Missouri Synod v. FCC* (1998), was recently followed by a D.C. federal trial court that struck down the Army's affirmative-action promotion policy. And remember that Justice Powell's opinion recognizing diversity in *Bakke* as a compelling interest hinged on the medical school's First Amendment claims to academic freedom, so that it was asserting a "countervailing constitutional interest" of its own against the white applicant's. But that countervailing interest is unavailable in the federal employment context.

Although Illegal, Preferences Are Still Ubiquitous

If the legal justifications for preferences based on race, ethnicity, and sex are so shaky, then we wouldn't expect our federal government to be using them, right? Yet, preferential hiring and promotion are everywhere. Consider just a few examples.

The NASA "Diversity Management Plan" declares: "If underrepresentation exists, the goal is to annually fill at least 50 percent of the vacancies in key management positions with individuals from Targeted and Diverse Groups until parity is reached based on relevant civilian labor force data."

In July, 2002, the *Chicago Sun-Times* published a story about a federal "suit claim[ing] that 26 of 29 promotions at the Department of Energy's Argonne, Illinois, office went to women or minorities during a four-year period" and that "managers' pay was structured to encourage that pattern of promotion," since "Managers who exceeded their 'diversity goals' got $10,000 to $20,000 annual bonuses on top of their $120,000 salaries." The DOE spokesman, in a subsequent *Washington Times* story, was not exactly reassuring. He said that the department had only "goals," not "quotas," and that the annual diversity bonuses are now for only $2000 to $3000. "We have goals to hire, train, and promote minorities," he said. "To my dismay, those $10,000 superbonuses lasted only three years."

The "Affirmative Employment Program Manager" of the Department of Health and Human Services recently sent around an e-mail announcing that HHS has "committed to selecting 92 interns from the HACU [Hispanic Association of Colleges and Universities] Internship program." He proudly continued, "With the addition of 7 Hispanic students from CMS [Centers for Medicare and Medicaid Services], it brings the HHS total to 99. There have been 402 interns selected Federal-wide."

The State Department's website declares, "The Foreign Service strives to *maintain* diversity in the representation of gender, geographic regions, race, and ethnicity," even though the Supreme Court stressed in its *Johnson* decision that "there is ample assurance that the Agency does not seek to use its Plan to *maintain* a permanent racial and sexual balance." (Emphasis added in both quotations.)

A recent report by the Federal Law Enforcement Training Center, a bureau of the Treasury Department, declared it to be "institutionally committed to creating and maintaining a workforce reflective of the race, the gender and the ethnic diversity of the Nation and the public we serve"; bragged about its "bottom-line representational progress of racial/ethnic minorities and women," touting various percentage increases; and urged senior managers to "pointedly discuss" and ask "probing questions" and "refrain from giving high performance ratings on this factor unless the high ratings have been legitimately earned by such deeds as actively identifying highly-qualified, diverse candidates …."

Secretary of Labor Elaine Chao told the National Association of Hispanic Federal Executives earlier this year that she had a "commitment … to bring more Hispanic Americans into the federal workforce"—that, despite "significant gains" in the number of Hispanic employees at the Department of Labor, "you have my commitment that we can and will do better."

The Environmental Protection Agency's 2002 "Workforce Diversity and Analysis Team" states that, as a result of Title VII, "the Federal Government is required to take affirmative employment (action taken to provide equal opportunity to minorities and women) to remedy the effects of past discrimination and ensure that its work force reflects the composition of the United States labor force as a whole." This is wrong. Title VII requires equal opportunity for everyone, not just "minorities and women," contains no requirement that all "effects of past discrimination" be erased (they cannot be), and is completely at odds with a requirement that any workforce reflect a predetermined racial, ethnic, and gender balance.

Earlier this year, the Justice Department, "Per the Deputy Attorney General," "initiated a comprehensive review of the diversity of its attorney workforce with respect to race, sex, and national origin." The department "asked KPMG Consulting in partnership with Taylor Cox Associates to conduct this analysis," according to a KPMG e-mail that solicited department employees to participate in focus groups. KPMG has finished its analysis and sent it back to the Deputy Attorney General's office, according to an official in the latter, which has the question of what the Justice Department will do next "under review."

OPM's annual report to Congress includes an "overview" of agency affirmative action initiatives, listing by agency some of their triumphs. For instance, the Department of Health and Human Services "supports a variety of minority-focused fellowships and internships"; the Department of Agriculture "has established and trained a Hispanic Recruitment Cadre"; the Department of Housing and Urban Development has taken steps to "ensure the broadest practical spectrum of participants, with emphasis on minorities and women"; the Department of Transportation, while acknowledging restructuring and budgetary constraints, is "targeting minorities for temporary promotions, details, and special assignments"; for the Department of the Interior, "job performance of all Senior Executives is measured against a workforce diversity critical element"; the National Science Foundation plans "to hold supervisors accountable for making meaningful efforts to increase diversity in the workforce"; and so on and so on. Agency by agency, the focus on numbers is relentless, and the concept of nondiscrimination is totally absent.

But none of this should come as too great a surprise, since the guidance elsewhere provided by OPM clearly suggests that agencies push employees to put a thumb on the scale when race, ethnicity, and sex are involved. It urges them to "Regularly monitor the agency workforce profile" and to "Monitor the number and diversity of applicants." More pointedly, it says that "agency heads should hold their executives, managers, and supervisors accountable for achieving results." Agencies should "Identify and reward" those who succeed and should "Consider establishing an agencywide diversity award." They should, in particular, "Consider nominating senior executives for Presidential Rank Awards"—which provide for lump-sum cash awards of 20 or 35 percent of the executive's base salary.

Nor is OPM alone in exhorting federal agencies to engage in affirmative discrimination. The Equal Employment Opportunity Commission also helps coordinate the violation of civil-rights law among the various parts of the executive branch and the independent agencies, pursuant to its oversight and enforcement authority under Section 717 of the Civil Rights Act, 42 U.S.C. sec. 2000e-17. A class action recently filed by the Center for Individual Rights against the Commission and HUD, *Worth v. Martinez*, alleges that the EEOC "continues to require, cajole and induce federal departments and agencies, such as HUD, to discriminate on the basis of race and gender in em-

ployment." The lawsuit alleges that, pursuant to its "affirmative employment plan," HUD "establishes certain racial and gender goals in employment, coupled with deadlines and target dates," and that "Managers who fail to perform [i.e., meet these goals] may receive lower evaluation ratings, a reduced or eliminated bonus, may be reassigned or lose a grade, and ultimately may be terminated." CIR notes that "HUD sets preferential hiring goals in two-thirds of the cells where minorities are overrepresented" and that the EEOC has never reevaluated its polices in light of the Supreme Court's 1995 ruling in *Adarand Constructors Inc. v. Pena*, holding that racial discrimination by the federal government is subject to strict scrutiny.

OPM devotes a whole separate section of its annual report to the "Hispanic Employment Initiative Nine-Point Plan," with each agency reporting on its efforts and accomplishments (e.g., the Department of Health and Human Services "reports that Hispanic representation has increased each quarter since the introduction of the Hispanic Agenda for Action in FY 1996").

And Executive Order No. 13,171—signed by President Clinton October 2000 and left in place by the Bush Administration—has the purpose and effect of encouraging federal managers to hire and promote with an eye on the racial and ethnic bottom line, so that Hispanics will be hired and promoted in greater proportions. As E.O. 13,171 itself says, its purpose is to "improve the representation of Hispanics in Federal employment" and, conversely, help "eliminate the underrepresentation of Hispanics in the federal work force." This will be done by, for instance, "ensur[ing] that performance plans for senior executives, managers, and supervisors include specific language related to significant accomplishments on diversity recruitment and career development and that accountability is predicated on those plans," and that each agency shall "reflect a continuing priority for eliminating Hispanic underrepresentation in the Federal workforce and incorporate actions under this order as strategies for achieving workforce diversity goals …."

When I wrote about this issue in the *Legal Times* (on August 5, 2002, in a shorter version), I received an interesting e-mail:

> "On the front page of *Legal Times* (in a prior issue, 7/29/02 I think), there were photographs of 3 female attorneys who had recently (and relatively easily/quickly) landed legal jobs with the Federal government (black female, Asian female, and white female). My (white male) colleagues and I read the article closely and objectively determined that these females had qualifications that were inferior to our quals. We have made several/numerous unsuccessful attempts to get Federal legal jobs; I personally have interviewed for at least 4 (and probably more) legal jobs with the Feds over the last 5 years and have had no offers. Won't bore you with my quals, but I now believe that I was mere "window dressing" in those interviews to ensure that white males were interviewed.
>
> I had a friend (white, male, Jewish) who could not get a job with the Feds. Then he remembered that his birth certificate was from Brazil due to the mere happenstance of his parents being on a business trip there when he was born. My friend then identified himself as "Latino" and almost immediately got hired as a GS-14. If we "connect the dots," that story of the 3 females hired into the Federal government indirectly corroborates your article, and together they stand for the idea that the Feds have hired everyone but white males. As one colleague has said to me, "My ancestors had to live under the 'No Irish Need Apply' system, and I have to live under the 'No White Males Need Apply' system." ….

Here's another e-mail I got, also apparently prompted by the *Legal Times* column:

> When I worked at [NASA's Jet Propulsion Laboratory] we were required to show preferential treatment toward women or minority headed businesses. This was a guideline we were required to follow whether the business could deliver the goods or not. … I also knew a female engineer who when hiring college "fresh outs" would exclude anybody but females and minorities. When I asked her about it her reply was, "Well, everyone knows that white males have all the advantages, so it's only fair that we exclude them." ...

Not only does the federal government discriminate against its own employees with regard to race, ethnicity, and sex, but it encourages private employers to do so as well, most notoriously in the Department of Labor's regulations under Executive Order 11,246, which require "goals and timetables" when the "incumbent" percentage of "minorities or women" is less than their "availability percentage." This is precisely the situation in the *Lutheran Church* case—that is, a federal agency pushing private actors into using race-conscious goals—that the D.C. circuit there rejected as an equal-protection violation.

As indicated above, most federal agencies send their affirmative action plans to the Equal Employment Opportunity Commission, and so our organization, the Center for Equal Opportunity, has made a formal Freedom of Information Act request for copies of all these plans.

Conclusion

Does this mean that all employment affirmative action is illegal? It depends on how you define "affirmative action," a term that more and more means very different things to different people. Originally, it meant simply taking positive, proactive steps—that is, affirmative action—to ensure that discrimination did not occur. There is no problem with that kind of affirmative action. Nor is it illegal for agencies to ensure that they are casting as wide a net as possible, recruiting far and wide and eschewing old-boy networks and irrational job qualifications. But of course most agencies go beyond this, and are looking for candidates of a particular skin color and ancestry and giving them stronger—not just equal—consideration.

To mix two metaphors: A useful rule of thumb is to put the shoe on the other foot. If an agency is using blackness in a way that would be illegal if it did the same thing with white-

ness, then there's a problem. For instance, should the fact that a candidate is white be a plus factor? If the answer is no—and of course it is—then it is also no if the word in word "white" is changed to "minority." This is the approach that was taken by the D.C. Circuit in the *Lutheran Church* case. If there is a legal problem with an agency making special efforts to recruit and promote European Americans, if we wouldn't like it if managers were under pressure to increase the number of white employees, if we would be offended if the bean counters focused obsessively on making sure that there weren't too many minority employees—then there is a problem, too, when the shoe is on the other foot.

It is bad enough to make judicial and political appointments based on race, ethnicity, and sex, as—unfortunately—all administrations seem to. But it is even worse to inflict this on career employees.

It is disturbing and unsettling for the federal government, of all things, to be playing fast and loose with the law, and doing so in order to pick and choose among the country's citizens on the basis of their skin color, ancestors' countries of origin, and genitalia. The government is setting a poor example.

Since so many public and private employers feel pressured to celebrate diversity by using illegal preferences, they are unlikely to stop discriminating unless dragged into court. What is really needed in this area is a Supreme Court decision overturning *Weber* and *Johnson*, but any employer liberal enough to defend its system of preferences in court will probably not pursue the matter all the way to the Supreme Court, since a potentially adverse decision from the highest court in the land is the last thing the civil-rights lobby wants. The one employer stubborn enough to defend its preferences but large enough to ignore the civil-rights establishment is the federal government. So let's have some lawsuits.

*Roger Clegg is general counsel of the Center for Equal Opportunity, a Sterling, Virginia–based think tank. He is also chairman-elect of the Federalist Society's Civil Rights practice group.

Footnotes

[1] In addition, Professor Nelson Lund has argued that Congress, in enacting the Civil Rights Act of 1991, implicitly rejected even the remedial justification for an exception to Title VII. Nelson Lund, "The Law of Affirmative Action in and after the Civil Rights Act of 1991: Congress Invites Judicial Reform," 6 *Geo. Mason L. Rev.* 87 (1997).]

The "Female-Friendly" Workplace

*By Christine Stolba**

Shame is a powerful emotion—a "condition of humiliating disgrace or disrepute" according to a standard dictionary definition—and has always been a useful weapon in the arsenal of those who seek to expose wrongdoing. In colonial times, offenders were placed in public stocks in the town square as penance for their misdeeds; during the Progressive Era, muckraking journalists exposed the wrongdoings of corporate titans in print. Modern versions of public shaming are more creative: the city of Denver, Colorado uses its public-access cable channel for "sin bin" programming that broadcasts the mug shots of prostitutes and johns collared by the local police. Judges in Wisconsin, Florida, and Texas have employed shaming tactics such as making minor offenders stand in heavily trafficked public spaces wearing signs that declare their sins.

The latest public shaming effort to make news was organized by the National Organization for Women. NOW recently revived its "Women Friendly Workplace Campaign" by naming Wal-Mart, the country's largest private employer, a "Merchant of Shame." NOW charged, "Wal-Mart's dismal record contradicts the worker-friendly image it projects to the public." During a press conference outside a Wal-Mart store in Minneapolis in June, NOW President Kim Gandy proclaimed that this "public pressure campaign" was "how we effect change" and urged local activists to demonstrate their support by picketing local Wal-Mart stores.

Wal-Mart, which still affectionately refers to its founder Sam Walton as "Mr. Sam" in its literature, by most accounts is an ideal twenty-first century employer. Its creed remains the "Three Basic Beliefs" enshrined at the company's founding in 1962: "respect for the individual; service to our customers; strive for excellence." The comments of Wal-Mart managers also have an inclusive, populist tone; as one former vice-chairman relates on the company's website, "'Our people make the difference' is not a meaningless slogan - it's a reality at Wal-Mart. We are a group of dedicated, hardworking, ordinary people who have teamed together to accomplish extraordinary things. We have very different backgrounds, different colors and different beliefs, but we do believe that every individual deserves to be treated with respect and dignity." Such is the philosophical provenance of the ubiquitous "greeters" who offer a cheerful hello to every customer entering Wal-Mart's numerous, and cavernous, stores.

But behind those friendly greetings lurks a world of corporate irresponsibility, according to NOW. Citing the existence of sexual harassment and discrimination complaints against Wal-Mart, as well as "exclusion of contraceptive coverage in employee insurance plans and discrimination on the basis of sexual orientation," NOW claims that "the list of Wal-Mart's workplace 'don'ts' is far too long."

The truth likely lies somewhere in between Wal-Mart's squeaky-clean image and NOW's tales of sordid sexism. Common sense suggests that, as the largest private employer in the country (and one with deep pockets) Wal-Mart would face a larger share of complaints by employees. And some of these complaints are likely valid legal grievances as, unfortunately, harassment and discrimination still occur. But Wal-Mart, the number one company listed on the *Fortune* 500, is also ranked as one of the 100 best companies to work for by *Fortune*. Last year's *Fortune* survey found 77% of Wal-Mart employee respondents reporting that "there is a family or team feeling" at Wal-Mart. In addition, the company is ranked by *Fortune* as one of the best companies for women.

NOW's deployment of facts here is reminiscent of earlier "Merchant of Shame" campaigns hosted by the organization against such targets as Smith Barney, Detroit Edison, and the U.S. Postal Service. In 1997, after naming Mitsubishi Motors a "Merchant of Shame," NOW sustained criticism for misrepresenting the scope of problems at Mitsubishi plants in order to raise money. Although mediation was under way between Mitsubishi and the Equal Employment Opportunity Commission regarding charges of sexual harassment at Mitsubishi's Normal, Illinois plant, NOW's national office took out a full-page advertisement which claimed that women involved in the lawsuit were the victims of retaliation, and solicited donations for the organization in the process. NOW's allegations came as news to the president of the union representing the women as well as to NOW's local representative in Illinois, both of whom told reporters that they had heard of no retaliatory actions against the women who filed complaints against the company.

NOW has picked an opportune cultural moment for its latest salvo. With accounting scandals at Enron, WorldCom, and other corporations dominating the news, and even the redoubtable domestic doyenne and omnimedia empress Martha Stewart under scrutiny for questionable stock trades, the public seems eager to pillory corporate America. "We know that harassment and abuse are ways to knock women and people of color out of the competition for higher-paying jobs and higher education," NOW's literature warns. Their response includes an arsenal of sixties-era civil disobedience and consciousness-raising tools tweaked to appeal to a cohort of aging, consumerist baby boomers. "Clout in the marketplace" is NOW's focus, and they urge twenty-first century activists to "get out your clipboards" and obtain signatures for "consumer's pledges." Businesses that refuse to sign an "employer's pledge" could find themselves bombarded by "flyers warning consumers of the refusal." A similar fate awaits local elected officials: "those who refuse to sign," advises NOW, "should be targeted like any other business that refuses."

NOW's campaign also includes an "on-line speak out." These speak outs encourage "women to share their experiences in unfriendly workplaces or campuses" and rec-

ommend "their best strategies for fighting back.". The 729 respondents (overwhelmingly self-identified as "anonymous") pour forth confessions that, taken together, are evidence of boorish behavior and petty office politicking, but rarely actionable incidents of harassment or discrimination. One woman complained of the "emotional harassment" inflicted on her by a boss who wasn't suitably sensitive to her needs while she was going through a divorce; another recounts the personality conflicts she had with a series of bosses (male and female), and pronounces herself perplexed that her superiors were not sympathetic to "everything that I have gone through . . . including a long line of psychologists for stress and panic disorder." As a supposed catalogue of legal wrongdoing, the speak-out is hardly compelling evidence of widespread corporate malfeasance.

There is little evidence that NOW's campaign has received much support from the public. Nevertheless, NOW's campaign is part of a broader feminist effort to impose a vision of gender equality on the American workplace that sees discrimination wherever gender parity does not exist, and that threatens lawsuits if the numbers don't add up.

In December 2001, for example, in a move whose brazenness rivals Lysistrata's infamous sexual boycott of Greek tragedy, NOW's Legal Defense and Education Fund descended on Capitol Hill to demand a share of the $11 billion earmarked by Congress for post-September 11 recovery efforts, threatening litigation if the money was not meted out to NOW's specifications. NOW-LDEF president Kathy Rodgers told lawmakers that federal funds should be given to "women in less traditional fields," such as firefighting, truck driving, and construction work, and argued that discrimination was to blame for the fact that more women are choosing not to enter male-dominated fields (only 25 of New York City's 11,500 firefighters are women, for example). Similarly, in 1997, the Florida chapter of NOW dubbed the retail chain Tire Kingdom a "Merchant of Shame" for failing to hire more women. Both accusations neglected to consider the possibility that women might simply prefer fields other than construction, fire fighting, or tire sales. As the slightly baffled general counsel for Tire Kingdom told the *St. Petersburg Times*, "this is not an industry that attracts a lot of women."

The Left's emphasis on diversity and female empowerment ignores the real concerns of twenty-first century women and men: *family*-friendly workplaces. As recent survey data reveal, flexible work arrangements such as comp time, flex time, and telecommuting appeal to men and women equally. NOW's attempts to shame American merchants into endorsing the feminist agenda likely will continue, but American women are pursuing a successful, yet quiet, boycott of their own, one whose effects are evident in the dwindling membership numbers of feminist organizations: a boycott against divisive gender politics.

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Supreme Court Upholds School Voucher Program

Last term, the United States Supreme Court upheld the constitutionality of an Ohio school voucher program, holding that the government may give financial aid to parents so they can send their children to private schools, including those with religious affiliations. The Court ruled in *Zelman v. Simmons-Harris* that the program is "entirely neutral with respect to religion" and simply provides low-income families freedom of educational choice. Chief Justice William H. Rehnquist authored the opinion for the Court. He was joined by Justices Sandra Day O'Connor, Antonin Scalia, Anthony M. Kennedy and Clarence Thomas. Justices John Paul Stevens, David H. Souter, Ruth Bader Ginsburg and Stephen G. Breyer dissented.

Supreme Court Limits Disabilities Act on Safety Issue

In an important decision interpreting the Americans with Disabilities Act, the Supreme Court last term ruled that employers may refuse to hire a disabled worker when the company determines the job would threaten the worker's life or health. The case, *Chevron v. Echazabal*, involved the employer's refusal to hire a job applicant with hepatitis C, a chronic liver disease, for a position in one of its oil refineries. The company argued that airborne toxins in the plant would make the individual's liver worse and could kill him. The rejected applicant insisted that he was the best judge of the risk to himself, and he sued Chevron for job discrimination under the ADA. The Supreme Court voted 9 to 0 to side with the company. Justice David H. Souter wrote in the opinion for the Court that the employer's position was reasonable. "Moral concerns aside, [Chevron] wishes to avoid time lost to sickness, excessive turnover from medical retirement or death, litigation under state tort law, and the risk of violating" federal occupational-safety laws.

ADA Does Not Trump Seniority Policies

In *USAirways v. Barnett*, another ADA case decided last term, the Supreme Court ruled that the law does not ordinarily require companies to bend their seniority rules so disabled employees can have particular jobs. The case involved a claim by an employee of USAirways that the ADA required the airline to provide him with a less physically demanding mailroom job when he developed back problems. USAirways argued that they were precluded from placing the plaintiff in the requested position because, under the terms of the governing collective bargaining agreement, another USAirways worker was entitled to the job. A five-member majority of the Court held that such an exception would be too disruptive for other employees who had built their own career expectations around a company seniority plan, and thus would not constitute a "reasonable accommodation." "In our view, the seniority system will prevail in the run of cases," Justice Stephen G. Breyer wrote in the opinion for the court, which was joined by Chief Justice William H. Rehnquist and Justices John Paul Stevens, Sandra Day O'Connor and Anthony M. Kennedy. Breyer added, "We can find nothing in the [ADA] that suggests Congress intended to undermine seniority systems."

Bush Administration Establishes Panel to Study Title IX

In June, the Bush administration announced the creation of a Blue Ribbon Panel to study implementation of Title IX, the federal law that prohibits sex discrimination in education. The panel was created to study concerns that the law has resulted in the elimination of a disproportionate number of male college athletic teams. U.S. Education Secretary Rod Paige said the 15-member committee will be charged with making recommendations by January 31, 2003 on ways the law can be strengthened while ensuring "fairness for all college athletes."

CIR Sues HUD and the EEOC Over Racial and Gender Preferences

On August 8, Washington-based Center for Individual Rights (CIR) filed a class action lawsuit challenging preferential hiring and promotion goals for women and minorities at the U.S. Department of Housing and Urban Development. The case, *Worth v. Martinez*, charges HUD and the Equal Employment Opportunity Commission — which encouraged and approved HUD's affirmative action plan — with intentional race and sex discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. The plaintiffs, HUD employee Dennis Worth and a class of similarly situated federal employees, are asking the court to end the discriminatory preferences at HUD, as well as the EEOC's encouragement and approval of such preferences throughout the federal government.

Feminist Group Asks Department of Education to Review Whether Voc-Ed Programs Violate Title IX

On June 6, 2002 the National Women's Law Center (NWLC) filed a complaint with the Office of Civil Rights at the U.S. Department of Education, asking the office to investigate vocational-technology programs for violations of Title IX, the federal law that prohibits sex discrimination in federally assisted programs. NWLC alleges that sex segregation is widespread in the nation's vocational and technical programs, and that female students are unlawfully steered toward cosmetology and clerical courses and away from higher-paying courses of study, such as plumbing and auto mechanics. Targeted states are Massachusetts, New York, New Jersey, Maryland, Florida, Mississippi, North Carolina, Illinois, Michigan, Missouri, Arizona, California and Washington.

CORPORATIONS

SARBANES-OXLEY HASTILY CHARTS NEW GROUND IN FEDERAL CORPORATE LAW

*BY ROBERT BARKER**

The Sarbanes-Oxley Act of 2002 represents a major shift in securities regulation in the United States. It is the first major foray of the Federal government into the area of corporate governance, and a shift of regulation from the States to the Federal government. It was hastily enacted and accelerated through Congress as it was written, with many provisions ending up as far more draconian than reported in precursor bills. Securities lawyers are still struggling to understand the implications of the Act for their clients, and for themselves.

Part of the reason for the confusion created by the Act stems from the fact that the Act represents a paradigm shift in securities regulation. The securities laws were originally based on a disclosure paradigm. Matters of internal corporate governance were left completely to State jurisdiction.[1]

In passing Sarbanes-Oxley, Congress felt great pressure to regulate the governance of U.S. publicly traded corporations. As a result, the Act has grafted new regulations onto the securities laws, imposing new regulatory duties on corporate directors and officers, accountants and even lawyers. It masks some of the effort under the guise of "disclosure", but does not even bother to disguise some of the more bizarre regulations imposed in the Act. In some cases, Congress gave the SEC the power to adopt regulations that could be adapted to existing corporate practice; in most cases, Congress simply enacted a prohibition, or a blanket direction to the SEC, mandating regulation complying with Congress' own words.

How Did We Get Here?

Before reviewing some major themes of the Act, it is important to review how the Federal Government decided that now was the time to step into areas of corporate governance, areas that have been reserved to the States and State courts for many years. It has been obvious to many observers that something was wrong in the redoubts of corporate America. Some argue that the failings of corporate America were due to an increase in greed, or to a lack of character in boardrooms and executive suites. While character faults may have played a role, it may be hard to argue, and more difficult to prove, that there was a spike in character faults in recent years. It may be more useful to review the changes in the regulation of corporate governance in the last quarter century that have led to the coziness of business and management in the boardrooms. How was it that an institution, the corporation, that started with an almost fiduciary respect for the investor became a Leviathan of cronyism and greed?

The answer may lie in developments throughout the 20th century that have separated the corporation from its original purpose: to make money for its investors. As a consequence, corporate law is no longer an equity-based body of law created to protect the private property of the investors, but a statutory-based regulatory scheme that, in many cases, has been specifically designed to insulate corporate directors from accountability to its investors.

In the beginning of this century, it was unlawful for corporations to do anything that did not serve the business purpose of the corporation — a director could be sued for giving corporate funds to charities or political causes. Such a use of corporate funds was *ultra vires*: an abuse of power by the executive or directors. Starting with the modern corporation codes in New Jersey and Delaware, various States recognized the need to give directors and management greater latitude as corporations played an increasingly prominent role in American society. State courts adopted the "business judgment rule" to deal with the new latitude granted to directors.

Beginning in the late 1970s, the courts started taking an even more expansive view of the business judgment rule as boards of directors experimented with novel securities, accounting techniques and takeover defenses. At the same time, State legislatures enacted laws to protect directors from the influence of the marketplace. Thus, for example, state takeover statutes authorized corporate boards to take into account factors other than economic factors, broadened indemnification statutes and permitted the board to exculpate itself from various types of liability. All these changes led to decreasing accountability at the board level.

The Delaware Supreme Court's decision in *Household International*, upholding the adoption of a poison pill as a valid exercise of business judgment, was a watershed decision that came as a shock to many corporate lawyers at the time. Coupled with court decisions like *Time-Warner*, it is not surprising that directors have become increasingly insulated from the interests of the shareholders. Management has, in some cases, been able to exploit this lack of accountability, giving increasingly greater perks to "independent" directors, who may not be as inclined to ask tough questions of management, to the detriment of shareholders.

It was some of the more notable failures of boards and management – at Enron, Global Crossing, Worldcom and Adelphia – that led to the hasty enactment of Sarbanes-Oxley.

In passing the Sarbanes-Oxley Act, Congress has stepped into the arena of corporate governance. There is likely to be great debate about whether the Federal government is the most appropriate source of regulation for corporate governance. On one hand, it brings the United States into line with other countries, which have a single unified body to regulate corporate governance, some with specific panels to make decisions on tough questions. On the other hand, it deprives the States of their traditional exclusive responsibilities in this area, and deprives the federal system of the benefit that comes from competing systems of law.

The Act has already garnered much criticism from lawyers and bar associations. Some foreign governments have already started to question Washington's "unilateralist" intrusion into the internal corporate affairs of the nearly 1,300 foreign companies registered with the SEC. Further, its "immediate effectiveness" has shocked many practitioners in some areas who had no idea that it was coming. The unintended consequences of the Act are sweeping across many areas of legal and business practice. For the immediate future, businesses and their employees will be struggling with learning the Act's intricacies, adapting to the new law and, perhaps, to its unintended consequences.

What the Act Does

The Act is clearly the most sweeping securities legislation since the 1930s. It extends beyond securities law and corporate governance and affects many areas of business conduct. To complicate things further, many portions of the Act are effective immediately and some portions of the Act have no exceptions to sweeping prohibitions. By sending corporate executives to their lawyers and accounting firms, maybe to multiple lawyers and accounting firms, it is likely that the first major consequence of the new Act will be an increased cost of doing business for public companies.

The major portions of the Act are summarized below. Of course, most public companies have already started complying with the portions of the Act that are relevant to them. But even private businesses, or businesses that aspire to the public markets, should pay special attention to the new Act.

Attorney Reporting Obligations. The Act requires new Federal regulation for lawyers who practice or appear before the SEC. Those lawyers, independent of any State obligation, must report "evidence" of securities law violations or breaches of fiduciary duty to the general counsel of their client. If the general counsel does not respond "appropriately," the lawyer must report the evidence to the client's audit committee. While some lawyers believe that the Act does not expand the duties of corporate securities lawyers, others believe it was an attempt to impose a new duty to make them liable to shareholders in class-action litigation. It is not clear what penalties apply to lawyers who do not comply, or whether the Act is attempting to impose a new Federal duty on securities lawyers independent of their duties under the State bars that regulate them.

Executive Compensation Issues. The Act also follows the "regulatory paradigm" in prohibiting all "extensions of credit" to officers and directors of public companies. As several law firms have already pointed out in client alerts, travel advances to directors and executive officers are now illegal. Depending on structure, the Act may have banned several common types of deferred compensation plans as well. Corporate relocation programs are also subject to scrutiny, as is any program that involves an "extension of credit." These provisions may need to be amended, as it is likely the breadth of the Act has led to some immediate unintended consequences.

In other cases, executives will be required to forfeit all gains from incentive compensation and bonuses for a full year. It is unclear whether the forfeited gain is repaid to the company, the shareholders, plaintiff's lawyers, or to the new restitution fund created by the Act. Since the law does not grant any room for regulatory interpretation, the courts may need to clarify the intent of Congress.

Changes in the Accounting Profession. The Act's most sweeping regulatory changes were directed at the accounting firms that audit public companies, which will now be subject to a to-be-created Public Company Accounting Oversight Board. Partners in charge of auditing any public company must be "rotated" after five years. This provision is effective immediately, so some long-standing relationships will be affected now. Audit committees must approve in advance any hiring of accounting firms and must expressly approve certain kinds of "non-auditing" services. Finally, auditors must adopt quality control procedures and keep their work papers for up to seven years.

Certification. There are two new personal certifications in the Act, requiring CEOs and CFOs to certify that (1) the financials and SEC reports have been properly prepared (Section 906), and (2) internal corporate controls are in place and adequate (Section 302). These certifications are in addition to the much-ballyhooed SEC order requiring certifications by the largest Fortune 1000 companies. Congress followed the "disclosure paradigm" in requiring the SEC to adopt new rules requiring public companies to disclose certain internal control policies.

Corporate Governance. The Act mandates that every public company have an audit committee comprised completely of independent directors. The Act defines the audit committee as the entire board in the absence of a formal audit committee; presumably, the Act means that the audit committee is all the independent directors. The Act defines which directors are "independent", a standard that State legislatures and courts have not been willing to define with certainty, possibly out of a reluctance to hamstring the flexibility of corporate boards.

While the Act does not require new forms of internal compliance programs, it is clear to many that Boards, CEOs and CFOs will be implementing new compliance programs to ensure the accuracy of the internal control reports for public companies. While some might deny it, these provisions are likely to cause Boards, CEOs and CFOs to reexamine the internal reporting systems inside their companies, and maybe to create duplicate lines of reporting.

In addition, the Act requires that the audit committee, and only the audit committee, may hire and fire auditors, and approve most non-audit functions performed by outside audit firms.

Criminal Provisions. The criminal provisions of the Act are particularly difficult to comprehend. "Knowing" violations of some of the new securities laws are subject to 10 years imprisonment. "Willful and knowing" violations are subject to 20 years imprisonment. Prosecutors and former prosecutors cannot tell the difference and many agree that courts will not be likely to impose such serious jail time for certification offenses. But it plays well in Peoria for any congressperson to note that he or she voted for "prison terms for corporate executives."

Whistleblower Protection/Analyst Protections. The Act contains new provisions to protect whistleblowers at all public companies, and to ensure that securities analysts are not punished for preparing an unfavorable report on a public company. Again, these provisions create a new regulatory structure for analysts and for public companies.

Faster Securities Filings. The Act requires the SEC to enact new regulations requiring faster reporting of insider trades: within two business days. In fact, the Act directs the SEC to adopt several new regulations. In a year's time, all public companies with web sites will be required to post insider trades on that web site.

The Act imposes greater regulation on public companies, and will likely create greater compliance costs. Congress was compelled by public opinion to pass something. But the Act does not fit well with existing legislative paradigms, and its internal inconsistencies alone will mean uncertainty for years to come. Even in its initial stages, it has been beset with ambiguous timetables and deadlines. Time will tell whether this is a quirky aberration caused by unique pressures, or the beginning of a new system of Federal corporation law.

For more information, see the Corporate Responsibility section of The Federalist Society's website at www.fed-soc.org, and in particular, the article by Peter L. Welsh, The Public Company Accounting Reform and Investor Protection Act of 202: Public Markets and Government Oversight (July 25, 2002).

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Footnotes

[1] The original securities laws did not empower the SEC to ban any particular type of offering – or to regulate at all. In fact, there was no SEC to enforce the Securities Act of 1933 – the SEC was created the next year in the Securities Exchange Act of 1934. Further, the 1933 and 1934 Acts did not address internal corporate governance issues. By the end of the 1930s, Congress was more confident of its ability to enact laws to regulate the securities markets – and the Supreme Court was more pliant in upholding Federal regulation. Thus, the Trust Indenture Act of 1939 specifies the powers that must be held by a trustee – the "internal corporate governance," so to speak, of a bond offering. And the Investment Company Act of 1940 created a broad, complex regulatory scheme that still catches some unwitting promoters – even those represented by competent securities counsel.

Commerce & Federal Criminal Law: The Risks of Over-Criminalizing Commercial Regulation

*Remarks by George J. Terwilliger III**

We are here today to consider issues of corporate governance. Recent events have generated renewed interest in and highlighted the importance of one aspect of corporate governance, namely, dealing with government enforcement proceedings, including criminal investigations and prosecutions. My purpose today is to discuss a phenomenon that has been a quarter of a century or so in the making: the government's increased use of criminal law and other punitive enforcement mechanisms to regulate business activity. In so doing, federal criminal law as applied to business has strayed from its core purpose of protecting the means and instrumentalities of commerce to being used as a punitive regulatory tool.

I would like to address three considerations that I hope will be of practical use to you concerning this issue:

First, I think it would be useful to remind ourselves of the role federal criminal law has played in carrying out the core federal function of protecting the means and instrumentalities of, and thereby promoting, commerce.

Second, I would like to summarize the case for the proposition that federal criminal law has strayed far from that purpose.

Third, I would like to present a few ideas about what we can do to fix that, both in court and in discourse with the makers of public policy.

I am constrained to make a sidebar observation concerning September 11, 2001. Those events changed many things, but they also brought some things into sharper focus. One is that a strong economy should not be taken for granted. To have a strong economy, we need strong resourceful companies operating in an environment that recognizes commerce as beneficial to the human condition.

We should remember that prosperity is, in fact, a liberating factor in human affairs. Hamilton recognized this 225 years ago when he wrote:

> "The prosperity of commerce is now perceived and acknowledged by all enlightened statesmen to be the most useful as well as the most productive source of national wealth; and has accordingly become a primary object of their political cares."

Michael Novak, the 20th century theorist, has reiterated and reinforced that view:

> "The invention of the market economy in Great Britain and the United States more profoundly revolutionized the world between 1800 and the present than any other single force. After five millennia of blundering, human beings finally figured out how wealth may be produced in a sustained, systematic way … the gains in liberty of personal choice … increased accordingly."

What we also know from experience is that to prosper and grow, business needs an environment that fosters and encourages commerce. The Founders recognized this and made promoting commerce a core function of the fledgling federal establishment. But today, much of the use of criminal law in the commercial context seems to have lost sight of that basic principle and core federal function.

This is not the result of some deliberate, anti-commercial policy choice, or the result of some unsound or ill-advised seismic shift in government posture towards business. Rather, it is the result of an accretion of events. We have quietly, perhaps imperceptibly, slipped our philosophical moorings, so that now government drifts from its role of protecting the commercial system toward an environment that criminalizes otherwise innocent behavior because it transgresses some regulation or other standard designed not to foster commerce, but to control or regulate how it is carried out.

Government regulation has become a tool of pursuing social goals and, with increasing regularity, government has resorted to criminal sanctions as a means of ensuring compliance with these regulatory norms. There is widespread support for many of these goals, such as clean air and water, safe medicines and food and an information infrastructure that has already exponentially increased our productivity. But should we make criminals out of those who fail to meet our expectations for achieving regulatory goals?

Let me be clear at the outset so that there is no mistake: I am not suggesting that we condone fraud or dishonesty in the marketplace. Far from it. A dishonest market is not a free market. But there is value in recognizing that a core function of the federal government, and therefore the core purpose of federal criminal law in the business context, is to promote commerce by protecting its means and instrumentalities.

The government and federal law enforcement have a critical role to play in policing the marketplace for fraud and corruption. It is clearly necessary to set and enforce standards that promote investor confidence in capital markets, provide transparency in credit transactions and to take such other steps, including the judicious use of criminal law, as are necessary to protect the integrity of commerce. Even though such measures present difficulties and expense for business, one does not have to look very far for examples of how dishonesty, deceit and corruption can cripple a nation's economy and its commercial system. Indeed, businesses themselves have a vital interest in a level—that is, an honest—commercial playing field.

But much of the criminal law that applies to business today has strayed far from promoting these core values and, instead, punishes criminally what are, in essence, regulatory offenses. In the 20th century, Congress pursued many regulatory initiatives that set the stage for this new use of criminal enforcement authority. Most of these were enacted as part of a continued expansion of federal regulations and programs in general. These initiatives were the catalyst for an accelerated pace in the regulation of business activities by punitive mechanisms, which use seems far afield from the value of maintaining integrity in commercial affairs. Examples of this trend include:

1. Environmental laws which include steep civil and criminal enforcement penalties for failing to meet regulatory standards in conducting what is otherwise legitimate and innocent commercial behavior. Consider, for example, that polluting is legal in the United States; you can get a permit from the government to do it. Polluting too much, however, is a felony. The line is razor thin, often expressed in parts per million, and the stuff of great debate between experts and scientists.

2. Billing government health programs for medical services is obviously legitimate commercial activity. Certain unbundling of the charges or otherwise sending a bill to the government that does not conform with a sheaf of federal regulatory dictates can be felonious conduct. Again, experts can and do disagree about minute aspects of coding medical services for reimbursement by public or private insurers.

3. Pumping oil and gas from federal lands is, of course, legitimate commercial activity. Failing to abide by complex government regulations when valuing crude oil or raw gas at the well for royalty purposes may not only lead to treble damages claims under the False Claims Act, but federal grand jury attention as well. And so on.

The core purpose of federal criminal law relating to commercial matters has traditionally been to foster commerce by protecting the means and instrumentalities necessary to it. It seems to me that now is a time to refocus on those fundamentals and to consider alternative mechanisms to achieve other goals sought through regulation.

To address the core federal function of promoting commerce, please allow me to trace briefly the evolution of the relationship between the federal authority and commercial activity.

The Constitution expressly gives Congress the power to "regulate" commerce. It also expressly gave Congress the power to "punish" treason, counterfeiting, piracies, felonies committed on the high seas and offenses against the law of nations. These provisions seem to have been intended by the Founders to serve one common and fundamental purpose: to protect the country and its government and to empower it, in turn, to protect the channels and instrumentalities of commerce, as they were then known. The notion that criminal statutes could be used directly to "regulate" commerce is simply not envisioned in the Founders' work.

Early on, Congress followed the philosophical lead of the Founders, enacting criminal statutes limited to punishing treason, murder and bribery on federal property or the high seas, perjury in federal court, bribery of federal judges, forgery of federal certificates and securities and customs offenses. These and other statutes were clearly aimed at punishing threats to a well-ordered system of commerce and protecting the government charged with securing the benefits of commerce that would accrue to the people.

Two statutes passed in the 19th century, the mail fraud statute and the False Claims Act were designed to protect the mails, an important instrumentality of commerce, and the integrity of federal procurement, a matter of considerable value to the commercial participants therein. After the War, Congress soon saw the need to protect the newest instrumentality of commerce, the railroad, from criminal interference as well.

This same practice of enacting criminal statues to protect the means and instrumentalities of commerce continued through much of the 20th century. Banks were recognized as important instrumentalities of commerce and the federal bank robbery statutes were enacted to protect banks from the likes of John Dillinger and other robbers. Later, banks became the beneficiaries of numerous criminal statutes designed to protect them from white collar swindlers and thieves. The Sherman Antitrust Act, enacted to remedy the predations of Standard Oil and to prevent their recurrence, was aimed at freeing interstate commerce from unnatural, anticompetitive impediments.

New Deal security acts and financial reporting laws were designed to preserve the integrity of commerce and increase investor and consumer confidence in publicly traded markets and the banking system generally.

Years later, RICO responded to the risk to legitimate commerce posed by the infiltration of organized crime.

When the Supreme Court decided in a 1909 watershed decision that corporations could be prosecuted for crimes, it is doubtful that it foresaw the minefield of regulatory offenses that the modern corporation would need to traverse on a daily basis. In *New York Central and Hudson River Railroad v. United States*, the Court reasoned simply that if a corporation could bind the shareholders to a contract, it should be held responsible for conduct on the corporation's behalf which is determined to be a crime. The Court also moved, rather casually, from the premise that corporations could be held liable for injuries to the conclusion that they also should be held liable for crimes. And lastly, the Court theorized that, if corporations could not be prosecuted, there were wrongs that could not be remedied and deterred. That last notion seems odd today, since the scope of civil remedies available to right corporate wrongs seems more than adequate and the keystone criminal remedy—jail—is not applicable to corporations.

But, indeed, the notion that corporations should be prosecuted criminally for their "wrongs" has proven to be a common refrain as the federal government has migrated away from the core purpose of fostering commerce by protecting the means and instrumentalities necessary to it.

The lengths to which the government sometimes will go to turn a regulatory infraction into a criminal case would be humorous if it were not for the consequences to the corporate defendant. In 1982, in *United States v. Hartley*, the Eleventh Circuit upheld the conviction of a corporation and two of its employees for selling the military breaded shrimp that failed to meet certain specifications, including the amount of breading on each piece of shrimp. To be sure, the defendants in that case also had committed serious criminal acts. They deceived the government by altering inspection standards and changing the weights used to determine how much shrimp the government bought. The latter deserve criminal treatment because they involve the type of deception and dishonesty that characterize criminal intent. But one must question whether the under-breading of shrimp, the fundamental aspect of the case, justified 33 counts of conspiracy, mail fraud, violations of the National Stolen Property Act and RICO.

There are also two other principles of corporate responsibility that arise in connection with this breaded shrimp caper. First, the Eleventh Circuit held that it is possible for a corporation to

conspire with its own officers, agents and employees under the federal conspiracy statute. In addition, the court of appeals held that a corporation may be simultaneously both a defendant and the "enterprise" under the RICO statute. The court was expressly non-sympathetic to the policy argument that this would make it far too easy to prosecute corporations under the RICO statute. Using language reminiscent of the Supreme Court's observations in the *New York Central* decision, the court of appeals said:

> "This is simply a reality to be faced by corporate entities. With the advantages of incorporation must come the attendant responsibilities."

One can easily acknowledge that corporations have a responsibility to abide by duly promulgated federal regulations. But enforcing those regulations through criminal prosecutions seems far from the traditional purpose of federal criminal law applied in the commercial setting. I do not advocate an 18th century view of the relationship between commercial activity and criminal law. It is clear though that, traditionally, commercial crimes were characterized by dishonest conduct in which the *mens rea* that delineates criminal acts was obviously present. Now federal criminal law applied to commerce seems to have lost that limitation. The result is something that may itself be as undesirable as polluted air and water:

An environment where the engine of commerce is starved for the fuel of entrepreneurial risk taking, and business decisions have far too much to do with avoiding the risk of oppressive federal inquiries into conduct controlled by the minutia of arcane federal regulations.

One of the ways this is brought about is the practice of Congress allowing regulatory agencies to define federal crimes, something that I think would be better left as a function of the politically accountable legislature itself.

This results when Congress enacts a statute with broad regulatory objectives, empowers an agency to promulgate regulations to accomplish those objectives and provides criminal penalties as part of the statute's general enforcement mechanisms. The result is that when agency bureaucrats write the regulations, they define the crimes. In addition, these regulations usually require regulated entities to provide information to the government, both formally and informally. Such reporting often involves data that are something other than merely objective compilations of quantifiable information. As a result, reports and certification of compliance with regulatory requirements become fodder for prosecutors considering whether to prosecute a corporation for making false statements or concealing material information from the government.

A few factors that suggest this trend continues are worth noting. The first example is when Congress recently reacted to allegations of safety defects in tires and/or automobiles by considering a wide range of draconian criminal provisions and new regulatory requirements in the consumer product safety area.

A second example is the ascendancy of plaintiff's lawyers not only as sources of public policy created through the legal system, but also as private prosecutors. Under the federal False Claims Act, private plaintiff's lawyers can become prosecutors under the statute's *qui tam* provisions. This is a potent weapon in the hands of a creative plaintiff's counsel. As noted this past May by the Eleventh Circuit in *United States ex rel Augustine v. Century Health Service Inc.,* "a number of courts have held that a false implied certification may constitute a false or fraudulent form even if the claim was not expressly false when it was filed." In other words, the claim may not be false, but nonetheless can be actionable if it is made without compliance with all attendant regulatory requirements of the program involved. Please note, however, that several circuits have at least limited the scope of this theory to those circumstances where there is an express certification of regulatory compliance required to accompany the claim. Cold comfort.

And then, of course, there is what has come to be called simply "Enron." Enron really epitomizes a phenomenon that began some time ago regarding concern with false or misleading corporate financial statements. This issue had been bubbling up for a couple of years, attracting the interest of both securities enforcers and the Justice Department and, of course, private plaintiffs' counsel. Might we now be at a crossroads occasioned by consideration of how to deal with business regulation in the post-Enron environment? There clearly has been pressure yet again to "do something." Will that include passing new laws defining yet new crimes, not for dishonesty, but for what a regulator might consider overaggressive use of generally accepted accounting standards?

Are changes needed to insure that financial reporting of corporate performance is accurate and is designed to promote investor confidence in the market place? Absolutely, of course. But maybe we should pause to consider where we are in terms of criminal enforcement against businesses before defining new federal crimes arising from commercial activity.

And this brings me to the last of these three considerations and that is what we can do to fix this. I believe there are three elements to an effective response to this growing trend to regulate commercial activity by application of criminal law:

1. Address the issue at the policy level in both the legislative and executive branches, beating the drum regularly to sound the core purpose of federal criminal law as applied to commerce.
2. Press both the policy and the legal issues at the pre-indictment stage in all cases where prosecutors, and particularly responsible supervisory officials, might be persuaded that these core federalist considerations, among others, militate against a criminal prosecution based on a purported transgression of regulatory standards.
3. Where the opportunity presents itself, litigate the underlying policy issue by challenging prosecutions brought on unclear and ambiguous regulatory standards. As I will discuss in a moment, the courts have provided an opening to do just that.

The policy argument is obvious: focus on using federal criminal provisions to secure the core federal interest in promoting and protecting the means of commerce. A good first move would be to scrap the "Corporate Prosecution Guidelines" issued by the Justice Department during the last Administration. Not only are these benchmarks for the exercise of prosecutorial discretion unmindful of the core function of government to foster and protect commerce, but they are also simply bad policy. I think that the Justice Department could do much better. Rethinking these Guidelines is a good vehicle to move to a more well-reasoned and sound policy on corporate prosecutions. Another obvious policy option is to seek other means to achieve regulatory goals. Choices include the use of tax and other financial incentives for meeting regulatory objectives, real rewards for self-policing and, as necessary, civil

damages and consent agreements to deter and change corporate behavior.

The second and third points are to be bold enough to argue and, if necessary, litigate some of the issues raised by egregious use of federal criminal law to regulate commercial activity. Two circuit courts of appeals recently rejected the overbroad application of general criminal statutes to ordinary commercial conduct. Those decisions by mainstream appellate courts, combined with a well-established principle of due process, can be used to craft persuasive arguments to establish limits on the untoward use of criminal enforcement mechanisms in the commercial context.

The Supreme Court has repeatedly held that "a penal statute must define a criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." That particular quote is from *Kolender v. Lawson*, a 1983 decision, but its roots extend deeply into Supreme Court due process jurisprudence.

If one were to wade through the Medicare cost reimbursement rules and ask if this is sufficient notice of what is required and what is prohibited, so as to justify the use of criminal sanctions for regulatory transgressions, the value of this aspect of due process would be quite apparent.

In fact, that is precisely what the Eleventh Circuit did this past March and the conclusion it reached is well worth considering.

In *United States v. Whiteside*, the court reversed the convictions of two hospital officials who had been prosecuted for knowingly and willfully filing false statements in federal health program reports required to be submitted to the government. The case turned on whether the defendants knowingly and willfully made a false statement when they filed a single report classifying debt interest in terms of "how the debt was being used at the time of the filing of the cost report rather than how the funds were used at the time of a loan origination." The court of appeals found no legal authority clearly supporting the government's interpretation of the regulation upon which the prosecution charged criminal offenses. Experts had disagreed as to whether the government's position was correct. The court concluded that "competing interpretations of the applicable law are far too reasonable to justify these convictions."

The Second Circuit made a similar determination in *United States v. Handakas*, a case that ironically was also decided in March 2002, holding that the term "honest services" as used in connection with the mail fraud statute was unconstitutionally vague as applied to the prosecution of a construction company owner in New York. He had been convicted of mail fraud for conduct allegedly violating New York regulations requiring outside contractors to pay the prevailing rate of wages and to furnish accurate reports of work performed under a state contract. The court of appeals reviewed its own precedent defining "honest services" under the fraud statute and found the statute unconstitutionally vague as applied, because even a person fully informed about the federal statutes and the relevant Second Circuit case law "would lack any comprehensible notice that federal law has criminalized breaches of contract."

The court explained the implications of allowing the criminal conviction to stand on such a conceptually empty standard:

> "If the honest services clause can be used to punish a failure to honor New York's insistence on the payment of prevailing rate of wages, it could make a criminal out of anyone who breaches any contractual representation: that tuna was netted dolphin free, that stationery is made of recycled paper, that sneakers or tee shirts are not made by child workers, that grapes are picked by union labor, in sum, so-called consumer protection law and far more."

One might add, that shrimp is not properly breaded.

The same points and arguments that have currency in litigation can be used aggressively, and I will tell you from experience—effectively—in the pre-indictment stages of a case to persuade prosecutors that alternative means to accomplish governmental objectives may be a far better policy choice than criminal prosecution. This is particularly so when the matter is presented to prosecutorial officials who have the responsibility to set policy in the exercise of prosecutorial discretion.

Quite rightfully, the Department of Justice and the FBI have continued to identify white collar crime as a priority. It is clear that the demands on federal law enforcement today are greater than ever before and we know that they cannot do everything. This seems a good time to address this issue and to refocus federal law enforcement on core federal functions. This means putting the emphasis back on protecting the means and instrumentalities of commerce rather than using criminal law to punish and control ordinary commercial activity governed by regulation. In mounting a defense to this trend, certain concepts are worth repeating. Corporations are not inherently evil. Wealth can serve good purposes. Commerce carries blessings to people far beyond the buyer and seller in a particular transaction.

Business leaders can contribute much by reminding our political leaders of these fundamentals. The adventurous, risk taking endeavors that lie at the heart of American commerce will thrive only so long as they are nourished in a hospitable environment. And the trend toward criminalizing the enforcement of regulated activities poses a threat to that environment. It would be a mistake for us not to consider these issues and take such corrective actions as consensus might allow.

* This transcript is from the proceeding of the Federalist Society's Corporate Governance Conference held on June 13, 2002 at The Cornell Club, New York, NY

References Cited

Act for the Punishment of Certain Crimes Against the United States, §§ 1, 3, 8, 16, 18, 21.

Act to Provide More Effectually for the Collection of the Duties Imposed by Law on Goods, Wares and Merchandise Imported Into the United States, and on the Tonnage of Ships or Vessels, § 27, 2 Stat. 145, 163 (1790), repealed by Act of March 2, 1799.

The Federalist No. 12, at 73 (Jacob E. Cooke ed., 1961) (A. Hamilton).

Kolender v. Lawson, 461 U.S. 352, 357 (1983) (citations omitted).

New York Cent. & H.R.R. Co. v. United States, 212 U.S. 481 (1909).

Michael Novak, The Spirit of Democratic Capitalism 17 (1991).

Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961–1968 (2000).

Securities Act of 1933, 15 U.S.C. § 77a (2000).

Securities Exchange Act of 1934, 15 U.S.C. § 78a (2000).

Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (2000).

U.S. Const. art. I, § 8, art. III, § 3.

United States v. Handakas, 286 F.3d 92 (2d Cir. 2002).

United States v. Hartley, 678 F.2d 961 (11th Cir. 1982).

United States v. Whiteside, 285 F.3d 1345 (11th Cir. 2002).

CRIMINAL LAW & PROCEDURE

AN EXAMINATION OF THE CRIMINALIZATION OF COMMERCIAL ACTIVITY

*BY MARY B. NEUMAYR**

I. Introduction

In the days and weeks following the dramatic collapse of energy giant Enron, the calls for legislation designed to avert "the next Enron" began. In recent months, numerous legislative and regulatory proposals have been put forward, and government authorities have instituted high profile criminal investigations or prosecutions of well known U.S. companies. Sweeping accounting reform legislation, which will include dramatically increased criminal penalties for corporate executives, is expected to be enacted shortly. All of these recent developments have served to make corporate America and the general public far more aware of criminal enforcement in the commercial sphere.[1]

Well before the collapse of Enron, however, Congress has steadily been passing new criminal statutes affecting the commercial sphere, and government prosecutors have increasingly been conducting criminal investigations and prosecutions of corporations, executives and employees under those statutes. As a result, the field of so-called "white collar" crime has significantly expanded in the past 30 years.[2] During the past decade, expanded criminal enforcement has been most evident in such areas as health care, intellectual property, environmental law, antitrust, and securities and financial institutions, and it is in these areas that the government now expends significant prosecutorial resources.

This expansion of criminal statutes and enforcement in the commercial area represents a significant shift in prosecutorial emphasis. With this expansion in the number of criminal statutes and white-collar crime prosecutions, there has also been a growing concern in the private sector that many of these statutes reduce or eliminate mens rea requirements, or fail to give adequate notice of the conduct prohibited or to limit prosecutorial discretion. Many observers are specifically concerned with statutes that carry criminal penalties and that are either overly broad or vague, or leave definition of the criminal conduct to regulatory discretion.

Notwithstanding the current highly charged political climate in Washington, D.C., it is essential to bear in mind that historically the American criminal justice system has been founded on the premise that the investigation, prosecution, and conviction of misconduct should be fair, just and efficient. This is based on the understanding that the exercise of government power has limits, that the law must recognize the freedom and dignity of all citizens, and that the law must be rational and knowable if it is to steer human affairs in a positive direction. It is important that these principles continue to guide criminal enforcement in the commercial context.

This paper is intended to promote discussion regarding the use of criminal statutes in the commercial area. The paper has been prepared with assistance from government prosecutors, private practitioners and academics, and was originally presented at a meeting of opinion leaders in July 2002. The paper begins with a list of proposed questions for discussion, followed by a summary of trends in criminal enforcement in the commercial sector and the post-Enron reform proposals. The paper then discusses the role of criminal sanctions, as well as (1) concerns with diminishing criminal mental state requirements; (2) the risks of vague or overly complicated statutes; and (3) alternatives to criminal enforcement. In closing, the paper discusses the importance of clear, respected prosecutorial guidelines.

II. Proposed Questions

It is important to consider that the principles of freedom, dignity, and limited exercise of government power apply to our commercial life, and that the ability of entrepreneurs, shareholders, and employees to earn a livelihood and to utilize their talents in pursuit of a vocation is an essential feature of human dignity. The fact of a corporate presence should not diminish the importance of these principles. Corporations, after all, are simply webs of human relationships and interactions. Considerations regarding the appropriateness of criminal sanctions in the commercial area may include:

- What has been driving the increased tendency toward criminalization of commercial activity?
- Under what circumstances should criminal law be used to resolve disputes over commercial conduct?
- Does the type of criminal conduct matter (e.g. where the victim is the public at large, where the dispute is between companies, or where the victim is a consumer or set of consumers)?
- What weight should be given to prevention or deterrence? And what is the proper balancing point between prevention and over-deterrence in the commercial sphere?
- What are the benchmarks or measures for government success and appropriate effectiveness?
- How should criminal sanctions be evaluated for their impact upon competition and innovation in the economy?
- Are the current trends in criminal prosecutions of commercial activity consistent with our traditional concepts of due process and fair play?
- What are the standards of intent, and do they leave the door too wide open for prosecution?
- Are changes appropriate to ensure that prosecutions are balanced and not heavily weighed in favor of unrelated factors such the need to justify prosecutorial resources dedicated to enforcement of specific types of cases, or potential recoveries of funds for agency budgets?
- Are the principles of federal prosecution and the Guidelines issued by the Department of Justice (DOJ) for corporate criminal investigation adequate?
- When is it appropriate to hold a corporation criminally liable, including where such prosecution will have a severe impact on innocent employees or shareholders?

While this paper does not undertake to answer all of these questions, it seeks to promote discussion by addressing

trends in enforcement (see Section III) and issues relating to the criminalizing of commercial activity (see Sections IV - VII).

III. Trends in the Criminalizing of Commercial Activity

In our American economy, areas in which criminal enforcement has dramatically increased include the following:

A. Health Care

Criminal enforcement has increased very significantly in recent years in the area of health care prosecutions. Investigating and prosecuting health care fraud became one of the DOJ's top priorities in 1993.[3] After several years of pursuing this initiative, the DOJ demonstrated its aggressive enforcement efforts, having filed 322 criminal cases related to health care fraud in 1998, 371 criminal cases in 1999, and 457 such cases in 2000.[4] In addition, the federal government funded Medicare fraud control units in many states, and Medicaid fraud came to be viewed as an area of state enforcement.[5]

The increase of prosecutions in the health care field has been attributable in large part to the enactment of new legislation carrying potential criminal penalties. In 1986, Congress amended the False Claims Act to include Medicare and Medicaid among the government programs against which individual whistleblowers could bring lawsuits alleging fraud against the government in "qui tam" lawsuits.[6] Qui tam lawsuits play a prominent role in health care prosecutions. The DOJ reports that "over half of the $480 million the Department was awarded in health care fraud cases in FY 1998, involved judgments or settlements related partially or completely to allegations in qui tam cases."[7] Qui tam cases raise important questions regarding the relationship between private lawsuits and government prosecutions. There is a perception in the private sector, moreover, that too many private "qui tam plaintiffs" bring cases which are frivolous yet very costly for companies to defend against, and that measures may be warranted to curb abuses by private litigants in such litigation.

Congress further strengthened the government's ability to pursue criminal health care cases with the Health Insurance Portability and Accountability Act of 1996 (HIPAA). HIPAA imposed significant new potential criminal liabilities upon health care providers. It created new criminal offenses for health care fraud, theft or embezzlement in connection with health care offense, false statements relating to health care offense, and obstruction of criminal investigations of health care offenses. In addition, HIPAA added a federal health care offense to the money laundering statute.[8]

The result of the complexity of new criminal health care statutes and widespread prosecutions, in conjunction with the growth of large health care providers, is that health care organizations now employ significant numbers of attorneys and other staff to respond to the growing number of criminal investigations and prosecutions. As is discussed further below, an analysis of the merits of criminal penalties in health care should attempt to compare the costs imposed by the pursuit of criminal investigations with the expected benefits of such prosecutions. In addition, such an analysis should evaluate whether alternative enforcement mechanisms, such as vigorous civil enforcement, could achieve similar ends.

It may also be appropriate to consider in the health care field whether some prosecutions are driven by factors unrelated to the merits of a specific case. For example, government prosecutors may be subject to pressure to pursue False Claims Act cases in order to achieve a public image of fighting fraud. Further, persons on both the prosecution and defense side have suggested that during the past decade many of the most obvious cases of intentional fraud in the health care area have been rooted out, and that enforcement authorities may be currently pursuing more ambiguous cases. They have also suggested that there may be internal pressure to bring health care prosecutions in order to utilize the large prosecutorial resources that have been built up during the 1990s, or in certain cases to enhance the prospect for a civil settlement, or because of the possibility of recovering fees for the prosecuting agency. In view of these perceptions, it may be helpful in the health care area to discuss whether there are changes in enforcement priorities or in the regulatory scheme which would be appropriate.

B. Intellectual Property

With the rapid growth of the importance of intellectual property to our national economy in the past decade has also come an increased focus on intellectual property crimes. As with health care, Congress led the way with new statutes and increased criminal penalties. In particular, in the past few decades, Congress has been active in expanding penalties in copyright law. In 1976, Congress revolutionized copyright law by establishing federal preemption of state law.[9] In 1982, Congress increased criminal penalties for infringement of certain works and expanded these penalties to all works in 1992.[10] In 1997, Congress passed the No Electronic Theft ("NET") Act criminalizing copying of works even without economic or commercial motive, and in 1998, at the behest of the copyright industries, Congress enacted the Digital Millennium Copyright Act providing criminal penalties for the sale or commercial use of devices or technology primarily designed to circumvent copyright protection technologies.[11] The DMCA in particular has caused significant discussion regarding the appropriate limits of government control of copyright technologies and the statute's impact upon fair use and other First Amendment issues.[12]

Congress has not only expanded criminal penalties in copyright law, an area in which criminal penalties previously existed, but Congress also created criminal penalties for misappropriation of trade secrets. In 1996, Congress enacted the Economic Espionage Act which targeted two types of conduct: (1) economic espionage intended to benefit any foreign government and (2) any theft or misappropriation of a trade secret with the knowledge or intent that it would harm the owner of that trade secret.[13] Criminalizing the latter conduct imposed criminal penalties for conduct that had previously been governed by an entire body of civil trade secret law.[14] Since the passage of the EEA, the DOJ has pursued 30 cases under the statute.[15] The vast majority of these cases involve allegations of a current or former employee misappropriating trade secrets.[16]

Notably Congress, out of concern that criminal penalties in the area of trade secret law presented the potential for abuse, expressed its desire that all prosecutions under the statute be approved at the highest levels of the Justice Department.[17] As a result, the DOJ issued a regulation requiring that all prosecutions under the EEA be approved by the Attorney General, the Deputy Attorney General, or the Assistant Attorney General of the Criminal Division for the first five years of the statute's existence.[18]

C. Environmental Law

Since the introduction of modern environmental law in 1970,[19] environmental criminal prosecutions have steadily increased and more frequently have involved negligent or accidental rather than intentional conduct. [20] Recently, it appears that there may be a change in this trend to the extent it appears that the Justice Department's Environmental Division may be focusing its criminal prosecutorial attention and resources on cases involving knowing and fraudulent conduct, as opposed to accidental or negligent violations. For example, Carnival Corp. recently agreed to pay $18 million after pleading guilty to environmental charges for illegal discharges in international waterways. [21] The cruise line company had reportedly falsified its dumping records and made false statements to Coast Guard officials about the unlawful practice.[22] Carnival's executives reportedly cooperated fully and agreed to an extensive compliance program.[23]

The increase in environmental prosecutions during the past decade is attributable to a variety of factors, including a greater number of statutes with criminal penalties.[24] Further, while many prosecutions involve well known hazardous waste laws, in addition, investigators and prosecutors increasingly look to traditional Title 18 crimes, including fraud, false statements, conspiracy, aiding and abetting, perjury and obstruction of justice. Further, in August 1994, Attorney General Janet Reno issued a Bluesheet authorizing U.S. Attorney's Offices to prosecute environmental crime cases of "national interest."[25] The DOJ credits its increased criminal enforcement to a number of factors, including various initiatives as well as a greater number of U.S. Environmental Protection Agency (EPA) investigators, and DOJ prosecutors assigned to environmental crimes.[26]

EPA criminal referrals to the DOJ have steadily increased during the past decade, and more than quadrupled between 1990 and 1999.[27] In 1990, there were 65 criminal matters referred to the DOJ for criminal prosecution, while charges were brought against 100 defendants and 62 years of imprisonment were imposed.[28] In 1999, there were 241 criminal referrals, while 322 defendants were charged and 208 years of prison sentences were imposed.[29] In 1999, in addition to the massive civil fines, there were $61.6 million in criminal fines, while in 2000 that figure increased to $122 million.[30]

One of the factors contributing to the increase in criminal penalties has been the emergence of a growing number of environmental crimes with negligence or strict liability standards.[31] In the environmental area, prosecutions are no longer limited to cases in which there was proof that the defendant knew and understood that his conduct violated the law and intended to violate the law.[32] Rather, federal prosecutors may seek criminal penalties under "public welfare" laws that do not require specific knowledge or intent for criminal liability.[33] Furthermore, high-level employees of the corporation may be pursued under the "responsible corporate officer" doctrine which allows for criminal liability without actual knowledge or intent.[34]

Companies or individuals in the private sector have in certain instances perceived the government's criminal environmental investigations and proceedings to be hostile, unreasonable or overzealous.[35] Further, there is a perception that government prosecutions are too commonly based on mere negligence or unknowing conduct, rather than knowing or intentional conduct aimed at violating the law.[36]

While vigorous enforcement of the nation's environmental laws is important to the public welfare, serious concerns may be raised where criminal prosecutions are based on negligence standards or vague statutes. On the one hand, the government should pursue clear cases of fraud, particularly in such areas as intentional fraud in laboratory testing where companies are obligated to test or sample for purposes of permit compliance, or perhaps in situations such as the recent Carnival Corp. case. Such fraud prevents the goals of the environmental laws from being achieved. On the other hand, it may be appropriate for government prosecutors to reevaluate their prosecution of cases of "technical" of unknowing violations of the environmental laws, and to consider whether alternative enforcement mechanisms, such as vigorous civil enforcement, environmental audits, compliance programs or other measures could achieve similar goals. [37]

D. Antitrust

In the antitrust area, there has been a vast expansion in criminal fines and penalties in recent years.[38] For example, for the ten years prior to 1997, the Antitrust Division obtained, on average, $29 million in fines annually.[39] In 1997, the Antitrust Division collected $205 million in criminal fines (500% higher than any previous year in its history), in 1998 the antitrust authorities collected $265 million in criminal fines, and in 1999 collected in excess of $1 billion.[40] Further, less than 10 years ago, $2 million was the largest corporate fine ever imposed for a single Sherman Act violation.[41] During the past five years, the Antitrust Division has imposed fines of $10 million or more against at least 30 defendants, and $100 million or more in at least 6 cases.[42] In connection with investigations in the vitamin industry, in 1999 the Antitrust Division obtained a fine of $500 million from Hoffmann-La Roche, Ltd., and $225 million from BASF AG.[43] Similarly, in cases involving graphite electrodes, SGL Carbon, Mitsubishi Corp. and UCAR International, Inc. were each subject to fines well in excess of $100 million.[44]

This increase in criminal fines is attributable to a number of factors, including a change in 1990 in the Sherman Act maximum fine from $1 million to $10 million per count.[45] Further, in 1991, new antitrust sentencing guidelines were applied to corporate offenders.[46] In addition, during the past decade criminal penalties have substantially increased because, while the Sherman Act has express provisions limiting corporate penalties to $10 million for corporate defendants and $350,000 for individuals,[47] prosecutors have been able to circumvent these limitations based on "double the gain/double the loss" standards.[48]

Another trend in the antitrust arena has been a significant increase in criminal penalties for individual executives and employees. The DOJ has, furthermore, been far more aggressive in recent years with regard to enforcement of international cartels, including increasingly through the extraterritorial application of the U.S. antitrust laws to conduct overseas affecting the United States.[49] Following prosecutions, the DOJ has secured prison sentences for individuals in various countries, including Germany, Switzerland, the Netherlands, England, France, Italy, Sweden, Canada, Mexico, Korea, and Japan.[50] In the past decade, the Antitrust Division has obtained these sentences with increasing frequency and for longer periods.[51]

Perhaps the most significant change in enforcement has been the change in amnesty policy. Effective 1994, the DOJ

Antitrust Division changed its amnesty policy such that the first person in the door receives full amnesty from criminal prosecution even where there is an active investigation. This creates a strong incentive for companies and individuals to come forward (although treble damage civil liability still applies), and has served to dramatically expand the number of cases.

The consequence of the dramatically increased criminal penalties in this area is that companies or individuals must dedicate huge resources, legal fees, and time to comply with a possible criminal investigation, even where no formal investigation is initiated or case is prosecuted. While cases involving antitrust violations that directly harm consumers should be pursued vigorously, particularly cases involving intentional price fixing which results in higher prices, government prosecutors should be cautious when instituting criminal investigations where violations are not knowing or willful.[52] As in other areas, prosecutors should consider the alternatives available, including civil enforcement.

E. Securities and Financial Institutions

In the areas of securities and financial institutions, there has also been an increasing number of criminal statutes and growing criminal enforcement. Even prior to the recent corporate controversies, the SEC in recent years has sought to increase prosecutions for securities fraud.[53] During the past few months, as has been widely publicized, both the New York Attorney General and the DOJ's Criminal Division have been conducting criminal investigations of securities analysts and investment firms in connection with concerns over potential conflicts of interest and other matters.[54] This year the SEC has also issued new proposed rules relating to auditing and disclosure matters, and a new Corporate Fraud Task Force has been established.[55]

With respect to financial reporting, there is already broad potential criminal liability even absent the sweeping accounting reform legislation expected in the near future (*see* Section IV). For example, the providing of false material information to the SEC may violate criminal statutes.[56] The provision of such information to investors may also violate the mail or wire fraud statutes, which merely require the use of the interstate mail or wire fraud when making a false statement.[57] Findings of mail or wire fraud can in turn be used to support RICO or money laundering prosecutions.[58] Furthermore, under federal case law, it is possible to prosecute persons for "conscious avoidance" instead of proving actual intent.[59]

There are also other federal criminal statutes which have been enacted to govern offenses by or against financial institutions, including statutes which provide for an array of criminal penalties.[60] Recently, following 9/11, the USA PATRIOT Act was enacted which includes criminal penalties, and amends the Bank Secrecy Act to require financial institutions to assist in fighting terrorism by establishing anti-money laundering programs and to adopt minimum standards for financial institutions regarding the identity of customers opening accounts.[61]

Criminal investigations and prosecutions in the areas of securities and financial institutions raise grave concerns for the companies and individuals targeted, particularly in view of the complexity or ambiguities in the relevant statutes and regulations. For this reason, it is important now, and will be increasingly important in the future, that enforcement authorities be cautious in their initiation of criminal investigations and prosecutions, and that they consider the specific nature of the alleged violations, the degree of knowledge, and the countervailing costs that criminal enforcement may have on the targets of the investigation. Prosecutors should consider whether less severe penalties or sanctions would be effective, including compliance programs, which may have a less dramatic impact on a company's core business and employees.

IV. Post-Enron Legislative Proposals

Following the Enron controversy, a host of new bills were introduced to further regulate financial reporting and auditing,[62] diversification of pension plan assets, account access or accountability under pension plans.[63] The sweeping new accounting reform legislation currently pending before Congress provides for dramatically increased criminal penalties, including the creating of a new securities fraud felony for any "scheme or artifice" to defraud shareholders, enhanced penalties for fraud and obstruction of justice, increased prison terms for mail or wire fraud, and criminal penalties relating to the certification of financial reports.[64] That proposed legislation also significantly extends the statute of limitations in securities fraud cases.

While many believe that there is justification for enacting additional criminal statutes to protect investors from fraud over and above existing statutes, others are concerned that such legislation could be an over-reaction to current political controversies and ultimately restrict economic growth or create criminal exposure for officers, directors, employees or others who may have been completely unaware, wholly unable to prevent, or played no role in the alleged misconduct. Others point to the potential impact on innocent employees of targeted companies, and cite to the recent prosecution of Arthur Andersen in connection with the Enron controversy.

V. Role of Criminal Sanctions

In connection with all of the above areas, it is important to consider the role of criminal sanctions. Citizens expect their criminal justice system to deter crime, provide punishment and retribution, and ensure due process for the accused. Those who emphasize repression of crime as the most important domestic goal of government, place a high premium on the efficiency of investigation and prosecution of criminals.[65] Others, who focus upon the maximization of human freedom, emphasize the protection of individuals from restrictions upon their liberty.[66]

While the rapid expansion of a particular area of the criminal law may be warranted by egregious misconduct, the growth of criminal laws in any area of the economy should be cause for concern. Such criminalizing inevitably raises questions of whether it is efficient regulation of commercial conduct, whether prosecutorial discretion is being properly used, or whether the goals of fair play and substantial justice are being achieved.

As a general matter, many persons view criminal sanctions as essential because they may have a far greater deterrent effect than monetary sanctions. Monetary sanctions may be passed along as a cost of business or avoided through minimizing the assets that can be reached by the courts. Those who advocate increased criminal sanctions believe the per-

sonal sanction of detention has a far greater deterrent value.[67]

At the same time, however, a variety of problems arise, when criminal sanctions are imposed in the commercial context. Two areas which raise particular concerns are (A) reduced mens rea requirements; [68] and (B) overly complex or ambiguous statutes.[69]

A. Criminal Mental States / Mens Rea

Historically, the common law imposed criminal sanctions only where an individual committed a crime with purpose or knowledge. The requirements of mens rea (a guilty mind) and an actus reus (a guilty act) were thought to ensure that only those who were guilty of accomplishing an evil act with a guilty mind would be prosecuted. These two requirements, however, ultimately came to be viewed as constraining the ability of legislators and prosecutors to prohibit or punish undesirable conduct in some circumstances. The result is that the law now imposes criminal liability in certain circumstances for negligent conduct.[70]

The Supreme Court has stated that an exception to mens rea exists for "public welfare offenses," although the Court has explicitly declined to define the scope of such offenses.[71] As commentators have observed, this requires defining the limits of "public welfare offenses," an exercise that is critical where statutes, such as certain environmental statutes, are likely to impose criminal liability upon a finding of negligence standard.[72]

Similarly, Congress has enacted many statutes that are vague with respect to the requisite mental state. For example, the recently enacted Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act, imposes criminal penalties on anyone who, with the specific intent to mislead National Highway Traffic Safety Administration (NHTSA), knowingly and willfully files a false, misleading or incomplete report to the NHTSA, or fails to file a required report concerning safety-related defects that have caused death or serious bodily injury.[73] The statute can easily be read to subject persons or corporations who file such reports to criminal liability for any defect that may occur in the future, even though the person filing the report had no knowledge of the defect at the time of submission of the report.

Not all of the new statutes applied to commercial conduct, however, include a reduced mental state. The diminishment of mens rea is less of a concern in the intellectual property area, for example. The intellectual property statutes all include a knowing standard, or in some instances the more rigorous, if not somewhat more ambiguous, willfulness standard.[74]

When legislators consider new criminal statutes, they should give considerable thought to the mental state they require for conviction. Where the conduct prohibited is fraud, they should be particularly vigilant that criminal prosecutions, which should be reserved for egregious conduct, are based on real knowing and willful fraud, and not merely on a theory of negligence or unknowing failure to comply with complex or ambiguous statutes.

B. Complex Statutes

Criminalizing commercial conduct requires overcoming at least two significant "complexity" challenges. First, modern commercial activity is generally significantly more complicated than the type of conduct traditionally addressed by the criminal justice system. Second, the statutes written by Congress to regulate the activity are far more complex than traditional criminal statutes. Such complexity can make it hard for individuals and companies to have fair and adequate notice of what might constitute a criminally punishable act.

1. Factual Complexity

As a general rule, criminal courts do not address issues that are as factually complex as civil or regulatory disputes. This can be anecdotally observed by comparing the shorter amount of time it takes for courts to resolve criminal matters, compared with the amount of time it takes to resolve most civil proceedings. As another example, the DOJ has recognized the inherent complexity of prosecuting health care fraud claims and advises its prosecutors to seek assistance from the Department of Health and Human Services because "[t]he reimbursement principles under Medicare have grown increasingly complicated over the years."[75] Further, health care fraud schemes are "diverse and vary in complexity" and may include, for example, billing for services not rendered or not medically necessary, double billing, upcoding, unbundling or fraudulent cost reporting.[76] Similar levels of factual complexity can be found in prosecutions arising in the securities, intellectual property, antitrust and other areas.

2. Statutory / Regulatory Complexity

A direct result of the factual complexity of many commercial activities is the complexity of the statutes that seek to impose criminal liability for conduct that transgresses commercial norms. Examples of such statutory complexity exist in each of the legal areas discussed in this paper. Criminal environmental statues are particularly notorious for detailed rules that include criminal penalties despite ambiguous terms.[77] Intellectual property is another area with complex statutes.[78] In the areas of health care or financial reporting, the statutes and regulations may be highly complex and beyond the ability of many persons to understand.

Courts in the United States require criminal statutes to specifically define the prohibited conduct, and courts construe criminal statutes using a "rule of lenity" that resolved any ambiguities in favor of the defendant.[79] Although these principles remain an essential element of the criminal law, some observers note that Congress and the courts have allowed exceptions to creep into the criminal law for regulatory violations. Such a diminishment of the specificity principle would fail to provide fair notice to citizens.

Two recent cases highlight the problem of complex or vague criminal statutes in the commercial context.

In *United States v. Whiteside,*[80] a defendant was convicted for making false statements relating to a "capital related interest expense" in Medicare/Medicaid and Civilian Health and Medical Program of the Uniformed Services reimbursement costs reports.[81] The Eleventh Circuit reversed the conviction, finding that the government had failed to prove that the defendant's statements were an unreasonable interpretation of ambiguous reimbursement requirements, and accordingly had failed to prove that the statements were knowing or false.[82] The Eleventh Circuit pointed to evidence that reasonable persons could differ as to the proper characterization of the debt interest at issue, and that experts had disagreed with the government's theory of capital reimbursement.[83]

In *United States v. Handakas*,[84] the Second Circuit examined the "honest services" provision of the mail fraud

statute.[85] That case involved the owner of a construction company which performed work for the New York City School Construction Authority (SCA).[86] The government contended that the defendant had failed to comply with a state mandated requirement that his company pay "prevailing rate of wages" to workers on work performed, and thereby had deprived the SCA of its intangible right to "honest services."[87] The Second Circuit found the provision to be unconstitutionally vague as applied to the defendant and overturned his criminal conviction. The Second Circuit noted that the meaning of 'honest services' in the text of the mail fraud statute "simply provides no clue to the public or the courts as to what conduct is prohibited under the statute."[88] The Court further noted that it was impossible to know what is forbidden under the statute without undertaking the "lawyer-like task" of answering questions about the large body of conflicting case law regarding "honest services."[89]

The *Handakas* Court also pointed out that "an indefinite criminal statute creates opportunity for the misuse of government power," and that there are dangers when an offense is "harnessed into service" by the state "when other prohibitions will not serve."[90] The Court described the mail fraud statute as an "all purpose prosecutorial expedient," stating as follows:

> The mail fraud statute has been aptly described as an all purpose prosecutorial expedient. By invoking § 1346, prosecutors are free to invite juries "to apply a legal standard which amounts to little more than the rhetoric of sixth grade civics classes." [Citation omitted.] If the "honest services" clause can be used to punish a failure to honor the SCA's insistence on the payment of prevailing rate of wages, it could make a criminal out of anyone who breaches any contractual representation: that tuna was netted dolphin free; that stationery is made of recycled paper; that sneakers or T-shirts are not made by child workers; that grapes are picked by union labor — in sum so called consumer protection law and far more.

Those who would propose new criminal sanctions in the commercial sphere must ask themselves whether the conduct they seek to proscribe is properly articulated and comprehensible to the person of ordinary understanding. In those instances where the potential conduct will occur in a context of complex transactions or technology, particular care is required in the drafting of statutes to ensure that fair warning is provided to participants in the particular market, and to ensure that innovation is not stifled.

VI. Alternatives to Criminalization

In all areas of criminal enforcement, consideration should be given to the various alternatives to criminal penalties. This is particularly true in the commercial arena where actors are presumably motivated by economic opportunity and may be influenced by economic incentives in lieu of criminal sanctions. Non-criminal alternatives may provide adequate prevention or deterrence, and criminal penalties may result in inefficient forms of over-deterrence. Alternatives to criminal penalties may include, *inter alia,* civil or administrative enforcement, self-reporting, or reform of vague statutes.

A. Civil or Administrative Enforcement

In each of the areas discussed above, there are extensive civil statutory and regulatory schemes which may be employed to encourage compliance. The use of civil or administrative enforcement mechanisms may avoid unduly burdening corporations or service providers with costs and penalties which ultimately are borne shareholders, employees or others who have no involvement in or awareness of the alleged wrongdoing. To this end, it may be appropriate for enforcement authorities to adopt procedures similar to those of the EEA discussed above, whereby criminal referrals are reviewed by senior officials and are closely scrutinized prior to initiation of a criminal prosecution. It may also be appropriate to consider in all of the above areas whether civil penalties, compliance programs or other means may be more effectively used to achieve the goals of the prosecuting agency.

B. Self-Reporting

Self-reporting is a tool utilized in the health care, environmental, government contracting and other areas of criminal law.[91] This is also an alternative, although the consequences for self-reporting vary in different areas. For example, in the defense contracting realm reporting entities can avoid criminal sanction. In the health care fraud and other arenas, however, the government reserves the right to prosecute those who self-report, although important incentives for self-reporting, such as possible lesser penalties, do exist.[92] Self-reporting may be an important tool in complex markets such as health care where the cost of enforcing laws is high, as well as when it may be difficult to draft statutes broad enough to describe prohibited conduct and yet be sufficiently narrow to be enforceable.

Notwithstanding the above, many observers take the view that under current enforcement standards and guidelines, companies may be unwilling to pursue self-reporting because of the potential risk of criminal prosecution. One proposal which has been made is that in those areas where companies which voluntarily report are currently still subject to criminal prosecution, that at least a presumption against prosecution be adopted in order to encourage more voluntarily reporting.

C. Reform of Vague Statutes

In order to avoid overcriminalizing commercial conduct, it may also be prudent for enforcement authorities and those in the private sector to consider and discuss modifications to existing statutes or regulations that would serve to more clearly define proscribed criminal conduct. While it is beyond the scope of this article to identify such statutes and regulations, regulators and private practitioners in specific industries may wish to jointly focus on specific statutes and regulations that carry potential criminal penalties and cause significant concern because they fail to describe the proscribed conduct, leave significant discretion to a regulatory agency to decide the actual criminal conduct, or have been otherwise been viewed as ambiguous or difficult to interpret.

VII. Role of Prosecutorial Guidelines and DOJ Approval

In closing, it should be noted that prosecutors play a critical role in the manner and frequency with which statutes are enforced.[93] This role is particularly critical in the commercial sphere where determinations of intent can be difficult, as well as where the availability of non-criminal resolutions plays a larger role than in non-economic crimes. In the federal arena, the DOJ has issued prosecution guidelines to federal prosecutors to provide a framework for prosecutorial decisions.[94]

The federal prosecution guidelines direct prosecutors to use the following factors when considering whether to prosecute a particular case:

1. Whether a substantial Federal interest would be served by prosecution;
2. Whether the person is subject to effective prosecution in another jurisdiction; or
3. Whether an adequate non-criminal alternative to prosecution exists.

With respect to the first criteria, it is worthwhile considering whether the guidelines are overly broad and indeterminate. What exactly is the "interest" to be served? Are they interests directly related to the criminal justice process, such as deterrence and prevention? Are those interests related to the policy goals at stake, such as a clean environment or a well-managed and economical health care market? Do interests here depend on the type and target of the criminal conduct—namely, is there a difference between acts that involve the public as a whole, that resemble disputes between companies, or that directly affect particular consumers of goods and services? And, finally, should the definition of the "interest" be at least somewhat historical or backward-looking, with due consideration to success and effectiveness based on the impact of prior prosecutorial activity?

The third criteria identified in the guidelines, whether a sufficient non-criminal alternative to prosecution exist, is particularly important to examine when proposing new criminal penalties in the commercial arena. Significant economic crimes frequently do have substantial non-criminal alternatives such as a civil suit by the aggrieved party. For example, the vast majority of trade secret cases will always have a civil alternative. Those who advocate increased criminal penalties must ask themselves how the penalties will interact with the civil alternatives and should consider whether precise criteria should be provided in the statute to ensure that only the most egregious violations are subject to criminal sanction. And, again, there should be due consideration of how criminal prosecution has fared in the past. This requires some careful thinking about what ought to be the benchmarks of success, as well as a careful consideration of whether there is an appropriate symmetry between who is being prosecuted and who really ultimately bears the costs of a particular criminal sanction (e.g., innocent shareholders, employees or consumers versus the culpable individuals).

VIII. Conclusion

Imposing criminal sanctions upon America's vibrant economy should not be done lightly. While vigorous enforcement is necessary to protect the public from genuine fraud and intentional misconduct, the exercise of proper prosecutorial discretion in the commercial sphere is very important. As Congress responds to the current Enron controversy and considers various proposals for new statutes to protect investors, workers, and managers in America's economy, attention should be paid to the potential risks and costs of further criminalizing commercial conduct. To the extent additional potential criminal sanctions are imposed upon entrepreneurs, workers, and management, it should only be done after careful consideration of the potential risks and costs that may be imposed upon economic activity. Congress and regulators should be wary of imposing criminal sanctions in lieu of alternatives that may sufficiently deter undesirable conduct with significantly lower societal costs.

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Footnotes

[1] The author expresses gratitude to all of those persons who provided comments or guidance concerning this paper, and particularly acknowledges Scott F. Frewing, Esq., Assistant United States Attorney, Northern District of California (San Jose).

[2] *See, e.g.,* William J. Genego, *The New Adversary*, 54 BROOK. L. REV. 781, 787 (1988); Peter J. Henning, *Testing the Limits of Investigating and Prosecuting White Collar Crime: How Far Will The Courts Allow Prosecutors to Go*?, 54 U. PITT. L. REV. 405, 408 (1993); Ellen S. Podgor, *Corporate And White Collar Crime: Simplifying The Ambiguous*, 31 AM. CRIM. L. REV. 391, 392 (1994).

[3] *See* Department of Justice, *Health Care Fraud Report, Fiscal Year 1997* (available at http://www.usdoj.gov/dag/pubdoc.html).

[4] *See* Department of Justice, *Health Care Fraud and Abuse Control Program Annual Report For FY 2000, Health Care Fraud and Abuse Control Program Annual Report For FY 1999*, *Health Care Fraud Report, Fiscal Year 1998* (each available at http://www.usdoj.gov/dag/pubdoc.html). All numbers are for the respective fiscal year.

[5] *See* Department of Justice, Criminal Resource Manual § 933 (available at http://www.usdoj.gov:80/usao/eousa/foia_reading_room/usam/title9/text/t9rm09.wpd).

[6] False Claims Act, 31 U.S.C. § 3729 et seq., *see generally* False Claims Act Amendments of 1986, Pub.L. 99-562, 100 Stat. 3153 (October 27, 1986), reprinted in, 10A USCCAN (December 1986).

[7] DOJ Health Care Fraud Report, *supra* note 3.

[8] 18 U.S.C. § 1956(c)(7)(F).

[9] 17 U.S.C. § 301.

[10] 17 U.S.C. § 506 and 18 U.S.C. § 2319.

[11] *See* 17 U.S.C. 1201 *et seq*.

[12] *See* David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. Pa. L. Rev. 673, 741 (2000); Pamela Samuelson, *Towards More Sensible Anti-Circumvention Regulations*, 5 Cyberspace Law. 2 (2000).

[13] 18 U.S.C. §§ 1831, 1832.

[14] Prior to the enactment of the EEA, federal prosecutors did charge criminal cases involving trade secrets using mail fraud or wire fraud theories under 18 U.S.C. §§ 1341, 1343.

[15] Department of Justice Computer Crime and Intellectual Property Section, Economic Espionage Act (EEA) Cases (available at www.cybercrime.gov/eeapub).

[16] See generally, DOJ EEA Cases supra note 14.

[17] Manager's Statement for H.R. 3723 (statement of Sen. Orin Hatch, Committee on the Judiciary) (portions available at www.cybercrime.gov/eealeghist.htm).

[18] See 28 C.F.R. § 0.64-5.

[19] In 1970, Congress initiated modern federal environmental law with the passage of the Clean Air Act and followed with a number of additional environmental statutes during the 1970s. Other statutes followed shortly thereafter. *See, e.g.,* Ocean Dumping Act (1972); Clean Water Act (1972); Federal Insecticide, Fungicide, and Rodenticide Act (1972); Endangered Species Act (1973); Safe Drinking Water Act (1974); and Resource Conservation and Recovery Act (1976). The decade culminated with the passage of the Comprehensive Environmental Response, Compensation and Liability Act (1980).

[20] *See, e.g.,* Richard Lazarus, *Fairness in Environmental Law*, 27 ENVTL. L. 705, 706-710 (1997); Richard Thornburgh, *Criminal Enforcement of Environmental Laws – A National Priority*, GEORGE WASH. L.R. 59, 776 n. 3 (1991); N. Kubasek, *The Role of Criminal Enforcement in Attaining Environmental Compliance in the United States and Abroad*, 7 U. Balt. J. Envtl. L. 122 (2000).

[21] *See* Reuters, "Carnival Admits Ocean Polluting," (April 19, 2002); *see also* Associated Press, "Carnival Pleads Guilty in Ocean Dumping Case, to Pay $18 Million" (April 20, 2002).

[22] *Id.*

[23] *Id.*

[24] For a list of major environmental laws, see http://www.epa.gov/epahome/laws.htm.

[25] *See* Office of Attorney General, Bluesheet Revision to the U.S. Attorney's Manual on Environmental Crimes (Aug. 23, 1994)(available at www.usdoj.gov/ag/readingroom/usam_env.htm).

[26] *See, e.g.,* David T. Buente and Kathryn B. Thomson, *The Changing Face of Federal Environmental Criminal Law: Trends and Developments-1999-2001*, 31 ELR News & Analysis 11340, 11342 (11-2001)("the late 1990s witnessed a blurring of the line between civil and criminal liability to the point of extinction under many federal criminal statutes").

[27] Annual Report on Enforcement and Compliance Assurance Accomplishments in 1999, Ex. B-5 (available at www/epa.gov/oeca/fy99accomp.pdf) .

[28] *Id.*

[29] *Id.*

[30] January 19, 2001 EPA Releases FY 2000 Enforcement and Compliance Assurance Data (available at www.epa.gov).

[31] *See, e.g.,* David T. Buente and Kathryn B. Thomson, *The Changing Face of Federal Environmental Criminal Law: Trends and Developments-1999-2001*, 31 ELR News & Analysis 11340 (11-2001)(stating that "the late 1990s witnessed a blurring of the line between civil and criminal liability to the point of extinction under many federal criminal statutes").

[32] *Id.*

[33] *See, e.g., U.S. v. Unser* 165 F.3d 755 (10th Cir. 1999)(criminal conviction of person lost in blizzard and drove snowmobile into National Forest Wilderness Area for violating statute for protection of wilderness); *U.S. v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999), *cert. denied*, 528 U.S. 1102 (2000)(criminal conviction of off duty supervisor for negligent discharge of oil into navigable waters where discharge caused accidentally by contractor on the site).

[34] This doctrine is derived from *United States v. Dotterwich,* 320 U.S. 277 (1943) and *United States v. Park,* 421 U.S. 658 (1975).

[35] *See*, *e.g.* Ronald W. Zorojeski and David Greene, *Enviro-Cops Continue Aggressive Tactics*, The Connecticut Law Tribune (November 20, 2000).

[36] *Id.*

[37] *See Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations Part III*, 60 Fed. Reg. 66,706 (Dec. 22, 1995).

[38] Status Report: Criminal Fines (2/01/2002)(available at www.usdoj.gov/atr/public/criminal/9937.htm); Antitrust Division, Sherman Act Violations Yielding a Fine of $10 Million or More (3/1/2002)(available at www.usdoj.gov/atr/public/criminal/10859.htm).

[39] Status Report: Criminal Fines (2/01/2002)(available at www.usdoj.gov/atr/public/criminal/9937.htm).

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] Antitrust Division, Sherman Act Violations Yielding a Fine of $10 Million or More (3/1/2002)(available at www.usdoj.gov/atr/public/criminal/10859.htm).

[44] *Id.*

[45] *See, e.g.*, Gary R. Spratling, *"The Trend Towards Higher Corporate Fines: It's a Whole New Ball Game,"* (March 7, 1997)(available at www.usdoj.gov/atr/public/speeches/4011.htm).

[46] *Id.*

[47] 18 U.S.C. § 3.

[48] 18 U.S.C. § 3571(d)(provides for fines of up to double the pecuniary gain to the defendant, or double the pecuniary loss to a person other than the defendant).

[49] Status Report: International Cartel Enforcement (2/01/2002) (available at www.usdoj.gov/atr/public/criminal/9939.htm).

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *See* Speech by SEC Staff; Remarks at the Glasser LegalWorks 20th Annual Federal Securities Institute by Stephen M. Cutler, Director, Division of Enforcement, U.S. Securities & Exchange Commission, February 15, 2002 ("[SEC has] made a concerted effort to increase criminal prosecutions of securities fraud")(available at http.www.sec.gov/news/speech/spch538.htm).

[54] *See* Bloomberg News, "U.S. Will Probe Analysts For Criminal Misconduct (Update3)" (4/23/02).

[55] *See* Executive Order dated July 9, 2002 (available at www.whitehouse.gov/news/releases/2002/07/20020709-2.html)

[56] 18 U.S.C. § 1001; Securities Exchange Act of 1934, Sec. 32.

[57] 18 U.S.C. §§ 1341, 1343.

[58] 18 U.S.C. § 981 *et seq*.(forfeiture provisions), §1961 *et seq.* (RICO); §§ 1956-57 (money laundering offenses).

[59] *See, e.g., U.S. v. Ferrarini*, 219 F.3d 145, 154 (2d Cir. 2002)(A conscious avoidance jury instruction "permits a finding of knowledge even when there is no evidence that the defendant possessed actual knowledge").

[60] *See, e.g.* 18 U.S.C. § 1344 (Bank Fraud Statute); 12 U.S.C. § 1818 (j)(Financial Institutions Reform, Recovery and Enforcement Act of 1989); 31 U.S.C. § 5322(A) (Bank Secrecy Act); *see also, e.g.* Matthew J. Shepherd, Scott N. Wagner and Natasha M. Williams, *Financial Institutions Fraud*, 38 Am. Crim. L. Rev. 843 (Summer 2001).

[61] 107th Congress, Public Law 107-56 (available at www.access.gpo.gov/congress).

[62] *See, e.g.,* S. 2004 ("Investor Confidence in Public Accounting Act of 2002"); H.R. 3970 ("Truth and Accountability in Accounting Act of 2002"); *see also* SEC Release 2002-53 (SEC proposes accelerated reporting dates and increased availability of disclosed data to the public); California Assembly Bill 2873 (Amended April 25, 2002).

[63] *See, e.g.,* S 2460 ("Shareholder Bill of Rights Act"); S. 1992 ("Protecting America's Pensions Act of 2002"); H.R. 3657 ("Employee Pension Freedom Act of 2002"); H.R. 2269 ("The Retirement Security Advice Act"); *see also* H.R. 3634 ("Enron Employee Pension Recovery Act of 2002"); S. 2010 ("Corporate and Criminal Fraud Accountability Act of 2002")(emphasis added); H.R. 3818, Sec. 15 ("Comprehensive Investor Protection Act of 2002").

[64] *See* H.R. 3763/S. 2673 ("Public Company Accounting Reform and Investor Protection Act of 2002).

[65] *See generally* Herbert L. Packer, Two Models of the Criminal Process, 113 U. Pa. L. Rev. 1 (1964) (describing two models of criminal procedure, the crime control model and the due process model).

[66] *Id*.

[67] *See,* Richard Lazarus, Fairness in Environmental Law, 27 Envtl. L. 705, 733-734 (1997) (advocating the importance of felony criminal sanctions for environmental crimes).

[68] *See* John C. Coffee, *Does Unlawful" Mean "Criminal?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. Rev. 193, 210-213 (1991); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 Nw. U. L. Rev. 453, 470 (1997)(expressing concern regarding trends of the "criminalization of civil law" and the "civilization of criminal law").

[69] *See, e.g.,* Ellen S. Podgor, *Corporate and White Collar Crime: Simplifying the Ambiguous*, 31 Am. Crime. L. Rev. 391 (1994).

[70] *See, e.g.,* 33 U.S.C. § 1319(c) (1988) (Clean Water Act); 42 U.S.C. § 7413(c)(4) (Clean Air Act).

[71] *Staples v. United States*, 511 U.S. 600, 607 (1994).

[72] *See* 33 U.S.C. § 1319 (1988) (Clean Water Act); 42 U.S.C. § 7413(c)(4) (Clean Air Act).

[73] 49 U.S.C. § 30170.

[74] 17 U.S.C. § 1204.

[75] Department of Justice, Criminal Resource Manual § 933 (available at http://www.usdoj.gov:80/usao/eousa/foia_reading_room/usam/title9/text/t9rm09.wpd) (as of January 9, 2002)

[76] Department of Justice, Health Care Fraud Report, Fiscal Year 1998 (available at http://www.usdoj.gov/dag/pubdoc/health98.htm#scope) (as of January 6, 2002) [hereinafter "DOJ Health Care Fraud Report"]

[77] *See, e.g. American Mining Congress v. EPA*, 824 F.2d 1177, 1189 (D.C.Cir.1987) (stating that the process of determining whether a material is a "solid waste" under the Resource Conservation and Recovery Act is a "mind-numbing journey"); *See also* R. Christopher Locke, *Environmental Crimes: The Absence of Intent and the Complexities of Compliance*, 16 Columbia Env. L. Journal 311 (1991).

[78] Intellectual property law is an area challenged with complex criminal statutes. For example, when Congress criminalized the manufacturing of technology designed to circumvent copyright protections by enacting the DMCA, Congress sought to balance protections for intellectual property with the need to permit research into encryption and digital rights management technology, as well as to preserve traditional notions of "fair use" of copyrighted works. As a result, the statute includes a number of exceptions and implicitly incorporates the entire body of fair use jurisprudence. These exceptions and the fair use issues have led some commentators to criticize the DMCS as potentially ambiguous, although those interested in distributing copyrighted works in digital form argue the statute is essential to protect property rights. The complex issues arising from statutes such as the DMCA may lead to complex litigation in the criminal context that was previously generally reserved for the civil sphere.

[79] *See The Schooner Enterprise*, 1 Paine 32 (1810); *Tozer v. United States*, 52 F. 917 (1892); *see also United States v. Thompson/Center Arms Co*., 504 U.S. 505 (1992) (applying rule of lenity to National Firearms Act).

[80] 285 F.3d 1345 (11th Cir. 2002).

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] 286 F.3d 92 (2d Cir. 2002).

[85] The elements of mail fraud include (1) a "scheme or artifice to defraud," (2) furthered by the use of interstate mail, (3) to deprive another of money, property or "the intangible right of honest services." 18 U.S.C. §§ 1341, 1346.

[86] 2002 U.S. App. LEXIS at *1.

[87] *Id.* at **5-6.

[88] *Id.* at *31.

[89] *Id.*

[90] *Id. at **39-41.*

[91] *See* 42 U.S.C. § 1320a-7b(a)(3) (making it a crime to "fail to disclose information with the fraudulent intent to secure an overpayment"). The Department of Health and Human Services "Provider Self Disclosure Program" is set forth in the October 30, 1998 Federal Register at 63 Fed. Reg. 58399.

[92] *See* United States Sentencing Guidelines, § 8C.

[93] Federal prosecutors are directed to "initiate or recommend Federal prosecution if he/she believes that the person's conduct constitutes a Federal offense and that the admissible evidence probably will be sufficient to obtain and sustain a conviction." United States Attorney Manual § 9-27 (available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm).

[94] United States Attorney Manual § 9-27 (available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm). *See also Federal Prosecution of Corporations* (available at http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html).

ENVIRONMENTAL LAW & PROPERTY RIGHTS

UNITED STATES V. CRAFT: CREATING A FEDERAL COMMON LAW OF PROPERTY?

*BY ANDREW S. GOLD**

The meaning of "property" in the federal context is not always clear—and courts have given the term vastly different meanings and scope depending on whether the Due Process Clause or Takings Clause or at issue. In many cases, however, the existence of property— as federally or constitutionally defined— is dependent on rights created by state law. As expressed in *Board of Regents of State Colleges v. Roth*:[1]

> Property rights… are not created by the Constitution. Rather, they are created and their dimensions defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.[2]

This dependence on independent sources to delimit the federal understanding of property is a longstanding part of our legal tradition.[3] It recognizes the role of state law in the federal system, and allows for some objective standard as to what federal property may be in specific cases.

At the same time, there is clearly a federal element in determining when an independently created interest is "property." An interest does not become or fail to become property based upon a legislature's saying so. The Supreme Court has occasionally outlined qualities which property must have to be protected by the Constitution. Thus, for example, the Court held in *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd*.,[4] that enforcement of the Lanham Act's false advertising provision did not implicate the Fourteenth Amendment Due Process clause because "the hallmark of a protected property interest is the right to exclude others."[5]

The distinction between the state definition of property interests (which may or may not turn out to be federal property), and the federal standards which determine if state-created interests are in fact federal property, is an important one if courts are to show continued deference to state law. Should courts have leeway to pick and choose among state-defined interests, the deference to state law becomes meaningless. Yet recent decisions suggest the Court is having trouble with the distinction between state and federal definitions of property.

In *United States v. Craft*,[6] the Supreme Court addressed the question whether a tenant by the entirety owns "property," or "rights to property," to which a federal tax lien may attach under 26 U.S.C § 6321. *Craft* was a sequel to another recent decision applying the same statute, *Drye v. United States*.[7] In *Drye*, the Court announced the quite reasonable rule that "[w]e look initially to state law to determine what rights the taxpayer has in the property the Government seeks to reach, then to federal law to determine whether the taxpayer's state-delineated rights qualify as 'property' or 'rights to property' within the compass of the federal tax lien legislation."[8] *Craft* substantially expanded the holding in *Drye*.

In *Craft*, the respondent, Sandra Craft, and her husband owned a piece of real property as tenants in the entirety. The IRS placed a federal tax lien on "all property and rights to property" belong to Mr. Craft. After notice of the lien, Craft and her husband executed a quitclaim deed transferring the husband's interest to Craft for one dollar. Upon trying to sell the property a few years later, a title search revealed the lien, and the IRS permitted the sale on condition that half the proceeds be held in escrow pending determination of its interest in the property. Craft brought suit in federal district court to quit title.

The IRS argued that its lien attached to the husband's interest in the tenancy by the entirety, and also that the transfer of the property was a fraudulent conveyance. The district court granted the government's motion for summary judgment, but on appeal the Sixth Circuit held the tax lien did not attach to the property since, under Michigan law, the husband had no separate interest in property held as a tenant by the entirety. On remand, the district court concluded that there could be no fraudulent conveyance if the tax lien could not attach to the property. The Sixth Circuit affirmed. The Supreme Court granted certiorari to decide whether Craft's husband had a separate interest in the entireties property to which the federal tax lien attached.

As the *Craft* majority noted, the English common law understood each joint tenant to possess an entire estate, rather than a fractional share. In contrast, in a tenancy in the entirety, the common law understanding was that there was no concurrent ownership. Instead, there was a form of single ownership by the marital entity—neither spouse owned an individual interest in the property. In Michigan, neither tenant has an "interest separable from that of the other."[9] However, a tenant by the entirety in Michigan possesses the right to use the property, receive income from it, and exclude others from it. The tenant also has a right of alienation—with the spouse's consent.

The majority noted Mr. Craft possessed a number of "essential" property rights. Without deciding whether the Craft case implicated "property" or "rights to property", the Court concluded that a federal tax lien could attach the based on the "bundle of sticks" possessed by Mr. Craft. The majority further concluded that the state law that a tenancy in the entirety is not owned by the individual spouses was a legal fiction. Citing *Drye*, it concluded that such legal fictions may be ignored when interpreting the federal tax lien, since state fictions do not define the meaning of property under the federal statute.

Justice Thomas's dissenting opinion, joined by Justices Scalia and Stevens, argued that the majority was improp-

erly defining property interests pursuant to federal law, rather than looking to state definitions of the property interests at issue. As Thomas noted, the Court's announcement that the state's definition of a tenancy in the entirety was a legal fiction proved too much. A partnership or a corporation are as much legal fictions as the tenancy, and yet presumably the unique forms of property in those cases would not be disregarded by the *Craft* majority. Justice Scalia, in a separate dissent, noted that a partnership's property cannot be encumbered by the debts of the individual members.

According to Thomas, *Drye* "was concerned not with whether state law recognized property as belonging to the taxpayer in the first place, but rather with whether state laws could disclaim or exempt such property from federal tax liability after the property interest was created."[10] *Drye*, like its predecessors, involved exemptions or disclaimers which operated under state law to end the state property rights after they had been created. Because the property interest already existed, the federal tax lien could attach to it in those cases.[11]

The result of the Court's holding, according to the dissent, was the creation of a "new federal common law of property."[12] A review of the decision shows this is true. The property interest from its inception was owned by the marriage entity, as defined by state law. The *Craft* majority simply rejected this idea, based on the number of property rights possessed by Mr. Craft. But this actually changed the tenancy property interest into a different property interest, not just owned by the marriage entity. Notably, the majority's opinion did not actually define what the property was that Mr. Craft owned that triggered the federal tax lien.

Although *Drye* and *Craft* may not appear at first glance to have broad import for property rights cases, the *Craft* majority's willingness to ignore state definitions of property interests is significant since it could be expanded to other contexts. Professor Thomas Merrill had argued (prior to the *Craft* decision) that the opinion in *Drye* provides a useful model for a federal "patterning" definition of constitutional property.[13] He proposed that, as in *Drye*, courts look to state law to determine what rights are at stake, and then to federal law to see if those rights fit into an understood pattern that characterizes property under a specific constitutional provision. As an example, the right to exclude others would indicate that property is at issue for Takings Clause purposes.

Craft represents a federal redefinition of what property rights existed under state law in light of policy. Merely looking at state law to determine what rights existed for purposes of the federal tax statute could not be squared with the Court's policy views—the fear that tenancy by the entirety as understood in Michigan might permit married couples to flout the tax laws encouraged a finding that Mr. Craft possessed property to which a lien could attach. Once the line between state and federal definitions of property is blurred, however, it is increasingly difficult to define property for federal purposes.

The potential for selective application of state property law by federal courts is evident in the Takings Clause context. State legislatures may not *retroactively* decree what property rights were possessed by a property owner for purposes of applying the Takings Clause. This principle parallels the holding in *Drye* that state laws cannot disclaim or exempt state-created property interests from federal tax liability after the interest was created. Yet, in *Palazzolo v. Rhode Island*[14] the Court recently held that *prospective* state regulation of property might be the subject of a regulatory taking claim brought by a post-enactment purchaser. This holding potentially redefined the collection of property rights owned by the landowner under state law in light of the onerous ripeness requirements which might apply to a prior owner's taking claim.

Although the *Palazzolo* holding was supported by very strong policy considerations, it selectively ignored state property law. Following *Palazzolo*, it is no longer as clear what a background principle of state law is for purposes of the Takings Clause. Property owners benefited in that case, but this doubtful state of affairs may come back to haunt them in future cases. Craft achieves a similar uncertainty in the federal tax lien context. As different as the two decisions are, they both indicate a willingness by federal courts to discard inconvenient, prospective state regulations in determining the existence of interests which may be property under federal law.

Craft might prove to be an isolated case, and *Palazzolo* was dictated by the pre-existing mess of modern regulatory takings jurisprudence. The effect of such holdings, however, is to make it less clear *ex ante* what state-created interests will qualify as federal property. Since the Court already differing standards in due process and takings cases, it is hard to think of a more confused, variegated subject than the federal common law which could result from such holdings.

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Footnotes

[1] 408 U.S. 564 (1972).
[2] *Id*. at 577.
[3] Excepting of course examples such as federal copyrights or patents.
[4] 527 U.S. 666 (1999).
[5] *Id*. at 673.
[6] 122 S.Ct. 1414 (2002).
[7] 528 U.S. 49 (1999).
[8] *Id*. at 58.
[9] *Long v. Earle*, 277 Mich. 505, 517, 269 N.W. 577, 581 (1936).
[10] Craft, supra note 6, at 1428 (Thomas, J., dissenting).
[11] Justice Thomas also noted that the rights which Mr. Craft possessed in the entireties property were not properly understood as the "rights to property" for purposes of the statute, since they either lacked exchangeable value, or had not yet ripened into a present estate. See *id*. at 1429-31 (Thomas, J., dissenting).
[12] See *id*. at 1428 (Thomas, J., dissenting).
[13] See Thomas W. Merrill, The Landscape of Constitutional Property, 86 Va. L. Rev. 885, 927 (2000) ("Federal constitutional law prescribes the set of criteria an interest must have to qualify as property; whether the claimant has an interest that fits the pattern is then determined by examining independent sources such as state law. The patterning definition approach is essentially the method for identifying property recently adopted by the Court for federal tax purposes in *Drye*.").
[14] 533 U.S. 606 (2001).

South Dakota's Eminent Domain Experiment to Curb Private Condemnation by Railroads

*By Donald J. Kochan**

Introduction

The government's eminent domain power is an extreme one, grounded in the nature of sovereignty but constrained in our Constitution to protect individuals from excessive and unnecessary takings of private property. Justifying eminent domain power becomes more difficult the farther it strays from the control of the sovereign, such as when it is delegated from the government to private entities such as railroads or natural gas operators. In such instances of delegation, the government allows one private entity to formally condemn the property of another private entity. The potential for abuse in such delegations is great, and designing rules to limit such delegated powers should be a priority.

South Dakota recently enacted novel legislation to try to check the awesome power held by railroads to condemn property within its state, but that legislation has recently come under fire in court. To simplify, the legislation essentially requires that railroads clear additional hurdles in order to prove that their acts of condemnation are truly necessary for the public benefit. Because the South Dakota legislation increases the costs of condemning property, it represents a wise means for constraining condemnation for private benefit.

"Public Use" and the South Dakota Legislation

Protections of property can be found throughout the United States Constitution, as well as the constitutions of the States. The most important of these is in the Takings Clause of the Fifth Amendment: "[N]or shall private property be taken for public use without just compensation."[1] As part of this protection, condemnations for purely private uses are, theoretically, prohibited. But over time, the "public use" component of the Takings Clause has been eroded in the courts, leaving little protection to private property owners subject to condemnation actions that benefit private interests. A relaxed public use standard often benefits powerful special interests, like railroads, capable of convincing the state to use or cede its power to allow the displacement of residents from their homes and businesses for private benefit.

Delegating eminent domain power to railroads and other common carriers has been justified as a means to overcome holdout problems that might preclude the development of common carrier systems that benefit the public. Without eminent domain power, it is theorized, common carriers like railroads would face high costs in obtaining property necessary to develop their network that would ultimately preclude investment in creating a network of rails that can connect the public for its own benefit. While these arguments have some merit, they do not defeat the position that the delegates of eminent domain power should be required to prove that their condemnations truly are necessary to that end of public benefit.

Such a requirement of proof of public benefit and necessity is precisely the aim of the South Dakota legislation. In 1999, South Dakota enacted a change in its eminent domain law. Prior to 1999, South Dakota law stated that: "A railroad may exercise the right of eminent domain in acquiring right-of-way as provided by statute."[2] The 1999 reform added several procedural steps and approvals that are designed to increase oversight such that railroads would be required to prove that their exercise of the State's eminent domain power was truly necessary for public benefit. Rather than give railroads carte blanche to define what condemnations were in the public interest, the legislation requires that the railroad's decisions to exercise eminent domain be filtered through political institutions within the State.

The 1999 reform required, among other things, that a railroad obtain authorization from the Governor or a state railroad commission "that the railroad's exercise of the right of eminent domain would be for a public use consistent with public necessity," including a submission of proof to establish the same by a preponderance of the evidence.[3] Thus, a railroad's exercise of delegated eminent domain power is not automatically triggered under the South Dakota reform, but instead must be filtered through an approval process from the sovereign state that delegated that power.

The South Dakota legislation went on to define what constitutes "public use consistent with public necessity,"[4] many of which undoubtedly were designed to serve the interests of the State of South Dakota, perhaps at the expense of the interests of the citizens of the United States at large. For that reason, the United States District Court for the District of South Dakota, on July 19, 2002, found most of the 1999 South Dakota provisions in violation of either the Commerce Clause or Supremacy Clause of the U.S. Constitution.[5] The court determined that South Dakota's requirements conflicted with the federal government's encouragement and approval of railroad activities, arguing that additional state requirements largely conflicted with these federal mandates and approvals in favor of railroad construction and unduly burdened interstate commerce. Based on conflict preemption under the Supremacy Clause and interference with interstate commerce, much of the South Dakota reform was invalidated.

One can dispute the court's findings on these issues. For example, unlike situations where the federal government has delegated to common carriers its own *federal* eminent domain power – such as under the Natural Gas Act[6] — Congress left railroads dependent upon state powers of eminent domain and the conditions antecedent thereto. Thus, it might be argued that railroads should be subject to any conditions placed upon the delegation of a state's sovereign powers that such a state may choose. After all, a state has a profound interest not only in the disposition of property within its territory but also in the use of its sovereign power of condemnation as delegated to private entities. Congress could have superseded state sovereignty by giving railroads federal eminent domain power, but it did not.

But, for purposes of this article, issues of Federalism, the Supremacy Clause, conflict preemption, and the Commerce Clause will be set aside. Instead, this article focuses on the wisdom and utility of the South Dakota reforms in protecting private property and limiting condemnations for private benefit.

The filter adopted in South Dakota serves several important purposes. It increases costs of private condemnations under the imprimatur of the state and increases the transparency and accountability of condemnations for private benefit by requiring that such condemnations be vetted with the state's elected representatives.

The Benefits of the South Dakota Legislation: Controlling Private Condemnations

Condemnation is an extremely powerful tool for private interests. By gaining it by delegation from the government, a private entity can escape market pressures which would otherwise require the negotiation and purchase of property rights. The private entity has the power to expel property owners without their consent, albeit requiring just compensation. In a normal transaction between private parties, a property owner can refuse to sell – he has the protection of a "property rule" which includes the right to exclude would be possessors. Once the prospective acquirer has eminent domain power, he has the right to oust a property owner so long as he pays compensation – the transaction is governed by a "liability rule" where one empowered with a delegation of sovereign eminent domain power can oust a property owner without that owner's consent so long as they pay "just compensation."

One way to check private interest exercise of eminent domain, including that by delegates of the sovereign power, is to require a procedural approval process by which layers, or filters, exist to make the exercise more difficult and concomitantly more costly. If a system is created where municipalities, agencies, and quasi-public delegates (like railroads) of the eminent domain power could be stripped of their ability to condemn unilaterally, adding a legislative or executive consent process would decrease the incidence of condemnations. Condemnations would require the consent of a number of additional parties. Many interest groups will find the investment in obtaining a condemnation too expensive under such a regime, thereby forcing them back into the competitive market for land acquisitions – railroads are forced to negotiate in the market rather than, at a whim, conscripting property by eminent domain.

By diversifying the governmental actors required to approve a condemnation decision, as the South Dakota legislation does by requiring Governor or commission approval, interest groups like railroads must either (i) spend more to obtain favor, often making the legislation no longer profitable (that is, the legislation no longer creates a rent), or (ii) disperse the resources it was willing to spend under the old regime, which will decrease the incentives for all of the affected governmental actors to zealously push the interest group's agenda.

South Dakota's legislation is very similar to the filtering rule that I have proposed elsewhere:[7] All formal exercises of the eminent domain power by any entity must be approved, through the normal legislative process, by the initial sovereign holding the power of eminent domain. Delegates of the eminent domain power shall not have the unilateral power in any particular condemnation to institute eminent domain proceedings without the formal consent of the delegating party holding that power. Municipalities, agencies, and quasi-public actors are not independent sovereigns.

Railroads and other delegates of eminent domain authority derive their power from the state or federal government; thus, they do not hold, as a right of sovereigns, the power to exercise eminent domain.[8] It is merely delegated to them by some entity, either the state or federal government, that holds that sovereign power. Thus, conditioning the exercise of that power is perfectly consistent with the nature of the power.[9] Alternatively stated, the greater power to delegate eminent domain includes the lesser power to condition that delegation.[10]

Delegation itself fosters rent-seeking. Both the entity obtaining the condemnation power and the interest groups likely to have access to that entity's condemnation powers will make payments to obtain the delegation. A filtering rule essentially decreases the degree to which the legislature can delegate the eminent domain power. Thus, the benefits interest groups obtain through delegation are diminished. Once an interest group must obtain the assent of both the delegate of eminent domain power as well as the various political institutions constituting the delegating party—such as two houses of the legislature and the executive—the price of condemnation increases not only because more governmental actors must receive payments but also because the number of distinct competing interests vying for each politician's services will also increase.[11]

The South Dakota filtering rule is similar to other proposals to solve purported constitutional problems. For example, McGinnis argued that spending bills should be subject to a supermajority rule.[12] At least part of his purpose in making such a proposal is to overcome the failures of the enumerated powers doctrine—a scope-restrictive rule like public use—at controlling the growth of governmental power.[13] A supermajority rule increases the price of legislation by requiring interest groups to "pay" a larger number of legislators in order to close a deal, thereby decreasing the supply and demand.

Conclusion

In its operation, the proposed filtering rule, exemplified by the South Dakota legislation, for condemnations would increase the costs of rent-seeking because it also increases the price of condemnations by making such actions more difficult to attain.[14] Increasing the difficulty of effecting a condemnation is particularly important if one believes that the power is especially susceptible to abusive application when held and exercised by private interests.

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Footnotes

[1]U.S. Const. amend. V.
[2] S.D.C.L. 49-16A-75 (1998).
[3] S.D.C.L. 49-16A-75 & .75.1 (2002).
[4] S.D.C.L. 49-16A-75.3 (2002).
[5] *Dakota, Minnesota, & Eastern R.R. Corp. v, State of South Dakota*, CIV No. 02-4083 (filed, July 19, 2002).
[6] 15 U.S.C. 717f(h).
[7] Donald J. Kochan, *"Public Use" and the Independent Judiciary: Condemnation in an Interest Group Perspective*, 3 TEX. R. L. & POL. 49 (1998).
[8] Consider congressional grants of eminent domain power to quasi- public actors. "Quasi-public actors" includes a number of private enterprises, usually due to their status as a common carrier, that have been delegated the power of eminent domain. *See, e.g.,* Natural Gas Act § 7(h), 15 U.S.C. § 717f(h) (granting natural gas companies the power of eminent domain). *See also* Dupree v. Texas E. Corp., 639 F.Supp. 463 (M.D.La. 1986) (recognizing that gas companies operating pursuant to section 7(h) legitimately hold eminent domain power).
[9] *See, e.g., Lim v. Michigan Dep't of Transp.*, 423 N.W.2d 343 (Mich. Ct. App. 1988) (no public or private agency may condemn without authorization in law); *Montana Talc Co. v. Cyprus Mines Corp.*, 748 P.2d 444 (Mont. 1987) (delegated eminent domain power must be derived from, and is limited by, legislative grant); Appeal of Swidzinski, 579 A.2d 1352 (Pa. Commw. Ct. 1990) (body to which eminent domain power is delegated has no authority beyond that legislatively granted).
[10] For example, the Oklahoma constitution limits the scope of delegation of eminent domain powers to an individual or entity. *See Malnar v. Whitfield*, 774 P.2d 1075 (Okla. Ct. App. 1989) (interpreting Okla. Const. art. II, § 23).
[11] Discussing the differences between the two houses of Congress, McGinnis described the importance of struggle between political institutions beholden to distinct interests at decreasing rent-seeking: "[D]ifferences in function also mean that branches will themselves acquire different institutional interests even when controlled by similar majorities, thus ensuring a perpetual struggle in a kind of state of nature at the heart of Leviathan—a struggle that inhibits the development of permanent or tyrannical majoritarian control." John O. McGinnis, *The Original Constitution and Its Decline: A Public Choice Perspective*, 21 HARV. J.L. & PUB. POL'Y 195, 199.
[12] *See* John O. McGinnis, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 Yale L.J. 483 (1995).
[13] *Id.*
[14] *See id.* at 508-11.

Bush Administration Environmental Policy: 18 Months Later

*By James L. Huffman**

Over a year ago I suggested in a talk to the Environmental Law & Property Rights Practice Group that "the Bush Administration . . . has taken more heat on its environmental policies than on any other single issue." A few months later our world was turned upside down by the terrible events of September 11 and environmental issues, along with most domestic matters, disappeared to the back pages of the newspapers. While most Americans have embraced the Administration's war on terrorism as evidenced by the President's continuing high standing in the polls, some environmentalists were quick to express concern that the high profile nature of the war on terrorism would provide cover for an administration bent on dismantling the environmental protections put in place over the last three decades.

Now, a year later, the President's recently released "Healthy Forests" proposal has ignited a firestorm of dismay and protest from environmentalists who object that the plan is a ruse for putting loggers back to work and lining the pockets of timber companies. There have been similar reactions to the President's decision not to attend the Johannesburg follow-on to the Kyoto and Rio meetings on the global environment. After the announcement of the Healthy Forests plan, Chris Wood of Trout Unlimited was quoted in the Seattle Times saying "[i]t took 25 years to build this network of environmental laws and protections and, in the span of 10 double-spaced pages, this would undo about half of them relative to public lands." Mike Anderson of the Wilderness Society is quoted in the same article saying "[i]t's outrageous; far worse than we expected."

Anderson's statement underscores the nature of the now resurfacing debate over the Bush Administration's approach to environmental and natural resource issues. Environmentalists have expected the worst from the outset. There was never really much room for discussion and compromise. Perhaps that is just the way it is in today's environmental politics. Each side takes the most extreme position in hopes of ending up somewhere in the reasonable middle. As political strategy this probably makes some sense, but it does little to advance our thinking about how best to solve environmental problems while sustaining the viable economy necessary to that end.

Nor is our thinking advanced by the hyperbole of much environmentalist argument, perhaps best evidenced over the past year by the environmentalist reaction to Bjørn Lomborg's book *The Skeptical Environmentalist*.[1] If Lomborg makes no other case in his lengthy and heavily referenced book, it is that environmentalists have misrepresented and overstated the realities of environmental problems consistently and often brazenly. A failure to acknowledge the serious limits of environmental science, and a refusal to stand corrected when better knowledge indicates that an environmental problem is not as severe as first believed, combine to deceive the general public and to secure the place of environmental activists in our political hierarchy. That place is firmly in the Democratic Party, making it difficult for Republicans who care about the environment to be taken seriously. Even environmentalists with the credentials of Bjørn Lomborg in Sweden, or Randal O'Toole and David Schoenbrod in this country (to name only two), quickly become the Uncle Tom's of the environmental movement when they suggest that the orthodoxy of mainstream environmental politics is often more about maintaining power than about improving the environment.

The environmentalist response to Lomborg's book, though disappointing, was to be expected. More surprising has been the response of scientists and some of the leading scientific journals. In a recent article in *Commentary,*[2] David Schoenbrod describes the attack on Lomborg's book (and, regrettably, on Lomborg) by scientists, noting that "it was the very opposite of the free give-and-take that is supposed to characterize responsible scientific discourse." Schoenbrod went on to observe that "[i]n choosing to treat *The Skeptical Environmentalist* as an attack on environmental science, Lomborg's scientific critics inadvertently revealed the degree of their own complicity with the misrepresentations and propagandistic distortions he so skillfully exposed." Because of this complicity, which exists among many of the scientists who staff the federal bureaucracies responsible for enforcing our environmental laws, the Bush Administration faces an additional hurdle in its effort to bring reason to environmental policy. Environmentalists have long sought the policy high ground by arguing that science, not politics, should govern. To the extent that our environmental laws have embraced this "science rules" approach, and to the extent we have scientists who are willing to compromise their professional calling to their political ends, competing interests are diminished by being nothing more than competing interests.

Of course there is hyperbole on the other side of these environmental debates, and there is an orthodoxy among free market advocates, neither of which is helpful to understanding or to the development of better policies. But there has not been a lot of either coming from the Bush Administration which helps to explain that the more ideological free marketeers have sometimes been as critical of the Administration as have been the environmentalists. As is often said, you must be doing something right if both sides are unhappy.

Of course the Bush Administration has not gotten it right in every case, and no doubt they have been responsive to the political pressure exerted by their supporters. It should not surprise anyone that the Administration has paid less attention to the environmentalist agenda in light of the total lack of political support from those interests and the reality that no amount of catering to the environmentalists will result in tangible support in the 2004 election. When a special interest so clearly allies itself with one party or the other, it finds itself either on the inside or the outside.

But the Administration does deserve credit for challenging some of the unfounded and ill-supported environmen-

tal orthodoxy rooted in extreme caution, uncertain science and a rigid reliance on public ownership or command and control regulation. My comments of more than a year ago noted three early actions that confirmed environmentalists' worst fears about the Bush Administration: arsenic, Kyoto and the appointment of Secretary of Interior Gale Norton.

On arsenic one has to conclude that the Administration erred from a political perspective. Although they were right to suggest that the regulation proposed by the Clinton Administration warranted a second look, the ultimate implementation of something very much like the original proposal left the Administration looking like a fox in the hen house. A more reasonable way to look at it would be that after review we could proceed with better assurance that the arsenic standard makes sense, but that is not the way of environmental politics. Any suggestion that we review an existing or proposed standard with an eye to lowering the standard is viewed as antienvironmental. If aspiring to zero pollution could ever make sense in a world of complex tradeoffs, it might be fair to describe a goal of less than zero pollution as antienvironmental, but that is not a world we will ever live in. The only defensible goal is to achieve optimal pollution; a goal we are more likely to realize if we periodically review our regulatory standards.

On Kyoto, the Administration continues to experience criticism both at home and abroad. In a year's time our understanding of climate change is not much advanced, but that has little to do with the politics of Kyoto. An unusually warm summer in many part of the United States and extreme weather events in Europe carry far more weight in climate change politics than does the fact that the science remains uncertain at best. And it is undeniable that the predicted costs of Kyoto compliance remain staggering in light of competing human needs on the planet. The oft-made argument of some Kyoto opponents that we will do far more good by spending our resources on human health and education, though true, is somewhat disingenuous since incurring expenses as a result of regulatory mandate is a far different matter from agreeing to tax ourselves at the same level of expense to achieve these worthy ends. But it is nonetheless true that when subjected to cost-benefit analysis, the case for Kyoto is not very convincing.

It is interesting to note that much of the criticism of Kyoto has focused on the Administration's failure to go along with the many other nations that have embraced Kyoto – it is a part of the broader objection that the Administration has been unilateralist in its foreign policy. But going along because other nations have signed on, particularly on matters of great national importance, is never a persuasive argument. Of course the United States could sign on to Kyoto with the same intention of noncompliance that many other nations have with respect to most international agreements, but that does not conform to the American way of doing things. As President Bush's recent speech to the United National General Assembly made abundantly clear, international rules that are ignored are irrelevant.

The Administration has also been criticized for its greenhouse gas policy by one of the most respectable of free market think tanks, the Competitive Enterprise Institute. Marlo Lewis of CEI's Environmental Studies Program argues that the "most pernicious" climate policy is that promulgated by the Bush Administration in its February 14, 2002, modifications of the Department of Energy's Voluntary Reporting of Greenhouse Gases program.[3] Those modifications provide "transferable credits" for voluntary greenhouse gas emission reductions. The theory is that issuance of transferable credits will assure that those who voluntarily cut emissions today will not be disadvantaged in the event of a Kyoto style regulatory regime in the future. On the face of it, it is not surprising that a sort of "thousand points of light" approach combined with a free market environmentalist's tradable emissions credit would appeal to the second Bush Administration. But as Lewis points out, it is an approach that will build a constituency for Kyoto-style regulation since the future value of the credits is dependent on such regulation.

Notwithstanding that the idea was originally proposed by the Clinton-Gore Administration and promoted by the environmentalist Pew Center on Global Climate Change, mainline environmental groups have opposed the voluntary approach as window dressing and another example of the Bush Administration serving as handmaiden to industry. It seems that even when the Administration does their bidding (albeit it, perhaps, unwittingly), environmentalist condemnation will be its reward.

While Secretary Norton was accused, tried and convicted of antienvironmentalism before taking office, her track record warrants better. She has taken seriously Interior's mandate to protect and conserve resources, while also taking seriously its mandate to develop natural resources. The Department of Interior, like the Forest Service, straddles the historic divide between natural resources development and environmental protection. As much as the environmentalists dislike the mining, grazing and water development laws enacted in the past, those laws remain a significant part of Interior's legislative mandate. Secretary Norton has sought to find the elusive balance implicit in these often conflicting mandates of development and protection. She inherited a department that for eight years had pursued a largely environmentalist agenda. Bringing things back into balance, like questioning existing pollution standards, is inevitably viewed as anti-environmental. Although one has to assume that Norton has been subjected to constant pressure from the resource development industries that supported the Bush campaign, she has taken environmental protection seriously in the context of the competing objectives her Department is mandated to pursue.

Illustrative of the management challenges posed by public lands laws born in the 19th Century, when settlement and resource development was the point, and modified over the past four decades to reflect modern environmental values is the ongoing controversy over forest fire management. The Clinton Administration would have faced less of a challenge given its pragmatic willingness to find environmental mandates where none existed in the law (e.g. ecosystem management), but for the Bush Administration, with its constituency of rural and resource dependent communities (and one hopes with a higher respect for the rule of law), improved forest fire management policy is both difficult and critical. Fires are clearly an important part of forest ecosystems, but in a world of intermingled forests

and human communities where the communities continue to have some dependence on the wood products of the forests, just letting it burn will not do.

The Administration's Healthy Forests initiative has been criticized from both sides of the environmental political divide. As suggested previously, environmentalists see it as the wolf of renewed timber harvesting in the sheep's clothing of forest protection. Although it is clearly unfair to contend that the Administration's only objective is renewed cutting of timber, the criticism is fair enough from those who cry wolf every time a tree is cut. There is certainly nothing inherently wrong with a policy of zero or very limited timber harvesting on the public lands. There are opportunity costs to not cutting those trees (including environmental costs both here and abroad), but it is a perfectly defensible position if we are prepared to accept those costs.

But the Healthy Forests plan has also been criticized for being ineffective to the extent its objective is to protect human communities and private property. Randal O'Toole of The Thoreau Institute estimates it will take at least 80 years to accomplish the Plan's prescribed treatment (removal of fuels) of the federal forest lands at a cost of $100 billion.[4] And O'Toole argues that excess fuel in the forests is not even the reason for this summer's fires, which he attributes to drought. Whatever the cause of the forest fires and whatever the best solution, it is not possible to settle on a fire management policy without first knowing what you are trying to accomplish and why. If the forests are no longer to be a source of wood products, perhaps our only reason for fire suppression is the protection of human settlement and private property. In that case, according to O'Toole, the treatment should focus on private lands and the relatively few public forest acres adjacent to those lands.

If O'Toole is right, and there is good reason to believe he is, the Administration should reassess the Healthy Forests initiative. But it can rest assured that there is nothing it can do that will satisfy environmentalists, short of closing down all of the public land forests. As I have indicated above, that might well be a defensible policy depending on the values of the American public, but it is not a policy that can be implemented under the existing public lands laws. It might be tempting to just do it, but that is not the role of the executive in our system of government.

Another issue that surfaced early in the Bush Administration was proposed drilling in the Alaskan National Wildlife Refuge. At that time the "energy crisis" in California gave the issue greater urgency than it has today, even with the many problems in the Middle East. That ANWR has become less of an issue confirms the suggestion in my earlier speech that it has more to do with philosophy than with environmental protection or energy. ANWR, which will no doubt surface again, became a symbol for both sides of the environmental debate. Like the Spotted Owl, Three Mile Island and Love Canal before it, ANWR has come to symbolize the philosophical differences that define our environmental politics. The Administration's judgment about whether or not to press for drilling in ANWR, therefore, should turn not on the energy that would be produced but on its assessment of the broader political debate on the environment. That is certainly the approach taken by environmentalists. My own sense of the matter is that there are better and bigger fish to fry from the Administration's perspective.

And speaking of fish to fry, the Administration found itself embroiled in the great Sucker Fish controversy in the Klamath River Basin of Oregon last summer. While some human damage was done as a result of cutting off water to farmers (unnecessarily some later studies have suggested), the Administration appears to have found a satisfactory middle ground, except from the perspective of those who would prefer to shut down irrigation permanently. Some anadromous fish runs in other parts of the Northwest have been surprisingly abundant this year, a situation sure to result in increased pressure for the roll back of fish protection measures. It is unlikely that the Administration will make it through its current term without having to face another battle in the salmon wars.

I argued in my speech of last year that a coherent environmental policy should reflect five basic considerations. I reiterate those considerations here along with some brief reflections on how the Bush Administration is doing in satisfying them.

First, the policy must recognize that zero pollution and other forms of purity are seldom possible or desirable.

The Administration's approach to pollution in general seems to recognize this fundamental premise. Its early, if ill-advised, review of proposed arsenic standards was rooted in a recognition that some level short of zero is going to be optimal at any point in time. What has been reported as a relaxation of snowmobile emission standards (actually snowmobiles have been unregulated, so the recent EPA proposal sets a lower standard than had been previously proposed, but would impose a higher standard than currently exists) is another illustration of the Administration's recognition that pollution control has its own opportunity costs.

Second, the policy should be integrated in the sense that individual policy initiatives should contribute to an overall improvement in environmental quality.

Not only should environmental policy be integrated to provide the most environmental protection possible for any given expenditure, but it should also be integrated with other policy objectives for the same reason. Given the unintended consequences that flow from every regulatory measure, the parochial nature of environmental politics where specific environmental objectives are pursued without regard for these unintended consequences, and the multitude of federal agencies with environmental responsibilities, it is unlikely that this or any administration will accomplish much in the way of integrated environmental policy. But it remains a worth objective if we care about getting the most impact for the dollars we spend.

Third, environmental policy should be founded upon, but not dictated by, sound science.

The nature of environmental politics makes this a difficult goal to achieve. So long as political interests on both sides of the debate continue to insist that science can and should displace politics, we will face distortions of fact and the

corruption of science in the process. The climate change debates illustrate that the problem is not unique to environmentalists. On their side the claim is that climate change is happening and that it is caused by human activity. On the other side the claim is that whatever climate change we are experiencing is the product of natural cycles and not human activity. The hard reality is that the best science can do is offer predictions, not certainties, and that policy makers must then made judgments based on those predictions. In my judgment, the Bush Administration has, on some issues, sought to achieve this necessary separation of science and policy. But they are swimming upstream in a political climate where many people seem to believe that science can trump politics.

Fourth, environmental policy should be formulated and implemented with the understanding that incentives matter.

The Administration clearly understands the importance of incentives as evidenced by its effort to use so-called market based approaches in environmental regulations. Its endorsement of the transferable credits in the voluntary greenhouse gas reporting program is well intended and will, if implemented, surely lead to more voluntary reductions (depending on how people assess the likelihood of Kyoto style regulation), but an unintended consequence may be to assure the U.S. ratification of Kyoto or something like it. The message the Administration should take from this example is that proponents of regulation sometimes have political incentives to favor market incentives.

Finally, environmental policy must set sustainable objectives, which means that the conditions for economic prosperity must continue to exist.

If there is any theme that runs through Bush Administration environmental policy thus far, it is a recognition of this fundamental truth. It has been said repeatedly, but seems to bear saying again and again, that environmental protection requires economic prosperity. The evidence is everywhere around the globe.

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Footnotes

[1]Cambridge University Press (2001)
[2]"The Mau-Mauing of Bjørn Lomborg," 114 *Commentary* 51 (2002)
[3]"If You Build It, They Will Come," CEI Enviro Wire, September 13, 2002.
[4]"Administration Plan Will Cost Taxpayers Billions But Will Not Stop Fires," The Thoreau Institute, August 22, 2002.

Federalism & Separation of Powers

U.S. Supreme Court Jurisprudence on Implied Private Rights of Action: The Pendulum Swings Back

*By Brian J. Leske**

Congress often does not explicitly provide for a private right of action when it enacts federal legislation.[1] Whether a private right of action can be implied from a federal regulatory scheme is thus a question of tremendous practical significance.[2] Although the U.S. Supreme Court initially approached the "implication question" liberally, judicial creation of private enforcement rights eventually raised separation-of-powers concerns. These concerns, in turn, gave rise to the development of an analysis based largely on congressional intent. In his concurring opinion in *Cannon v. University of Chicago*,[3] then-Associate Justice William H. Rehnquist recognized the importance of congressional clarity in creating private rights of action and warned that "this Court in the future should be extremely reluctant to imply a cause of action absent such specificity on the part of the Legislative Branch."[4] Almost twenty-five years later, it has become readily apparent that the Rehnquist Court has followed this path. Several opinions handed down during the October 2000 and 2001 Terms show that a majority of the Court is now hostile to implied private rights of action and is unlikely to extend them further.

This article first examines the development of implied private rights of action and the threat of independent judicial lawmaking. It observes that the Supreme Court's current approach to the implication question responds to heightened separation-of-powers concerns. Next, the article discusses a number of recent Supreme Court opinions that similarly have construed private rights of action and ancillary issues very narrowly.[5] These cases show that the Rehnquist Court is generally unwilling to risk disrupting the statutory enforcement scheme or to substitute its own judgment for that of Congress. The outcome in these cases also is consistent with recent sovereign immunity and federalism jurisprudence, which reflects a general inclination against private individual litigation and a preference for federal agencies to enforce federal statutory rights. Last, this article briefly considers whether the current trend in resolving the implication question impacts a related legal theory, namely, the use of mandamus to enforce statutory duties where the underlying statute does not provide for a cause of action. This particular theory is being employed in the litigation against Vice President Richard B. Cheney and other federal officials to obtain information related to the development of the Bush Administration's national energy policy.

A Brief History of Implied Private Rights of Action

The Supreme Court's approach to the implication of private rights of action has evolved steadily over the past two centuries. In short, the Supreme Court is now much less willing to imply a cause of action from a federal statute than ever before. It also is well aware of the separation-of-powers concerns inherent in judicial implication of federal enforcement rights.

But this was not always so. At common law, plaintiffs were entitled to a remedy for every legal wrong. Relying upon the general common law powers recognized in *Swift v. Tyson*,[6] federal courts implied private rights of action for violations of federal statutes.[7] Federal courts also used their equity powers to fashion relief for plaintiffs alleging irreparable injury due to violations of federal laws.[8] These early approaches focused almost exclusively on whether the plaintiff had an adequate remedy for an injury, and not on whether the legislature had intended to create a cause of action.[9]

The question of whether a court could imply a right of action from a federal statute arose infrequently in the nineteenth century. Congress did not grant federal courts jurisdiction to hear federal claims until 1875,[10] and it was not until the New Deal Era that this country witnessed an explosion of federal legislation.[11] Because many of these latter statutes did not provide explicitly for a cause of action, the implication question then began to arise with much more frequency and quickly gained in importance.

At the same time, the Supreme Court began to rein in the general notion that judicially enforceable rights exist even though there is no state or federal law that authorizes them. In *Erie v. Tompkins*, the Supreme Court held that "[t]here is no federal general common law,"[12] thereby overruling *Swift v. Tyson*, which had given federal courts general lawmaking authority that was wholly independent of state law. The *Erie* Court ruled that in the absence of an applicable constitutional provision or federal statute, "the law to be applied in any case is the law of the State."[13] Consequently, federal courts were no longer free to fashion and apply "substantive rules of common law applicable in a State."[14] Under *Erie* (and the Rules of Decision Act, upon which *Erie* is based),[15] federal courts instead had to rely upon a federal source for the authority to create any substantive federal law, including federal rights.[16]

In *Guaranty Trust v. York*, the Supreme Court extended the *Erie* doctrine to equitable actions.[17] In that case, the Court held that federal courts sitting in diversity must apply state statutes of limitations to equitable claims and could not use federal equity powers "to deny substantive rights created by State law or to create substantive rights denied by State law."[18] Although Guaranty Trust recognized that equity authorized federal courts to provide a *remedy* for a substantive right created by a State,[19] it adopted the post-*Erie* view that federal courts were not free to create a substantive *right* where no state or federal law would have done so.

Even in the wake of these decisions, the Supreme Court continued its generous approach toward the implication of private rights of action.[20] This trend continued until the Supreme Court decided *Cort v. Ash*.[21] At issue in *Cort* was

whether a private right of action for damages could be implied under 18 U.S.C. § 610, which was a criminal statute prohibiting certain corporate expenditures. The Court concluded that no private right of action existed, and announced a new four-factor test for courts to analyze the implication question: (1) whether the plaintiff belonged to the class of persons the statute was designed to protect; (2) whether Congress intended to create or deny a private remedy; (3) whether that private remedy was consistent with the statutory scheme and/or purpose; and (4) whether the right and remedy traditionally were relegated to state law.[22]

Although the *Cort* factors included consideration of legislative intent, federal courts remained free to imply a cause of action without regard to whether Congress intended to grant one. This open-ended approach was strongly criticized, particularly on separation-of-powers grounds.[23] In his dissent in *Cannon*, for example, Justice Powell argued that because federal power is limited—that is, each branch of government can exercise only the power that is specifically and affirmatively granted to it—judicial recognition of causes of action risked distorting the constitutional process.[24]

To be sure, Article I of the U.S. Constitution provides in pertinent part that "All legislative Powers herein granted shall be vested in a Congress of the United States."[25] As the Legislative Branch, Congress is responsible for "making" law, which includes determining when private parties are to be given causes of action under legislation it enacts. Article III of the U.S. Constitution, on the other hand, provides that "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[26] This provision can be understood as both a grant and limitation on the authority of the federal courts, because Congress alone is responsible for determining the federal courts' jurisdiction. In exercising the judicial power, federal courts must evaluate federal statutes in light of a Constitution that provides for this separation of powers.

Under these principles, law "made" by the judiciary—here, judicial creation of private enforcement rights without regard to legislative intent—arguably lacks constitutional legitimacy because it does not follow constitutionally prescribed lawmaking procedures.[27] Likewise, by implying a cause of action where none is expressed in the text of a federal statute or otherwise clearly intended by the legislature, there is a legitimate concern that a federal court impermissibly expands the scope of its own jurisdiction by "creating" a federal question where one ordinarily does not exist.[28]

Beginning with *Cannon*, the Supreme Court began to abandon the *Cort* factors in favor of a much narrower approach.[29] This new approach limited the role of federal courts to determining whether Congress intended to create a private cause of action.[30] The judicial task, the Court emphasized in these post-*Cannon* cases, is to determine not only whether the federal statute demonstrates an intent to create a private right, but also whether the statute demonstrates an intent to create a private remedy.[31]

In these cases, the Supreme Court treated the implication question as one of statutory construction, which allowed it to avoid difficult questions regarding its constitutional authority to imply causes of action.[32] Indeed, when a federal court concludes that Congress intended to create a private cause of action, it can be said to be performing the traditional judicial task of interpreting and applying the statute, rather than improper lawmaking.[33]

Since *Cannon*, the primacy of congressional intent has prevailed, and the Supreme Court consistently has concluded that no private right of action exists unless the statutory text grants such a right, either explicitly or through evidence of clear congressional intent.[34]

Recent Supreme Court Jurisprudence: The Pendulum Continues To Swing

During the October 2000 and 2001 Terms, the Supreme Court decided several more cases that construed private rights of action or ancillary issues very narrowly. These opinions confirm not only a clear reluctance on the part of the Rehnquist Court to imply a private right of action from a federal regulatory scheme, but also that a majority of the Court is against extending implied private rights of action any further. In addition, these cases demonstrate that both separation-of-powers and federalism concerns guide the Court in approaching the implication question.

First, *Alexander v. Sandoval*[35] presented the question whether private individuals could sue to enforce disparate-impact regulations promulgated under § 602 of Title VI of the Civil Rights Act of 1964, which prohibits racial discrimination in federally funded programs and activities. In determining whether a private cause of action against the State could be implied from that section, the Supreme Court expressly rejected the invitation "'to provide such remedies as are necessary to make effective the congressional purpose.'"[36] The Court wholly refused to venture beyond Congress's statutory intent, observing that "[w]ithout it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute."[37]

After analyzing the text, structure, and remedial scheme of Title VI and its amendments, the *Sandoval* Court found no "'rights-creating'" language, and concluded that nowhere "does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under § 602."[38] This conclusion is significant because the Court previously assumed that a private right of action existed to enforce § 601 of Title VI, which banned intentional discrimination.[39] In *Sandoval*, however, the Court clearly stated that it is no longer in favor of implying private rights of action in the statutory context.

Next, in *Barnes v. Gorman*[40] the Supreme Court limited the types of remedies available in private suits brought under Title VI and many other federal statutes. In that case, a jury had awarded both compensatory and punitive damages to a plaintiff who had sued certain state governmental entities under § 202 of the Americans with Disabilities Act of 1990 ("ADA"), which prohibits discrimination against the disabled by public entities, and § 504 of the Rehabilitation Act of 1973, which prohibits discrimination against the disabled by recipi-

ents of federal funding, including private organizations. Although a right of action existed, the scope of "appropriate relief" for violations of those statutes remained unclear under existing precedent.[41]

To determine the types of damages available, the Supreme Court noted that legislation that places conditions on the grant of federal funds (such as Title VI) invokes Congress's power under the Spending Clause.[42] The Court also noted that this relationship between the federal and state governments has been characterized as contractual in nature.[43] Observing that punitive damages are not available for breach of contract, the Court concluded that punitive damages could not be awarded in suits enforcing Spending Clause legislation.[44]

Because many statutes—including the ones at issue in *Barnes*—adopt the remedies, procedures and rights in Title VI, punitive damages will not be available under a large number of federal statutes. Moreover, Congress seldom explicitly authorizes the recovery of punitive damages in legislation it enacts, and, in light of *Barnes*, it is unlikely that the Supreme Court will imply a punitive damages provision in the future.

In addition to implied private rights of action, certain federal rights can be redressed through an action under 42 U.S.C. § 1983, which provides redress for violations of federal statutes under color of state law.[45] In *Gonzaga University v. Doe*[46] also decided during the October 2001 Term, a student brought a § 1983 action for damages against a private university to enforce provisions of the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g, which prohibits federal funding of education institutions that have a policy of releasing student records to unauthorized persons.[47] The Supreme Court foreclosed the suit, holding that there is no private right of action under § 1983 to enforce the relevant provisions of the statute.

Of particular importance, the Supreme Court in *Gonzaga* rejected the suggestion that its implied right of action cases are distinct from its § 1983 cases. It stated that although the question whether a statutory violation may be enforced through § 1983 is a different inquiry than whether a private right of action can be implied from a particular statute, "the inquiries overlap in one meaningful respect—in either case [a court] must first determine whether Congress *intended to create a federal right*."[48] Clarifying the test set forth in *Blessing v. Freestone*,[49] the Supreme Court declared that "if Congress wishes to create new rights enforceable under § 1983, it must do so in clear and unambiguous terms—no less and no more than what is required for Congress to create new rights enforceable under an implied private right of action."[50]

Gonzaga thus places plaintiffs seeking to enforce federal statutory rights under § 1983 on the same initial footing as plaintiffs proceeding under an implied private right of action theory.[51] It also confirms that where a remedial statute does not explicitly confer any enforceable rights,[52] individualized rights must unambiguously be found elsewhere to permit a cause of action. The practical effect is to replace the presumption found in the early § 1983 cases—specifically, that plaintiffs seeking to vindicate federal rights may proceed so long Congress has not foreclosed a § 1983 action—with the presumption now found in the implication cases. As discussed above, this presumption is against finding a right of action unless Congress has clearly demonstrated its intent to grant one.

Several considerations could explain the Court's more narrow approach to § 1983 cases and the implication question in general.[53] The Court may be concerned that the implied enforcement of a federal statute may be different than what Congress had intended, or that substantive and remedial provisions in the statute were a legislative compromise, which might be upset by judicial implication.[54] The Court also may have recognized that although numerous federal statutory provisions cannot be enforced in court under its new approach, they nonetheless could be enforced by the appropriate administrative agency. This may be what Congress intended in the first place, because specialized agencies are subject to outside political pressures and may be in the best position to pursue enforcement efforts. In fact, administrative law recognizes that the executive branch, rather than the judiciary, is responsible for enforcing federal policies embodied in federal legislation.

It also is worth noting here that the outcome in this line of cases is consistent with the Supreme Court's recent immunity and federalism jurisprudence, which reflects a general inclination against private individual litigation and a preference for federal agencies to enforce certain statutory rights. For example, in *Alden v. Maine*,[55] the Court dismissed an action under the Fair Labor Standards Act of 1938 on the grounds that States were immune from suits in their own state courts. In the Court's view, federal authorization of private suits against nonconsenting States raised serious federalism concerns. The Court believed that it also might threaten a State's financial integrity, which would not be present if decision-making was vested in a national power. Likewise, in dismissing a student's § 1983 action for unauthorized disclosure of educational records, the Court in *Gonzaga* refused to subject state and local school officials to private suits for money damages for failing to comply with federal funding conditions. The *Gonzaga* Court observed that "Congress expressly authorized the Secretary of Education to 'deal with violations' of the Act," and, thus, the Department of Education presumably could protect those students' rights.[56] And in *Equal Employment Opportunity Comm'n v. Waffle House, Inc.*,[57] the Court allowed the EEOC to pursue victim-specific judicial relief in an enforcement action under Title I of the ADA, despite an agreement between the employer and employee to arbitrate any dispute or claim. The Court appeared content to defer to the agency's decision regarding enforcement of various provisions of the statute, even though the law generally prefers arbitration over litigation.

Finally, in cases involving alleged violations of constitutional rights, the Supreme Court has approached the implication question very differently. Traditionally, the Court has been much more willing to recognize implied rights of action in constitutional cases than in statutory cases.[58] The chief basis cited for this distinction is that constitutional provisions rarely include an express cause of action, whereas Congress has the opportunity to include a private cause of action in legislation it enacts.

In *Correctional Services Corp. v. Malesko*,[59] however, the Supreme Court continued with its narrow approach to the implication question, applying it to a constitutional case. In

Malesko, the Court declined to extend the holding of *Bivens* to imply a cause of action against a private company that was a government contractor.[60] It concluded that the rationale of *Bivens*—which was to deter federal officers from committing constitutional violations—does not extend to corporations. The Court further observed that its prior cases meant that "[s]o long as the plaintiff had an avenue for some redress, bedrock principles of separation of powers foreclosed judicial imposition of a new substantive liability."[61] Here, the respondent, a federal inmate imprisoned in a private facility, was not "a plaintiff in search of a remedy," but rather had many alternative remedies, including parallel tort remedies unavailable to inmates in government facilities.[62] The Court thus found no basis to create a new constitutional tort.

Concurring in the judgment, Justice Scalia, joined by Justice Thomas, declared unequivocally that the rationale of *Bivens* should not be extended any further: "*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action—decreeing them to be 'implied' by the mere existence of a statutory or constitutional prohibition."[63] The concurrence noted that *Sandoval* "abandoned that power to invent 'implications' in the statutory field," and that "[t]here is even greater reason to abandon it in the constitutional field, since an 'implication' imagined in the Constitution can presumably not even be repudiated by Congress."[64]

Although the Rehnquist Court may not have abandoned implying private rights of action altogether, the pendulum clearly is swinging in that direction. The Court's narrow approach to the implication question applies in both constitutional and statutory cases, and generally reflects an unwillingness to risk distorting either the constitutional process or the statutory scheme. The result of this approach has been to reverse the presumption found in the first implication cases and to place the burden on plaintiffs to show that Congress clearly intended to grant a private right of action in the statute. And, assuming the ideological composition of the Court remains more or less the same, this trend likely will continue, and may impact the analysis of related legal theories.

The Use of Mandamus to Create A Private Right of Action: A New Look at the Question

Whether courts may use the mandamus jurisdictional statute[65] to provide a plaintiff with a right of action where the underlying substantive statute itself does not explicitly provide for one is an unresolved and complex question. Although a comprehensive analysis of this question (and the vitality of "nonstatutory" judicial review, discussed *infra*) is well beyond the scope of this article, this section will briefly consider how the Court's narrow approach toward the implication of private rights of action may impact certain claims in the litigation against Vice President Richard B. Cheney to obtain information related to the development of the Bush Administration's national energy policy.[66] This section first discusses the background of the Cheney litigation and the mandamus statute.[67] It next observes that current Supreme Court jurisprudence on implied rights of action casts doubt on the whether courts may use mandamus[68] essentially to create a cause of action where the underlying statute does not provide for one.

In January 2001, President George W. Bush created the National Energy Policy Development Group ("NEPDG") to gather information, deliberate, and provide him with recommendations for a national energy policy. The NEPDG consists of more than a dozen senior advisers, including the Vice President of the United States. In May 2001, the NEPDG issued a report that recommended a set of energy policies to be implemented through administrative action and proposed legislation.

Shortly thereafter, Judicial Watch, Inc., a self-described non-profit public interest law firm, filed suit in the U.S. District Court for the District of Columbia, alleging violations of the Federal Advisory Committee Act ("FACA") and the Freedom of Information Act ("FOIA"). In January 2002, the Sierra Club, a non-profit environmental organization, filed suit in U.S. District Court for the Northern District of California, asserting similar claims under FACA, the Administrative Procedures Act ("APA"), and the mandamus statute, 28 U.S.C. § 1361. The plaintiffs in these actions claimed that the NEPDG, Vice President Cheney, several Cabinet members, and certain private parties had unlawfully refused to provide copies of minutes and other documents related to NEPDG's deliberations and recommendations.

The suits eventually were consolidated before Judge Emmet G. Sullivan of the U.S. District Court for the District of Columbia. The federal defendants promptly moved for summary judgment, arguing (for purposes relevant here) that neither FACA nor the mandamus statute provides plaintiffs with a cause of action. The district court dismissed the FACA claims, concluding that, under *Sandoval*, "this Court has no choice but to hold that FACA provides no private right of action."[69]

However, the district court declined to dismiss the claims brought under the mandamus statute, relying on *Chamber of Commerce v. Reich*[70] and principles of so-called "nonstatutory" judicial review.[71] It ruled that "the mandamus statute may provide an avenue to remedy violations of statutory duties even when the statute that creates the duty does not contain a private right of action."[72] The district court concluded that FACA creates non-discretionary duties on the part of at least one of the federal defendants, and, therefore, that the plaintiffs properly stated a claim upon which relief could be granted.[73]

The district court's reliance on the mandamus statute is problematic for several reasons. Recent Supreme Court jurisprudence casts doubt over the propriety of "nonstatutory" judicial review under these particular circumstances and the use of mandamus to enforce FACA. The Supreme Court in *Sandoval* made clear that statutory intent to create a private right of action is controlling and courts simply are not free to imply one.[74] FACA does not explicitly confer a private right of action on plaintiffs, and therefore mandamus cannot be read to authorize judicial review of determinations made under that statute. Indeed, the *Sandoval* Court expressed grave concerns over the constitutionality of judicial implication of private enforcement rights.[75]

Recognizing these limitations, the district court concluded that no separation-of-powers concerns were presented because "Congress itself created the mandamus statute."[76] But

reliance on the mandamus statute as the sole basis for a cause of action is misplaced because the statute is jurisdictional in nature. In fact, Congress enacted the Mandamus and Venue Act of 1962[77] to broaden the venue in which mandamus actions against federal officers may be brought.[78] Specifically, section 1361 extended the power to issue mandamus to all federal district courts, which formerly was exercised only by the district court in Washington, D.C.

In enacting the mandamus statute, Congress did not intend to create any new substantive rights or a cause of action. Rather, section 1361 authorizes federal district courts to hear and award relief in statutory cases that are supported by independently-created substantive causes of action.[79] In this respect, the mandamus statute is much like section 1983, which is remedial in nature and confers no enforceable rights.[80] Additionally, the Supreme Court made clear in *Gonzaga* that a federal statute must unambiguously provide for a right of action to be enforceable under section 1983.[81] Because FACA does not explicitly confer a private right of action, it follows that it cannot be enforced through the mandamus statute.

Although the *Gonzaga* Court acknowledged that separation-of-powers concerns are more pronounced in the implied rights of action context than in the statutory context, it was not persuaded by this distinction. The Court explained: "But we fail to see how relations between the branches are served by having courts apply a multi-factor balancing test to pick and choose which federal requirements may be enforced by § 1983 and which may not."[82] This reasoning applies with equal force to the mandamus statute.

In light of the Supreme Court's narrow approach to the implication question, it is not clear that courts may use mandamus to create a cause of action where one does not exist in the substantive statute at issue. Under recent Supreme Court jurisprudence, reliance upon the mandamus statute to enforce those particular federal statutes may raise separation-of-power concerns, and it risks disrupting not only the enforcement scheme Congress has created, but the constitutional process as well.

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Footnotes

1. As used herein, the phrase "private right of action" refers to the right of a private party to seek judicial relief from injuries caused by a violation of a statutory duty.
2. This article does not expressly consider whether certain statutory rights may otherwise be enforced through an action brought under 42 U.S.C. § 1983. *See, e.g.*, Maine v. Thiboutot, 448 U.S. 1 (1980) (holding that persons may sue under § 1983 to enforce federal rights violated under color of state law). However, the Supreme Court has ruled that the threshold determination—"whether Congress *intended to create a federal right*"—is the same under both inquiries. Gonzaga Univ. v. Doe, 122 S. Ct. 2268, 2275 (2002).
3. 441 U.S. 677, 717 (1979) (Rehnquist, J., concurring).
4. *Id.* at 718. For a stronger contemporaneous criticism, see *id.* at 731 (Powell, J., dissenting) ("Absent the most compelling evidence of affirmative congressional intent, a federal court should not infer a private cause of action.").
5. *See, e.g.*, *Gonzaga*, 122 S. Ct. 2268; Barnes v. Gorman, 122 S. Ct. 2097 (2002); Correctional Services Corp. v. Malesko, 534 U.S. 61 (2001); Alexander v. Sandoval, 532 U.S. 275 (2001).
6. 41 U.S. (16 Pet.) 1, 18-19 (1842).
7. *See* Cass R. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394, 412 (1982) (citing Tex. & Pac. Ry. Co. v. Rigsby, 241 U.S. 33, 39-42 (1916) (implying a cause of action under the federal Safety Appliance Acts)).
8. *See* Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518 (1851) (invoking equity powers to conclude that a bridge constituted an actionable nuisance, even though no statutory cause of action existed); *see also* Boyle v. Zacharie, 31 U.S. (6 Pet.) 648, 658 (1832) (noting that "[i]n the exercise of [chancery] jurisdiction, the courts of the United States are not governed by the state practice").
9. Susan J. Stabile, *The Role of Congressional Intent in Determining the Existence of Implied Private Rights of Action*, 71 NOTRE DAME L. REV. 861, 864 (1996).
10. *Id.* at 865. This grant of authority is currently codified at 28 U.S.C. § 1331 (2000).
11. *Id.*
12. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).
13. *Id.*
14. *Id.*
15. The current version of the Rules of Decision Act, codified at 28 U.S.C. § 1652, provides that "[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."
16. *See Erie*, 304 U.S. at 78; *see also* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1414-15 (2001) ("*Erie* demonstrates that federal courts—no less than Congress and the President—must respect federal law-making procedures.").
17. 326 U.S. 99, 111-12 (1945).
18. *Id*. at 105.
19. *See id.*
20. *See, e.g.*, J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964) (implying a private right of action under section 14(a) of the Securities Exchange Act of 1934 and declaring that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose").
21. 422 U.S. 66 (1975).
22. *Id.* at 78.
23. *See, e.g.*, Cannon v. Univ. of Chi., 441 U.S. 677, 743 (1979) (Powell, J., dissenting) (observing that the *Cort* approach "allows the Judicial Branch to assume policymaking authority vested by the Constitution in the Legislative Branch").
24. *Id.*
25. U.S. CONST. art. I, § 1.
26. U.S. CONST. art. III, § 1.
27. *See Cannon*, 441 U.S. at 740 (Powell, J., dissenting) ("Of the four factors mentioned in *Cort*, only one refers expressly to legislative intent. The other three invite independent judicial lawmaking.").
Furthermore, some commentators have argued that rejection of unconventional federal lawmaking—that is, lawmaking that fails to comply with the procedures established in the Constitution for adopting the "Constitution," "Laws," and "Treaties" of the United States—not only preserves the Constitution's separation of powers, but also safeguards federalism, at least to the extent such lawmaking purports to displace state law. *See generally* Clark, *supra* note 16; *see also* Richard W. Creswell, *The Separation of Powers Implications of Implied Rights of Action*, 34 MERCER L. REV. 973, 991-92 (1983).
28. *See Cannon*, 441 U.S. at 746 (Powell, J., dissenting) ("By creating a private action, a court of limited jurisdiction necessarily extends its authority to embrace a dispute Congress has not assigned it to resolve.").
29. *See id*. at 688 (majority opinion) (relying on the *Cort* factors to find a private right of action under Title IX of the Education Amendments of 1972, but viewing them as the means through which to judge congressional intent).
30. *See, e.g.*, Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15-16 (1979) (finding no private right of action under the Investment Advisers Act of 1940 and emphasizing that congressional intent to create a cause of action was dispositive); Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979) (finding no private right of action under section 17(a) of the Securities Exchange Act of 1934 and limiting the approach "solely to determining whether Congress intended to create the private right of action").
31. *See Transamerica*, 444 U.S. at 14-16, 23-24; *Touche Ross & Co.*, 442 U.S. at 571.
32. *See* Clark, *supra* note 16, at 1424 (citing *Touche Ross & Co.*, 442 U.S. at 568); *see also Cannon*, 441 U.S. at 717 (Rehnquist, J., concurring) ("The question of the existence of a private right of action is basically one of statutory

construction.").

33. Even this point is subject to debate. Justice Scalia, for example, has suggested that the Court "get out of the business of implied private rights of action altogether" because "[a]n enactment by implication cannot realistically be regarded as the product of the difficult lawmaking process our Constitution has prescribed." Thompson v. Thompson, 484 U.S. 174, 191-92 (1988) (Scalia, J., concurring); *see also* Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 365 (1991) (Scalia, J., concurring) ("Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.").

[34]. *See, e.g.*, Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A, 511 U.S. 164, 188 (1994) (finding no private right of action under the Securities Exchange Act of 1934 for conduct in aiding and abetting fraud by another); Karahalios v. Nat'l Fed'n of Fed. Employees, 489 U.S. 527, 532-33 (1989) (finding no private right of action under Title VII of the Civil Service Reform Act of 1978 for alleged violations of duty of fair representation); *see also Thompson*, 484 U.S. at 190 (Scalia, J., concurring) (compiling cases); Merrell Dow Pharms. Inc. v. Thompson, 478 U.S. 804, 812 n.9 (1986) (same).

35. 532 U.S. 275 (2001). In *Sandoval*, the Court split 5-4 along ideological lines. Justice Scalia authored the majority opinion, in which Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Thomas, joined.

36. *Id.* at 287 (quoting J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964)).

37. *Id.* at 286-87.

38. *Id.* at 288, 293.

39. *See Cannon v. Univ. of Chi.*, 441 U.S. 677, 699-701, 710-11 (holding that a private right of action existed to enforce Title IX of the Education Amendments of 1972, because it was patterned after Title VI).

40. 122 S. Ct. 2097 (2002). The decision in *Barnes* was unanimous. Justice Scalia delivered the opinion of the Court, in which Chief Justice Rehnquist and Justices O'Connor, Kennedy, Souter, and Thomas, joined. Justice Stevens disagreed with the analysis employed by the majority, and filed an opinion concurring in the judgment, in which Justices Ginsburg, and Breyer, joined. Justice Souter also filed a separate concurring opinion, in which Justice O'Connor joined.

41. *Id.* at 2100.

42. *Id.* (citing U.S. CONST. art. I, § 8, cl. 1).

43. *Id.* at 2100-01 (citing Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).

44. *Id.* at 2102.

45. *See* Maine v. Thiboutot, 448 U.S. 1 (1980).

46. 122 S. Ct. 2268 (2002). The decision in *Gonzaga* was 7-2. Chief Justice Rehnquist authored the majority opinion, in which Justices O'Connor, Scalia, Kennedy, and Thomas, joined. Justice Breyer filed a concurring opinion, in which Justice Souter joined. Justice Stevens filed the dissenting opinion, in which Justice Ginsburg joined.

47. *Id.* at 2271. Although technically a suit against a private entity, the *Gonzaga* Court assumed without deciding that the disclosures occurred under color of state law. *Id*. at 2272 n.1.

48. *Id.* at 2275.

49. 520 U.S. 329 (1997).

50. *Gonzaga*, 122 S. Ct. at 2279.

51. The inquiries diverge when determining whether Congress intended to create a private *remedy* in the statute. This question is not raised by actions brought under § 1983, because in enacting that section, Congress intended to provide a mechanism for enforcing the violation of certain federal rights, albeit rights independently secured elsewhere.

52. In *Gonzaga*, "§ 1983 by itself does not protect anyone against anything." *Id.* at 2276 (quoting Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 617 (1979)).

53. *See generally* Sunstein, *supra* note 7, at 416-18 (outlining four considerations making it "troublesome to interpret section 1983 as conferring a [private] right of action").

54. *Id.* at 414.

55. 527 U.S. 706 (1999).

56. *Gonzaga*, 122 S. Ct. at 2278 (citation omitted).

57. 122 S. Ct. 754 (2002).

58. *See, e.g.*, Bivens v. Six Unknown Fed. Narcotics Agent, 403 U.S. 388 (1971) (implying a right of action for damages under the Fourth Amendment); *see also* Carlson v. Green, 446 U.S. 14 (1980) (implied damages remedy under the Cruel and Unusual Punishment Clause of the Eighth Amendment); Davis v. Passman, 442 U.S. 228 (1979) (implied damages remedy under the Due Process Clause of the Fifth Amendment). *But see* FDIC v. Meyer, 510 U.S. 471 (1994) (refusing to extend *Bivens* to a suit against a federal agency); Bush v. Lucas, 462 U.S. 367 (1983) (refusing to imply a new nonstatutory damages remedy for federal employees whose First Amendment rights are violated by their superiors).

The Supreme Court also consistently permits suits against state officers in their official capacities to enjoin ongoing violations of both federal statutory and constitutional law. *See, e.g.*, Ex parte Young, 209 U.S. 123 (1908); *see also* Verizon Md. Inc. v. Pub. Serv. Comm'n of Md., 122 S. Ct. 1753 (2002) (reaffirming the availability of *Ex parte Young*).

59. 534 U.S. 61 (2001). As in *Sandoval*, the Court split 5-4 along ideological lines. Chief Justice Rehnquist authored the majority opinion, in which Justices O'Connor, Scalia, Kennedy, and Thomas, joined.

60. *Id.* at 63.

61. *Id.* at 69.

62. *Id.* at 74.

63. *Id.* at 75 (Scalia, J., concurring).

64. *Id.*

65. 28 U.S.C. § 1361 (2000) ("The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.").

66. *See Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group*, No. 01-1530, 2002 U.S. Dist. LEXIS 12598 (D.D.C. July 11, 2002).

67. Virtually all the background information concerning the Cheney litigation was obtained from the Memorandum Opinion issued in the case on July 11, 2002, which can be found at 2002 U.S. Dist. LEXIS 12598. Likewise, much of the background concerning mandamus is from an article that appeared in the *Harvard Law Review*. *See* Clark Byse & Joseph V. Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 HARV. L. REV. 308 (1962).

68. Often described as a "drastic remedy," mandamus may issue to compel a public official to perform a purely ministerial, i.e., nondiscretionary duty. The common law writ of mandamus was abolished by Federal Rule of Civil Procedure 81(b). However, 28 U.S.C. § 1651(a) (2000) provides that federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." Pursuant to their powers under that section, federal courts continue to grant equitable relief, including mandatory injunctions, which sometimes are referred to as "writs of mandamus."

69. *Judicial Watch*, 2002 U.S. Dist. LEXIS 12598, at *32-33. The district court did not dismiss the plaintiffs' APA claims against the Cabinet members, which alleged a failure to comply with FACA.

70. 74 F.3d 1322 (D.C. Cir. 1996).

71. *Judicial Watch*, 2002 U.S. Dist. LEXIS 12598, at *56-57. "Nonstatutory" review actions traditionally find their jurisdictional basis in the general grant of federal-question jurisdiction in 28 U.S.C. § 1331. *Reich*, 74 F.3d at 1327-28. Here, the district court identified the basis as the mandamus statute. Thus, "nonstatutory" judicial review is somewhat of a misnomer because all actions in the federal district courts must be based on some statute.

72. *Judicial Watch*, 2002 U.S. Dist. LEXIS 12598, at *58-59.

73. The district court acknowledged that it was premature to determine whether the relief of mandamus will or will not issue. To be sure, mandamus is a "drastic [remedy], to be invoked only in extraordinary situations." Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 34 (1980); *see also* Consolidated Edison Co. of N.Y. v. Ashcroft, 286 F.3d 600, 605 (D.C. Cir. 2002). Furthermore, it is not entirely clear that mandamus even could issue against the Vice President of the United States. *See* Franklin v. Massachusetts, 505 U.S. 788, 802-03 (1992); Swan v. Clinton, 100 F.3d 973, 978 (D.C. Cir. 1996).

74. *See* Alexander v. Sandoval, 532 U.S. at 275, 286 (2001); *see also* Correctional Servs. Corp. v. Malesko, 534 U.S. at 61, 66 (2001) (refusing to imply a cause of action for alleged constitutional violation).

75. This concern is particularly pronounced where Congress has manifested an intent to preclude judicial review in a statute. *See Reich*, 74 F.3d at 1328 ("To be sure, if Congress precluded non-statutory judicial review . . . that would be another matter."). In this regard, the federal defendants in the Cheney litigation noted that "Congress considered, but declined to include in FACA, an express right of action or other provision for judicial review." Memorandum In Support of Motion to Dismiss at 5, *Judicial Watch* (No. 01-1530).

76. *Judicial Watch*, 2002 U.S. Dist. LEXIS 12598, at *58.

77. Currently codified, in part, at 28 U.S.C. §§ 1361, 1391(e) (2000).

78. *See* Byse & Fiocca, *supra* note 67, at 318-19.

79. *See* Public Citizen v. Kantor, 864 F. Supp. 208, 213 (D.D.C. 1994); Mead Corp. v. United States, 490 F. Supp. 405, 407 (D.D.C. 1980), *aff'd*, 652 F.2d 1050 (D.C. Cir. 1981). *But see Reich*, 74 F.3d at 1327.

80. See Gonzaga Univ. v. Doe, 122 S. Ct. 2268, 2276 (2002) ("'[O]ne cannot go into court and claim a 'violation of §1983'—for § 1983 by itself does not protect anyone against anything.'") (citation omitted) (alteration in original).

81. *Id.*

82. *Id.* at 2277.

Sovereign Immunity

Fed. Maritime Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1864 (2002).

Decided May 28, 2002.

South Carolina State Ports Authority (the "*Port Authority*") refused to grant South Carolina Maritime Services Inc. ("*Maritime*") permission to berth its cruise ship at the Port Authority's port in Charleston, citing its anti-gambling policy. Maritime filed a complaint with the Federal Maritime Commission (FMC), contending that the Port Authority had violated the Shipping Act of 1984. In the subsequent proceeding before an administrative law judge (ALJ), the Port Authority claimed that, as an arm of the State of South Carolina, it was entitled to immunity under the Eleventh Amendment from Maritime's suit. The ALJ agreed with the Port Authority, stating that "'[i]f federal courts that are established under Article III of the Constitution must respect States' 11th Amendment immunity and Congress is powerless to override the States' immunity under Article I of the Constitution, it is irrational to argue that an agency like the Commission, created under an Article I statute, is free to disregard the 11th Amendment or its related doctrine of State immunity from *private* suits.'" *Id*. at 1869 (alteration in original) (citation omitted). Maritime did not appeal the ruling; however, the FMC, on its own motion, reviewed and reversed the ALJ's ruling, holding that the Eleventh Amendment is intended to cover "'proceedings before judicial tribunals . . . not executive branch administrative agencies.'" *Id.* (citation omitted). The Port Authority appealed to the Fourth Circuit, which reversed the FMC's ruling, concluding that "the proceeding 'walks, talks, and squawks very much like a lawsuit.'" *Id.* (citation omitted). The Supreme Court affirmed the Fourth Circuit. Justice Thomas delivered the opinion of the Court, joined by the Chief Justice and Justices O'Connor, Scalia, and Kennedy. Justice Stevens filed a dissenting opinion. Justice Breyer filed a dissenting opinion in which Justices Stevens, Souter, and Ginsburg joined.

The Court first affirmed that the States only "surrender[ed] a portion of their inherent immunity" at the time the Constitution was ratified. *Id.* at 1870. While the States "consent[ed] to suits brought by sister States or by the Federal Government," they retained their immunity from private suits. *Id.* Having affirmed the "defining feature" of "[d]ual sovereignty," in the constitutional system, the Court next turned to the question of whether this sovereign immunity is limited to judicial proceedings or whether it extends to administrative proceedings. *Id.* Justice Thomas noted that history does not provide "direct guidance" for the question, as the Framers "could not have anticipated the vast growth of the administrative state." *Id.* at 1872. However, Thomas continued, "This Court . . . has applied a presumption . . . that the Constitution was not intended to 'rais[e] up' any proceedings against the States that were 'anomalous and unheard of when the Constitution was adopted.'" *Id.* (alteration in original). The similarities between the FMC proceeding and judicial proceedings are "overwhelming." *Id.* at 1874. Additionally, he emphasized, sovereign immunity is granted "to accord States the dignity that is consistent with their status as sovereign entities." *Id.* If the Framers thought it "an impermissible affront to a State's dignity to be required to answer the complaints of private parties in federal courts, we cannot imagine that they would have found it acceptable to compel a State to do exactly the same thing before [an] administrative tribunal." *Id.* The FMC made several attempts to distinguish the administrative proceedings from judicial proceedings; however, Thomas determined that none of these outweighed the "primary function" of sovereign immunity, which is to "afford the States the dignity and respect due sovereign entities." *Id.* at 1879.

Justice Breyer's dissent[1] summarized the case as a "typical Executive Branch agency exercising typical Executive Branch powers seeking to determine whether a particular person has violated federal law." *Id.* at 1882 (Breyer, J., dissenting). Breyer continued, "The Framers enunciated . . . the principle that the Federal Government may sue a State without its consent. They also described in the First Amendment the right of a citizen to petition the Federal Government for a redress of grievances. . . . [In this case,] a private citizen has asked the Federal Government to determine whether the State has complied with federal law and, if not, to take appropriate legal action in court." *Id.* at 1885. Breyer went on to acknowledge that the principles he articulated "apply only through analogy." *Id.* The citizen "believing that a State has violated federal law, seeks a determination by an Executive Branch agency that he is right . . . ; if the State fails to comply, the Federal Government may bring an action against the State in federal court." *Id*. Furthermore, Breyer argued, citizens cannot compel states to respond; they can merely "produce practical pressures upon the State to respond." *Id*. at 1886. Such practical pressures "cannot sufficiently 'affront' a State's 'dignity' as to warrant constitutional 'sovereign immunity' protections." *Id.* at 1887. The Court's response, he declared, "simply begs the question of *when* and *why* States should be entitled to special constitutional protection." *Id.* Breyer closes, despairing that the Court is departing from the understanding of the Constitution that has endured "since the New Deal." *Id.* at 1889. Instead, he mourns, they seem unable to understand "the Constitution's demands for structural flexibility sufficient to adapt substantive laws and institutions to rapidly changing social, economic, and technological conditions." *Id*. The Court's decision, he opines, restricts the Federal Government "far too severely." *Id.*

Lapides v. Bd. of Regents of Univ. Sys. of Ga., 122 S. Ct. 1640 (2002).

Decided May 13, 2002.

Respondent, a professor, brought a lawsuit against the Board of Regents of the University of System of Georgia, as well as other university officials. Respondent claimed that the placement of certain information in his personnel files violated

both Georgia and federal law. The defendants removed the case to federal court, where the individual defendants sought dismissal on qualified immunity grounds. The District court allowed dismissal of the individual federal suits. The State also sought dismissal of its case under the Eleventh Amendment, arguing that it retained immunity in federal court, despite the fact that a state statute had waived its sovereign immunity in state court. The Eleventh Circuit held for the State, but the Court reversed. Justice Breyer delivered the opinion for a unanimous court.

Although limiting its holding to state-law claims for which the State has explicitly waived its immunity from state-court proceedings, the Court found it "inconsistent" to allow a State to first invoke federal jurisdiction and then to claim Eleventh Amendment immunity. *Id*. at 1643. The Court noted that to allow such a scenario is to allow the State to first extend the judicial power of the United States to the case at hand, and then, in a second step, to deny the judicial power of the United States to the case at hand. A Constitution that "permit[s] States to follow their litigation interests by freely asserting both claims in the same case could generate seriously unfair results." *Id.* Adopting Georgia's interpretation of the Eleventh Amendment would allow "States to achieve 'unfair tactical advantage[s,]' if not in this case, in others." *Id.* at 1645 (alteration in original) (citation omitted). Nor can a "benign motive" excuse Georgia, as "[m]otives are difficult to evaluate, while jurisdictional rules should be clear." *Id.* Justice Breyer similarly found other arguments of Georgia inadequate to remove the State from the general rule that a voluntary act of the State binds it and that it cannot escape such a result by invoking the Eleventh Amendment. Such a rule "rest[s] upon the problems of inconsistency and unfairness that a contrary rule of law would create." *Id.*

Raygor v. Regents of the Univ. of Minn., 122 S. Ct. 999 (2002).
Decided February 27, 2002.

Petitioners allege age discrimination by their employer, the University of Minnesota. They filed suit in federal district court under the Age Discrimination in Employment act (ADEA) and a state law discrimination statute. The latter was filed under the federal supplemental jurisdiction statute, 28 U.S.C. § 1367, which also purports to toll the limitations period for supplemental claims while they are pending in federal court. The District Court dismissed all claims, citing the State's sovereign immunity. Petitioners refiled the state claims in state court, claiming that the statute of limitations had been tolled under § 1367(d). The Court held § 1367(d) unconstitutional when applied to claims against nonconsenting state defendants. Justice O'Connor delivered the opinion of the Court, joined by the Chief Justice and Justices Scalia, Kennedy, and Thomas. Justice Ginsburg filed an opinion concurring in part and concurring in the judgment. Justice Stevens filed a dissenting opinion, joined by Justices Souter and Breyer.

The Court held that the grant of supplemental jurisdiction in § 1367(a) "does not extend to claims against nonconsenting state defendants." *Id.* at 1005. The grant of jurisdiction in § 1367(a) is broad, "insufficient to constitute a clear statement of an intent to abrogate state sovereign immunity." *Id.* The remaining question, O'Connor noted, is whether, under § 1367(d),[2] the statute of limitations can be tolled for a claim originally asserted as a supplemental claim under § 1367(a), but later dismissed on Eleventh Amendment grounds. In suits against the United States, O'Connor stated, the "limitations period may be 'a central condition' of the sovereign's waiver of immunity." *Id.* There is a rebuttable presumption that equitable tolling applies to the United States' waiver of immunity; however, this rule should not necessarily be applied to the States since the State "'may prescribe the terms and conditions on which it consents to be sued.'" *Id.* at 1006 (citation omitted). Instead, O'Connor held, "When 'Congress intends to alter the "usual constitutional balance between the States and the Federal Government," it must make its intention to do so "unmistakably clear in the language of the statute.'" *Id.* (citation omitted). A federal law tolling a statute of limitations "at least affects the federal balance in an area that has been a historic power of the States, whether or not it constitutes an abrogation of state sovereign immunity." *Id.* Furthermore, § 1367(d) does not state a "clear intent to toll the limitations period for claims against nonconsenting States that are dismissed on Eleventh Amendment grounds." *Id.* Since the State never consented to suit, § 1367(d) does not apply, and the statute of limitations is not tolled.

Scope of the Spending Clause
Gonzaga Univ. v. Doe, 122 S. Ct. 2268 (2002).
Decided June 20, 2002.

Respondent was an undergraduate student in the School of Education at Gonzaga University. His "teacher certification specialist," motivated by information overheard regarding Respondent, as well as a state requirement that all new teachers obtain an affidavit of good moral character, disclosed certain of Respondent's personal information to a state agency responsible for teacher certification. Respondent alleged a violation of the Family Educational Rights and Privacy Act of 1974 (FERPA), a statute enacted under Congress' Spending Power. *See* 20 U.S.C. § 1232g(b)(1). Respondent claimed that this violation gave him a private right of action under 42 U.S.C. § 1983.[3] The Court found the Respondent's action to be foreclosed, as "the relevant provisions of FERPA create no personal rights to enforce under 42 U.S.C. § 1983." *Id.* at 2271-72. The Chief Justice delivered the opinion of the Court, joined by Justices O'Connor, Scalia, Kennedy, and Thomas. Justice Breyer filed an opinion concurring in the judgment, in which Justice Souter joined. Justice Stevens filed a dissenting opinion, in which Justice Ginsburg joined.

The Chief Justice's opinion addressed an important federalism issue. Can a federal court, relying upon § 1983, authorize private parties to enforce FERPA, a federal spending statute, against a state or local government that has accepted funds? No, said Rehnquist: "[U]nless Congress 'speak[s] with a clear voice,' and manifests an 'unambiguous' intent to confer individual rights, federal funding provisions provide no basis for private enforcement by § 1983." *Id.* at 2273 (citations omitted). Rehnquist continued, "[We] reject the notion that our cases permit anything short of an unambiguously conferred

right to support a cause of action brought under § 1983." *Id.* at 2275. The relevant inquiry, as with implied right of action cases, is "whether Congress *intended to create a federal right*." *Id.* Rehnquist rejected the argument of Stevens that separation of powers concerns are "more pronounced in the implied right of action context as opposed to the § 1983 context." *Id.* at 2277. Furthermore, Rehnquist held that if "'Congress intends to alter the "usual constitutional balance between the States and the Federal Government," it must make its intention to do so "unmistakably clear in the language of the statute."'" *Id.* at 2279 (citations omitted). The remainder of the opinion went on to evaluate whether or not such an unambiguous intent had, in fact, been manifested in the language of FERPA. The Court found that it had not.

Barnes v. Gorman, 122 S. Ct. 2097 (2002).
Decided June 17, 2002.

The Respondent, a paraplegic, was arrested for trespassing. Over Respondent's objection, the police officers arresting him removed him from his wheelchair and placed him in a police van. They used a seatbelt and Respondent's own belt to strap him to a bench in the van. When one of the belts subsequently came loose, Respondent fell to the floor and suffered serious injuries. Respondent filed suit, alleging that appropriate policies had not been implemented for the arrest and transportation of persons with spinal cord injuries and claiming that he had been discriminated against in violation of § 202 of the Americans with Disabilities Act of 1990 (ADA) and § 504 of the Rehabilitation Act of 1973. A jury found Petitioners liable and awarded the Respondent both compensatory and punitive damages. The Court, however, held that punitive damages may not be awarded in private suits brought under § 202 of the ADA and § 504 of the Rehabilitation Act. Justice Scalia delivered the opinion of the Court, joined by the Chief Justice and Justices O'Connor, Kennedy, Souter, and Thomas. Justice Souter filed a concurring opinion, in which Justice O'Connor joined. Justice Stevens filed an opinion concurring in the judgment, in which Justices Ginsburg and Breyer joined.

The Court refused to expand the scope of the federally imposed conditions that can be attached to funds disbursed under the Spending Power. Justice Scalia held that the remedies for both § 202 of the ADA and § 504 of the Rehabilitation Act are "coextensive with the remedies available in a private cause of action brought under Title VI of the Civil Rights Act of 1964." *Id*. at 2100. As with other Spending Clause statutes, Scalia noted, Title VI operates "'much in the nature of a *contract:* in return for federal funds, the [recipients] agree to comply with federally imposed conditions.' . . . Just as a valid contract requires offer and acceptance of its terms, '[t]he legitimacy of Congress' power to legislate . . . rests on whether the [recipient] voluntarily and knowingly accepts the terms of the "contract."'" *Id.* at 2100-01 (citations omitted) (first, third, and fourth alterations in original). The same contract law analogy, the Court held, applies in determining the scope of remedies. Not only are punitive damages generally not available for breach of contract cases, but "it is doubtful that funding recipients would have agreed to exposure to such unorthodox and indeterminate liability; it is doubtful whether they would even have *accepted the funding* if punitive damages liability was a required condition." *Id.* at 2102. Therefore, merely by accepting federal funds, Title VI recipients have not implicitly consented to liability for punitive damages. Because suits brought under § 202 of the ADA and § 504 of the Rehabilitation Act are coextensive with Title VI, punitive damages may not be brought for those types of claims, either.

Immunity of State Officials Against § 1983 Suits
Hope v. Pelzer, 122 S. Ct. 2508 (2002).
Decided June 27, 2002.

Respondent, an inmate in an Alabama prison, was twice handcuffed to a hitching post for disruptive conduct. His arms were handcuffed above shoulder height, causing him to complain of pain. During the first incident, he was offered the opportunity for water and bathroom breaks. During the second incident, however, he was ordered to take off his shirt and stand in the sun for seven hours. He alleged that he was deprived of water and bathroom breaks and taunted for his thirst. Respondent filed suit under § 1983 against three guards involved in the first incident, only one of whom was also involved in the second incident. The Court held that the officials' claim of sovereign immunity was precluded at the summary judgment phase. Justice Stevens delivered the opinion of the court, in which Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer joined. Justice Thomas filed a dissenting opinion, in which the Chief Justice and Justice Scalia joined.

In its reversal of the Eleventh Circuit, the Court held to a looser standard for subjecting state officials to § 1983 liability than had the appellate court. First, the Court quickly resolved the "threshold inquiry" of "whether plaintiff's allegations, if true, establish a constitutional violation," determining that the Eleventh Amendment violation was "obvious." *Id*. at 2513-14.[4] Having deemed the actions "cruel and unusual punishment," the Court then turned to whether the officials should be shielded from liability because "their actions did not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Id.* at 2515 (citation omitted). The Eleventh Circuit had upheld the officials' claim of sovereign immunity, noting that "the federal law by which the government official's conduct should be evaluated must be preexisting, obvious and mandatory, . . . [established by] cases that are materially similar to the facts in the case in front of us." *Id*. at 2513 (internal quotation marks omitted). Although precedents existed which were "analogous," none was "materially similar" to Respondent's situation; therefore, qualified immunity should be upheld. *Id*. (internal quotation marks omitted). The Court, however, holding that such a standard placed a "rigid gloss on the qualified immunity standard," held that "fair warning," rather than a "materially similar" standard was sufficient. *Id*. at 2515-16. Respondent, it held, had met the "fair warning" burden.

In his dissent, Justice Thomas noted that the Court had correctly stated the initial standard for granting qualified immunity, but had then incorrectly applied it. *Id*. at 2522 (Thomas, J., dissenting). Instead, the Eleventh Circuit had "properly

noted," that "'[i]t is important to analyze the facts'" in prior cases and "'determine if they are materially similar to the facts in the case in front of us.'" *Id.* (alteration in original) (citations omitted). Far from imposing a "'rigid gloss,'" the Eleventh Circuit "merely (and sensibly) evaluated the cases relied upon by petitioner to determine whether they involved facts 'materially similar' to those present in this case." *Id.* at 2523. Thomas concluded that "conduct can be 'clearly established' as unlawful" even without identifying a "materially similar" case. *Id.* at 2522. There are "[c]ertain actions [that] so obviously run afoul of the law that an assertion of qualified immunity may [nevertheless] be overcome." *Id.* However, due to weaknesses in the Respondent's claim not discussed by the majority, neither the "materially similar" nor the "obviously run[s] afoul" standards were met and qualified immunity should have been granted to Petitioners.

Federal Preemption of State Laws

City of Columbus v. Ours Garage & Wrecker Serv., 122 S. Ct. 2226 (2002).

Decided June 20, 2002.

Federal preemption provisions relating to motor carriers specifically reserve certain safety regulations to the States. The City of Columbus, Ohio, a municipality, passed extensive safety regulations under this exception. The delegation of this responsibility to local governments in Ohio resulted in a challenge to the local statutes. While most of the *City of Columbus* opinion revolved around the specific language of the statutes in dispute, an important federalism point was made as the Court upheld the authority of the States, when delegated power by Congress, to, in turn, delegate this power to local governments. Justice Ginsburg delivered the opinion of the Court, in which the Chief Justice and Justices Stevens, Kennedy, Souter, Thomas, and Breyer joined. Justice Scalia filed a dissenting opinion, in which Justice O'Connor joined.

Federal preemption provisions relating to motor carriers preempt any provisions by "'a State [or] political subdivision of a State . . . related to a price, route, or service of any motor carrier . . . with respect to the transportation of property.'" *Id.*. at 2230 (citation omitted). The same preemption statute specifically reserves to the States the power to implement certain safety regulations. The general rule specifically mentions both "State[s]" and "political subdivision[s]," while the exception only mentions "State[s]." The Court held that the failure of the statute to mention political subdivisions does not prohibit the States from delegating its authority. Justice Ginsburg stated, "Ordinarily, a political subdivision may exercise whatever portion of state power the State, under its own constitution and laws, chooses to delegate to the subdivision. Absent a clear statement to the contrary, Congress' reference to the 'regulatory authority of a State' should be read to preserve, not preempt, the traditional prerogative of the States to delegate their authority to their constituent parts." *Id.* (citation omitted).

Rush Prudential HMO v. Moran, 122 S. Ct. 2151 (2002).

Decided June 20, 2002.

Respondent was denied surgery by Petitioner, her HMO, on the grounds that the procedure was not "medically necessary." Respondent made a written demand for an independent medical review of the claim, as provided for in § 4-10 of Illinois' HMO Act. The Illinois Act provides that, upon a finding through such an independent review that the claim is "medically necessary," the HMO is to pay for the requested procedure. Respondent's independent doctor determined the claim to be medically necessary, but Petitioner still refused to pay for the procedure. Respondent filed suit to compel compliance under § 4-10. In response, Petitioner claimed that § 4-10 is preempted by ERISA. The district court denied Respondent's claim on preemption grounds; however, the Seventh Circuit reversed. The Court affirmed, holding that ERISA does not preempt this provision of the Illinois Act. Justice Souter delivered the opinion of the Court, joined by Justices Stevens, O'Connor, Ginsburg, and Breyer. Justice Thomas filed a dissenting opinion, in which the Chief Justice and Justices Scalia and Kennedy joined.

ERISA contains an express preemption provision, which states that ERISA is to "'supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.'" *Id.*. at 2158 (citation omitted). The preemption clause is followed by a saving clause, providing that "'nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.'" *Id.* (citation omitted). The Court noted that the "congressional language seems simultaneously to preempt everything and hardly anything." *Id.* at 2159. In such a scenario, Justice Souter noted, it is to be remembered that the "'historic police powers of the States were not [meant] to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Id.* (alteration in original) (citation omitted). Interpreting the language in the statute according to its "'ordinary meaning,'" Souter continued, § 4-10 can only be saved from preemption if it "regulates insurance" as provided for in the saving clause in ERISA. *Id.* (citation omitted). Souter concluded that § 4-10 does, under a "common-sense view," "regulate insurance"; therefore, ERISA does not preempt § 4-10 unless § 4-10 also imposes a "new obligation or remedy" that runs contrary to the congressional policy laid out in ERISA. *Id.* at 2159, 2163, 2170. Souter determined that the requirements in § 4-10 bear "a closer resemblance to second-opinion requirements than to arbitration schemes." *Id.* at 2170. Accordingly, no "new obligation or remedy" is imposed and the statute is not preempted.

Justice Thomas' dissent emphasized congressional intent to establish "a uniform federal law of employee benefits so that employers are encouraged to provide benefits to their employees." *Id*. at 2171 (Thomas, J., dissenting). Thomas and the majority were in agreement on some portions of the analysis to be applied: They each note that the preemption and saving clauses are "antithetically broad and 'are not a model of legislative drafting.'" *Id.* at 2174 (citations omitted). Furthermore, Souter and Thomas agreed that "even a state law that 'regulates insurance' may be pre-empted if it supplements the remedies provided by ERISA, despite ERISA's saving clause." *Id.* at 2171. However, Thomas concludes that § 4-10 "cannot be characterized as anything other than an alternative state law remedy or vehicle for seeking benefits." *Id.* at 2175. Failing to

uphold preemption would "eviscerate ERISA's comprehensive and exclusive remedial scheme. . . . [T]he Court today ignores the 'interlocking, interrelated, and interdependent' nature of that remedial scheme and announces that the relevant inquiry is whether a state regulatory scheme 'provides [a] new cause of action' or authorizes a 'new form of ultimate relief.'" *Id.* at 2176 (alteration in original) (citation omitted).

Also of Interest

John C. Eastman & Edwin Meese, *The Federalism Side of School Vouchers* (July 2002).
http://www.ashbrook.org/publicat/oped/eastman/02/vouchers2.html

Terry Eastland, *Federalism's Friends* (June 2002).
http://www.weeklystandard.com/Content/Public/Articles/000/000/001/410jskqg.asp

John C. Eastman, *The Federalism Issue Underlying The Vouchers Case* (February 2002).
https://www.claremont.org/projects/jurisprudence/020225eastman.html

Michael Greve, *Federalism on the Bench* (December 2001).
http://www.weeklystandard.com/content/public/articles/000/000/000/601rkzha.asp

Footnotes

1. Justice Stevens joined in Justice Breyer's dissent, but he also wrote a brief dissent of his own, stating his view that the "'dignity' rationale is '"embarrassingly insufficient."'" *Fed. Maritime Comm'n*, 122 S. Ct. at 1880 (Stevens, J., dissenting) (citations omitted).
2. § 1367(d) states that "'[t]he period of limitations for any claim asserted under subsection (a) . . . shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period."
3. The Washington courts found that petitioners acted "under color of state law" for purposes of § 1983. The Court assumed, without deciding, that the relevant disclosures occurred under color of state law. *Gonzaga*, 122 S. Ct. at 2272 n.1.
4. The dissent called this Eighth Amendment analysis "woefully incomplete." *Hope*, 122 S. Ct. at 2521 (Thomas, J., dissenting).

FINANCIAL SERVICES & E-COMMERCE

THE USA PATRIOT ACT OF 2001 - CRIMINAL PROCEDURES PROVISIONS

*BY KENT SCHEIDEGGER, CHARLES HOBSON, MARITZA MESKAN, KANNON SHANMUGAM, STEPHEN HENDERSON**

A. Introduction

The antiterrorism bill recently enacted by Congress makes a number of significant changes to criminal procedure and related topics. This paper describes some of these changes and discusses some of the legal implications. Many of the most important changes relate to the laws on wiretapping and surveillance. These sections are the subject of a separate paper.

Four different versions of the bill were considered before final passage. The Administration proposed a bill shortly after the terrorist attacks of September 11, 2001. On October 11, the Senate passed S. 1510, the Uniting and Strengthening America Act, containing most of the Administration's proposals, but with some modifications, deletions, and additions, largely as the result of negotiations between the Attorney General, Senator Leahy, and Senator Hatch.[1] The same day, the House Judiciary Committee reported H. R. 2975, the PATRIOT Act of 2001, which contained substantial differences.[2] The next day, this bill was amended on the House floor to substitute the text of H. R. 3108, a bill similar to, and titled the same as, the Senate bill.[3] This bill passed the House the same day.[4] On October 23, H. R. 3162, the USA PATRIOT Act, was introduced, reconciling the remaining differences between the House and Senate versions, and it passed the House the next day, 357 to 66.[5] On October 25, H. R. 3162 passed the Senate 98 to 1.[6] The President signed it on Saturday, October 26, as Public Law 107-56.[7]

The provisions of the bill which deal with criminal procedure or related topics, other than those addressed in the wiretapping and surveillance paper, include:

- § 203 amends Federal Rule of Criminal Procedure 6(e)(3)(C) to permit sharing of grand jury information with other agencies if it involves foreign intelligence information, as defined. It also amends 18 U. S. C. § 2517 to permit similar sharing of information from wiretaps.
- § 213 adds subsection (b) to 18 U. S. C. § 3103a to authorize delayed notice of execution of a warrant, if three conditions are met: (1) immediate notice would have an "adverse result," defined as physical danger, flight from prosecution, destruction of evidence, intimidation of witnesses, jeopardizing investigation, or delay of a trial; (2) no tangible property or wire, electronic, or stored communications are to be seized, with exceptions; and (3) notice will be given "within a reasonable period."
- § 219 amends Federal Rule of Criminal Procedure 41(a) to authorize nationwide search warrants in terrorism investigations.
- § 223 creates remedies for unauthorized disclosures. Subsection (a) amends 18 U. S. C. § 2520, relating to wiretapping, to provide for court referrals for administrative discipline of employees. It also provides that use of intercepted information beyond that authorized by § 2517 is a violation for the purpose of the civil remedy of the existing § 2520(a). Subsection (b) makes similar changes to 18 U. S. C. § 2707, on stored communications. Subsection (c) creates a civil action against the United States for money damages with a $10,000 minimum. It provides for costs but not attorney's fees.
- § 412(a) adds § 236A to the Immigration and Nationality Act. The new section requires the Attorney General to take into custody any alien certified to be inadmissible or deportable on one of six grounds: 8 U. S. C. § 1182(a)(3)(A)(i) (espionage, sabotage, or export restrictions);
- 1182(a)(3)(A)(iii) (attempt to overthrow U. S. Government); § 1182(a)(3)(B) (terrorist activities, amended by § 411 of the Act); and parallel provisions of § 1227, *i.e.* subds. (a)(4)(A)(i) & (iii) and (a)(4)(B). In addition, it authorizes certification for an alien "engaged in other activity that endangers the national security of the United States."
- § 412(b) limits judicial review of detentions under § 412(a) to habeas corpus. It expressly includes judicial review of the merits of the decision to detain, but it does not specify a standard of review. In most cases, the habeas petition would be in the district court in the place of detention. Appeal of the decision of that court is exclusively to the D.C. Circuit, regardless of where the district court is.
- § 412(c) requires the Attorney General to make semiannual reports to Congress on the use of this statute.
- § 503 amends 42 U. S. C. § 14135a, part of the DNA Analysis Backlog Elimination Act of 2000. That section requires collection of DNA samples from federal prisoners convicted of any of several violent crimes, including murder, sex crimes, kidnapping, and robbery or of burglary. The amendment replaces a temporary subsection, no longer needed, with one extending the scope of DNA sampling to terrorism offenses (18 U. S. C. § 2332b(g)(5)(B)) and all crimes of violence (18 U. S. C. § 16). This change will considerably expand the size of the DNA database, although the federal government will not, as some states do, test defendants before trial.
- § 804 amends 18 U. S. C. § 7, defining the "special maritime and territorial jurisdiction of the United States." These are the places where federal law defines and punishes crimes that would normally fall under state jurisdiction. It includes military bases and ships at sea, among others. The amendment adds embassies, consulates, similar properties, and their adjacent residences, for the purpose of crimes committed by or against U. S. nationals.
- § 809 extends the statute of limitation for certain terrorism crimes to eight years and eliminates it altogether for a narrower set of crimes causing or risking death or serious bodily injury.

Many of these changes are matters of policy, well within the legislative authority. They raise few constitutional questions. The judicial role in the litigation of these statutes will therefore be primarily interpretation rather than review for validity. A few provisions do raise constitutional issues.

B. Grand Jury Disclosure

With English antecedents dating from the 12th century, the grand jury was used by the American colonial government to prosecute crown officials, including British soldiers, and as a way to protest abuses and to criticize the action/inaction of the Crown's government.[8] It emerged from the American Revolution with increased prestige and, therefore, was included in the 5th Amendment in the Bill of Rights.[9]

Traditionally thought of as both sword and shield, it served to protect citizens from government overbearance, but also to enable prosecution of offenses. Critics of the contemporary grand jury argue that, from post-revolutionary times to present, the screening role or "shield" has lost importance, while the "sword" or the investigative role and the government's power has expanded to make the present day role the opposite of what was originally intended by the Founding Fathers.[10]

The general rule is that grand jury proceedings are secret.[11] The rule of secrecy has generally been considered to serve a number of purposes. Grand jury secrecy strengthens the investigative function by safeguarding witnesses against possible reprisals and serves as a screening function to protect innocent suspects that the grand jury decides not to charge.[12] The secrecy of the proceedings serves as an investigative advantage. It keeps the target of the proceedings "in the dark" as to the focus of the inquiry, thus, preventing the target's flight and destruction or fabrication of evidence.[13] Secrecy encourages otherwise reluctant witnesses to be forthcoming by deterring possible witness intimidation and also keeps the investigation from coming to the attention of the public. Whether the target of a grand jury investigation is a prominent person or regular citizen, public disclosure that he is under investigation might cause irreparable harm to his reputation, even if no basis for prosecution is found. Moreover, where a prominent person is the target, prosecutors might be inhibited from initiating an investigation.[14]

Grand jury secrecy has never been absolute. Early on, courts recognized that secrecy needed to be imposed only as long as it furthered the effectiveness of a grand jury's investigative and screening functions.[15] Over the second half of the 20th Century, courts and legislatures have moved towards relaxing the rules of secrecy.[16] Courts often strike a balance between weighing the justification of grand jury secrecy against the various interests served by disclosure.[17]

One view is that the secrecy requirements of the grand jury are basically right for reasons beyond its historical use. Grand jury targets are more deserving of protection because they exist in an institutional framework that involves a moderate level of coercion and because they are often prominent people who suffer greater reputational losses when their coerced testimony or targeting is disclosed.[18]

Another view considers the grand jury as a "prosecutorial puppet" that uses the blanket secrecy to conceal the inequities of the grand jury system and insures that the public does not see that the proceedings lack safeguards. Originally a check on prosecutorial power, it has become a tool for prosecutorial overreaching.[19] At its inception, the grand jury's more important function was to protect the innocent from government persecution and to provide a forum for the public's grievances. In present times, the prosecutor dominates the grand jury proceedings. With few procedural safeguards, *i.e.*, no defense attorneys present, no judge present, no evidentiary rules, no double jeopardy rule, broad subpoena power, and limited judicial interference after *United States* v. *Williams*,[20] grand juries operate largely outside the courts' control.

The existing rule provides for six exceptions. Three of these exceptions require court authorization: disclosures in connection with a judicial proceeding, request of a defendant, or to state officials to prosecute violations of state law.[21] Three exceptions permit disclosure by the attorney for the government without judicial authorization: to another federal government attorney, to other state or federal government personnel assisting in the federal prosecution, or to another federal grand jury.[22] The three exceptions to disclosure without judicial approval are internal to government, in a broad sense, and for the purpose of federal law enforcement only.

The Act rewrites Rule 6(e)(3)(C), expanding the authority to share criminal investigative information. The present exceptions in paragraphs (C)(i)-(iv) are renumbered (C)(i)(I)-(IV), and a new exception (V) is added. This new exception allows disclosure of matters that involve foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947)[23] or foreign intelligence information to any other Federal law enforcement, intelligence, protective, immigration, national defense, or national security official as necessary in order to assist them in performing their duties, subject to any limitations on unauthorized disclosure of such information. Foreign intelligence information is defined as information, whether or not concerning a United States person that relates to the ability of the United States to protect against actual or potential attack or other grave hostile acts of a foreign power or agent. Foreign intelligence information also includes information necessary to protect against sabotage or international terrorism by a foreign power or agent, a foreign power's clandestine intelligence activities conducted by its intelligence services, networks, or agents, or information about the national defense and security or the conduct of the foreign affairs of the United States.[24]

As the Act was moving through Congress, there was little controversy regarding whether to expand the disclosure exceptions. The principal controversy was over whether to make the new exception subject to prior court approval.[25] The House Judiciary Committee version would have required court permission.[26] The final legislation does not require court permission.

The amendment to Rule 6 presents no substantial constitutional questions. The grand jury secrecy rule is a rule of policy which has always had exceptions, and it has been frequently modified.[27] The secrecy rule has no credible claim to constitutional stature. The notices required by Rule 6(e)(3)(C)(iii) will provide a database for Congress to consider when it reviews Title II of this Act four years hence. Although the grand jury provision does not "sunset" automatically,[28] a review of it may be expected to be on the agenda when Congress considers renewal of the sections that will expire.

C. Delayed Notice of Warrant Execution

When premises are searched or movable property is seized, the owner is generally given immediate notice of the search or seizure. Federal Rule of Criminal Procedure 41(d) expressly requires the officer to give an inventory for the seizure of personal property. Where nothing tangible is taken, however, there is no express provision in the law for notice that an entry was made.

In wiretapping cases, prompt notice would obviously defeat the purpose of the tap.[29] After-the fact notice appears to be both necessary and sufficient. In *Berger* v. *New York*,[30] the Supreme Court noted the lack of a notice provision in striking down the New York wiretapping law. The next year, Congress included a notice provision in the federal wiretapping law.[31] The Supreme Court has said this notice provision, along with a companion return provision, satisfies constitutional requirements.[32]

In *Dalia* v. *United States*,[33] the Supreme Court rejected a contention that the Fourth Amendment completely forbids covert entry. In *Dalia*, the purpose of the entry was to plant a "bug." Relying on its earlier approval of notice after the completion of the surveillance, the Court held, "There is no reason why the same notice is not equally sufficient with respect to electronic surveillances requiring covert entry."[34]

This leaves the question of whether there is a Fourth Amendment requirement of notice of entry to search rather than to plant a device, and, if so, whether delayed notice of the type used in wiretapping cases is sufficient. The Supreme Court has not addressed this question, and there is a division in the Courts of Appeals regarding whether the notice requirement is constitutionally based at all. The Ninth Circuit held in the *Freitas* case that notice was constitutionally required, the time must be short, and it "should not exceed seven days except upon a strong showing of necessity."[35] In the *Pangburn* case, the Second Circuit declined to follow the holding of *Freitas* that notice is constitutionally required. Instead, *Pangburn* derived a notice requirement from Rule 41.[36] The nonconstitutional status of the rule was important in *Pangburn* because of the differing standard for suppression as a remedy.[37] It is even more important now, since the constitutional status of a rule limits the power of Congress to modify it, although it does not completely preclude a legislative role in defining adequate protection.[38]

The new statute provides only for delayed notice, not absence of notice, so the constitutional question would be whether the grounds and length of delay are constitutionally sufficient. The statute does not provide a fixed period, but rather "a reasonable period [after the warrant's] execution," with extensions "for good cause shown." This standard would probably not pass muster under the Ninth Circuit's relatively rigid constitutional rule in *Freitas*, but would under a more flexible approach.

Although not squarely on point, we can derive some indication of the likely outcome from the Supreme Court's recent cases on the legality of "no-knock" warrants. These cases involve the manner of execution of the entry, and specifically the timing of notice, rather than the issues of determining whether a search is legal at all, which make up the bulk of Fourth Amendment cases.

Remarkably, the constitutional status of the common-law "knock and announce" rule was not settled until 1995, over two centuries after the adoption of the Fourth Amendment, when the Supreme Court held that it was generally part of the reasonableness of searches required by that amendment.[39] At the same time, the Court cautioned that the "flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests."[40]

Two years later, the high court expanded on this caveat in its unanimous decision in *Richards* v. *Wisconsin*. "In order to justify a 'no-knock' entry, the police must have a *reasonable suspicion* that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, *or that it would inhibit the effective investigation* of the crime by, for example allowing the destruction of evidence . . . . This showing is not high, but the police should be required to make it whenever the reasonableness of a no-knock entry is challenged."[41]

If the new statute is judged along the lines of the relatively lenient standard of *Richards*, it should clear the hurdle with ease. The statute requires "reasonable cause,"[42] which is at least as high as "reasonable suspicion." It requires danger of an "adverse result," incorporating by reference the definition of 18 U. S. C. § 2705(a)(2), relating to access to stored communications. The definition of paragraph (E) that disclosure would "seriously jeopardiz[e] an investigation" is no less stringent than *Richards* and possibly more so. The other criteria also fit within the principle of reasonableness of *Richards*.

Richards does not, of course, address length of delay, as that is not an issue in the "no-knock" situations. However, its broad allowance for the legitimate needs of law enforcement, coupled with the Court's earlier approval of the 90-day delay authorized in § 2518(8)(d) make it unlikely that the 7-day limit of *Freitas* will survive Supreme Court scrutiny.

The final question is whether the "sneak and peak" warrant would be subject to a greater degree of constitutional scrutiny than the "no-knock" warrant. That seems unlikely. To be sure, the *Freitas* court was correct in its observation that "surreptitious searches . . . strike at the very heart of the interests protected by the Fourth Amendment."[43] Yet however unsettling such a search in one's absence may be, it pales in comparison to the terror of unknown intruders suddenly kicking in one's door and bursting in while the residents are home. In the delayed notice case, the police are doing what the warrant allows them to do in the resident's absence in any event, and the only difference is how long after the fact they will receive their notice.

In light of the Supreme Court's recent no-knock cases and earlier covert entry cases, it seems unlikely that any constitutional challenge to section 3103a(b) will succeed.

D. Remedies for Surveillance Violations

A recurring and controversial question in the area of search, seizure, and surveillance concerns the remedy for violations of the legal requirements. In 1914, the Supreme Court excluded illegally obtained evidence from federal criminal trials,[44] and in 1961 it extended this rule to the states.[45]

The other principal remedy has been a civil suit against the offending officer. For state and local officers, these suits are brought under the civil rights private action statute, 42 U. S. C. § 1983,[46] and for federal officers they are brought under a judicially-created cause of action, first announced by the Supreme Court in the *Bivens* case in 1971.[47] As a practical matter, recovery under these sections is limited by two corollary rules. First, the employing government entity is generally not liable as employer, although local governments can be liable for a pattern of violations committed as a matter of policy or custom.[48] Second, the doctrine of qualified immunity shields the officers for any actions which were not clearly illegal at the time of the action.[49] These two rules operating in tandem may leave no one liable for a violation.[50]

In 1995, Senator Hatch proposed eliminating the Fourth Amendment exclusionary rule in federal courts and replacing it with a civil action against the United States.[51] An action directly against the government provides a deeper pocket and avoids the immunity problem. This proposal was highly controversial,[52] and it was not adopted.

For search limitations created by statute, the remedy is under legislative control.[53] Congress may forbid exclusion of evidence and make other remedies exclusive, as it did in the Right to Financial Privacy Act.[54] Conversely, Congress can require suppression, as it did in the original wiretapping statute.[55] The original wiretapping statute and its exclusionary rule apply only to "wire" or "oral communication," *i.e.*, voice.[56] When Congress added "electronic communication" in the Electronic Communications Privacy Act, it specifically decided not to extend the exclusionary rule.[57]

The House Judiciary Committee's version of the "PATRIOT Act" would have amended the exclusionary rule of § 2515 to include electronic communications, reversing Congress's 1986 decision.[58] This section was omitted from the substitute and from the final legislation, which instead contains a civil compensation remedy.

Section 223(c)(1) of the Act enacts 18 U. S. C. § 2712, creating a cause of action against the United States for "[a]ny person who is aggrieved by any willful violation of" Chapter 121 of Title 18 (stored wire and electronic communications), Chapter 119 (wiretapping), or of three sections of the Foreign Intelligence Surveillance Act: 50 U. S. C. §§ 1806(a), 1825(a), and 1845(a) (use of FISA information). Presumably, this action is only for violations by federal officers, although the language does not expressly contain this limitation. It would be remarkable, to say the least, for the federal government to shoulder liability for the actions of state or local officers or even private persons.

The statute provides for actual damages with a $10,000 floor and for litigation costs, but it does not provide for attorney's fees.[59] The damage floor helps to answer the argument that civil remedies are insufficient because violations without major tangible damages cannot be feasibly litigated, although it still requires a lean law practice to pursue a $10,000 claim economically. The new section further provides that the amount of the award is to be docked from the budget of the offending agency.[60] This provision is clearly intended to insure that the management of the agency has a direct interest in preventing violations.

This section may be most significant as a harbinger of future legislative action in the search and seizure area. By reaffirming its 1986 decision and enacting a new direct action against the government, Congress has taken another step toward a general recognition that excluding valid, probative evidence in criminal prosecution is the wrong way to enforce privacy protections. Compensation for the victims of violations, whether they be innocent or guilty, and hitting the offending agency in the budget, bureaucracy's most sensitive point, may be the path of the future.

E. Detention of Suspected Terrorists

Section 412 adds section 236A to the Immigration and Nationality Act.[61] Presumably it will be codified as 8 U. S. C. § 1226A.[62] It gives the Attorney General broad powers to detain aliens suspected of terrorism, and it sets forth the process for reviewing detentions pursuant to the statute. Although Section 412 raises real constitutional and statutory interpretation issues, it should survive judicial review intact.

Subdivision (a) sets out the means for detaining aliens, (b) provides the sole means of reviewing the detention, and (c) establishes a reporting system. Subdivision (a)(1) gives the Attorney General the authority to take into custody any alien he certifies as a threat to national security under subdivision (a)(3). Subdivision (a)(2) limits release of the alien. Except for the limitation procedure provided for in subdivision (a)(6), the alien shall remain in custody until the alien is removed (*i.e.*, deported), "is finally determined not to be removable," or until the Attorney General determines that he is no longer subject to certification. Subdivision (a)(3) allows the Attorney General to certify an alien if he has "reasonable grounds to believe" that the alien has or will commit espionage or sabotage, try to overthrow the government, commit terrorist acts, or is otherwise engaged in activities that threaten national security. Subdivision (a)(4) limits delegation of this power to the Deputy Attorney General. Subdivision (a)(5) requires the Attorney General to begin criminal or deportation proceedings within seven days of the detention. Subdivision (a)(6) allows the detention of those aliens not likely to be deported "in the foreseeable future" for additional six-month periods if release would threaten national security or public safety. Subdivision (a)(7) requires the Attorney General to review the certification finding every six months and gives the alien the right to request review every six months.

Subdivision (b) limits judicial review of this statute or any decision under it to habeas review in federal court. The mechanism for judicial review is set forth in (b)(1). This subdivision limits review of "any action or decision relating to this section," including the "merits" of an (a)(3) or (a)(6) determination, to "habeas corpus proceedings consistent with this subsection." Subdivision (b)(2) provides that the habeas petition can only be filed with a Supreme Court justice, D.C. Circuit

justice, or "any district court otherwise having jurisdiction to entertain it." Paragraph (B) of this subdivision incorporates the rule that a petition filed with a higher court may be transferred to a district court. Under (b)(3) appellate jurisdiction over the habeas proceedings vests exclusively in the D.C. Circuit. Subdivision (b)(4) limits the rules of decision to Supreme Court and D.C. Circuit precedents. Subdivision (c) requires the Attorney General to provide reports regarding the detainees to the Senate and House Judiciary Committees.

The final language is confusing and possibly contradictory in subsection (a)(2) regarding the effect of the outcome of the removal proceedings. The second sentence retains language from the original Senate bill that "custody should be maintained irrespective . . . of any relief from removal granted the alien . . . ." Yet the last sentence, added in the final stages, says, "If the alien is finally determined not to be removable, detention pursuant to this subsection shall terminate." If the basis of detention was also the ground for removal, and if that ground has been finally adjudicated to be false, continued detention would raise serious constitutional questions. It seems likely the courts would avoid the questions by relying on the last sentence.

The primary constitutional issue raised by Section 412 is the legality of the detention under the Fifth Amendment's due process guarantee. Protection from government detention lies at the heart of due process.[63] This last term, the Supreme Court addressed the standards for reviewing immigration detention in *Zadvydas* v. *Davis*.[64] The question in *Zadvydas* was whether 8 U. S. C. § 1231(a)(6) "authorizes the Attorney General to detain a removable alien *indefinitely* beyond the removable period or only for a period *reasonably necessary* to secure the alien's removal" from the country.[65] The Court read the statute narrowly, holding that allowing the indefinite detention of resident aliens who were not likely to be deported "would raise a serious constitutional problem."[66]

Indefinite detention is constitutionally permissible in certain narrow situations involving special justification for the detention and sufficient procedural protections for the detainee.[67] Section 412 addresses both requirements. *Zadvydas* specifically mentions "suspected terrorists" as a " 'small segment of particularly dangerous individuals' " who could be subject to indefinite detention.[68] In *Zadvydas*, the Court was critical of the fact that the only procedural protections for the detainee in that case were found in administrative proceedings.[69] By contrast, Section 412 provides for a habeas review on the merits of any detention.

The *Zadvydas* standard must be met because aliens are subject to potentially indefinite detention under Section 412. Subdivision (a)(6), titled "Limitation on Indefinite Detention" provides that any alien "whose removal is unlikely in the reasonably foreseeable future, may be detained for additional *periods* of up to six months," (emphasis added), if release threatens national security or the safety of an individual or the community. Any doubt about this language is resolved by (a)(7) which requires the Attorney General to review certification "every 6 months" and allows the alien to request reconsideration of certification "each 6 months . . . ." So long as the certification is reviewed every six months, it may continue indefinitely. Since the (a)(6) review is also subject to review by a habeas court, there is once again more procedural protection than in *Zadvydas*.

Another potential constitutional problem is the evidentiary standard for detaining aliens. Section 412 authorizes detention whenever there is "reasonable grounds to believe" that the alien is engaged in terrorist activity. This phrase is taken from *Terry* v. *Ohio*.[70] Now known as the "reasonable suspicion" standard,[71] it requires less proof than probable cause.[72] Since the *Terry* standard only authorizes a brief "stop and frisk" in its Fourth Amendment context, allowing this standard to justify a potentially indefinite detention raises a constitutional issue.

The fact that national security is involved weighs heavily in the Fourth Amendment balance. The *Zadvydas* Court explicitly distinguished "terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security."[73] It is difficult to estimate exactly how much deference the courts will give to the unprecedented national security concerns addressed by this bill, but it is clear that the constitutional calculus differs significantly from *Zadvydas*, or any other recent detention case. The principle of judicial deference pervades the area of national security.[74] During World War II, German saboteurs caught in the United States were tried before a miliary tribunal under the Articles of War.[75] Deference is also found in the Constitution's text, which authorizes the suspension of habeas corpus "in Cases of Rebellion or Invasion the public Safety may require it."[76] Given the current threat to security posed by alien terrorists, and given that habeas review is available to challenge the Attorney General's findings, due process should be satisfied.

Section 412's habeas review mechanism also raises important statutory interpretation issues for the courts. The vast majority of modern habeas corpus litigation concerns collateral attacks on state convictions. These proceedings have their own special rules of procedure.[77] Section 412 does not refer to these postconviction procedures, however. Instead, proceedings are governed under the general grant of habeas jurisdiction to the federal courts, which gives federal courts the power to grant writs of habeas to individuals held in federal custody and those held "in custody in violation of the Constitution or laws or treaties of the United States."[78] Outside the postconviction context, neither Congress nor the Supreme Court has promulgated rules for habeas procedures. Instead, the habeas courts applying section 412 will have to fill this vacuum.

A particularly important issue will be what standard of review to apply to the Attorney General's determination that the alien is in one of (a)(3)'s certification categories. In other words, how much deference must be paid to the Attorney General's conclusion that he has reasonable grounds to believe that an alien is a terrorist? There is a strong case for applying a deferential standard. Applying the "reasonable grounds" standard might be characterized as a discretionary act on the part of the Attorney General. Since discretionary acts are often reviewed under a deferential standard,[79] and courts generally defer to the political branches in national security matters, the (a)(3) certification could be reviewed deferentially by the habeas court.

The argument for a less deferential standard is that a more meaningful judicial review of the detention helps to alleviate due process concerns. The *Zadvydas* Court found a "serious constitutional problem" with allowing indefinite detention "without . . . significant later judicial review."[80] Given Section 412's low *Terry* standard, deferential review is almost no review at all.

Only the most arbitrary detentions could be overturned by a habeas court applying such a standard. Although de novo review may not be mandated by the Constitution in light of the significant public safety concerns confronting the country, applying a de novo standard would avoid a substantial constitutional issue. Since the Supreme Court took a similar approach to statutory interpretation in *Zadvydas*, the courts are likely to take the same approach to Section 412.

The remaining procedural questions will be answered by examining other habeas cases that do not involve collateral attacks on convictions. For example, the D.C. Circuit, which provides the rule of decision in Section 412 cases, allows a patient to utilize habeas corpus to challenge his confinement to a mental institution.[81] The needed procedures will be found in this and similar cases. Given the low evidentiary standard that must be met, and the need for expedited proceedings in these cases, the habeas hearing should be brief, much more like a preliminary hearing than a full trial. These expedited hearings should not place an excessive burden on the Justice Department.

F. DNA Database Expansion

Congress has acted on several occasions to expand the government's databank of DNA samples of known offenders.[82] By comparing crime scene evidence against this database, perpetrators can be identified in cases where there is no other evidence of identity.[83] "DNA has been called 'the single greatest advance in the search for truth since advent of cross-examination.' "[84]

Despite its great potential to improve the accuracy and efficacy of the criminal justice system, expansion of the database is controversial. Some are concerned that the DNA gathered will be used for purposes other than identification.[85] Most controversial are proposals to test suspects upon arrest, rather than after conviction or even a preliminary hearing.[86] Whatever the merits of testing mere arrestees, these proposals have met a practical roadblock in the reality that the labs are badly backlogged with higher priority samples.[87]

Present law provides for sampling of federal prisoners convicted of murder, sexual abuse and related offenses, peonage and slavery, kidnapping, offenses involving robbery or burglary, a similar list of offenses within Indian country, and attempts to commit the above offenses.[88] Section 503 of the Act expands the list to include a list of terrorism, sabotage, and assassination crimes,[89] and all crimes of violence, as defined in 18 U. S. C. § 16. The latter definition is quite broad, including uses of force against property as well as persons. However, it is not as broad as some state laws, which extend to all felonies.[90] Further, the statute remains limited to convicted felons and therefore does not raise the issues involved in sampling indicted defendants before trial or arrestees.

Constitutional attacks on DNA sampling laws have been uniformly unsuccessful. A recent case observes, "although all 50 states have enacted . . . DNA profiling laws, and although a number of other jurisdictions have considered the question of whether such laws violate Fourth Amendment principles, and have used any of several theories to resolve that question, appellant has been unable to cite one that has resolved it against DNA profiling."[91]

One of the few jurists to accept an anti-databank argument was Judge Murnaghan of the Fourth Circuit, dissenting in the *Jones* case. He concluded that the government's "articulated interest in the testing of non-violent felons does not counter-balance the privacy violation in the procedure."[92] The basis for this conclusion of attenuated interest is Judge Murnaghan's belief that a person convicted of a nonviolent offense is "not significantly more likely to commit a violent crime in the future than a member of the general population."[93] He cites no authority for this remarkable hypothesis.

In reality, people convicted of nonviolent crimes are vastly more likely to commit violent crimes in the future than are members of the general population, and this has been well known for a long time. As far back as 1981, a RAND study found that "offenders tend to be nonspecialists," and there was no "identifiable group of career criminals who commit only violence."[94] A more recent survey of state prison populations by present and prior offense found that, of recidivists incarcerated for a violent offense, the number with only nonviolent priors actually exceeds the number with a violent prior.[95] The notion that criminality is neatly segmented into violent and nonviolent is fundamentally wrong. Criminals share a general disregard of the law and the rights of others that makes them more likely to commit crimes of all types than the general population. The government has an interest in including as many such people in the databank as is feasible.

In light of the uniform rejection of constitutional attacks on similar laws, and the strong government interests furthered by this project, the expansion of sampling in this statute is virtually certain to be upheld, if attacked.

G. Conclusion

The criminal procedure and related sections of the USA PATRIOT Act of 2001 generally do not "push the envelope" of constitutional limits. The most serious issues arise in the alien detention provision, where it is likely that the courts will construe the language so as to minimize the constitutional difficulty.

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Footnotes

1. 147 Cong. Rec. S10548 (daily ed. Oct. 11, 200 1) (statement of Senator Leahy) (discussing process); *id*., at S10604 (vote).
2. Provide Appropriate Tools Required to Intercept and Obstruct Terrorism (PATRIOT) Act of 2001, Report of the Committee on the Judiciary, House of Representatives, to accompany H. R. 2975, H. R. Rep. No. 107-236, 107th Cong., 1st Sess., pt. 1 (2001).
3. See 147 Cong. Rec. H6712-H6713 (daily ed. Oct. 12, 2001); *id*., at H6716 (statement of Mr. Sensenbrenner) (noting differences from Senate-passed version); *id*., at H6725-H6726 (vote on amendment).
4. *Id*., at H6739-H6759 (text); *id*., at H6775-H6776 (vote).
5. 147 Cong. Rec. H7224 (daily ed. Oct. 24, 2001).
6. 147 Cong. Rec. S11059 (daily ed. Oct. 25, 2001).
7. 115 Stat. 272. For the remainder of this paper, Public Law 107-56 is referred to simply as "the Act."
8. 3 W. La Fave, Criminal Procedure § 8.2(a), at 11-13 (2d ed. 1999).
9. La Fave, *supra* note 8, at 11-14.
10. See *id*. § 8.2(c), at 19; Bernstein, Behind the Gray Door: *Williams*, Secrecy, and the Federal Grand Jury, 69 N. Y. U. L. Rev. 563, 563-564 (1994) ("ignominious prosecutorial puppet").
11. See Fed. Rule of Crim . Proc. 6(e)(2).
12. La Fave, *supra* note 8, § 8.1(a), at 7.
13. La Fave, *supra*, note 8, § 8.3(f), at 29; Richman, Grand Jury Secrecy: Plugging the Leaks in an Empty Bucket,
36 Am. Crim. L. Rev. 339, 345 (1999).
14. La Fave, *supra* note 8, at 29; Richman, *supra* note 13, at 345.
15. La Fave, *supra* note 8, at 57-58.
16. La Fave, *supra* note 8, at 58-59.
17. La Fave, *supra* note 8, at 59.
18. Richman, *supra* note 13, at 355.
19. Bernstein, *supra* note 10, at 570.
20. 504 U. S. 36, 54-55 (1992).
21. Fed. Rule Crim. Proc. 6(e)(3)(C)(i), (ii), (iv).
22. Fed. Rule Crim. Proc. 6(e)(3)(A)(i), (ii), (C)(iii).
23. 50 U. S. C. § 401a.
24. Fed. Rule Crim. Proc. 6(e)(3)(C)(iv)(I)-(II).
25. See 147 Cong. Rec. S10556 (daily ed. Oct. 11, 2001) (statement of Sen. Leahy).
26. H. R. Rep. No. 107-236, *supra* note 2, at 73, 135.
27. See Bernstein, *supra* note 10, at 599.
28. Pub. L. No. 107-56 § 224(a) (exception for § 203(a)).
29. See 2 W. La Fave, Search and Seizure § 4.12(b), at 720 (3d ed. 19 96).
30. 388 U. S. 41, 60 (1967).
31. 18 U. S. C. § 2518(8)(d).
32. *United States v. Donovan*, 429 U. S. 413, 428-429, n. 19 (1977).
33. 441 U. S. 238, 248 (1979).
34. *Ibid*.
35. *United States v. Freitas*, 800 F. 2d 1451, 1456 (9th Cir. 1986).
36. *United States v. Pangburn*, 983 F. 2d 449, 455 (2d Cir. 1993).
37. See *ibid*.
38. See *Dickerson v. United States*, 530 U. S. 428, 440 (2000).
39. *Wilson v. Arkansas*, 514 U. S. 927, 931 (1995).
40. *Id*., at 934.
41. 520 U. S. 385, 394-395 (1997) (emphasis added).
42. 18 U. S. C. § 3103a(b)(1).
43. 800 F. 2d, at 1456.
44. *Weeks v. United States*, 232 U. S. 383, 398 (1914).
45. *Mapp v. Ohio*, 367 U. S. 643, 655 (1961).
46. See, *e.g.*, *Howlett v. Rose*, 496 U. S. 356, 358-359 (1990).
47. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971).
48. *Monell v. New York City Dept. of Social Services*, 436 U. S. 658, 694 (1978).
49. See *Anderson v. Creighton*, 483 U. S. 635, 640 (1987).
50. See *Arizona v. Evans*, 514 U. S. 1, 22-23 (19 95) (Stevens, J., dissenting).
51. S. 3, 104th Cong., 1st Sess. § 507 (1995).
52. See generally, The Jury and the Search for Truth: The Case Against Excluding Relevant Evidence at Trial, Hearing Before the Senate Comm. on the Judiciary, S. Hrg. 104-724, 104th Cong., 1st Sess. (1995).
53. See La Fave, *supra* note 29, § 1.5(b), at 132-133.
54. 12 U. S. C. § 3417(d); see *United States v. Daccarett*; 6 F. 3d 37, 52 (2d Cir. 1993).
55. 18 U. S. C. §§ 2515, 2518(10)(a).
56. See 8 U. S. C. § 2510(1), (2).
57. See 18 U. S . C. § 2518(10)(c); *Electronic Communications Privacy Act of 1986*, S. Rep. No. 99-541, 99th Cong., 2d Sess. (1986), *reprinted in* 1986 U. S. Code Cong. & Admin. News 3555, 3577.
58. H. R. Rep. 107-236, *supra* note 2, at 58.
59. 18 U. S. C. § 2712(a).
60. 18 U. S. C. § 2712(b)(5).
61. 8 U. S. C. §§ 1101 et seq.
62. The present Immigration and Nationality Act § 236 is codified as 8 U . S. C. § 1226.
63. See *Foucha v. Louisiana*, 504 U. S. 71, 80 (1992).
64. 150 L. Ed. 2d 653, 121 S. Ct. 2491 (2001).
65. *Id*., at 662, 121 S. C t., at 2495 (emphasis in original).
66. *Id*., at 666, 121 S. Ct., at 2498.
67. See *id*., at 667, 121 S. Ct., at 2498-2499; see also *United States v. Salerno*, 481 U. S. 73 9, 746 (1987); *Kansas v. Hendricks*, 521 U. S. 346, 356 (1997).
68. See 150 L. Ed. 2d, at 668, 121 S. Ct., at 2499 (quoting *Hendricks*, *supra*, 521 U. S., at 368).
69. See 150 L. Ed. 2d, at 668, 121 S. Ct., at 2499-2500.
70. 392 U. S. 1, 30 (196 8).
71. See *California v. Hodari D.*, 499 U. S. 621, 635 (1991).
72. See *Terry*, *supra*, 392 U. S., at 27.
73. 150 L. Ed. 2d, at 670-671, 121 S. Ct., at 2502.
74. See, *e.g.*, *Department of Navy v. Egan*, 484 U. S. 51 8, 530 (1988); *CIA v. Sims*, 471 U. S. 159, 180-181 (1985).
75. See *Ex Parte Quirin*, 317 U. S. 1, 48 (194 2).
76. U. S. Const., Art. I, § 9, cl. 2; see *Ex parte Milligan*, 71 U. S. 2, 114-115 (1866) (discussing suspension during the Civil War).
77. See generally Rules Governing Section 2254 Cases in the United States District Courts.
78. 28 U. S. C. § 2241(c)(1), (3).
79. See, *e.g.*, *Cooler & Gell v. Hartmarx Corp.*, 496 U. S. 384, 400 (1990).
80. 150 L. Ed. 2d, at 668, 121 S. Ct., at 2500.
81. See *Curry v. Overholser*, 287 F. 2d 137, 140 (D.C. Cir. 1960).
82. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 811(a)(2), 110 Stat. 1214, 1312 (1996); DNA Analysis Backlog Elimination Act of 2000, Pub. L. No. 106-546, § 6, 114 Stat. 2726, 2733 (2000).
83. See National Commission of the Future of DNA Evidence, What Every Law Enforcement Officer Should Know About DNA Evidence 2, 5 (1999).
84. Report of the National Task Force on Privacy, Technology, and Criminal Justice Information 45 (NCJ 187669) (quoting New York State Judge Joseph Harris, 1988).
85. See *ibid*.; Juengst, I-DNA-fication, Personal Privacy, and Social Justice, 75 Chi.-Kent L. Rev. 61, 64-65 (1999).
86. See National Task Force, *supra* note 84, at 46.
87. See Recommendation of the National Commission on the Future of DNA Evidence to the Attorney General Regarding Arrestee DNA Sample Collection (Jan. 16, 2000), http://www.ojp.usdoj.gov/nij/dna/arrestrc.html.
88. 42 U. S. C. § 14135a(d).
89. 42 U. S. C. § 141351(d)(2)(A) (as amended), incorporating the list of 18 U. S. C. § 2332b(g)(5).
90. See, *e.g.*, Va. Code § 19.2-310.2.
91. *People v. King*, 82 Cal.A pp.4th 1363, 1370, 99 Cal. Rptr. 220 (2000); see also *Jones v. Murray*, 962 F. 2d 302, 305-310 (4th Cir. 1992), cert. denied, 506 U. S. 977 (1992) (rejecting Fourth Amendment and *Ex Post Facto* claims); *Roe v. Marcotte*, 193 F. 3d 72 (2d Cir. 1999) (Fourth Amendment and equal protection, criticizing *Jones*'s reasoning but coming to the same conclusion); *Johnson v. Commonwealth*, 529 S. E. 2d 769, 779 (Va. 2000) (Fourth Amendment, self-incrimination, cruel and unusual punishment).
92. *Jones v. Murray*, 962 F. 2d, at 311 (dissenting opinion).
93. *Id*., at 313-314.
94. M. Peterson & H. Braiker, Who Commits Crimes? xxiv, xxv ii (1981).
95. Bureau of Justice Statistics, Correctional Populations in the United States—1997, Table 4.10, at 57 (2000). Inmates with a current violent offense and a previous sentence are 35% of the state prison population, of which 18.2% have only nonviolent priors.

Racial Profiling of Borrowers: An Idea Fraught with Peril

*By James M. Rockett**

In the early 1970s, during my first days as a banking lawyer, I was anxious to purchase my first home and, as was the custom in those days preceding the impact of Burt Lance, I was referred by my bank employer to a correspondent bank. The scene that followed is forever etched in my memory. I met the banker, a middle-aged man with polished nails, a black tailored suit, white shirt and wide suspenders who condescended to consider the business of a young lawyer. After explaining my excitement about the old Victorian home in a transitional area of San Francisco that I hoped to buy, I asked if his bank would provide the mortgage financing. He peered at me with a quizzical look and drew himself up in his chair: "Young man, if you want to live in an area with all of those blacks [not the pejorative phrase he actually used] don't expect our bank to assist you. Good day." Unfortunately, in those days, as our country was coming to terms with recently enacted civil rights laws and efforts to create a society that treated all persons fairly, lending discrimination based on race was real. It was widespread; it was overt; and it was largely ignored. Banking was the bastion of the white, economically advantaged male and not much consideration was given to those who fell outside a fairly narrow band of bank customers.

During the ensuing decades, banking has changed dramatically. Important among those changes, racial discrimination, be it in employment or lending, is without doubt the exception. And, despite the perceptions of those who view the world in terms of racial inequality, banks are serving the needs of minorities in ways that never before were believed to be possible. The fact is that, as banks rely more routinely on non-personal communication with their customers through the Internet or other electronic or telephonic methods, the opportunity to know and consider the race of the customer is virtually eliminated. Moreover, through the process of credit scoring, decisions are being made that take into account only economic factors that exclude racial components. Rapidly we are approaching a lending environment that ignores or cannot factor elements that in the past allowed racial discrimination.

In spite of enormous progress in systematically eliminating racial considerations from lending through laws and regulations that, by any measure, have been extremely successful — and, one must concede, there will always be rogue individuals in positions of discretion whose prejudices intrude to the occasional disadvantage of a specific prospective borrower — the Federal Reserve Board, at the insistence of regulatory and advocacy groups, is considering the re-introduction of race as a factor in loan applications. This effort has come in the form of a proposal to amend the Board's Regulation B in order to permit "voluntary" collection of racial data in loan applications. In other words, loan applications will appear which request that the applicant identify his or her race. It needs to be understood that Regulation B and the statute it implements, the Equal Credit Opportunity Act, have existed for many years as barriers to racial discrimination in bank lending. They have always forbade banks from inquiring into "prohibited factors" in the application process. It would appear that, having virtually eliminated lending bias without curing all of society's economic disparities, the politically motivated regulators and special interest groups are now intent on focusing on the banking industry as the source of general economic inequities. This may seem a harsh indictment, but let's examine the Fed's proposal in the context of current regulatory trends.

Initially, it is important to note that reported incidents of actual discrimination are dealt with harshly and quickly by a variety of legal and regulatory methods. Banks are sensitive to this and train and monitor their employees carefully for any signs of inappropriate behavior. But the Fed's proposal is not aimed at actual discrimination; it is seeking evidence of statistical "discrimination." Throughout the Clinton Administration, the government, led by the Department of Justice, attacked "Fair Lending" issues through statistical analyses. Regardless of actual proof, the DOJ sought data that, viewed through a prism which assigns racial discrimination as a primary explanation, suggests disparate treatment between white borrowers and minority borrowers. For example, the Clinton DOJ extracted settlements from mortgage lenders after examinations of data collected under the Home Mortgage Disclosure Act ("HMDA") suggested that African-American applicants paid higher loan fees or rates than did Caucasian applicants. No explanation other than racial discrimination was possible for the DOJ. Similarly, the DOJ was not particularly concerned about the accuracy of the information on which it relied for condemning practices. The DOJ relied on methods such as a review of applicant surnames to surmise ethnic composition of borrowers in measuring "disparate treatment" and forced settlements based on such wildly unreliable data. The Fed itself played into these tactics with its now infamous "Boston Fed" study of racial considerations in the lending process. Given this methodology, it is not surprising that the Fed is seeking to "permit" banks to gather racial data on loan applications. No matter how sporadic or unreliable the information may prove to be, it will be fodder for manipulation.

The Fed seeks to conceal the motivations for permitting the gathering of heretofore prohibited information by proposing that it be "voluntary." What can be wrong with simply allowing a bank that desires to monitor its own progress in fair lending to gather the information necessary to do so? The answer to this query is painfully obvious. First, once the information is captured, it will be

there for the regulators through the examination process and, eventually, for interest groups, through intimidation or subpoena, to see, manipulate and use to advance their agendas. Second, there will be no uniformity in capturing the data. Definitions of "race" or "ethnicity" will vary institution by institution. In our melting-pot society, defining such concepts is increasingly imprecise. Third, the "voluntary" nature of the process will produce information that is even less reliable that data currently available through HMDA (which itself is extremely tenuous). Fourth, with an emphasis on privacy pervading the American public, the willingness of applicants to share information about their racial backgrounds is questionable. At best, application questions about race are intrusive, possibly leading to target marketing or other mischief; at worst, they will be viewed as efforts by banks to consider impermissible factors and to discriminate against certain classes of applicants. During this "voluntary" phase, banks won't even have the defense that "the government made me do it" when customers inquire about such inappropriate inquiries.

In actuality, the "voluntary" phase will only exist for a short period. As soon as the data is sporadically available from voluntary sources, it will simply be too tempting to ignore. Fed studies, hearings before political bodies, governmental enforcement actions, class actions and investigative journalism will all command access to such information. Once these drums commence their relentless beat, the Fed will bow to overwhelming demand and make the collection and availability of race related loan data mandatory.

While such an outcome may please a limited constituency of regulators and activists, what effect does the pernicious practice of inquiring into race have on minorities who, because of the historically low interest rate environment we are experiencing, are finally reaching a position where bank borrowing has become a reality? The minority family applying for a personal line of credit with a bank or the minority owned or operated business seeking a commercial loan will be queried about their background in a way that has been illegal for years. The not-so-subtle message is that race is considered in the credit granting process. And the detrimental impact of that message cannot be measured against the theoretical benefit of access to faulty racial data generated through loan applications, whether or not voluntary.

Finally, the collection of racial information in the application process cannot possibly benefit society, especially minorities. Foremost, the data once collected will not tell the full story in spite of what the proponents maintain. This is because such data fails to take into account statistical variances that result from considerations other than race . Lending is a balance between risk and reward. A good lender will consider many factors in determining creditworthiness of a customer and will price the granting of credit in accordance with the risk involved. Legally, race cannot be a factor considered in this evaluation; but, if data is collected in the application process, it certainly can be manipulated to appear to be the reason for denying credit or pricing credit differently. Creditworthiness is an explanation for apparent disparities in lending data but, because that justification cannot be quickly explained by one question on the loan application, it will never be accepted as the answer by those seeking a simple solution.

What seems to be lost on the proponents of the Fed's proposal is that, unlike banking during the 1970s (when my horrible experience was commonplace), now banking is highly competitive and modern bankers are required to be entrepreneurial. In a financial world where earnings per share is paramount and compensation systems reward profitable production, there is no room for racial discrimination. Today's generation of bankers (no longer wearing dark suits and suspenders) will without hesitation lend to little green men from outerspace if a profit can be realized, thus enhancing the bonus pool. Moreover, combining such an environment with the almost impossible task of determining the racial identity of an applicant virtually assures us of discrimination-free lending. "Hold on," caution the proponents of the Fed's proposal, "How then do you explain disparate treatment that is suggested by the data?" Well, once again the laws of economics intrude. In society as a whole, economic rewards are not spread evenly over all racial and ethnic classes. This is certainly not good; but it is reality. If banks, solely using economic factors which predict creditworthiness, make loans based on those considerations, it is highly probable that statistically disparate impact can be demonstrated. This is neither the fault of banks nor is it an indication of racial discrimination. It is simply a reflection of the socio-economic state of our society, one for which bankers cannot be blamed. And unreliable data culled from offensive questions on loan applications cannot remedy economic disparity or reshape the lending practices in our country. Too much time has passed since those disgusting early days of discriminatory bankers and too much progress toward a race-neutral lending environment has been achieved for the Fed to force a focus on race in lending.

The Federal Reserve proposal needs to be stopped in its tracks. And those who truly want a lending process that rejects racial considerations need to demand that it do so.

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Free Speech & Election Law

Free Speech War on the Range: Legal Challenges to Nation's Commodity Checkoff Programs

*By Eric Schippers**

Got Milk?

The question may sound innocuous, but for many of America's independent farmers and ranchers, that marketing slogan and others like it represents compelled speech in violation of the First Amendment.

In addition to the ubiquitous milk moustache, the nation's agricultural commodity promotion programs — known as "checkoffs" — are responsible for such well-known ads as: "*Beef. It's What's for Dinner*" and "*Ahh, The Power of Cheese*." Authorized by Congress, run by agricultural producers, and overseen by the U.S. Department of Agriculture (USDA), more than a dozen checkoff programs for various agricultural commodities are funded through mandatory assessments on farmers and ranchers based on a portion of their sales. The beef checkoff, for example, raises more than $80 million annually from beef producers who are assessed $1 per head of cattle sold.

The twelve largest commodity promotion boards collect more than $700 million per year of farmers' hard-earned money for these so-called "generic" collective advertising programs. However, after the U.S. Supreme Court struck down the mushroom promotion program last year, many farmers and ranchers are now realizing that they *got milked.*

In *United States v. United Foods, Inc*., the Supreme Court held that the federal statute requiring mushroom growers to pay for generic mushroom advertisements violated the First Amendment by compelling support for speech with which at least some of the growers disagreed. The opinion, penned by Justice Kennedy, stated that "First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors. . . . Just as the First Amendment may prevent the government from prohibiting speech, the First Amendment may prevent the government from. . . compelling certain individuals to pay subsidies for speech to which they object."[1]

In declaring the mushroom checkoff unconstitutional, the *United Foods* Court took significant strides to undo some of the damage caused by its much-criticized 1997 decision in *Glickman v. Wileman Brothers & Elliott, Inc*.[2] In *Glickman*, the Court rendered its decision in the assumed factual context that the producers of California tree fruits were part of a larger collective marketing program in which the objectors had given up their market autonomy. The issue was not whether the producers were compelled to speak, but whether the "mandated assessments for speech were ancillary to a more comprehensive program restricting marketing autonomy."[3]

In sharp contrast to *Glickman*, the mushroom producers in *United Foods* were subject to "no marketing orders that regulate how mushrooms may be produced and sold, no exemption from the antitrust laws, and nothing preventing individual producers from making their own marketing decisions."[4]

In the wake of *United Foods*, lawsuits are now pending over other commodity promotions programs, including the beef and dairy checkoffs, which are materially indistinguishable from the mushroom program.[5,6]

In *Charter v. USDA*, independent Montana cattle ranchers Steve and Jeanne Charter have challenged the constitutionality of the Beef Act, which the government itself in *United Foods* had claimed was indistinguishable from the Mushroom Act. The government now claims, however, that the Beef Act is a part of a broader regulatory system to which the forced collective speech under the Act is "germane." But nothing in the Beef Act compels a cooperative marketing scheme or any other form of collective action that would prevent beef producers from making independent marketing decisions.

The government also asserts that the speech at issue is commercial in nature and that compelled support for such speech is subject to, and would survive, the *Central Hudson* test for restrictions on commercial speech.[7] Interestingly, the government did not rely upon *Central Hudson* in defense of the mushroom checkoff program. Regardless, the Supreme Court has clarified in *Glickman* that a lower court's application of the *Central Hudson* test should not be relied upon "for the purpose of testing the constitutionality of marketing order assessments for promotional advertising" because no explanation is given for how the *Central Hudson* test, which involves a restriction of commercial speech, should govern a case involving the compelled funding of speech.[8]

Perhaps recognizing the weakness of its arguments in light of *United Foods*, the government now places its strongest emphasis on the novel argument that checkoffs may be constitutional if construed as an extension of the government's own speech.[9]

The future of commodity checkoff programs may now hinge on whether the speech funded through the programs is, in fact, government speech and, if so, whether compelled support for government speech is nonetheless subject to the same First Amendment scrutiny as compelled support for third-party speech.

The government speech immunity defense for checkoff programs has never been accepted by any appel-

late court. Only two cases have dealt with the issue; the U.S. Court of Appeals for the Third Circuit held that the Beef Act, establishing the beef checkoff, is not government speech.[10] Likewise, the U.S. Court of Appeals for the Ninth Circuit held that the almond checkoff program is not government speech.[11]

In addition, none of the checkoff programs attribute the views they express to the government, but instead attribute them to agricultural producers. Common sense dictates that if the speech in question is not attributed to the government, is paid for by farmers, and is attributed to farmers, it is not government speech. In fact, in the case of beef, the USDA food pyramid — which is government speech — warns Americans not to eat too much beef.[12]

During recent Congressional negotiations over the 2002 Farm Bill, 15 agricultural trade associations sought to bolster the specious government speech argument by lobbying for language to be included in the bill that would declare all checkoff-related advertising as "government speech." Fearing that *United Foods* "ha[d] put all research and promotion programs under a cloud of doubt," the associations attempted to influence the outcome of pending litigation over checkoff programs.[13] Congress, in rejecting that attempt, reinforced the long-established position that checkoffs are producer-driven, producer-funded, "self-help" programs.[14]

If Congress wants to act to preserve the purported benefits of collective advertising, while at the same time respecting the First Amendment, it could do so by amending existing laws to limit such collective speech to those agricultural producers who have voluntarily entered into collective production, promotion or sales arrangements; for example, through agricultural cooperatives already authorized under current law.[15] That change would provide the economies of scale touted by proponents of the current system without forcing a collective regime upon those wishing to remain independent in the market in the true spirit of the family farmer and the independent rancher. It would also avoid any "free-rider" concerns by permitting voluntary co-ops to "brand" their collective advertising, while allowing independent producers to compete with such co-ops based on the unique attributes and quality of their products.

EDITOR'S NOTE: On June 21, 2002, U.S. District Judge Charles Kornmann, in *Livestock Marketing Association v. USDA* (Civ. 00-1032, U.S. District Court, Northern Division, South Dakota), ruled the Federal Beef Promotion and Research Act, responsible for the beef checkoff, "unconstitutional in violation of the First Amendment because it requires plaintiffs to pay, in part, for speech to which the plaintiffs object." After July 15, 2002, the U.S. Department of Agriculture (USDA) and the Cattlemen's Beef Board (CBB) are barred from any further collection of checkoff funds in order to "wind down" the program; money remaining on hand can continue to be used for promotional purposes. The cases against the beef checkoff (which seeks a more thorough repudiation of the Beef Act) and dairy checkoff referenced in Mr. Schippers's article are still pending.

*Eric Schippers is the Executive Director of the Center for Individual Freedom. Founded in 1998, the Center for Individual Freedom is a non-partisan, non-profit organization with the mission to protect and defend individual freedoms and rights guaranteed by the U.S. Constitution. The Center is assisting in lawsuits filed by independent beef ranchers against the beef checkoff, and by a Pennsylvania family of dairy farmers against the dairy checkoff. The Center filed an amicus curiae in the *United Foods* case, as well as in a case involving "generic" collective advertising for California plum growers (*Gerawan Farming, Inc. v. Veneman, No. S080610. Calif. Supreme Court*). Copies of the legal briefs may be read online at www.cfif.org.

Footnotes

[1] *United States. v. United Foods, Inc*., 533 U.S. 405, 410-11 (2001).
[2] *Glickman v. Wileman Brothers & Elliott, Inc*., 521 U.S. 457 (1997).
[3] *United Foods*, 533 U.S. at 411 (describing *Glickman*).
[4] *Id*. at 412.
[5] *Charter v. USDA*, CV 00-198-BLG-RFC (U.S. District Court, Billings, Montana). In writing this article, the author references legal briefs prepared by Mr. Erik S. Jaffe, Mr. Kelly J. Varnes and Ms. Renee L. Giachino. Mr. Jaffe, a sole practitioner in Washington, D.C., concentrating in appellate litigation, is Chairman of the Advertising Law and Regulation Subcommittee of the Federalist Society; Mr. Kelly J. Varnes is an associate in the law firm of Hendrickson, Everson, Noennig & Woodward, P.C. in Billings, Montana; Ms. Renee Giachino is General Counsel of the Center for Individual Freedom.
[6] *Cochran v. Veneman*, No. CV-02-0529 (U.S. District Court, Middle District of Pennsylvania). A family of dairy farmers, in conjunction with the Center for Individual Freedom, filed on April 2, 2002 a lawsuit challenging the constitutionality of the mandatory dairy promotion program. The suit, filed in U.S. District Court in Scranton, Pennsylvania, on behalf of Joe and Brenda Cochran, seeks to enjoin the USDA and the Dairy Promotion Board from collecting dairy checkoff assessments, or using existing checkoff funds without prior consent of those assessed, pending a declaratory judgment in the case.
[7] *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980). The precise boundary between commercial and noncommercial speech has not been clearly defined. The Supreme Court has previously characterized commercial speech as speech that does "no more than propose a commercial transaction."
[8] *Glickman, 521 U.S. at 474.*
[9] The government also has forced United Foods, Inc. back into district court to once again argue the constitutionality of the Mushroom Act based on its new "government speech" theory.
[10] *United States v. Frame*, 885 F.2d 1119,1132 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990). The Third Circuit held that "the underlying rationale of the right to be free from compelled speech or association leads us to conclude that the compelled expressive activities mandated by the Beef Promotion Act are not properly characterized as 'government speech.'"
[11] *Cal-Almond, Inc. v. Department of Agriculture*, 67 F.3d 874 (9th Cir. 1995).
[12] USDA, The Food Guide Pyramid, www.nal.usda.gov:8001/py/pmap.htm
[13] March 5, 2002 letter to Senate Agriculture, Nutrition and Forestry Committee Chairman Tom Harkin signed by Alabama Farmers' Federation, Alabama Peanut Producers Association, American Beekeeping Federation, American Farm Bureau Federation, American Mushroom Institute, Georgia Agricultural Commodity Commission for Peanuts, National Cattlemen's Beef Association, National Cotton Council of America, National Milk Producers Federation, National Pork Producers Council, National Potato Council, The Popcorn Institute, United Egg Association, United Egg Producers and Western Peanut Growers Association.
[14] *Frame*, 885 F.2d at 1135.
[15] The Capper-Volstead Act allows for voluntary cooperatives which can market, promote and sell agricultural commodities.

The Facts About the Federal Election Commission's Rules on Soft Money Pursuant to the Bipartisan Campaign Reform Act of 2002*

By a 5-1 vote on June 22, 2002, the Federal Election Commission promulgated the first of six sets of rules to implement the Bipartisan Campaign Reform Act of 2002 (usually called, "McCain-Feingold," "Shays-Meehan," or simply "BCRA"). These rules have been criticized as being contrary to BCRA's language, and threats have been made to use the Congressional Review Act of 1996 to repeal the regulations.

The assault on the FEC's rules ranges from misleading to simply incorrect, as the following chart shows.

Allegation	The FEC defined the term "solicit" "extremely narrowly," opening the door to federal office holders to continue raising soft money.[1]	The FEC's rules allow officeholders to solicit soft money at state and local party fundraisers.[4]
What the Law Provides	The statute does not define "solicit."	"Not withstanding paragraph (1) or subsection (b)(2)(C) [the ban on solicitations by federal office holders], a candidate or an individual holding Federal office may attend, speak, or be a featured guest at a fundraising event for a State, district, or local committee of a political party." 2 U.S.C. 441i (e)(3).
What the Commission Did	On a 4-1 vote, defined "solicit" as "to ask that another person make a contribution, donation, or transfer of funds, or otherwise provide anything of value, whether … directly, or through a conduit or intermediary." 11 C.F.R. 300.2 (m). Contrary to many reports, the Commission's definition does not require that one "explicitly," "expressly," or "directly" ask for a contribution before triggering the Act's limits on solicitations.	On a 5-1 vote, provided that, "A Federal candidate or individual holding Federal office may attend, speak, or be a featured guest at a fundraising event for a State, district, or local committee of a political party … Candidates and individuals holding Federal office may speak at such events without restriction or regulation." 11 C.F.R. 300.64.
What the Critics Want/Analysis	Wanted the Commission to include the word "suggest" in the definition of "solicit."[2] Webster's defines "solicit" as "1. Entreat, beg; 2. To approach with a request or plea; 3. Ask, request." All of these would seem to be covered by the Commission's definition. Reformers complain, however, that the FEC's definition will allow solicitations through "a wink and a nod."[3] The Commission rejected this approach as overly vague and an invitation to frivolous complaints, in which almost any contact between an office holder and an individual could be considered a solicitation. Office holders, political parties, and volunteers should not be subject to investigation and liability unless a solicitation is made.	Despite the clear exemption in the statute for officeholders to "speak" as the "featured guest" at a "fundraiser," reformers claim that, "nothing in the statute permits Federal candidates and officeholders to raise unlimited soft money for state parties at any state party fundraising events."[5] This defies the plain language of the statute - officeholders may "speak," "notwithstanding" the ban. This provision would make no sense if comments made at the event were not exempt from the ban, since nothing in the statute otherwise prohibits speaking at such events. And it begs the question: what does one think that the "featured guest" at a "fundraiser" is likely to speak about? The FEC is not a speech police reviewing transcripts of an officeholder's remarks looking for signs of "solicitation."

Allegation	The Commission exempted internet communications from its regulations.	The Commission exempted e-mails from its regulations.	The FEC rules will allow lawmakers to continue raising unlimited soft money for their Leadership PACs.[8]
What the Law Provides	"The term 'public communication' means a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising." 2 U.S.C. 431 (22).	"The term 'Mass mailing' means a mailing by United States mail or facsimile of more than 500 pieces of mail of an identical or substantially similar nature within any 30-day period. 2 U.S.C. 431 (23).	The Act prohibits "a candidate, individual holding Federal office, … or an entity directly or indirectly established, financed, maintained or controlled by or acting on behalf of one or more candidates or individuals holding Federal office," from raising soft money for any purpose, subject only to the exception for speaking at state party fundraisers, discussed above. 2 U.S.C. 441i (e)(1).
What the Commission Did	Provided that "public communication" means a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising." 11 C.F.R. 100.26.	Mass mailing means a mailing by United States mail or facsimile of more than 500 pieces of mail of an identical or substantially similar nature within any 30-day period. 11 C.F.R. 100.27.	The rules adopted by the Commission make clear that Leadership PACs may not solicit soft money. *See* 11 C.F.R. 300.60, 300.61, and 300.62.
What the Critics Want/Analysis	Although the BCRA does not mention internet communications in its definition of "public communication," in written comments to the Commission, the Act's sponsors urged the FEC to claim authority to regulate internet communications.[6] The Commission noted that Congress discussed the internet elsewhere in the Act, but did not include it in this section. Under the long-established doctrine of *Ejusdem generis,* a general catch-all phase following a list of specific terms does not indicate intent to include a separate and distinct item not included in the list of specifics. Nothing in the legislative history indicates the intent to regulate the internet.	BCRA refers to mail and facsimile, but not to e-mail. Nevertheless, despite the lack of statutory authority, reformers urged the FEC to take jurisdiction over the use of e-mail for political purposes.[7] As with the internet, the FEC declined to exercise jurisdiction over this new media absent a manifestation of intent by Congress that it intended to regulate e-mail communications.	The FEC's rules specifically prohibit Leadership PACs from raising or spending soft money, just as the critics want. Claims to the contrary are wrong, and appear to be based on a misreading of another section of the Commission's regulations.

Allegation	Federal Office holders will still be able to raise soft money for state parties to run "issue ads" attacking federal candidates.[9]	"The Commission's regulations allow national parties to set up shell operations between now and the Election Day to carry on the raising and spending of soft money on behalf of the national parties after that date, when the new law takes effect."[10]	The Commission is allowing "soft money" to be used to raise more soft money, when the statute requires that hard money be used.[13]
What the Law Provides	The statute prohibits state parties from using soft money to pay for any ad that "promotes or supports, or attacks or opposes a candidate for [Federal office]." The statute does not define the phrase.	The statute prohibits a national committee of a political party or "any entity that *is* established, financed, maintained or controlled by such a national committee" from raising or spending soft money after November 6, 2002. 2 U.S.C. 441i (a) (emphasis added). The statute does not define the phrase "established, financed, maintained or controlled." It should be noted, however, that regardless of any definition promulgated by the FEC to implement this section, it would be perfectly legal for the Chairman of the RNC or DNC to resign prior to November 6, start a new, partisan organization, hire staff away from the national committee to run it, and spend soft money, so long as the new group was not "established, financed, maintained or controlled" by the national party.	Under BCRA, national committees will no longer be allowed to raise soft money. State and local parties may still raise soft money for state activities. BCRA also authorizes state and local parties to use "Levin Funds" to pay for some types of grassroots activities that affect both state and federal elections. Levin Funds are subject to limits, prohibitions, and reporting requirements under BCRA, although these are less strict than limits on traditional "hard money." According to BCRA, fundraising costs in connection with Levin Funds must be paid for "from funds subject to the limitations, prohibitions, and reporting requirements of this Act. 2 U.S.C. 441i (b)(2).
What the Commission Did	Did not define the phrase "promotes or supports, or attacks or opposes," thus leaving the statutory language to take effect without further definition.	After defining "established, financed, maintained or controlled," the Commission's rules provide that an organization shall only be considered established, financed, maintained or controlled based on its activities after the effective date of the Act. An organization that has previously received financial support from a national party committee must show that it has disposed of all such funds by November 6, 2002, to take advantage of this provision. 11 C.F.R. 300.2 (c)(3).	For many years the FEC's rules have required state parties to use hard money to pay the cost of raising hard money, while soft money may be used to pay the costs of raising soft money. This regulatory scheme is not changed by the law or the Commission's new rules. Similarly, the FEC's new rules allow Levin Funds, which are subject to the limits of the Act, to be used to raise Levin Funds. *See* 11 C.F.R. 300.33 (c)(3).
What the Critics Want/Analysis	The Commission did exactly what the critics requested.	Even though the House soundly defeated a proposed amendment to make the law effective immediately on passage, the critics argue that, contrary to the plain language of the statute, the ban should take immediate effect.[11] Indeed they urge that it have retroactive effect - according to the reformers, if an entity was ever established, financed, maintained or controlled by a party, even many years ago, it would be forever subject to the Act.[12] This is contrary to the statute, which applies only if an entity "*is* established, financed, maintained or controlled" by a national party, not if it ever was, or was for some past period. The critics' approach would prohibit groups such as the Republican Governors' Association or the Association of State Democratic Chairs from engaging in lawful activity under state law in connection with state elections. The FEC notes that if an organization is actually raising or spending soft money "on behalf of the national parties after that date," it would be subject to the Act's limitations, since it would be financed, maintained or controlled by the party.	Wanted fundraising costs for Levin Funds to be paid for with traditional "hard money" rather than other Levin Funds.[14] This is the basis of the claim that the Commission is allowing "soft money" to be used to pay fundraising costs when "hard money" is required. However, BCRA only requires that funds "subject to the limitations, prohibitions, and reporting requirements of the Act," be used. Levin Funds fit that definition, and follow the current, common-sense structure for paying fund-raising costs (hard money raises hard money, soft money raises soft money, Levin Funds raise Levin Funds). The Commission sought to support the use of Levin Funds to engage in grassroots activities, as intended by Congress.

Allegation	"The Commission imposed its own artificial dates" to determine when Get Out The Vote and Voter Identification occur in connection with a federal election.[15]	The Commission's definition of "Get-Out-The-Vote" (GOTV) is too narrow[18]
What the Law Provides	State parties may only use federal hard money for "voter identification, get-out-the-vote activity, or generic campaign activity conducted in connection with an election in which a candidate for Federal office appears on the ballot." 2 U.S.C. 431 (20)(A)(ii). Does not define the phrase "in connection with an election in which a candidate for Federal office appears on the ballot."	The statute does not define "Get-Out-The-Vote."
What the Commission Did	Defined "in connection with an election in which a candidate for Federal office appears on the ballot" as "(i) the period of time beginning on the date of the earliest filing deadline for access to the primary ballot for Federal candidates as determined by state law … and ending on the date of the general election, up to and including any general runoff." 11 C.F.R. 100.24 (a)(1).	"Get-out-the-vote [GOTV] activity means contacting registered voters by telephone, in person, or by other individualized means, to assist them in engaging in the act of voting…." The rule goes on to list examples of GOTV, including but not limited to providing information on the date of the election, the hours and location of polls, and providing transportation to the polls. 11 C.F.R. 100.24(a)(3).
What the Critics Want/Analysis	Even though the Act specifically limits this provision to activities "in connection with an election in which a candidate for Federal office appears on the ballot," the critics argue that the limit should, with one minor exception, take place literally always, because there is always another federal election coming up. This would have the effect of federalizing countless state and local elections, and would make meaningless the statute's limitation to activities "in connection with an election in which a candidate for Federal office appears on the ballot." The critics argue that the only exception created by this statutory limitation is in five states that elect governors in odd numbered years.[16] There is no basis for this in the statute. At the Commission's hearing on June 4, 2002, a representative from Common Cause admitted that the limitation would also have to apply to jurisdictions holding local elections.[17] Later, however, Common Cause went back to arguing that the statute actually federalized all elections except in five states, despite the statutory language to the contrary. Most of the nation's largest cities elect mayors in odd numbered years. Many if not most other local officials are also elected in odd years, or in the spring of even years, and many, if not most, local bond and tax issues are also voted on at that time. Since GOTV and voter ID are done close to elections, the FEC's rules assure that state funds will not be used in federal elections.	The critics claim that the definition should include "encouraging" people to vote.[19] The Commission was concerned that such a broad definition would cover general exhortations to vote, such as an officeholder generically urging citizens to vote as part of a high school commencement speech or a speech at an NAACP convention. The Commission's definition is very broad in addressing actual efforts to get out the vote in connection with an election.

Allegation	The Commission's definition of "voter identification activites" does not include the cost of purchasing lists of voters.[20]	The Commission has defined "agent" too narrowly.[21]
What the Law Provides	The statute does not define "voter identification activities."	The statute does not define "agent."
What the Commission Did	"Voter identification means creating or enhancing voter lists by verifying or adding information about the voters' likelihood of voting in an upcoming election or their likelihood of voting for specific candidates." 11 C.F.R. 100.24 (a)(4).	The Commission defined "agent" to include those with either express or implied authority, when acting on behalf of a principal. 11 C.F.R. 300.2 (b).
What the Critics Want/Analysis	Wanted to include the purchase of voter lists as part of "voter identification." The Commission did not include the purchase of lists of voters in its definition because state and local parties often use such list for other purposes, such as fund-raising. However, any effort to enhance the list with voting information is covered, including any effort to identify the likelihood of voting in an election or for specific candidates.	Sought to have definition of "agent" include people acting without any sanction of the principal, if perceived to have "apparent authority."[22] This could have resulted in widespread liability of candidates, parties, volunteer workers, and campaigns, for actions of volunteers and others acting with no legal authority.

*This document was prepared by the office of Commissioner Bradley A. Smith. It is not an official document of the Federal Election Commission.

Footnotes

[1] Office of Sen. John McCain, *FEC Undermines the New Campaign Finance Law in Direct Contravention of the Statute's Language, Purpose and Legislative History*, undated; http://mccain.senate.gov visited June 26, 2002);
[2] *Id.*
[3] *Joint Statement of Congressional Sponsors on the FEC's Consideration of Soft Money Rules*," June 20, 2002, http://mccainsenate.gov.
[4] Office of Sen. John McCain, *supra* n. 1.
[5] *Id.*
[6] Federal Election Commission, Hearing on Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, June 4-5, 2002, Comments of Sen. John S. McCain, Sen. Russell D. Feingold, Rep. Christopher Shays, and Rep. Marty Meehan. *See also id.,* comments of Campaign and Media Legal Center; Comments of Center for Responsive Politics.
[7] *Id.*
[8] Office of Sen. John McCain, *supra* n. 1.
[9] David Whitney, *Political parties seeing windfall Campaign finance reform is expected to boost the 'soft money' the groups receive*, Sacramento Bee, June 26, 2002, p. A3.
[10] Office of Sen. John McCain, *supra* n. 1.
[11] *Id.*
[12] Federal Election Commission, Hearing on Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, June 4-5, 2002, Comments of Sen. John S. McCain, Sen. Russell D. Feingold, Rep. Christopher Shays, and Rep. Marty Meehan. *See also id.,* comments of Common Cause; Comments of Center for Responsive Politics.
[13] Richard Oppel, *Soft Money Ban Goes Into Effect, but the Effect Is Uncertain* , New York Times, June 23, 2002, p. 22
[14] *Id.*, citing comments of Larry Noble of Center for Responsive Politics.
[15] Office of Sen. John McCain, *supra* n. 1.
[16] Federal Election Commission, Hearing on Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, June 4-5, 2002, Comments of Sen. John S. McCain, Sen. Russell D. Feingold, Rep. Christopher Shays, and Rep. Marty Meehan. *See also id.,* comments of Common Cause.
[17] Federal Election Commission, Public Hearing: Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, Transcript, June 4, 2002, p. 66-68. *See also* Federal Election Commission, Hearing on Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, June 4-5, 2002, Comments of Campaign and Media Legal Center ("in the case of states with odd-year elections, such activity taking place in the odd year prior to the election will not be 'in connection with' an election in which a Federal candidate is on the ballot."); Comments of Center for Responsive Politics (similarly noting that any election in an odd year would not fall under the definition).
[18] Office of Sen. John McCain, *supra* n. 1.
[19] *Id.*
[20] *Id.*
[21] *Joint Statement of Congressional Sponsors In Response to the FEC's Draft Final Soft Money Rules*, June 18, 2002, http://mccainsenate.gov.
[22] Federal Election Commission, Hearing on Prohibited and

International & National Security Law

The Just Demands of Peace & Security: International Law & the Case Against Iraq

*By Paul Schott Stevens, Andru E. Wall & Ata Dinlenc**

In his dramatic speech to the United Nations on September 12, 2002, President Bush declared that Iraq must comply with all relevant Security Council resolutions and with the terms of the 1991 cease-fire agreement, or face the consequences. Vowing that the United States will not "stand by and do nothing while dangers gather," he urged that the terms of the Security Council's previous resolutions against Iraq be enforced — and with them "the just demands of peace and security." Recalling the ineffectiveness of the League of Nations, the President emphasized that the Security Council framework was established precisely so that UN "deliberations would be more than talk," and Security Council resolutions not be "cast aside without consequence." The President catalogued the major actions taken by the Security Council following Iraq's invasion of Kuwait, and chronicled Iraq's notorious and continuing non-compliance. He argued forcefully that Iraq's actions are more than "a threat to peace," they are a threat to the very "authority of the United Nations" itself.

In the widening international and domestic debate over Iraq, some insist that US or coalition military action against Iraq today would be unlawful unless once again explicitly authorized by the Security Council. As a matter of international law, this clearly is not the case. A renewed Security Council mandate may be useful or desirable, but it is not necessary. The Security Council previously has authorized the use of force against Iraq, the Council has not rescinded but rather reaffirmed its position on numerous occasions since, and the circumstances justifying the Council's conclusion that Iraq is a threat to international peace and the security of the Middle East region remain unchanged. The UN Charter contemplates that the Security Council may — as it has with respect to Iraq — authorize the use of force to remove threats to international peace and security. The Charter also recognizes that, in response to acts of aggression, states — such as the US and its coalition partners — have an inherent right to act individually and collectively in their defense. Further military action against Iraq may, we believe, be justified on either or both grounds.

This paper will review briefly the framework in which the Security Council operates, the legal nature of its actions generally with respect to the restoration and maintenance of international peace and security, and the right to self-defense enshrined in the United Nations Charter. It then will analyze the succession of resolutions that the Security Council has adopted with respect to Iraq since 1990, and highlight the strong and continuing legal sanction they provide for military action by the US and other nations against Iraq.

I. The Use of Force, the Role of the United Nations Security Council and the Right of Self-Defense

The Charter of the United Nations has governed the use of force by states since 1945. The Preamble to the Charter leaves no question as to the UN's fundamental purpose: "to save succeeding generations from the scourge of war." The delegates that gathered in San Francisco in the closing days of World War Two envisioned a system of collective security that would operate "to maintain international peace and security." In this system, members of the international community would consider an attack on one state to be an attack upon all, and would cooperate to remove threats to the peace and suppress acts of aggression. Thus, Article 2 of the UN Charter provides that "[a]ll Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered." It further provides that "[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." In this manner, the UN Charter deprives states of any right they may have to use military force to resolve international disputes, subject to two broad exceptions: first, when force is authorized by the Security Council under its Chapter VII authorities; and second, when force is used in self-defense. We discuss each of these in turn below.

A. Actions of the UN Security Council

The Security Council, pursuant to Article 24 of the Charter, has primary responsibility to maintain international peace and security in accordance with the principles and purposes of the United Nations. Article 25 makes decisions of the Security Council legally binding on all states. While the General Assembly of the United Nations may make recommendations to states in matters concerning international peace and security, the Security Council alone has the power to decide such matters.

The Charter grants the Security Council wide discretion in carrying out this responsibility. The Security Council has the responsibility, under Article 39 of Chapter VII, to determine "the existence of any threat to the peace, breach of the peace, or act of aggression." After making such a determination, the Security Council may make recommendations or it may "decide" to take measures "in accordance with Articles 41 [non-force measures] and 42 [military force], to maintain international peace and security."[1] With respect to authorizing the use of military forces, the Security Council may choose to deploy national forces under UN command and control (as in the Korean conflict), or it may authorize a regional organization to lead an enforcement action (as with NATO in the Balkans), or it may recognize the right of member states to use force individually or collectively (as in the Gulf War with respect to Iraq).[2]

When the Security Council acts "to restore international peace and security," its pronouncements are determinative. By providing explicit legal authorization that is binding on

all member states, the Security Council ratifies the pre-existing right of states to use force in individual or collective self-defense. At the same time, it brands the aggressor as an international outlaw.

The Security Council's determinations thus typically resolve two questions: Has an armed attack occurred that gives rise to a right of self-defense? Who is the aggressor? Following its invasion and occupation of Kuwait, Iraq cited long-standing claims to sovereignty over Kuwaiti territory as a legal justification for its forceful annexation of that nation. On August 2, 1990, in Resolution 660, the Council promptly determined that the Iraqi invasion was "a breach of international peace and security," repudiated the Iraqi claim, and thereby effectively foreclosed debate over the legitimacy of the coalition's military response. Four days later, the Security Council passed Resolution 661, in which it affirmed "the inherent right of individual or collective self-defense, in response to the armed attack by Iraq against Kuwait." The Security Council thus decisively answered both questions: there had been an armed attack and Iraq was the aggressor.

B. The Right of Self-Defense

The second exception to the general prohibition on the use of military force concerns the right of self-defense against an armed attack. The Charter, in this regard, has preserved and carried forward a right to use force in individual or collective self-defense that clearly existed under customary international law before the founding of the UN. Article 51 of the Charter encapsulates this right:

> Nothing in this present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to restore international peace and security....

In these terms, the Charter recognizes a legal right of self-defense — "inherent" in the English version, and "*droit naturel*" in the French text — in situations involving an armed attack, where the Security Council has not itself "taken measures necessary" to restore peace. This right of self-defense extends to states both individually and collectively. An armed attack upon one member of the United Nations is regarded as an attack upon all, giving all members the right to act in collective self-defense against the aggressor. As Professor Yoram Dinstein, in his seminal treatise on the *jus ad bellum*, affirms: "There is no doubt that, in principle, Article 51 permits any UN Member to help another if the latter has fallen prey to an armed attack."[3]

Subject to the customary limits of necessity and proportionality, the inherent right of self-defense continues until international peace and security actually are restored.[4] The text of the Charter, the record of its adoption, and subsequent practice makes clear that states individually and collectively may lawfully act in self-defense until such time as international peace and security are actually restored.[5]

The condition that defensive measures be "proportional" requires that military action be limited to what is reasonably necessary to achieve lawful objectives.[6] This means simply that there must be "some symmetry or approximation" between those measures resorted to in defense and the original (unlawful) use of force.[7] The key here is what steps reasonably are necessary to restore the peace. A full-scale invasion of an aggressor may not be a proportionate response to a single minor attack — but in the case of a ongoing series of such attacks, invasion may be altogether proportionate, indeed it may be the only response that suffices to foreclose the possibility of continuing aggression and thus achieve the lawful purpose of the defenders.

In considering further military action against Iraq, it should be noted that state practice provides no support for the notion that lawful defensive actions extend only to expelling an aggressor. The Security Council itself confirmed that Kuwait and the coalition of member states that came to its defense in 1990 were authorized not merely to expel Iraq, but also to take further actions necessary to restore international peace and eliminate future threats to the security of the region. The legal import of the Security Council's actions, as discussed below, reflected its judgment about what measures were both necessary and proportionate to vindicate these most fundamental purposes of the UN Charter.

II. The Security Council's Response to Iraq's Invasion of Kuwait

A. The Security Council's Coercive Measures

Within hours of Iraq's invasion of Kuwait on August 2, 1990, the Security Council passed ***Resolution 660*** — the first of fifty-seven resolutions that it has adopted concerning Iraq over the past twelve years. The Security Council determined that the invasion constituted a "breach of international peace and security" and, "[a]cting under Articles 39 and 40 of the Charter," the Security Council condemned the invasion, demanded that Iraq withdraw, and called upon the parties to negotiate an end to the conflict. As noted above, the Security Council's determination that Iraq's invasion constituted a breach of the peace decisively answered the question of the legality of Iraq's actions.[8]

Iraq defied the Security Council's demand that it withdraw from Kuwait. As a result, on August 6, the Security Council adopted ***Resolution 661***, in which it affirmed "the inherent right of individual or collective self-defence" and, "acting under Chapter VII," enacted a comprehensive economic embargo. The embargo prohibited states from importing commodities from Iraq or occupied Kuwait, or exporting commodities to Iraq or Kuwait (with the exception of medical supplies and humanitarian foodstuffs). At that time, the Security Council stated that the purpose of the embargo was to "secure [the] compliance of Iraq with paragraph 2 of resolution 660 (1990) and to restore the authority of the legitimate Government of Kuwait." Thus, the Security Council initially limited its objectives — and the Chapter VII measures enacted to achieve those objectives — to an Iraqi withdrawal and the restoration of the Kuwaiti government. Not long thereafter, however, the Council dramatically expanded its objectives.

Because Iraq openly defied the embargo, the Security Council passed ***Resolution 665*** on August 25, 1990, which called upon the US-led coalition to use naval forces to interdict

maritime shipping to ensure compliance with the sanctions enacted in Resolution 661. In so doing, the Security Council arguably crossed a threshold from Article 41 measures (which include economic sanctions) to Article 42 measures (which include such uses of military force as a blockade). However, the Security Council's resolutions refer to neither of these articles; rather, the resolutions are rooted more generally under Chapter VII (which includes Article 51). This fact, taken together with the Security Council's recognition of the right of self-defense in Resolution 661, makes it clear that the Security Council acted to delegate enforcement of its resolutions to those states acting in collective self-defense with Kuwait.[9]

Iraq remained obdurate, so the Security Council, acting under Chapter VII of the Charter, adopted the following additional resolutions:

- ***Resolution 662*** (Aug. 9, 1990) declared Iraq's annexation of Kuwait "null and void."
- ***Resolutions 664 and 666*** (Aug. 18 and Sept. 13, 1990) demanded the protection and release of third-state nationals and compliance with international humanitarian law.
- ***Resolution 667*** (Sept. 16, 1990) condemned Iraq's "aggressive acts" and violations of international law, including "acts of violence against diplomatic missions and their personnel," and demanded the immediate release of foreign nationals and respect for Security Council decisions.
- ***Resolution 669*** (Sept. 24, 1990) addressed the issue of assisting countries harmed by the sanctions regime.
- ***Resolution 670*** (Sept. 25, 1990) condemned Iraq's "flagrant violation … of international humanitarian law," reminded Iraq that those individuals who order or commit grave breaches of the Geneva Conventions may be prosecuted, and strengthened the sanctions regime by banning most flights to and from Iraq and Kuwait.
- ***Resolution 674*** (Oct. 29, 1990) again condemned Iraq's treatment of third-state nations and reminded Iraq of its obligation under international law to pay reparations for the "invasion and illegal occupation of Kuwait."
- ***Resolution 677*** (Nov. 28, 1990) condemned Iraq's attempt to alter the demographic composition of the Kuwaiti population.

Between August and November 1990, while coalition military forces were massing in the Saudi Arabian desert near the border with Iraq, the Security Council, through these and other actions, sought to secure Iraq's prompt withdrawal from Kuwait and otherwise to make it conform its conduct to the requirements of international law. In this regard, the Security Council may be said to have acted as its founders intended — by resorting to ever more stringent and coercive measures in an effort to restore international peace and security without the use of military force. This effort was unavailing. Iraq's utter defiance of its demands compelled the Security Council to give its explicit authorization to the use of force against Iraq.

B. The Authorization to Use Force Against Iraq

While the United States and the United Kingdom urged adoption of a Security Council resolution authorizing military action against Iraq, neither nation believed international law required such authorization as a prerequisite to the use of force. United Nations support for the exercise of the right of collective self-defense was important and even essential for many other reasons, but not as a legal matter. As President Bush's National Security Adviser Brent Scowcroft later observed:

> While we had sought United Nations support from the outset of the crisis, it had been as part of our efforts to forge an international consensus, not because we thought we required its mandate. The UN provided an added cloak of political cover. Never did we think that without its blessing we could not or would not intervene.[10]

While unambiguously authorized to use military force under Article 51 of the Charter, the coalition, led by the United States, nonetheless sought and received Security Council approval of its actions. ***Resolution 678***, passed on November 29, 1990, authorized "all necessary means" to eject Iraq from Kuwait and "to uphold and implement. … all subsequent relevant resolutions and to restore international peace and security to the area." The Security Council reaffirmed its eleven previous resolutions concerning Iraq and explicitly recognized the right of those "States co-operating with the Government of Kuwait" to use force in collective self-defense.

The international community understood the words "States co-operating with the Government of Kuwait" to recognize the right of collective self-defense, because the phrase took note of the *voluntary* actions of coalition member states, as distinct from the creation of a UN force. This point was highlighted in paragraph three of Resolution 678, in which the Security Council formally "request[ed] all States" to support the actions of the coalition. By contrast, when the Security Council acts under Article 42, Article 48 provides that states "shall" carry out the decisions of the Security Council. As Nicholas Rostow has observed, these circumstances make it clear that "article 51 rights can be exercised in the context of Security Council approval."[11]

C. The Cease-Fire Resolutions

Iraq ignored the ultimatum — the "one final opportunity" — given it by the Security Council in Resolution 678, which delayed military action by the coalition until after January 15, 1991. The next day, a 28-nation, US-led coalition commenced Operation Desert Storm. After six weeks of intense bombing followed by an astonishingly successful 100-hour ground campaign, the coalition liberated Kuwait and then unilaterally halted offensive military operations.

Within days the Security Council passed ***Resolution 686*** (March 2, 1991), which recalled and reaffirmed the continuing validity of its twelve previous resolutions addressing the Iraqi aggression (including Resolution 678). It also noted "the suspension of offensive combat operations" by coalition forces, but did not mention any definitive termination. Resolution 686 reiterated the Security Council's need "to be assured of Iraq's peaceful intentions," took note of the objective expressed in Resolution 678 "of restoring international peace and security in the region," and highlighted the "importance of Iraq taking the necessary measures which would permit a definitive end to the hostilities." The Security Council demanded that Iraq "cease

hostile or provocative actions by its forces against all Member States," set up a meeting to arrange "the military aspects of a cessation of hostilities," and provide information on weapons or explosives in and immediately around Kuwait.

On March 3, 1991 General H. Norman Schwarzkopf, USA, the commander of coalition forces, and Lieutenant General Sultan Hashim Ahmad al-Jabburi, the deputy chief of staff of the Iraqi ministry of defense, negotiated a cease-fire agreement.[12] The cease-fire agreement, among other things, established a demarcation line and addressed the issue of repatriation of Kuwaitis and POWs held in Iraq. The terms of the cease-fire were not crafted by the Security Council. Rather, they were dictated by the coalition to the Iraqis, who accepted the terms in the field.

The cease-fire agreement reached by Schwarzkopf and al-Jabburi on March 3, 1991 was committed to writing by the United States, vetted by the Security Council, and on April 3 adopted by the Security Council in ***Resolution 687***. That resolution embodies what has been described as the "most peremptory and far-reaching cease-fire terms ever resorted to by the Security Council."[13] Resolution 687 recalled and reaffirmed all of the Council's prior actions — reflected in thirteen earlier resolutions — concerning Iraq. In addition, Resolution 687 —

- Noted statements by Iraq threatening to use chemical weapons and its prior use of such weapons in violation of Iraq's treaty obligations.
- Deplored "threats made by Iraq … to make use of terrorism against targets outside Iraq".
- Demarcated the border between Kuwait and Iraq, and established a UN observer group to monitor the border.
- Outlawed Iraq's nuclear, biological, and chemical weapons programs, established a comprehensive program to monitor and verify Iraq's disarmament, and decided "that Iraq shall unconditionally accept the destruction, removal, or rendering harmless [of such weapons], under international supervision". (three times the resolution refers to Iraq's "unconditional" acceptance of a rigorous on-site UN weapons inspections program)
- Required Iraq "to condemn unequivocally and renounce all acts, methods and practices of terrorism" and to prohibit terrorist organizations from operating from Iraq.
- Reaffirmed Iraq's obligations under international law to pay reparations, and established a compensation fund to be paid out of Iraq's sale of oil.
- Declared Iraq's repudiation of its foreign debt to be "null and void".
- Modified and strengthened the sanctions regime that had been in place against Iraq since the fall of 1990.
- Established a UN border observer unit.
- Demanded the repatriation of third-State nationals.
- Declared that "a formal cease-fire" would become effective upon Iraq's unconditional acceptance of all these provisions.

Iraq formally accepted the terms of the cease-fire in a letter delivered to the Security Council on April 6, 1991, which denounced the "iniquitous resolution" but ultimately declared that Iraq had "no choice but to accept."[14]

As noted above, when the Security Council authorized the use of force against Iraq in Resolution 678, it prospectively approved the exercise of the right of collective self-defense. So, too, when the Security Council enshrined the cease-fire agreement in Resolution 687, it validated and lent its own legal mandate to all the terms of the agreement between Iraq and the coalition, as to which it insisted upon Iraq's "unconditional acceptance." This elevated the terms of the cease-fire from a mere agreement between warring parties to an obligation enforceable against Iraq under the terms of the UN Charter itself.

D. Iraq's Continuing Violation of the Cease-Fire

The terms of the cease-fire, as set forth in Resolution 687, were intended as a comprehensive framework to restore peace and maintain the security of the region. From April 1991 to this very day, however, Iraq has flaunted its legal obligations under that resolution and others adopted by the Security Council since the invasion of Kuwait. This has necessitated continuing military operations by the coalition, acting in collective self-defense and under color of the Security Council's resolutions, and it also has necessitated subsequent pronouncements by the Security Council regarding Iraq's violations of its legal obligations.

2. The Military Conflict from 1991 to Present

Resolution 687 obligated Iraq to, among other things, cease further offensive military actions. Despite the "cease fire," however, hostilities were suspended only temporarily in 1991. In the intervening eleven years, Iraq's unceasing military provocations have required United States and coalition partners to engage Iraqi forces repeatedly. Coalition combat and reconnaissance aircraft have flown more than 250,000 sorties over Iraq since April 1991 to enforce the terms of the cease-fire agreement and maintain the no-fly zones. Iraqi forces have fired on these aircraft thousands of times, and US and coalition pilots have returned fire thousands of times. Noting that so many people seem to be unmindful of Iraq's conduct and the ongoing military response it has necessitated, Time magazine has referred to this as "The Forgotten War."[15]

A partial catalogue of these operations accordingly may be instructive. In 1993, for example, the United States determined that Iraq had mounted a plot to assassinate former President George Bush. In June of that year, the US responded by launching twenty-four Tomahawk cruise missiles against the Iraqi intelligence headquarters in Baghdad. President Clinton justified this attack under Article 51 and stated that it "should be clear … that we will strike directly at those who direct and pursue Iraqi policies when it is necessary to do so in our self-defense."[16]

In January of the same year, Iraq notified the UN Special Commission (UNSCOM), the body entrusted by the Security Council to oversee Iraq's compliance with its disarmament obligations, that it would be prohibited from using the Habbaniyah airfield, which had the effect of precluding short-notice inspections. US, UK and French forces responded with air strikes in southern Iraq. The President of the Security Council denounced Iraq's actions as a violation of Resolution 687, and warned that "serious consequences" would flow from "continued defiance."[17]

Also in January 1993, Iraq deployed surface-to-air missile (SAM) batteries close to the border of the no-fly zone. Following attacks by Iraq on American F-15 and U-2 aircraft, US, British, and French air forces engaged SAM sites and air-defense control centers in southern Iraq. That same month, US naval forces in the Red Sea and the Arabian Gulf launched Tomahawk cruise missiles against a nuclear fabrication facility near Baghdad. The next day coalition air forces re-engaged SAM sites and air-defense control centers that had been missed in the strikes of the previous week. At the time, UN Secretary-General Boutros Boutros-Ghali stated publicly that the coalition had taken these military actions lawfully under "a mandate from the Security Council" in response to Iraq's violations of Resolution 687.[18]

Shortly thereafter, in response to a series of border "incidents" and other "actions by Iraq in violation of relevant Security Council resolutions," the Security Council adopted ***Resolution 806*** (February 5, 1993), in which it pointed out "once again its guarantee of the inviolability" of the Iraq-Kuwait border. Circumstances compelled the Security Council to reiterate this guarantee only a few months later in ***Resolution 833*** (May 27, 1993), which again reaffirmed Resolution 687 and reminded Iraq that its fulfillment of its obligations thereunder formed "the basis for the cease-fire." The Security Council also determined to take "all necessary measures" pursuant to Resolutions 687 and 773[19] and the Charter to enforce its decision to guarantee the border.

In the fall of 1994, Iraq moved a large military force threateningly close to the Kuwaiti border, pulling it back only after the United States denounced the move and responded by sending a carrier battle group, scores of attack aircraft, and over 50,000 troops to the region. The Security Council, in ***Resolution 949*** (October 15, 1994), once again determined that the Iraqi actions constituted "a threat to peace and security in the region." The Security Council demanded that Iraq "not again utilize its military or any other forces in a hostile or provocative manner" and "cooperate fully with the United Nations Special Commission."

In October 1998, Iraq abruptly halted any further cooperation with UNSCOM. In November 1998, Iraq reneged on a promise to permit UNSCOM to resume its inspections. As a result, President Clinton ordered the deployment of military forces in Operation Desert Fox,[20] which was launched on December 16, 1998. During this operation, US and UK forces engaged hundreds of Iraqi targets, in order to deprive Iraq of the capability to produce and use weapons of mass destruction and to wage further offensive military operations.[21]

In the three years following Operation Desert Fox, the Iraqis have engaged coalition aircraft with missiles and anti-aircraft fire on over 1,000 separate occasions.[22] In the majority of those incidents, the coalition has responded by bombing the offending Iraqi site and in the process has damaged or destroyed over 400 targets. On other occasions US and British aircraft attacked anti-ship missile sites, command-and-control sites, military communications sites, and fuel and ammunition dumps.[23] Since 2001 and the inauguration of President George W. Bush, the coalition has been compelled to continue its military operations, launching dozens of attacks on Iraqi anti-aircraft defenses and other targets, including a Silkworm anti-ship missile site on September 5, 2002. As Defense Secretary Donald Rumsfeld has stated, these continuing operations have had the objective of degrading Iraqi air defense capabilities, reducing the threat posed to coalition aircraft and aircrews, and enforcing the no-fly zones in Iraq.[24]

2. Iraq's Treatment of its Civilian Populations

Within just two days of Iraq's acceptance of the formal cease-fire agreement, the coalition (led by the United States, United Kingdom, and France) was compelled to establish a "no-fly zone" in northern Iraq in response to Iraq's continuing disregard of international humanitarian standards and brutal suppression of a Kurdish popular uprising there. "Deeply disturbed by the magnitude of human suffering involved," the Security Council in ***Resolution 688*** (April 5, 1991) condemned "the repression of the Iraqi civilian population" and branded Iraq once again a "threat to international peace and security." The coalition established a second no-fly zone in southern Iraq after Shiite dissidents were brutally attacked by Iraqi helicopter gunships in August of 1992. Iraq denounced the legality of the no-fly zones as a violation of its sovereignty and an act of aggression by the coalition, and announced that it would attack any coalition aircraft found flying in its airspace.

Under Saddam Hussein, human rights abuses against Iraqi civilians — clear violations of Resolution 688 and its predecessors — have been "widespread, serious, and systematic."[25] The regime has carried out a twenty-year campaign against the Kurds, attacking them with chemical weapons on dozens of occasions, destroying over 4,000 Kurdish villages, killing at least 50,000 people, and forcing hundreds of thousands to flee their homes.[26] In a 1994 report, the Special Rapporteur of the UN Commission on Human Rights concluded that the regime in Baghdad was guilty of war crimes, crimes against humanity, and possibly genocide.[27]

3. Iraq's Violation of Disarmament and Inspection Obligations

Over the past decade, the Security Council has found numerous other violations of Resolution 687 by Iraq — particularly with respect to those provisions outlawing Iraq's nuclear, chemical and biological weapons programs, and demanding that Iraq agree unconditionally to destroy its weapons of mass destruction and submit to a rigorous UN inspections and monitoring program. Within months of the cease-fire, the Security Council in ***Resolution 707*** (August 15, 1991) determined that Iraq was concealing its weapons programs and providing incomplete information to the Security Council. The Security Council condemned these actions as "a material breach" of the cease-fire. It directed Iraq immediately to provide "full, final and complete disclosure, as required by Resolution 687 (1991), of all aspects of its programmes to develop weapons of mass destruction," and otherwise to cooperate fully with UN weapons inspectors.

It bears emphasizing that the Security Council's determination that Iraq was in material breach of its cease-fire agreement removed any question of the coalition's legal right to resume offensive military operations. Regrettably, this was

not done. As a senior UNSCOM official commented in 1997, Security Council resolutions condemning Iraq appeared to have "all the impact of traffic tickets"[28] — a lesson clearly not lost on Saddam Hussein.

Between 1991, when the Security Council first found Iraq in "material breach" of the cease-fire in Resolution 707, and 1999, when the UN Monitoring, Verification and Inspection Commission (UNMOVIC) was created to supplant UNSCOM, the Security Council passed fully twelve resolutions addressing Iraq's refusal to meet its disarmament and inspection obligations. ***Resolution 715*** (October 11, 1991) demanded that Iraq "meet unconditionally all its obligations under the plans approved by the present resolution and cooperate fully" with UNSCOM and the International Atomic Energy Agency. Additional inspection, verification and monitoring plans were approved by the Security Council in ***Resolution 1051*** (March 27, 1996), which again demanded that Iraq "meet unconditionally all its obligations."

In June 1996, Iraq took non-compliance with its cease-fire obligations to a new level, when it blocked access to various Republican Guard sites. In response, the Security Council passed ***Resolution 1060*** (June 12, 1996), which recalled Resolutions 687, 707 and 715 and demanded that Iraq allow "immediate, unconditional and unrestricted access to any and all areas, facilities, equipment, records and means of transportation" for UN inspection. The next month an UNSCOM inspection team, denied admission to a Republican Guard camp, viewed "long, round objects looking for all the world like Scud missiles being hurriedly driven away."[29]

On August 23, 1996, the President of the Security Council observed on the Council's behalf: "The denial by Iraq, on repeated occasions, of immediate, unconditional and unrestricted access to sites … constitute a gross violation of its obligations."[30] Other "clear and flagrant" violations of Resolution 687 were cited in ***Resolution 1115*** (June 21, 1997), in which the Security Council yet again demanded "immediate, unconditional and unrestricted" access for UN inspectors. During a visit to the Iraqi Chemical Corps headquarters in September 1997, UNSCOM inspectors were detained at the gate "for hours while files were openly trucked away and other documents burned on the roof of the building."[31] On November 12, 1997, the Council considered Iraq's refusal to permit entry for certain UN inspectors and its intentional hiding of "significant pieces of dual-capable equipment." In ***Resolution 1137*** it again determined that Iraqi conduct constituted "a threat to international peace and security, and demanded that Iraq "cooperate fully and immediately and without conditions or restrictions." Noting that the terms of the cease-fire resolution were "the governing standard of Iraqi compliance," the Security Council once more insisted on "immediate, unconditional and unrestricted access to any and all areas" for UN inspectors.

Hoping to retrieve the situation, UN Secretary-General Kofi Annan traveled to Baghdad in early 1998 and agreed with Iraq to modify the inspections regime. This agreement was embodied in ***Resolution 1154*** (March 2, 1998), which nonetheless reiterated that all previous Security Council resolutions "constitute[d] the governing standard of Iraqi compliance" with respect to disarmament and inspections. The Security Council then emphasized anew its demand for "immediate, unconditional and unrestricted access ... necessary for the implementation of resolution 687," and warned "that any violation would have the severest consequences."

The Security Council passed a similarly worded resolution on September 9, 1998. ***Resolution 1194*** noted Iraq's decision not to cooperate with weapons inspectors, condemned the decision as "a totally unacceptable contravention of its obligations," and reaffirmed the Security Council's "intention to act in accordance with the relevant provisions of resolution 687" with respect to the embargo until Iraq complied with UN inspections. After Iraq declared that it was ceasing all cooperation with UNSCOM, the Security Council in ***Resolution 1205*** (November 5, 1998) condemned Iraq's decision as a "flagrant violation" of the cease-fire agreement.

The last resolution directly addressing weapons inspections was ***Resolution 1284*** (December 17, 1999), in which the Security Council established UNMOVIC to supplant UNSCOM and assume responsibility for further inspections and monitoring. As it had with respect to UNSCOM, the Security Council called upon Iraq to provide UNMOVIC "immediate, unconditional and unrestricted access to any and all areas .... as well as to all officials" and other authorities in Iraq that UNMOVIC deemed necessary to fulfill its mission.

As this succession of resolutions indicates, the mechanisms used by the Security Council to monitor Iraq's compliance with its disarmament and inspection obligations have proved utterly unavailing in the face of what Richard Butler, former head of UNSCOM, has termed "Iraq's unremitting policy of concealment and resistance."[32] In the most recent formal assessment, a comprehensive expert review conducted under the Security Council in 1999 concluded that Iraq had not met its legal obligations, set forth a list of outstanding disarmament issues, and described the extensive requirements associated with an effective monitoring program if one is ever to be implemented to secure Iraq's future compliance.[33] As Ambassador Butler points out, no one has been watching Saddam Hussein in the interim and "[y]ou can be sure that he is … building weapons."[34]

The record before the Security Council has the highest significance for policymakers concerned with the threat of weapons of mass destruction.[35] But it also has great significance as a matter of international law. In Resolution 678, the Security Council authorized the US and its coalition partners to take "all necessary means" not only to eject Iraq from Kuwait, but also to "uphold and implement resolution 660 (1990) and all *subsequent* relevant resolutions to restore international peace and security to the area." The record admits no doubt that Iraq has not fulfilled and does not intend to fulfill its disarmament, inspections and monitoring obligations under Resolution 687, a "subsequent" resolution that is not merely relevant but rather of central importance to the Security Council's efforts to restore peace and security. Accordingly, under Resolution 678, the US and other UN member states clearly have the Security Council's authorization to resort to the use of force and other "necessary means" to secure Iraq's compliance. As a legal matter, no further or additional Security Council action is necessary for this purpose.

III. Collective Defense or Collective Inaction?

As Senator Robert Kerry recently observed, "the war against Iraq did not end in 1991."[36] Hostilities with Iraq, precipitated by Iraq's invasion of Kuwait on August 2, 1990, have not ceased and are not over. Coalition military operations (including but not limited to the enforcement of the no-fly zones) have continued without interruption since Operation Desert Storm. Both the United States and the United Kingdom have consistently maintained that these operations are legally justified under both Article 51 *and* Resolution 678. Actions taken in the exercise of the right of self-defense may parallel actions taken under Security Council authorization or direction (including the use of force). Here, the Security Council explicitly recognized the legitimacy of the coalition's operations at their outset. Unquestionably, it also has acknowledged, in the extreme circumstances posed by Iraq, that principles of necessity and proportionality encompass a broad range of measures to restore international peace and security.

It has been said that a "cease-fire is, in essence, a reaffirmation by the parties of their obligations under Article 2(4) of the Charter."[37] Others have taken this argument a step further, claiming that when a cease-fire is negotiated, any use of force previously authorized by the Security Council automatically terminates and the parties revert back to the controlling general prohibition on the use of force under Article 2(4). On this view, "[a]rmed responses to breaches of cease-fire agreements cannot be made by individual states; a new Security Council authorization must be adopted."[38] The fundamental error of the position is this: it confuses the suspension of hostilities with the termination of hostilities. As Professor Dinstein has emphasized, the legal status of a conflict remains unchanged after a cease-fire agreement has been reached: "a suspension of hostilities connotes that the state of war goes on, but temporarily there is no warfare."[39] There cannot be a "reversion" back to Article 2(4) until the circumstances giving rise to a lawful use of force are addressed and peace and security thereby restored, matters typically made the subject of a final peace agreement.

Operational realities likewise suggest that a party to a cease-fire agreement, even one endorsed by the Security Council, may determine that it has been breached materially by the other side. The United States and other members of the coalition have responded forcefully to numerous violations of the cease fire by Iraq since 1991. As Professor Ruth Wedgwood has noted, for example, the "right to use force unilaterally to vindicate the inspection regime is ... ratified by the institutional history of UNSCOM.…"[40] The Security Council has not taken exception to these actions. Rather, in 1993 the Secretary-General explicitly acknowledged the legality of the armed responses, and in 1994 the Security Council itself recognized the continuing validity of Resolution 678 in which it originally authorized the use of force.

Thus, a cease fire does not, in itself, extinguish the right of self-defense, and certainly does not do so not when its terms are disregarded *ab initio*.[41] The persistent, well-documented Iraqi violations of the cease-fire agreement constitute a renunciation of the agreement, and justify the resumption of military operations designed to achieve the lawful objectives that the coalition has had in view since the invasion of Kuwait. As a legal matter, this conclusion seems only more compelling where the Security Council has embraced the terms of the cease fire in numerous resolutions, identified numerous, flagrant and material violations, and warned repeatedly of the consequences. Significantly, at no time has the Council retreated from its insistence that the cease-fire resolution "constitutes the standard of compliance," and logically also of non-compliance. Presumably, the Security Council might, in different circumstances, determine that there was no material breach of a cease fire and that resumption of defensive military actions accordingly was unjustified. Such is not the case here.

If the right of collective self-defense recognized in Article 51 *were* extinguished upon acceptance of a cease-fire agreement, aggressors would have a perverse incentive to enter into such agreements without intending to honor them. By the same token, states acting legitimately in their own defense would have every reason not to cease hostilities short of unconditional surrender. Such a principle would serve no humanitarian interest, and leave little room for negotiating conditions on the cessation of hostilities in conflicts, like the Gulf War, where doing so would save further unnecessary loss of life and property.

IV. Conclusion

It is tempting but inaccurate to view the road forward with Iraq in singular terms — a process driven by the Security Council, through the various measures it may take now or in the future to restore international peace and security. In fact, the Security Council already has spoken to *all* fundamental legal issues — Iraq's unlawful aggression, Iraq's violation of its cease fire obligations, the legitimacy of the coalition's military actions from 1991 to date, and the range of those measures the Security Council deems necessary and proportionate in order to restore peace and security in the region. Moreover, quite apart from the Security Council's pronouncements, international law recognizes an inherent right of collective self-defense, a right that continues and that may be exercised as necessary until international peace and security actually are restored. To be sure, the United Nations process is important. It is *the* process by which Iraq can be readmitted to the community of law-abiding nations. Meantime, while the political and moral value of a new Security Council mandate should not to be underestimated, the Security Council's prior actions and Article 51 of the UN Charter provide complete and independent legal bases for the US and coalition partners to resume large-scale offensive military actions against Iraq.

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Footnotes

[1] The utilization of military force by the Security Council through military units provided by member states is addressed in Articles 42 through 48 of Chapter VII. The Charter envisioned that states would agree to loan troops to the United Nations, which would establish a Military Staff Committee to command the forces. The Security Council's use of military force under Article 42 would be carried out by a United Nations force under Article 43 and all member states would be obligated to assist. No such agreements have been made and the Military Staff Committee has remained dormant.

The distinction between these three options became clearer in 1995 when the Security Council in Resolution 1031 "[a]cting under Chapter VII" authorized "Member States acting through or in cooperation with the organization [NATO] ... to take all necessary measures" to enforce the Dayton Peace Accord. Article 53, which authorizes the Security Council to utilize regional organizations in enforcement actions, is in Chapter VIII. In practical terms, the Security Council determined pursuant to Article 39 that the situation in Bosnia was a threat to international peace and security and then went through Article 39 to authorize NATO's enforcement action under Article 53.

[2] *See* Michael N. Schmitt, *Clipped Wings: Effective and Legal No-Fly Zone Rules of Engagement*, 20 Loy. L.A. Int'l & Comp. L.J. 727, 731 (1998).

[3] Yoram Dinstein, War, Aggression and Self-Defence 223-4 (3d ed. 2001).

[4] Importantly, Article 51 refers to Security Council actions "necessary to restore international peace and security." *See* Andru E. Wall, *Concluding The War With Iraq*, 2003 Israel Yearbook on Human Rights (Yoram Dinstein, ed.) (forthcoming 2003).

[5] Testimony of US Secretary of State John Foster Dulles to the US Senate during debate over ratification of the Charter leaves no question that the right of self-defense continues until such time as international peace and security is actually restored. *See* Malvina Halberstam, *The Right to Self-Defense Once the Security Council Takes Action*, 17 Mich. J. Int'l L. 229, 240-8 (1996).

[6] M.S. McDougal & F. Feliciano, Law and Minimum World Public Order 242 (1961).

[7] Dinstein, *supra* note 4 at 198. Professor Dinstein emphasizes that this does not mean there must be equality in "scale and effect."

[8] The Charter envisions that a state exercising the right of self-defense under Article 51 will report its actions to the Security Council, which in turn will consider the legality of the actions. Resolution 660 prospectively made that determination.

[9] This point becomes even more apparent as one analyzes the resolutions up to and including the "authorization" to use force contained in Resolution 678.

[10] George Bush and Brent Scowcroft, A World Transformed 416 (Knopf, 1998).

[11] Nicholas Rostow, *The International Use of Force After the Cold War*, 32 Harv. Int'l L.J. 411, 420 (1991).

[12] *See* H. Norman Schwarzkopf, It Doesn't Take A Hero 485-90 (Bantam, 1992).

[13] Dinstein, *supra* note 4, at 50.

[14] U.N. Doc. S/22456 (Apr. 6, 1991). During Security Council debates at the time Iraqi forces were leaving Kuwait, the United Kingdom noted that this signified merely a new phase of the crisis. Recalling the language of Resolution 678, the UK representative, Sir David Hannay, said that this new phase was "probably the most difficult, and certainly the most important .... and it is the one that must be dedicated to the restoration of peace and security in the region." Ambassador Hannay urged that the Security Council "should establish the basic framework within which the conditions can be created for a definitive end to the hostilities, and that is what the present resolution is designed to do." Such requirements, he observed, "flow from the resolutions we have adopted and from the statements previously made...." and "must be explicitly accepted by Iraq, and that is essential to permit the definitive end to the hostilities." (U.N. Doc. S/PV.2978 (Mar. 2, 1991)).

[15] Mark Thompson, *The Forgotten War*, Time, Sept. 23, 2002, p. 43.

[16] William J. Clinton, Letter to Congressional Leaders on Iraq, July 22, 1993, 29 Weekly Comp. Pres. Doc. 1420 (1993).

[17] U.N. Doc. S/25091 (1993).

[18] George H. W. Bush, Letter to Congressional Leaders Reporting on Iraq's Compliance With United Nations Security Council Resolutions, Jan. 19, 1993, 29 Weekly Comp. Pres. Doc. 67 (1993).

[19] Resolution 773 (Aug. 26, 1992) was in furtherance of paragraphs 2 through 4 of Resolution 687 dealing with the demarcation of the Iraq-Kuwait border. Paragraph 4 of Resolution 773 underlined the Security Council's decision to "take as appropriate all necessary measures" to guarantee the "inviolability" of the border, "as provided for in paragraph 4 of resolution 687 (1991)."

[20] President Clinton justified US military actions on the grounds that, among other things, "Iraq's actions were a material breach of the Gulf War cease-fire resolution (UNSC Resolution 687)...." *See* Letter to Congressional Leaders Reporting on Iraq's Compliance With United Nations Security Council Resolutions, March 3, 1999, 35 Weekly Comp. Pres. Doc. 341 (1999).

[21] Operation Desert Fox continued over four days and reportedly involved almost 30,000 troops, 37 warships, and 348 aircraft from the United States, as well as additional forces from the United Kingdom. Those forces launched over 300 Tomahawk cruise missiles from the sea, 90 cruise missiles from B-52 bombers, and over 600 other bombs and missiles. Among the targets were air defense systems, command and control sites, security and military intelligence facilities, alternate command and control and leadership sites, Republican Guard sites, airfields, anything related to the research, development, production, or delivery of weapons of mass destruction, and the Basrah petroleum oil lubricant facility that was contributing to the illegal export of gas and oil. *See* Secretary of Defense William Cohen and General Anthony Zinni, Press Briefing, US DoD Transcript of News Briefing of 21 Dec. 1998

[22] US DoD Transcript of News Briefing on 10 Aug. 2001.

[23] *See U.S. Fires on Anti-Ship Sites*, Newsday (New York, NY), Feb. 3, 1999 at A17; Michael Kilian, *Allies Hit Targets in Iraq*, Chicago Tribune, Aug. 11, 2001 at 6; Dana Priest, *U.S. Planes Intensify Iraq Strikes*, Wash. Post, Mar. 2, 1999 at A1. It is indicative of Iraq's attitude toward its cease-fire obligations that Saddam Hussein, in February 2000, offered a sizable cash bounty to any Iraqi who shot down a US or British aircraft or captured an "enemy" pilot. John Correll, *Northern Watch*, Air Force Magazine, Feb., 2000 at 32

[24] News Release from the United States Department of Defense, February 16, 2001, No. 069-01.

[25] As the US State Department has reported, dissidents are decapitated and their family members tortured, women are routinely raped for blackmail and torture, the tongues of critics are amputated, and Shiite clerics and political opponents are summarily executed. *See* Country Reports on Human Rights Practices — Iraq (US Department of State)(Mar. 4, 2002).

[26] Iraq's Crime of Genocide 14 (Human Rights Watch Books, 1995). Hussein's use of chemical weapons on the Kurds reportedly became so well-known among his troops that on one occasion in 1991 Iraqi troops terrorized Kurds by dropping flour on them from helicopters. Andrew Cockburn and Patrick Cockburn, Out of the Ashes: The Resurrection of Saddam Hussein 264 (HarperCollins, 1999).

[27] U.N.Doc. A/49/651 (Nov. 8, 1994).

[28] *Id.*

[29] Cockburn, *supra* note 27, at 266.

[30] U.N. Doc. S/PRST/1996/36.

[31] Cockburn, *supra* note 27, at 271.

[32] Richard Butler, The Greatest Threat: Iraq, Weapons of Mass Destruction and the Crisis of Global Security 228 (Public Affairs, 2000).

[33] U.N. Doc. S/1999/94 (Jan. 29, 1999).

[34] *Id*. at 277.

[35] Charles Duelfer, who served a deputy executive chairman of UNSCOM from 1993 to 2000, recently wrote that "the lesson of Iraq's weapons of mass destruction is that they helped the regime survive; and regional states, such as Iran, have taken note." Charles Duelfer, *The Inevitable Failure of Inspections in Iraq*, Arms Control Today (Sept. 2002), p. 10. Other independent experts also believe that Iraq is rebuilding its programs. *See Iraq's Weapons of Mass Destruction*, International Institute of Strategic Studies (Sept. 2002).

[36] *Finish The War: Liberate Iraq,* Wall Street Journal (Sept. 12, 2002).

[37] David Morriss, *From War to Peace: A Study of Cease-Fire Agreements and the Evolving Role of the United Nations*, 36 VA. J. Int'l L. 801, 893 (1996).

[38] *See* Jules Lobel and Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires, and the Iraqi Inspections Regime*, 93 Am. J. Int'l. L. 124, 129 (1999).

[39] Dinstein, *supra* note 4, at 51. Professor Dinstein continues by pointing out that a prolonged general cease-fire has the psychological feel of neither war nor peace, but legally a state of war remains until a peace treaty is reached — "despite the absence of combat in the interval."

[40] Ruth Wedgwood, *The Enforcement of Security Council Resolution 687: The Threat of Force Against Iraq's Weapons of Mass Destruction*, 92 AM. J. INT'L L. 724, 727 (Oct. 1998).

[41] As the Yemeni representative on the Security Council accurately observed, Resolution 687 "aims at the formal declaration of a cease-fire — only a cease-fire. This means that the state of war will continue between Iraq and the forces of the alliance until a definitive end is put to the military operations and hostilities." The US representative stated, to similar effect, that Resolution 687 laid "the groundwork for the permanent cease-fire" and would "in stages produce a return to normalcy and non-belligerency." U.N.Doc. S/PV.2981 (Apr. 3, 1991).

Constitutional & Policy Issues Regarding Domestic U.S. Enforcement of the Proposed Biological Warfare Convention Inspection Protocol

*By Thomas C. Wingfield & Michael McDavid Coyne**

The first wave of targeted biological warfare attacks on the United States has driven the Administration and Congress to reexamine America's legal and policy options for making future attacks—especially large, indiscriminate ones—less likely. While this is largely a military and intelligence problem, international law does have has an enabling role to play. One frequently proposed option is strengthening the Biological Weapons Convention with an enforcement mechanism, the centerpiece of which would be an intrusive inspection regime resembling that of the Chemical Weapons Convention ("CWC").[1]

The 1972 Biological Toxins and Weapons Convention ("BWC")[2] purports to ban completely the development, employment, transfer, acquisition, production, and possession of all biological weapons listed in the convention. The primary criticism of the BWC has been its lack of an enforcement mechanism. Attempts to craft an enforcement protocol have met with resistance in the United States from constituencies who believe that such a protocol would violate three main parts of the U.S. Constitution: the Appointments Clause, and the Fourth and Fifth Amendments. While advocates and opponents of such an inspection regime will continue to argue their policy preferences, it is important to first stake out the constitutional limits which frame the debate. This will permit a principled discussion within the bounds of constitutionally permissible options. It will also serve as a reminder to our European allies in the current war that, unlike their parliamentary systems, the American constitutional system has firm brakes on government action that are not easily removed.

While few outside academia imagine that such a vigorous inspection approach, on its own, would have any effect on the malefactors currently contemplating the further use of biological weapons against the United States, in democracies already possessing a free press, separation of power, and an engaged and politically potent citizenry, the addition of an intrusive inspection regime could persuasively demonstrate the rejection of chemical and biological weapons. In setting a universally accepted standard for the discovery and destruction of such weapons, the customary international law arising from the consistent state practice of the civilized nations could quickly expand the *de facto* standard into a *de jure* one. This might permit a firmer basis for obtaining an authorization or consensus to use force, and even provide an additional lawful basis for unilateral action.

This paper will first examine the Constitutional and legal impediments to employment of an effective BWC inspection protocol in the U.S., with a particular view towards analogizing the situation to the current inspection regime prescribed by the CWC. Second, key policy and procedural issues concerning proposed enforcement mechanisms to the BWC will be considered.

I. U.S. CONSTITUTIONAL CONCERNS

Article II, Section II, Clause 2 of the Constitution (the "Appointments Clause") gives the President the power to appoint all "officers of the United States," with the advice and consent of the Senate, however, Congress may authorize "such inferior Officers, as they think proper" to be appointed by the President alone, the courts of law, or the heads of departments. Generally speaking, "inferior officers" are officers whose work is directed and supervised at some level by others who were appointed by presidential nomination with the Senate's advice and consent.[3] The Appointments Clause is understood to be an instrument of the separation of powers doctrine, wherein no one single branch of government has the ability to act unchecked by another branch of government.

Commentators have suggested that inspections under the BWC would run afoul of the Appointments Clause by vesting executive authority (*i.e.*, the presidential appointment of inspectors) in officers who were accountable to neither the Executive nor the Legislative branches, and thus violating the separation of powers doctrine.[4] This line of reasoning assumes that the inspectors are solely members of an international authority such as the United Nations, and would be accountable only to such international authority. As such, a hypothetical BWC inspector might be appointed by the President, but then report his finding to a special BWC commission unrelated to the U.S Congress or judiciary.

In 1997, the U.S Senate considered Senate Resolution 75,[5] ("Senate CWC Ratification") regarding the ratification of the CWC. From the outset the Senate declared the primacy of the U.S. Constitution, stating that:

> *Nothing in the [CWC] requires or authorizes legislation, or other action by the United States prohibited by the Constitution of the United States, as interpreted by the United States.*[6]

The Senate also dealt with similar issues regarding the selection of inspectors and conflict with the Appointments Clause, and resolved the matter by ensuring that there would always be federal "inferior officers" present at CWC compliance inspections. In order to accomplish this, a "United States National Authority" was established. It consists of personnel from the Department of Defense when military installation inspections are in question and Department of Commerce personnel when non-military facilities are inspected. The presence of a United States officer (in conjunction with the international authority) would seem to address the legitimate concerns associated with the Appointments Clause and separation of powers doctrine given its relatively successful operation with respect to the CWC.

The Fourth Amendment to the Constitution reads:

> *The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no*

> *Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*

As a general rule, searches of private property in the United States require that authorities show cause for the search and obtain a warrant to conduct the search unless the occupant consents. Certain administrative inspections utilized to enforce regulatory schemes with regard to such items as alcohol and firearms are, however, exempt from the Fourth Amendment warrant requirement and may be authorized simply by statute.[7]

Critics of the BWC have noted the possibility that inspections could prove unconstitutional because they might be overly broad and present unnecessary invasion upon private property, especially companies engaged in the bioengineering and pharmaceuticals business. In addition, commentators have argued that the precedent permitting inspections within *pervasively regulated* industries does not apply to the likely targets of BWC inspectors because the pharmaceutical and bioengineering fields have not historically been considered pervasively regulated.[8]

Other exceptions to the general requirement for a search warrant have evolved, which have relegated the warrant requirement primarily to criminal cases. The elimination of a warrant requirement has increased even within criminal field to include exceptions for administrative searches justified by *special needs beyond the normal need for law enforcement*.[9] The Supreme Court has upheld warrantless searches by administrative authorities in public schools, government offices, and prisons, and has upheld drug testing of public and transportation employees under this rule.[10]

The Senate CWC Ratification addressed these issues and promulgated the following procedures as conditions to its consent:

> (28) CONSTITUTIONAL PROTECTION AGAINST UNREASONABLE SEARCH AND SEIZURE.—
>
> (A) IN GENERAL.—In order to protect United States Citizens Against unreasonable searches and seizures, prior to the deposit of the United States instrument of ratification, the President shall certify to Congress that—
>
> (i) for any challenge inspection conducted on the territory of the United States . . . where consent has been withheld, the United States . . . will first obtain a criminal search warrant based upon probable cause, supported by oath or affirmation, and describing with particularity the place to be searched and the persons or things to be seized; and
>
> (ii) for any routine inspection of a declared facility under the [CWC] that is conducted on the territory of the United States, where consent has been withheld, the United States . . . first will obtain an administrative search warrant from a United States magistrate judge.[11]

Under the CWC, there are two basic types of inspections contemplated, the routine, scripted variety which have occurred in arms control settings for years, and the challenge inspection. Voluntary compliance with routine inspections has proved non-problematic for CWC inspectors. In addition to the concerns of inspected parties about the appearance of non-compliance with the CWC by refusing routine inspection, voluntary consent has been backed up by the possibility of obtaining a potentially more invasive criminal search warrant. There has to date, however, been no test of the challenge mechanism described above. The existence of a CWC inspection regime that appears to be narrowly tailored with constitutionality in mind, and which contains numerous procedural safeguards, would seem to be equally applicable to any BWC inspection procedure.

In addition, new technologies have been developed (and are continually being developed) that may permit sufficient inspection to occur without even having to cross what is constitutionally considered a "search." Immunological and DNA assays may now be conducted with little more than air samples from the inspection target.[12]

The Fifth Amendment to the Constitution reads in pertinent part that:

> *No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

Under the Fifth Amendment, if the federal government takes private property—which *is* an act within the discretion of the federal government—the owner must be provided with just compensation.[13]

BWC critics have argued that any inspection regime would necessarily put the confidential business information and intellectual property of certain companies at risk of theft by foreign inspectors. The aggrieved party in such a scenario would ordinarily be free to seek full recompense from the taker, but because the takers may be subject to diplomatic immunity or otherwise practically immune to judgments, critics urge that the federal government should agree to compensate companies that become the victim of such intellectual property theft. Hence the main issue is how to assure that Fifth Amendment *just compensation* rights of a party are not potentially violated by a BWC inspection procedure.

Industrial espionage is a widespread problem that is not limited to the rather narrow field of international weapons inspections and compliance. Indeed, many of the same mechanisms companies use to protect confidential information could be employed in the case of BWC inspections. In addition, technological advances and lessons learned through CWC inspections can substantially mitigate the likelihood that intellectual property theft would occur under the circumstances.

The Senate Ratification Resolution addressed the same issue in the context of the CWC, providing that:

> (A) UNAUTHORIZED DISCLOSURE OF UNITED STATES BUSINESS INFORMATION.—Whenever the President determines that persuasive information is available indicating that—

(i) an officer or employee of the [inspecting organization] has willfully published, divulged, disclosed, or made known in any manner or to any extent not authorized by the [CWC] any United States Confidential business information coming to him in the course of his employment or official duties or by reason of his examination or investigation of any return, report, or record made to or filed with the [inspecting organization], or any officer or employee thereof, and

(ii) such practice or disclosure has resulted in financial losses or damages to a United States person, the President shall, within 30 days after the receipt of such information by the executive branch of Government, notify Congress in writing of such determination.[14]

The Senate Ratification Resolution goes on to provide that the President will certify to Congress that the inspecting authority will have waived any immunities from jurisdiction that might be pleaded by the inspector, and that if such a waiver is not forthcoming, funding to the inspecting authority may be withheld.[15]

While this procedure has not yet been tested, it would appear to provide a reasonable response to many of the concerns raised by those concerned that businesses would have no redress against larcenous inspectors. At the same time, technology may work to the advantage of intellectual property owners by ensuring that tests are immediate, binary (*i.e.*, they tell the inspector only if a prohibited material is present or absent) and leave the inspector with no samples from which further study or theft would be beneficial. Electronic devices that perform a type of DNA sampling are capable of doing this and are available on the market today.

II. POLICY RELATED MATTERS

Regardless of constitutional strengths or infirmities, there are excellent policy arguments to be made against arms control agreements that are concluded for their own sake, as ends in themselves, rather than as means to an end. Such agreements are rightly criticized as subtracting from international peace and security, in that they demonstrate vacillation by democracies unwilling to enforce the norms they claim to support. One such policy objection to a strengthened BWC is the example of nations that have signed and then immediately violated the original Convention. The former Soviet Union did this routinely, and maintained an impressive stockpile of biological weapons—and a vast research and development infrastructure—long after signing the BWC. This is proof of the inefficacy of treaties unsupported by credible enforcement mechanisms, but not necessarily an indictment of all treaties *per se*. A CWC-type regime of routine and challenge inspections would make this kind of large-scale violation less likely.

Another objection follows logically from this, in that small or covert programs could escape such an inspection regime. While this may be true, it is not necessarily fatal flaw. The mere fact that such a program would have to be kept small (with presumably a resultingly smaller capability), or be made covert (with the costs proportionate to the degree of secrecy (ergo efficacy) desired) would lead many nations to conclude that a small capability expensively developed and maintained might not be worth the financial investment, or the risk of international condemnation if exposed. An enforceable BWC would narrow the list of candidate violators to a more predictable length, and allow vastly increased intelligence collection against this smaller set of targets.

A third objection is that Iraq's biological weapons program escaped detection by a far more intrusive inspection regime than is being contemplated for the BWC. This is an excellent point, but perhaps it militates for tougher inspections or greater resolve in dealing with recalcitrant inspection targets, not capitulation on the part of inspectors. Hence, the issue with Iraq points not so much towards a failed inspection regime as it does toward a generally suspect foreign policy.

Another series of criticisms revolve around the protection of classified government information, or proprietary commercial information. That is, any inspection regime intrusive enough to detect the presence of an unlawful biological agent would, by definition, be sensitive enough to determine not just the presence, but characteristics of, lawful but secret agents, such as a patented microbe of a biotech firm. This is a valid criticism, and if a good-faith BWC inspection presents a threat, the threat of a bad-faith inspection under the pretext of a BWC concern is even more vexing. There is a long list of nations whose governments and commercial interests hope to benefit from America's immense investment in biotech by stealing its final products. Whether operating in good or bad faith, the members of an international BW inspection team would almost certainly be as well equipped as their CWC counterparts. According to the Defense Threat Reduction Agency:

> CWC inspection equipment will include transportable satellite communications, binoculars, chemical agent detectors and monitors, gas chromatography/mass spectrometers, individual protective equipment, and computers. Non-destructive or non-damaging evaluation equipment such as neutron interrogation systems, ultrasonic pulse echo systems, and acoustic resonance spectroscopy will also be used . . . .[16]

In addition to this analytical equipment, the CWC also provides that inspectors may operate their own communications equipment, both among inspectors at the site and between inspectors and OPCW headquarters in The Hague.[17]

As serious as this problem is, it is not intractable, and most if not all of the work has been done in preparation for the CWC's inspection regime. Section 2 of the Senate's resolution of advice and consent to the CWC contains twenty-eight "understandings" of key provisions of the CWC.[18] These understandings are *de facto* conditions negotiated between the Senate and the Administration, and, along with the implementing Executive Order, are the legal nexus through which the Convention operates in the U.S. Five of these provisions are apposite in the protection of proprietary information, and could be directly transplanted to the BWC:

§ Paragraph 3 states that fifty percent of out year (beyond the current fiscal year) funds would be withheld from the U.S. contribution to the OPCW's operating budget if an independent internal oversight office were not estab-

lished within that organization.[19] The Senate intended that something resembling an Inspector General would provide an extra layer of security for the protection of confidential information provided to the OPCW in the course of its inspections.

§ Paragraph 9 requires protecting the confidential business information of U.S. chemical, biotechnology, and pharmaceutical firms.[20] The Senate requires the Administration to certify annually that these industries are not being harmed by their compliance with the CWC.[21]

§ Paragraph 16 is intended to protect against the compromise of confidential business information, either from an unauthorized disclosure or a breach of confidentiality.[22] The former is, under the Senate understanding, a publication of confidential business information made by an OPCW employee and resulting in financial damage to the owner of the information.[23] The latter is an inappropriate disclosure of such information by an OPCW employee to the government of a State Party.[24] In both cases, the Senate states that it will withhold a punitive fifty percent of the annual dues to the OPCW until the offending party is made amenable to suit in the United States, or the injured party is otherwise made whole.[25]

§ Paragraph 18 is a straightforward prohibition against taking physical samples from an inspection site inside the United States to a laboratory outside the United States.[26] Given that a violative chemical substance can be identified on-site, this prohibition is a precaution against the "reverse engineering" of samples taken from sensitive government or commercial facilities.

§ Paragraph 21 advises the Administration to make assistance teams from the Defense Threat Reduction Agency available to the owner or operator of any facility subject to routine or challenge inspections under the CWC.

In addition to these protections, there is another layer of defense known as "managed access." The techniques of managed access were developed by the British in anticipation of intrusive arms control inspections. One commentator explained:

> In broad outline, under this approach a challenge inspection would be permitted "anywhere, anytime" but it would not involve unfettered access. Rather, the inspected state would have rights to limit access in certain respects. Inspectors would be permitted to perform those activities necessary to confirm that treaty violations were not being conducted at the inspected site but would not necessarily be able to determine what in fact did take place there.[27]

The most prominent of these are listed in paragraph 48 of the CWC:

> [T]he Inspected State Party shall have the right to take measures to protect sensitive installations and prevent disclosure of confidential information and data not related to chemical weapons. Such measures may include, *inter alia*:
>
> (a) Removal of sensitive papers from office spaces;
>
> (b) Shrouding of sensitive displays, stores, and equipment;
>
> (c) Shrouding of sensitive pieces of equipment, such as computer or electronic systems;
>
> (d) Logging off computer systems and turning off data indicating devices;
>
> (e) Restriction of sample analysis to presence or absence of chemicals listed in Schedules 1, 2 and 3 or appropriate degradation products;
>
> (f) Using random selective access techniques whereby inspectors are requested to select a given percentage or number of buildings of their choice to inspect; the same principle can apply to the interior and content of sensitive buildings;
>
> (g) In exceptional cases, giving only individual inspectors
>
> access to certain parts of the inspection site.[28]

The Defense Threat Reduction Agency, charged with advising U.S. government and private facilities on the fundamentals of treaty compliance, suggests additional managed access techniques:

> Careful inspection route planning is often the easiest and most economical method of protecting sensitive areas. By simply escorting inspectors on a pre-determined route, both between and within buildings, escorts can prevent the team from seeing some classified, sensitive or proprietary activities . . . . When the facility believes it cannot grant access into a building or area, an alternate means of demonstrating compliance must be suggested for those areas. Examples of such alternate means include showing inspectors convincing photographs or other documentation related to an inspector's concern. . . . In some cases, it may not be prudent to allow an inspector from a certain country to have access to a sensitive room or area . . . in extreme cases where route planning, alternative means and shrouding cannot be effective, it may be worthwhile to consider temporarily shutting down or moving operations in highly sensitive areas prior to allowing inspectors access.[29]

Finally, and perhaps most interestingly, the CWC does not mention or prohibit operational deception, the intentional misleading of inspectors in areas not material to the object and purpose of the treaty. While deceiving the inspection team about possible non-compliance is a clear violation of the CWC, taking indicators of an unhideable secret, and adding to them deceptive indicators of a false secret, would deceive only those inspectors operating in bad faith as intelligence collectors. This doctrine could, with equal efficacy, be incorporated in to a BWC inspection regime.

While nontrivial objections to the constitutionality of a BWC inspection regime exist, especially with regard to concerns under the Fifth Amendment, it appears likely that an inspection annex could be fashioned to pass constitutional muster. On the other hand, getting past the policy and practical issues opposing an inspection regime involves more than the satisfaction of constitutional rule-based precedent. No responsible party will argue that private industry (or government) should be forced to open its doors and secrets to competitors

and enemies, but advancing technologies appear to be improving the likelihood that that these well-founded misappropriation concerns can be overcome.[30] In addition, the U.S. experience with CWC inspection compliance seems to indicate that there is first, some benefit to inspections and second, a potentially workable solution to the policy issues.

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Footnotes

[1] *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction*, Jan. 13, 1993, 32 I.L.M. 800; S. Treaty Doc. No. 21, 103d Cong., 1st Sess. (1993) [hereinafter Chemical Weapons Convention], *reprinted in* WALTER KRUTZSCH & RALF TRAPP, A COMMENTARY ON THE CHEMICAL WEAPONS CONVENTION (1994) at 471.

[2] *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction*. 26 U.S.T., 1015 U.N.T.S., entered into force March 26, 1975.]

[3] *Edmond v. United States*, 520 U.S. 651, 663 (1997) (Scalia, J.).

[4] *See generally*, Ronald D. Rotunda, *Constitutional Problems with Enforcing the Biological Weapons Convention*, Cato Institute, Foreign Policy Briefing No. 61 (Sept. 28, 2000) [hereinafter *Rotunda*]. *See also* David Kopel, *Another Bad Treaty,* National Review Online << http://www.nationalreview.com/kopel/kopel090601.shtml>> (Sept. 6, 2001).

[5] S. Res. 75, 105th Cong., 1st Sess. (1997) ("To advise and consent to the ratification of the Chemical Weapons Convention, subject to certain conditions").

[6] *Id.* at 39.

[7] *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970); *United States v. Biswell*, 406 U.S. 311 (1972).

[8] See *Dow Chemical Co. v. United States*, 476 U.S.227 (1986).

[9] See *New York v. Burger*, 482 U.S. 691 (1987).

[10] See *Id.*

[11] S. Res. 75 at 62.

[12] See generally, Dr. Jack Melling, *Issues Relating to On-Site Sampling and Analysis,* paper prepared for the Federation of American Scientists (Aug. 19, 1997) (available at <http://www.fas.org/bwc/papers/onistes&a.htm>) Of course this same fact may militate against the presence of *hostile* inspectors on Fifth Amendment takings grounds discussed *infra*.

[13] See *Backus v. Fort Street Union Depot Co*., 169 U.S. 557 (1898).

[14] S. Res. 75 at 44.

[15] *Id.*

[16] DEFENSE THREAT REDUCTION AGENCY, SECURITY OFFICE, ARMS CONTROL AND THE INSPECTOR, Oct. 4, 1997, 11.

[17] Chemical Weapons Convention, *supra* note 2, verification annex, pt. II, sec. D, para. 44, *in* KRUTZSCH & TRAPP, *supra* note 2, at 297.

[18] S. Exec. Res. 75, 105th Cong., CONG. REC. S3378 (daily ed. Apr. 17, 1997), sec. 2.

[19] *Id*. at 3-6.

[20] *Id*. at 21.

[21] *Id*.

[22] *Id*. at 43-48.

[23] *Id*. at 44. The Senate Resolution states:

(A) UNAUTHORIZED DISCLOSURE OF BUSINESS INFORMATION.—Whenever the President determines that persuasive information is available indicating that—

(i) an officer or employee of the Organization [the OPCW] has willfully published, divulged, disclosed, or made known in any manner or to any extent not authorized by the Convention any United States confidential business information coming to him in the course of his employment or official duties or by reason of any examination or investigation of any return, report, or record made to or filed with the Organization, or any officer or employee thereof, and

(ii) such practice or disclosure has resulted in financial losses or damages to a United States person, the President shall, within 30 days after the receipt of such information by the executive branch of Government, notify the Congress in writing of such determination. *Id.*

[24] *Id*. at 46. The Senate Resolution states:

(B) BREACHES OF CONFIDENTIALITY.—

(i) CERTIFICATION.—In the case of any breach of confidentiality involving both a State Party and the Organization, including any officer or employee thereof, the President shall, within 270 days after providing written notification to Congress that the Commission described under paragraph 23 of the Confidentiality Annex has been established to consider the breach. *Id*.

[25] *Id.* at 45-47.

[26] *Id*. at 51.

[27] J. CHRISTIAN KESSLER, VERIFYING NONPROLIFERATION TREATIES: OBLIGATION, PROCESS, AND SOVEREIGNTY (1994) at 78-9.

[28] Chemical Weapons Convention, verification annex, pt. X, Sec. C, para. 48.

[29] DEFENSE THREAT REDUCTION AGENCY, SECURITY OFFICE, CHEMICAL WEAPONS CONVENTION: THE IMPACT, Apr. 28, 1995, 9-11.

[30] This is arguably of heightened importance because it (i) lessens or eliminates the possibility of IP or classified information theft, and (ii) diminishes the need to build an adequate and appropriate remedy into the effectuating legislation.

Intellectual Property

Case Note: *The Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*

*By Arun Chandra**

A significant portion of the patent bar was caught off-guard when the Supreme Court recently ruled that the Court of Appeals for the Federal Circuit (hereinafter "Federal Circuit") cannot assert jurisdiction over a case in which the plaintiff does not assert a patent claim.[1] Consequently, a defendant's original counterclaim for patent infringement is insufficient to bring the case within the appellate jurisdiction of the Federal Circuit and all appeals must be taken to the regional Court of Appeals that reviews decisions from the district court where the case is tried.[2]

Prior to the Supreme Court's *Holmes Group* ruling, the Federal Circuit took the view that it had jurisdiction over all cases that included a patent law issue.[3] Consequently, if, for example, ABC Corporation brought a trade dress infringement suit against XYZ Corporation and then XYZ Corporation counterclaimed alleging that ABC Corporation infringed its patent, all resulting appeals would be heard by the Federal Circuit. However, as noted above, after *Holmes Group*, this is no longer the case.

History of *Holmes Group* Case

In May of 1990, Vornado Air Circulation Systems, Inc. (hereinafter "Vornado") obtained a utility patent for a ducted fan.[4] In addition to the patent, Vornado believed that its patented fans also had a unique trade dress. As a result, in late 1992 it sued its competitor, Duracraft Corporation (hereinafter "Duracraft"), claiming that Duracraft's use of a "spiral grill design" in fans infringed Vornado's trade dress.[5] Unfortunately for Vornado, the Court of Appeals for the Tenth Circuit ruled that Vornado did not have any valid trade dress rights in its grill design, as a result of which Durasoft did not infringe any trade dress.[6]

A few years later, despite the earlier ruling against it, Vornado filed a complaint with the United States International Trade Commission (hereinafter "ITC") against The Holmes Group, Inc. (hereinafter "Holmes Group").[7] The complaint alleged that Holmes Group's sale of fans and heaters with a spiral grill design infringed Vornado's patent as well as the same trade dress that was held unprotectible in *Vornado I*.[8]

Immediately after Vornado filed its ITC complaint, Holmes Group filed suit against Vornado in the United States District Court for the District of Kansas. Holmes Group sought a declaratory judgment that its products did not infringe Vornado's trade dress and an injunction restraining Vornado from accusing it of trade dress infringement in promotional materials.[9] Vornado's answer asserted a compulsory counterclaim alleging patent infringement by Holmes Group.[10] The district court granted the declaratory judgment and injunction that Holmes Group sought.[11] It also held that Vornado was collaterally estopped from relitigating its claim of trade-dress rights in the spiral grill design because of *Vornado I*.[12]

Vornado appealed the district court's ruling to the Federal Circuit. Holmes Group responded by arguing, *inter alia*, that the Federal Circuit lacked appellate jurisdiction since its original complaint had not included any patent-law issues. Ignoring Holmes Group's challenge to its jurisdiction, the Federal Circuit went ahead and vacated the district court's judgment in an unpublished *per curiam* opinion.[13] The case was remanded for consideration of whether the "change in the law" exception to collateral estoppel applied in light of Supreme Court's decision in *TrafFix Devices, Inc.* v. *Marketing Displays, Inc.*[14]

Upon losing in the Federal Circuit, Holmes Group appealed to the Supreme Court, which granted certiorari.[15]

Supreme Court's Ruling

Justice Scalia delivered the opinion of the Court that was joined by Justices Rehnquist, Kennedy, Souter, Thomas and Breyer. Justice Stevens filed an opinion concurring in part and concurring in judgment. Justice Ginsburg issued a separate opinion concurring only in the judgement, which was joined by Justice O'Connor.

The Court began its analysis by noting that Congress vested the Federal Circuit with exclusive jurisdiction over appeals from final decisions of district courts of the United States if the district court's jurisdiction was based, in whole or in part, on 28 U.S.C. § 1338.[16] In turn, Section 1338(a) states that "district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents."[17]

Because Section 1338(a) does not provide any black-and-white test to determine whether a case arises "under any Act of Congress relating to patents," the Court sought guidance from its earlier rulings interpreting other similar statutes.[18] In particular, the Court looked to its interpretation of the phrase "arising under" in Section 1331,[19] which empowers district courts with jurisdiction over civil actions "arising under the Constitution, laws, or treaties of the United States."[20] Since the well-pleaded-complaint rule governs whether a case arises under federal law for purposes of Section 1331, a similar adaptation of the rule to Section 1338(a) required that a consideration of "whether a case 'arises under' patent law 'must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration ....'"[21] In other words, the "plaintiff's well pleaded complaint 'must establish either that federal patent law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal patent law ....'"[22]

Reviewing the law on the issue of whether a federal law counterclaim can serve as a basis for establishing federal jurisdiction in cases originating in state courts,[23] the Court noted that because the plaintiff is the master of the complaint, the well-pleaded-complaint rule enables him to have his cause heard in state court by eschewing claims based on federal law.[24] If, however, a counterclaim could form the basis of federal jurisdiction, then "a defendant [would be able] to remove a case brought in state court under state law, thereby defeating a plaintiff's choice of forum, simply by raising a federal counterclaim,"[25] and the plaintiff would no longer remain the master of his complaint. The Court worried that conferring such a power to remove cases upon the defendant would radically expand the class of removable cases, which would be contrary to the due regard for the independence of state governments.[26] In addition, "allowing responsive pleadings by the defendant to establish 'arising under' jurisdiction would undermine the clarity and ease of administration of the well-pleaded-complaint doctrine, which serves as a 'quick rule of thumb' for resolving jurisdictional conflicts."[27] Clearly, these reasons recommended against "transform[ing] the longstanding well-pleaded-complaint rule into the well-pleaded-complaint-*or-counterclaim* rule,"[28] as applied to Section 1338.

Living up to his reputation of a textualist, Justice Scalia dismissed the argument that the Court must effectuate Congress' goal of promoting uniformity in patent law by interpreting Sections 1295(a)(1) and 1338(a) as conferring exclusive appellate jurisdiction on the Federal Circuit whenever a patent-law counterclaim is raised.[29] He refused to speculate what would further Congress' goal of ensuring patent-law uniformity, but instead noted that it was the words of the statute that governed.[30] Continuing on, Justice Scalia argued that "[i]t would be an unprecedented feat of *interpretive necromancy* to say that § 1338(a)'s 'arising under' language means one thing (the well-pleaded-complaint rule) in its own right, but something quite different (respondent's *complaint-or-counterclaim rule*) when referred to by § 1295(a)(1)."[31]

Justice Stevens agreed that "the exclusive jurisdiction of the Court of Appeals for the Federal Circuit in patent cases is fixed with reference to that of the district court."[32] Further, because "the jurisdiction of the court of appeals is not 'fixed' until the notice of appeal is filed,"[33] Justice Stevens was of the view that an amendment by plaintiff that added a patent law claim to the original complaint would also bring the case within Federal Circuit's jurisdiction.[34]

As a result:

> … if a case began as an antitrust case, but an amendment to the complaint added a patent claim that was pending or was decided when the appeal is taken, the jurisdiction of the district court would have been based "in part" on 28 U.S.C. § 1338(a), and therefore § 1295(a)(1) would grant the Federal Circuit jurisdiction over the appeal. Conversely, if the only patent count in a multi-count complaint was voluntarily dismissed in advance of trial, it would seem equally clear that the appeal should be taken to the appropriate regional court of appeals rather than to the Federal Circuit.[35]

Justice Ginsburg, on the other hand, argued that the Congress' purpose in enacting the underlying statute should control. As such, she would "give effect to Congress' endeavor to grant the Federal Circuit exclusive appellate jurisdiction at least over district court adjudications of patent claims."[36] She was of the view that "when the claim stated in a compulsory counterclaim arises under federal patent law and is adjudicated on the merits by a federal district court, the Federal Circuit has exclusive appellate jurisdiction over that adjudication and other determinations made in the same case."[37] Justice Ginsburg concurred in the judgment, however, solely because no patent claim was adjudicated at the district court level.[38]

Conclusion

As an initial matter, *Holmes Group* illustrates that the Supreme Court does remain aware of happenings at the Federal Circuit, and will not hesitate to review cases even where a Federal Circuit opinion appears uncontroversial. This should definitely surprise those who believe that the Supreme Court gives high deference to the Federal Circuit on patent law issues.[39]

After *Holmes Group*, it is clear that a plaintiff can avoid review of his case by the Federal Circuit by omitting patent claims from his complaint.[40] For example, where a plaintiff fears that the Federal Circuit may be less receptive, he can ensure that an appeal from his case goes to his regional Court of Appeals by asserting only non-patent claims in the original complaint. However, the question of whether an amendment adding a patent law claim to the original complaint brings the case within Federal Circuit's jurisdiction remains a mystery to be solved at a later date.

Of course, a necessary corollary of the decision is that regional Courts of Appeals will also get to decide patent issues raised in response to antitrust, trademark, copyright, trade secret, contract, unfair trade practices, or other non-patent claims filed by a plaintiff. That is, "other circuits will [now] have some role to play in the development of … [patent] law."[41] While the prospect of all Courts of Appeals ruling on patent issues may trouble some, others will agree with Justice Stevens that "[a]n occasional conflict in [patent law] decisions may be useful in identifying questions that merit … [the] Court's attention. Moreover, occasional decisions by courts with broader jurisdiction will provide an antidote to the risk that the specialized court may develop an institutional bias."[42]

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Footnotes

[1] *See The Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 122 S.Ct. 1889 (2002).
[2] *See id*.
[3] *See The Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 13 Fed. Appx. 961 (2001); *DSC Communications Corp. v. Pulse Communications, Inc.*, 170 F.3d 1354, 1359 (Fed. Cir. 1999) (holding that "any counterclaim raising a nonfrivolous claim of patent infringement is sufficient to support … [the Federal Circuit's] appellate jurisdiction."); *Aerojet-General Corp. v. Machine Tool Works, Oerlikon-Buehrle Ltd.*, 895 F.2d 736 (Fed. Cir. 1990).
[4] *See* U.S. Patent No. 4,927,324 (issued May 22, 1990).
[5] *See Holmes Group*, 122 S.Ct. at 1892.
[6] *Vornado Air Circulation Systems, Inc. v. Duracraft Corp.*, 58 F.3d 1498 (10th Cir. 1995) (*Vornado I*).
[7] *See* ITC Institutes Section 337 Investigation on Certain Spiral Grilled Products Including Ducted Fans and Components Thereof (January 21, 2000), *at* http://www.usitc.gov/er/nl2000/ER0121X3.HTM.
[8] *Id*.
[9] *See Holmes Group*, 122 S.Ct. at 1892.
[10] *Id*.
[11] *The Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc*., 93 F. Supp. 2d 1140 (D. Kan. 2000).
[12] *Id*. at 1142-43.
[13] 13 Fed. Appx. 961 (2001).
[14] *Id*. *TrafFix Devices, Inc.* was decided after the district court's judgment and resolved a circuit split in trade dress law. *See* 121 S.Ct. 1255 (2001).
[15] *The Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 122 S.Ct. 510 (2001).
[16] *See Holmes Group*, 122 S.Ct. at 1892-93.
[17] 28 U.S.C. § 1338 (a).
[18] *Holmes Group*, 122 S.Ct. at 1893 (reviewing previous cases involving 28 U.S.C. § 1331 because Section 1331 uses the same operative language as 28 U.S.C. § 1338). The Court explained that linguistic consistency required it "to apply the same test to determine whether a case arises under § 1338(a) as under § 1331." *Id*. (*citing Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 808 (1988)).
[19] *Id*.
[20] 28 U.S.C. § 1331.
[21] *Holmes Group*, 122 S.Ct. at 1893 (*quoting Christianson,* 486 U.S. at 809).
[22] *Id*. (*quoting Christianson,* 486 U.S. at 809) (internal brackets omitted). It should be noted that the Court left unanswered the question of whether the Federal Circuit can have jurisdiction where an actual or constructive amendment to the complaint raises a patent-law claim, but not the original complaint. *Id*. at 1893, n. 1.
[23] *Id*. at 1894 ("Allowing a counterclaim to establish 'arising under' jurisdiction would also contravene the longstanding policies underlying our precedents.").
[24] *Id*.
[25] *Id*.
[26] *See id*.
[27] *Id*.
[28] *Id*. (emphasis in original) (internal quotation marks omitted).
[29] *Id*. at 1894-95.
[30] *Id*. at 1895.
[31] *Id*. (emphasis added).
[32] *Id*. (Stevens, J., concurring) (internal quotation marks omitted).
[33] *Id*. at 1895 (Stevens, J., concurring).
[34] *Id*. at 1895-96. Justice Scalia had refused to discuss whether an amended complaint that added a patent law claim could bring the case within Federal Circuit's jurisdiction. *See id*. at 1893, n. 1.
[35] *Id*. at 1896.
[36] *Id*. at 1898 (*citing* Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U.L.Rev. 1, 36 (1989)).
[37] *Id*.
[38] *Id*.
[39] In fact, the Supreme Court has reversed or vacated seventy percent of all patent decisions rendered by the Federal Circuit since it came into existence in 1982, including four of the last five decisions. *See* Bruce M. Wexler & Joseph M. O'Malley, Jr., *Deciding Jurisdiction in Patent Appeals*, N.Y.L.J. S3 (Aug. 12, 2002).
[40] In fact, in light of *Holmes Group*, the Federal Circuit recently transferred an antitrust case with patent law counterclaims to a regional circuit court. *See Telecomm Technical Servs., Inc. v. Siemens Rolm Communications, Inc.*, 2002 WL 1425237 (Fed. Cir. 2002).
[41] *Holmes Group*, 122 S.Ct. at 1898 (Stevens, J., concurring).
[42] *Id*.

Eldred v. Ashcroft: Just Another Mickey Mouse Copyright Case?

*By David Applegate, Esq.**

Currently on the Supreme Court's docket is the case of *Eldred v. Ashcroft*, which challenges the constitutionality of the 1998 Sonny Bono Copyright Term Extension Act [1] ("the CTEA"). In brief, the CTEA extends the duration of existing U.S. copyrights by twenty years, to a maximum length of the author's life plus seventy years for works created after January 1, 1978; to 95 years from publication or 120 years from creation in the case of anonymous works, pseudonymous works, and works made for hire created after 1978; and to a maximum 95 years total for works created before 1978.

Plaintiffs in *Eldred* contend that this Congressional extension of copyright terms, the eleventh in forty years, violates the Copyright Clause of the U.S. Constitution in at least three particulars and the First Amendment in at least two. (In the lower courts, plaintiffs have also contended that the CTEA violates the "public trust" doctrine.) The government maintains, on the other hand, that the copyright extension provisions of the CTEA represent a proper exercise of Congressional power, consistent with the Constitution and applicable legislative and judicial precedent.

Constitutional basis for copyright

To those of us who grew up with the cartoons of Walt Disney or those who write for a living, it may seem something akin to natural law that creators should have exclusive rights to their creations. Royalties, after all, are the fruits of an author's labors, and why should anyone else but Disney make money from the works of Mickey Mouse? If you build a business or a home, then it's yours until you sell it (or lose it through neglect or failure to pay your taxes); why shouldn't the same be true for creators of stories, songs, or characters? On the other hand, if you invent and patent the electric light bulb, then you lose exclusive rights to it once your patent expires. And, like patents, copyrights in the United States are creatures of statute, pursuant to a Constitutional grant of limited authority.

Article I, Section 8, clause 8, of the U. S. Constitution empowers Congress in pertinent part "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings . . . ."[2] The historical underpinning of this provision is England's Statute of Anne, enacted in 1710 to limit the previously perpetual rights of publishers of printed works (authors by common law had no rights). Out of concern that American publishers might otherwise obtain the same kind of monopoly previously known in England, the framers of the U. S. Constitution created a Copyright Clause to "prevent the formation of oppressive monopolies,"[3] by giving authors the exclusive right to their respective writings only for "limited Times."

Congressional implementation

The history of Congressional action to implement the Copyright Clause has nonetheless included repeated extensions of the "limited Times" for which U.S. copyrights subsist. In 1790, just a year after the Constitution's ratification, Congress determined that the appropriate "limited Time" for copyright protection should be 14 years, subject to renewal for another 14 years.[4] In 1831, Congress extended the initial term of U.S. copyrights to 28 years, still renewable for only 14, for a total of 42 years[5] . But in 1909, Congress extended the renewal term to 28 years as well, for a maximum total of 56 years of U.S. copyright protection.[6]

For new material created in 1909, even a renewed copyright would have expired by the end of 1965. Between 1962 and 1974, however, Congress incrementally increased subsisting copyright terms nearly annually, reaching a maximum term of 70 years in 1974.[7] In 1976, to conform more closely with international norms under the Berne Convention, Congress then completely changed the methodology for computing copyright terms.[8] The 1976 revision increased the term of U. S. copyright for works created on or after January 1, 1978 (its effective date), to the life of individual authors plus 50 years, or in the case of nonidentifiable authors or works made for hire, to the earlier of 75 years from the year of publication or 100 years from the year of creation.[9] For works created before 1978, Congress extended the renewal term from 28 to 47 years, thus allowing 75 years of total protection from the time the copyright was "secured."[10]

The CTEA

In passing the CTEA in 1998, Congress extended the terms of U. S. copyrights by yet another twenty years. Because of the pre- and post-1978 dichotomy of the 1976 Act in view of the 1909 Act, the mechanics are slightly complicated.[11] In essence, however, the CTEA increased copyright terms as follows: (1) for works created in or after 1978, to which an individual or individuals hold the copyright, to the life of the last surviving author plus 70 years;[12] (2) for anonymous works, pseudonymous works, and works made for hire created in or after 1978, to the earlier of 95 years from publication or 120 years from creation;[13] (3) for works created before 1978 and still in their first term on January 1, 1978, to an initial term of 28 years plus a renewal term of 67 years, for a maximum of 95 years;[14] (4) for works created before 1978 and already in their renewal term on January 1, 1978, to a fixed term of 95 years.[15]

In the sense that it extends the terms of subsisting copyrights as well, the CTEA applies both prospectively and retroactively.

History of the Eldred litigation

Eldred's complaint

In 1999, Eric Eldred, a "noncommercial publisher of existing works and a creator of new derivative ones,"[16] and others[17] brought suit in United States District Court for the District of Columbia, claiming that the CTEA was unconstitutional on a number of grounds.[18] In brief, Eldred asserted that the CTEA violates the Copyright Clause of the Constitution itself; that it is inconsistent with the First Amendment; and that it violates the "public trust" doctrine, which holds in part that a principal purpose of government is to promote the interests of

the general public rather than to redistribute public goods from broad public uses to restricted private benefit.[19]

Judgment on the pleadings against Eldred

After Eldred amended the complaint twice, in part to add new plaintiffs, the government moved for judgment on the pleadings, and Eldred cross-moved for summary judgment. On October 28, 1999, Judge June Green of the District of Columbia denied Eldred's motion and granted judgment on the pleadings for the government.

In a brief opinion, Judge Green rejected each of Eldred's arguments, ruling (1) that the First Amendment gives no right to use the copyrighted works of others; (2) that the "limited Times" provision of the Copyright Clause is subject to the discretion of Congress; and (3) that the public trust doctrine applies only to the context in which it originally arose, that of navigable waters. Accordingly, Judge Green found the CTEA constitutional, denied Eldred's motion for summary judgment, and granted judgment on the pleadings to the government.

The D. C. Circuit affirms

Eldred then appealed to the D. C. Circuit, joined by L. Ray Patterson, Laura N. Gasaway, Marcia Hamilton, Edward Walterscheid, and the Eagle Forum Education and Legal Defense Fund as *amici curiae*. Weighing in as *amici* on behalf of the government were the Sherwood Anderson Literary Estate Trust; The Sherwood Anderson Foundation; the American Society of Composers, Authors, and Publishers; AmSong, Inc.; the Association of American Publishers, Inc.; Broadcast Music, Inc.; the Motion Picture Association of America, Inc.; the National Music Publishers Association, Inc.; the Recording Industry Association of America, Inc.; and The Songwriters Guild of America.

Eldred and *amici* argued before the Court of Appeals that the CTEA is unconstitutional for three main reasons. First, they argued, it fails the intermediate scrutiny test required to protect freedom of expression under the First Amendment. Second, they argued, the retroactive term extension violates the originality requirement of copyright by granting new monopolies to what are by then "unoriginal" works. Third, they argued, the CTEA violates both the preamble and the "limited Times" requirement of the Copyright Clause because retroactive extensions do not promote the creation of new works and because a perpetual increase in terms is by definition not "limited."

Judge Ginsburg's majority opinion

In a 2-1 decision by Judge Ginsburg, with Judge Sentelle dissenting, the D. C. Circuit upheld the District Court in its entirety.[20] Relying on the Supreme Court's decision in *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 560 (1985), and its own decision in *United Video, Inc. v. FCC*, 890 F.2d 1173 (Fed. Cir. 1989),[21] the D.C. Circuit held, first, that plaintiffs lack any First Amendment right to exploit the copyrighted works of others.

Second, the Court of Appeals held that the originality requirement for copyright explained in *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340, 345 (1991) (holding that telephone directory listings compiled in white pages directories are uncopyrightable facts), applies only to the initial eligibility of subject matter for copyright, rather than more broadly to congressional authority over that subject matter. Thus, if a work is sufficiently "original" to merit copyright protection in the first place, then it remains "original" for purposes of renewal, even though in retrospect it is no longer "original" in a literal sense.

Finally, the D. C. Circuit rejected Eldred's argument that the introductory language of the Copyright Clause — "to promote the Progress of Science and useful Arts" — constitutes a limit on congressional power. The Court of Appeals therefore affirmed the CTEA as a rational exercise of what Eldred has characterized as nearly unlimited congressional authority to define the terms of copyright.

Judge Sentelle's dissent

In dissent, Judge Sentelle agreed with Eldred that the CTEA exceeds the Constitutional authority of Congress. Urging that the court adopt the rationale of the Supreme Court's recent Commerce Clause decision in *United States v. Lopez*, 514 U.S. 549, 556-7 (1995), which held that Congressional power under the Commerce Clause is subject to "outer limits," Judge Sentelle emphasized his understanding of the limited nature of the Copyright Clause as "not an open grant of power to secure exclusive rights" but rather "a grant of power to promote progress"; "not an elastic and open-ended use of that means, but only a securing for limited times."[22] According to Judge Sentelle, the CTEA exceeds the outer limits of Congressional authority under the Copyright Clause because there is "no apparent substantive distinction between permanent protection and permanently available authority to extend originally limited protection."[23] Therefore, said Judge Sentelle, the retroactive term extensions of the CTEA exceed the enumerated powers of Congress and are not Constitutional.

Petition for Certiorari

Following denial of rehearing and denial of rehearing *en banc*, from which two judges (Sentelle and Tatel) dissented, Eldred petitioned the U. S. Supreme Court for *certiorari* on October 11, 2001. Numerous copyright law professors,[24] constitutional law professors,[25] library associations,[26] and others[27] supported the petition as *amici curiae*.

On February 19, 2002, the U. S. Supreme Court granted *certiorari*. Briefing for petitioner is now complete, supported in whole or in part by numerous *amici*.[28]

Issues Raised Before the Supreme Court

Eldred's Brief

Eldred's brief before the Supreme Court makes three main arguments. First, Eldred argues that the CTEA's blanket retroactive extension of existing copyrights violates both the purpose ("to promote the Progress of Science and the useful Arts") and the means ("by securing for limited Times to Authors and Inventors the exclusive Right to their respective writings and Discoveries") set forth in the Copyright Clause. Second, Eldred argues that both the CTEA's blanket retroactive and its prospective extensions of copyrights violate the First Amendment. Third, Eldred argues that the pro-

spective and retroactive extensions of the CTEA are inseverable, so that the Court should invalidate the CTEA in its entirety.

Constitutionally - Copyright Clause

With respect to the language of the Copyright Clause itself, Eldred argues that retroactively extended copyright terms are not "limited," that they do not promote the progress of science, and that they violate the explicit *quid pro quo* of the Copyright Clause: that an author produce a "writing" in exchange for an "exclusive right" for a "limited time," all as confirmed by the clause's historical context. In addition, Eldred argues, the CTEA's retroactive aspect violates the "originality" requirement of *Feist*, because a previously existing copyrighted work is no longer "original" at the time its term is extended.

Constitutionally - First Amendment

With respect to freedom of speech, Eldred argues that the Court of Appeals erred in finding that *Harper & Row* is an "insuperable bar" to First Amendment scrutiny of the CTEA. To the contrary, Eldred argues, the CTEA should be seen instead as content-neutral regulation of speech subject to the intermediate scrutiny standard of *Turner Broadcasting Systems, Inc., v. Federal Communications Commission*, 512 U.S. 622 (1994) and 520 U.S. 180 (1997). Eldred argues that the CTEA's retroactive extension provisions do not satisfy *Turner* because they do not advance an important governmental interest and because they burden substantially more speech than necessary. At the very least, Eldred argues, the Court should reverse and remand the case for an evidentiary hearing on this issue.

Constitutionality - Inseverability

Finally, with respect to severability, Eldred argues that although the CTEA purports to be silent on the issue, the relevant portion of the statute that applies prospectively to "works created on or after January 1, 1978"[29] is also the section that applies retroactively, without distinguishing between works created on, before, or after the CTEA's effective date. Likewise, the relevant section of the Copyright Act amended by the CTEA suffers from the same fatal flaw; it contains no words that can limit the CTEA's application to works created on or after its effective date.[30] Because inserting such words in the statute now is a legislative, not a judicial function, Eldred argues, the Court can not save the CTEA by inserting those words itself, but must instead find the CTEA unconstitutional in its entirety.

Amicus Briefs

The *amicus* briefs in *Eldred* are well-coordinated, each dealing primarily with issues particular to that *amicus*.[31] The primary arguments of Eldred's *amici* are set forth below.

The College Arts Association, *et al.*, whose members "use, preserve, study, teach, publicly display, publicly perform and create derivative works from works affected by" the CTEA[32], argue first that the CTEA's retroactive term extension severely inhibits a wide range of expression in ways that Congress failed to consider and that are not sufficiently protected by "fair use," thereby resulting in extensive self-censorship in violation of the First Amendment. Second, they argue, these harms are unjustified under the intermediate scrutiny standard of *Turner*, which collectively established the analytic framework under which cable providers must carry the signals of "free" broadcast television stations and networks.

Constitutional law and First Amendment scholars Jack M. Balkin, *et al*., argue that copyright law, like all laws, is subject to First Amendment scrutiny; that the categorical exclusion of copyright law from First Amendment scrutiny proposed by the Court of Appeals misconstrues *Harper & Row*; and that the CTEA is not likely to survive the close First Amendment scrutiny that it deserves.

In turn, the Eagle Forum Educational & Legal Defense Fund and the Association of American Physicians and Surgeons, Inc. argue that the Copyright Clause expressly limits Congressional power concerning government-conferred monopolies, that the CTEA is not "categorically immune" from First Amendment challenge, and that alleged harmonization with foreign law is neither a legitimate Constitutional basis nor a factual one.[33]

For their part, seventeen economists weigh in by arguing that it is highly unlikely that the economic benefits from the CTEA's copyright extension will outweigh its costs. This is so, they argue, because the CTEA provides at most a very small benefit to innovation and at the same time increases the social cost of monopoly.[34] In addition, they argue that the CTEA reduces innovation by restricting the production of new creative works that make use of existing materials.

The Free Software Foundation hews more closely to the arguments of Eldred, arguing that the Framers intended copyrights to be strictly limited in time, that this historical policy is absolutely essential to reconciling the Constitution's twin values of copyright monopoly and free expression, and that the particular dangers of abuse and corruption justify strict Constitutional scrutiny when the term of statutory monopolies is extended.

Film restorer Hal Roach Studios and its chairman, Michael Agee, argue from their perspective that the CTEA actually impedes public access to America's film heritage and hurts film preservation, restoration, and digitization by reducing the incentives to preservationists and by limiting public access to films. They further argue that it impedes access to "orphan" works (documentaries, newsreels, independent productions, and the like, which constitute the majority of films); that it fails effectively to spur restoration or digitization of the remaining minority of films; and that it effectively undermines the deposit requirements of the Copyright Act with respect to motion picture works (because the volatile cellular nitrate base used on most pre-1950 films will cause their self-destruction or decomposition before they pass into the newly-extended public domain).

Intel Corporation, in only partial support of Eldred, "offers no view on the appropriateness of the specific copyright term extension" at issue, but instead argues that the Supreme Court should use the case to provide guidance on how far Congress can incrementally extend of the Copyright Act, which, if unchecked, will at some point undermine the delicate balance between copyright protection and the preservation of public domain contemplated by the Framers.[35]

Amici intellectual property law professors weigh in by essentially reiterating Eldred's arguments. The Internet Archive and other digital and on-line archives emphasize the historical importance of the public domain to the development of intellectual property, the effect of the CTEA in preventing works from entering the public domain, and the important role of digital archives in reinvigorating the public domain that the CTEA will ultimately impede.

Amici library associations support the Copyright Clause arguments of Eldred and emphasize the substantial burden that the CTEA places on efforts to preserve works, to make them available to the public, and to use them to create new works, while at the same time it diminishes the purported benefits for preservation of, and access to, works.

The National Writers Union, *et al.*, argue that the "CTEA violates the Constitution by failing to promote the progress of science and useful arts."[36] In particular, they argue that Congress failed in its obligation fully to consider the CTEA's effects with respect to European Union harmonization, its purported benefit to authors, its impact on film preservation, its incentives and disincentives for individual creators, and its effects on the economics of corporate cultural production.

Tyler Ochoa and other scholars of the history and development of copyright and patent law in England and the U.S. take a strictly historical approach, providing "a summary of their understanding of that history and development" from the 1500's antecedents of England's 1624 Statute of Monopolies through and including the 1834 case of *Wheaton v. Peters*,[37] in an effort to aid the Supreme Court in its consideration of the case.[38]

Law professor Malla Pollack of the Northern Illinois University College of Law, "an expert in the history of . . . the Copyright and Patent Clause, . . . hopes to bring to the Court's attention information not clearly presented by any other brief."[39] In a succinct argument, he argues that both textual choices and the Framers' fear of the twin evils of monopoly and corruption support a narrow construction of the Copyright Clause, and that the Supreme Court's "usual reticence on constitutional issues" is therefore unsuitable in this case.[40]

Finally, the Progressive Intellectual Property Law Association and the Union for the Public Domain, in partial support of Eldred, argue that the only portion of the CTEA that demands review is its retroactive term extension. They further argue that without retroactive term extension, Congress would have shown no interest in copyright term extension at all and that the retroactive and prospective term extension aspects of the CTEA are inseverable. They therefore urge the Supreme Court to overturn the CTEA as well.

Summary and Conclusions

Eldred's challenge to the CTEA's constitutionality, his *amici* support, and the government's response raise a number of debatable issues: Do such periodic extensions merely represent perpetual copyright on the instalment plan? In what way can a retroactive extension be said to "promote the progress of science and useful arts?" Doesn't preventing works from falling into the public domain restrict the public's First Amendment rights to freedom of expression? Don't such extensions represent an unconstitutional taking (from the public) without just compensation? And don't both the real-world and theoretical costs of the CTEA outweigh its benefits?

Or, on the other hand, has Congress acted Constitutionally by merely re-determining, in light of economic practicalities, the definition of "limited Times," thus acting reasonably to put the United States on equal footing with the European Union? Does the public really have a First Amendment right to exploit the copyrighted works of others? And how can securing to individuals (or their heirs) the fruits of their labors be considered a "taking" at all, much less an unconstitutional one? Is it really true, to quote Pete Seeger, that "the grandchildren should be able to find some other way to make a living, even if their grandfather did write 'How Much Is That Doggie in the Window?'"[41]

As evidenced in particular by the briefs of *amici,* one can challenge the CTEA's recent extension of U. S. copyrights on any number of policy grounds. From a Federalist Society perspective, of course, the only proper focus of the Supreme Court's inquiry is whether, in enacting the CTEA, Congress exceeded the authority that the Constitution grants it.

As the summary above suggests, the arguments for and against the constitutionality of the CTEA will have been more than thoroughly briefed by the time the Supreme Court hears oral argument in *Eldred v. Ashcroft*. In the end, in a case sometimes described as "Mickey Mouse v. the People,@[42] will Mickey Mouse or the people prevail?

Only time — perhaps an extended time — will tell.

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Footnotes

1. S. Res. 505, 105th Cong. (codified at 17 U.S.C. ' 101, *et seq.*).
2. U. S. CONST., art. I, ' 8, cl. 8. Contrary to modern usage, the reference to "science" is actually the predicate for the copyright authority; "useful Arts" is the underpinning of the patent laws.
3. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975); *see* Marci Hamilton, *Copyright Duration Extension and the Dark Heart of Copyright*, 14 CARDOZO ARTS & ENT. L. J. 655, 659 (1996).
4. Act of May 31, 1790 ' 1, 1 Stat. 124, 124.
5. Act of Feb. 3, 1831 ' 1, 4 Stat. 436, 436.
6. Act of March 4, 1909 ' 23, 35 Stat. 1075, 1080.
7. The precise term extension of each of these laws is summarized below, extracted from a table in the Second Amended Complaint, *Eldred v. Reno*, No. 99-CV-00065 JLG at & 62 (U.S. Dist. D.C. 1999):

Year	Law	Subsisting Copyrights Extended to	Maximum Copyright Term
1962	Pub. L. 87-668	12/31/65	59 years
1965	Pub. L. 89-142	12/31/67	61 years
1967	Pub. L. 90-141	12/31/68	62 years
1968	Pub. L. 90-416	12/31/69	63 years
1969	Pub. L. 91-147	12/31/70	64 years
1970	Pub. L. 91-555	12/31/71	65 years
1971	Pub. L. 92-170	12/31/72	66 years
1972	Pub. L. 92-566	12/31/74	68 years
1974	Pub. L. 93-573	12/31/76	70 years

8. See H.R. Rep. No. 94-1476 at 135 (1976).
9. See Pub. L. No. 94-553 '' 302-05, 90 Stat. 2541, 2572-76 (1976).
10. Typically, this means from the date the work was first published with notice

in the proper form, assuming compliance with all other relevant statutory conditions, or by registration in the case of certain unpublished and other works. See Circular No. 1, U.S. Copyright Office, at www.copyright.gov/circs/circ1.html#note. In all cases, copyrights run to and including December 31 of the year in which they would otherwise expire. 17 U.S.C. ‘ 304 (2000).

11. See 17 U.S.C. ‘’ 302-304, inclusive, especially ‘ 304 (a)-(d).

12. See Pub. L. No. 105-298 ‘ 102(b)(1), 112 Stat. 2827; 17 U.S.C. ‘ 302(a).

13. See Pub. L. No. 105-298 ‘ 102(b)(3), 112 Stat. 2827; 17 U.S.C. ‘ 302(c).

14. See Pub. L. No. 105-298 ‘ 102(d), 112 Stat. 2827; 17 U.S.C. ‘ 304(a).

15. See Pub. L. No. 105-298 ‘ 102(d), 112 Stat. 2827; 17 U.S.C. ‘ 304(b).

16. *Eldred v. Ashcroft*, No. 01-618, Supreme Court of the United States, Brief for Petitioners at 5.

17. Petitioners are “various individuals and businesses that rely upon speech in the public domain for their creative work and livelihood.” *Eldred v. Ashcroft*, No. 01-618, Supreme Court of the United States, Brief for Petitioners at 3. Besides Eldred personally, they include Eldritch Press, a not-for-profit association that posts literary works on the Internet to make them available to the world, of which Eldred is director; Higginson Book Company, a sole proprietorship that reprints books on demand; Jill Crandall, a choir director in Athens, Georgia; Tri-Horn International, which publishes products involving the history and traditions of golf; Luck’s Music Library, Inc. and Edwin F. Kalmus & Co., Inc., which sell, rent, and publish classical orchestral sheet music; American Film Heritage Association, a not-for-profit film preservation group; Moviecraft, Inc., a commercial film archive; Dover Publications, a large-scale commercial paperback book publisher; and Copyright’s Commons, a not-for-profit coalition in Cambridge, Massachusetts dedicated to supporting the public domain. Second Amended Complaint, *Eldred v. Reno*, No. 99-CV-00065 JLG at && 2-11 (U.S. Dist. D.C. 1999); *see id.*, 27-55.

18. *Eldred v. Reno*, No. 99-CV-00065 JLG (U.S. Dist. D.C. 1999).

19. Second Amended Complaint, *Eldred v. Reno*, No. 99-CV-00065 JLG (U.S. Dist. D.C. 1999); *see, e.g.,* Joseph L. Sax, DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION, 163-165 (1970).

20. *Eldred v. Reno*, 239 F.3d 372 (2001).

21. *Harper & Row* had held that “First Amendment protections are already embodied in the Copyright Act’s distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use.” 471 U.S. at 560 (1985). *United Video*, in the view of Judge Ginsburg, had held that “copyrights are categorically immune from challenges under the First Amendment.” *Eldred v. Reno*, 239 F.3d 372 at ** (2001).

22. *Eldred v. Reno*, 239 F.3d 372 (2001) (Sentelle, J., dissenting), available online at http://cyber.law.harvard.edu/cc/dcaopinion.html#sentelledissent.

23. *Id.*

24. The copyright professors who lent support to Eldred’s *cert.* petition are Jessica Litman, Wayne State University; Dennis Karjala, Arizona State University; Laura N. Gasaway, University of North Carolina; Keith Aoki, University of Oregon; Stephen R. Barnett, University of California at Berkeley; Ann Bartow, University of South Carolina; James Boyle, Duke University; Dan L. Burk, University of Minnesota; Julie E. Cohen, Georgetown University Law Center; Shubha Ghosh, University at Buffalo Law School, State University of New York; Paul Heald, University of Georgia; Lydia Pallas Loren, Northwestern School of Law, Lewis and Clark College; Michael J. Madison, University of Pittsburgh; Michael J. Meurer, Boston University School of Law; Tyler T. Ochoa, Whittier Law School; L. Ray Patterson, University of Georgia; Malla Pollack, Northern Illinois University; R. Anthony Reese, University of Texas at Austin; Pamela Samuelson, University of California at Berkeley; Alfred C. Yen, Boston College; and Diane L. Zimmerman, New York University.

25. The constitutional law professors who supported Eldred’s *cert.* petition are Jack M. Balkin, Yale; Yochai Benkler, New York University; Burt Neuborne, New York University; and Jed Rubenfeld, Yale.

26. The supporting library associations are the American Association of Law Libraries, the American Library Association, the Association of Research Libraries, the Digital Future Coalition, the Medical Library Association, and the Society of American Archivists.

27. Additional *amici* include Phyllis Schlafly’s Eagle Forum, the Cato Institute, and the Internet Archive, a public nonprofit founded to build an “Internet library” offering permanent access for researchers, historians, scholars, and artists to historical collections in digital format.

28. Eldred’s *amici* include the College Art Association, the Visual Resources Association, the National Humanities Alliance, the Consortium of College and University Media Centers and National Initiative for a Networked Cultural Heritage, Jeffrey P. Cunard, Bruce P. Keller, Christopher J. Robinson, and Rebecca Tushnet; constitutional law professors Jack M. Balkin, Yochai Benkler, Burt Neuborne, Robert Post, and Jed Rubenfeld; the Eagle Forum Education & Legal Defense Fund, the Association of American Physicians and Surgeons, Phyllis Schlafly, and Karen Tripp; economists Roy T. Englert, Jr., George A. Akerlof, Kenneth J. Arrow, Timothy F. Bresnahan, James M. Buchanan, Ronald H. Coase, Linda R. Cohen, Milton Friedman, Jerry R. Green, Robert W. Hahn, Thomas W. Hazlett, C. Scott Hemphill, Robert E. Litan, Roger G. Noll, Richard Schmalensee, Steven Shavell, Hal R. Varian, and Richard J. Zeckhauser; the Free Software Foundation; Hal Roach Studios; Intel Corporation (in partial support); 53 intellectual property law professors, including Jessica Litman, Jon Weinberg, Dennis S. Karjala, Keith Aoki, Stephen R. Barnett, Margreth Barrett, Ann Bartow, Tom W. Bell, Paul Schiff Berman, Dan L. Burk, Margaret Chon, Richard Chused, Julie E. Cohen , Kenneth D. Crews, Robert Denicola, F. Jay Dougherty, Rochelle C. Dreyfuss, Christine Haight Farley, Eric M. Freedman, Laura N. Gasaway, Shubha Ghosh, Llewellyn Joseph Gibbons, Paul J. Heald, Steven D. Jamar, John Kidwell, Robert A. Kreiss, Lew Kurlantzick, Marshall A. Leaffer, Joseph P. Liu, Lydia Pallas Loren, Michael J. Madison, Peter W. Martin, Willajeanne McLean, Charles R. McManis, Robert P. Merges, Michael J. Meurer, Neil Weinstock Netanel, Francis M. Nevins, Dawn C. Nunziato, Robert L. Oakley, Ruth Gana Okediji, Maureen A. O’Rourke, David G. Post, Margaret Jane Radin, R. Anthony Reese, John Rothchild, Pamela Samuelson, David J. Seipp, David E. Shipley, David E. Sorkin, J. Russell VerSteeg, Eugene Volokh, Sarah K. Wiant, and Diane L. Zimmerman; the Internet Archive, Prelinger Archives, a commercial, for-profit archive that licenses footage of historical images and sounds to commercial and not-for-profit organizations; Project Gutenberg Literary Archive Foundation, a public non-profit publisher of public domain literary works on the Internet; Deirdre K. Mulligan, Jason M. Schultz, Mark Lemley, Jennifer M. Urban, and Steven M. Harris; the American Association of Law Libraries, the American Historical Association, the American Library Association, the Art Libraries Society of North America, the Association for Recorded Sound Collections, the Association of Research Libraries, the Council on Library and Information Resources, the International Association of Jazz Record Collectors, the Medical Library Association, the Midwest Archives Conference, the Music Library Association, the National Council on Public History, the Society for American Music, the Society of American Archivists, and the Special Libraries Association; Arnold P. Lutzker and Carl H. Settlemeyer III; National Writers Union, Peter Jaszi, Charles Baxter, Wendell Berry, Guy Davenport, William Gass, Patricia Hampl, Eva Hoffman, Ursula K. Leguin, Barry Lopez, Peter Matthiessen, Jack Miles, David Foster Wallace, Lawrence Golan, Ronald Hall, Richard Kapp, John McDonough, The United States Public Policy Committee for the Association of Computing Machinery, Computer Professionals for Social Responsibility, The Apache Software Foundation, The Domain Name Rights Coalition, The Center for The Public Domain, Public Knowledge, The Digital Future Coalition, The Public Domain Research Corporation, The Center for Book Culture, Litnet, The Computer and Communications Industry Association, and The Consumer Electronics Association; professors Tyler T. Ochoa and Mark Rose, historian Edward C. Walterscheid, The Organization of American Historians, and H-Net: Humanities and Social Sciences OnLine, an international scholarly society; professor Malla Pollack, an expert in the history of the Copyright Clause; and the Progressive Intellectual Property Law Association and the Union for the Public Domain (in partial support).

29. Pub. L. No. 105-298, ‘ 102(b); 17 U.S.C. ‘ 302 (1998).

30. Br. for Petitioner at 48.

31. *See* letter dated March 5, 2002, from Daniel H. Bromberg, Jones, Day, Reavis & Pogue, to Jonathan L. Zitrain, Esq., The Berkman Center for Internet & Society, re: Amicus Briefs in *Eldred v. Ashcroft*, available online at http://eon.law.harvard.edu/openlaw/ eldredvashcroft/supct/amicus-letter.pdf.

32. Brief of College Arts Association, *et al.*, as *Amicus Curiae* in Support of Petitioners at 2.

33. In fact, the CTEA arguably increases the disparity between U.S. copyright law and that of the European Union in a number of ways, as in the case of anonymous and pseudonymous works. *See* Brief of *Amici Curiae* Eagle Forum Educational & Legal Defense Fund and the Association of American Physicians and Surgeons, Inc. in Support of Petitioners at 26. And because the EU is not subject to the U.S. Constitution in the first place, the length of copyrights in the EU is Constitutionally irrelevant. *Id.* at 27.

34. The economics are interesting; assuming a constant revenue stream at a 7% interest rate, these economists calculate that the CTEA would yield a mere one-third of one percent increase in present-value payments as additional compensation to authors or their heirs. *See* Brief of George E. Akerloff, *et al.*, as *Amici Curiae* in Support of Petitioners at 5-7 and Appendix B. See also, Affidavit of Hal R. Varian, Plaintiff’s Response to the Government’s Motion for Judgment on the Pleadings and Cross-Motion for Summary Judgment, *Eldred v. Reno*, No. 99-CV-00065 JLG (U.S. Dist. D.C.), July 23, 1999.

35. *See* Brief of *Amicus Curiae* Intel Corporation in Partial Support of Petitioners at 2-3.

36. *See* Brief of *Amici Curiae* National Writers Union, *et al.*, in Support of Petitioners at 5.

37. Ironically, a dispute between two early reporters of U. S. Supreme Court reports. *See Wheaton v. Peters*, 29 F. Cas. 862 (C.C.E.D. Pa. 1832) (No. 17,486), *rev’d*, 33 U.S. (8 Pet.) 591 (1834).

38. Brief *Amicus Curiae* of Tyler Ochoa, *et al.*, in Support of Petitioners at 1.

39. Brief of Malla Pollack, *Amicus Curiae* Supporting Petitioners, at 1 (page 8 of 21 of printout at http://eon.law.harvard.edu/openlaw/eldredvashcroft/supct/amici/pollack.html).

40. *Id.* at 21 (page 12 of 21 of printout at http://eon.law.harvard.edu/openlaw/eldredvashcroft/supct/amici/pollack.html)

41. See Steve Zeitlin, “Strangling Culture with a Copyright Law,” *The New York Times*, April 25, 1998, available online at http://www.law.asu.edu/HomePages/Karjala/ OpposingCopyrightExtension/commentary/zeitlin.html.

42. *See* Damien Cave, *Mickey Mouse vs. The People*, www.salon.com/tech/feature/2002/02/12/web_copyright/index.html, Feb. 21, 2002.

The Imperfection of Language: *Festo* Sets a Foreseeability Bar for Prosecution History Estoppel

*By David B. Walker**

I. Introduction

In its recent decision in *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., Ltd* ("*Festo II*"), the United States Supreme Court established a new balance between two significant and competing doctrines in patent law, the doctrine of equivalents and prosecution history estoppel.[1] The long-standing balance between these two doctrines was unsettled by the decision below, in which the United States Court of Appeals for the Federal Circuit ("Federal Circuit") rejected the "flexible bar" of its prior precedent[2] as unworkable and adopted a "complete bar."[3] In *Festo II*, the Supreme Court announces a guiding principle—the imperfection of language—to govern the balancing of the competing doctrines while satisfying the incentive and notice functions of the patent system. Applying that principle, the Court rejects the complete bar established by the court below and instead adopts a foreseeability bar to govern the application of prosecution history estoppel. The foreseeability bar does not bar all equivalents to elements narrowed by patentability-based amendments as did the complete bar, but does apply a sufficiently heightened standard compared to the flexible bar to be more "complete" than "flexible." Although the new standard follows a substantially different path to determine the application and scope of estoppel than the complete bar, the foreseeability bar applies prosecution history estoppel so stringently that a limited number of cases likely will meet its strict standards for the availability of equivalents to amended claim elements.[4]

II. The Conflict Between Incentives and Notice—Balancing the Doctrine of Equivalents and Prosecution History Estoppel

The monopoly granted when a patent issues represents a bargain between the inventor and the public. The patent laws "promote the Progress of Science and useful Arts" by rewarding innovation with a temporary monopoly.[5] In return for this property right, the inventor agrees to dedicate the invention to the public after the term of the patent expires.[6] To facilitate that dedication, the patentee must describe his or her invention in "full, clear, concise, and exact terms."[7] The Supreme Court describes this "as part of the delicate balance the law attempts to maintain between inventors, who rely on the promise of the law to bring the invention forth, and the public, which should be encouraged to pursue innovations, creations, and new ideas beyond the inventor's exclusive rights."[8] Thus, the patent system serves two competing functions: (1) to provide incentives to the inventor to bring forth the invention in the first place; and (2) to provide notice to the public of the metes and bounds of the patent grant.

The patent system can only perform its incentive function if inventors believe they will receive adequate protection for their inventions.[9] The doctrine of equivalents enhances incentives to inventors by protecting a patent holder "against efforts of copyists to evade liability for infringement by making only insubstantial changes to a patented invention."[10] Indeed, the Supreme Court has long recognized the role of the doctrine of equivalents in securing the patentee's right to the full measure of the invention. In 1854, the Court stated that "[t]he exclusive right to the thing patented is not secured, if the public are at liberty to make substantial copies of it, varying its form or proportions."[11] In *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, the Court similarly observed that:

> to permit imitation of a patented invention which does not copy every literal detail would be to convert the protection of the patent grant into a hollow and useless thing. . . . It would deprive [the patentee] of the benefit of his invention and would foster concealment rather than disclosure of inventions, which is one of the primary purposes of the patent system.[12]

Most recently, the Court reaffirmed the doctrine of equivalents in *Warner-Jenkinson*.[13]

Although the availability of equivalents enhances incentives, it also creates uncertainty and potentially undermines the notice function of the patent claims.[14] This uncertainty can lead to at least three undesirable side effects: (1) deterrence of competitors from legitimate manufactures; (2) mistaken investment in development of protected subject matter; and (3) wasteful litigation.[15] Despite these unintended consequences, the Court concludes, as it had in each previous consideration of the two doctrines,[16] that the uncertainty introduced by the doctrine of equivalents is the price of ensuring appropriate incentives for innovation.[17] Thus, the Court embraces the necessity of a more complex and less bright-line rule as an inherent cost of maintaining the incentives to innovation that are central to the patent system. After concluding that the doctrine of equivalents is necessary to the incentive function, the Court sets about establishing a framework for the application of prosecution history estoppel to balance the incentive and notice functions of the patent system.

III. A "New" Governing Principle—the Imperfection of Language Precludes a Complete Bar

Festo II reaffirms the Court's earlier precedent that "equivalents remain a firmly entrenched part of the settled rights protected by the patent," but bases that conclusion on a premise not clearly articulated in those prior opinions—language's inability to capture the essence of innovation.[18] Defining new inventions using existing terminology is a difficult process and, "the nature of language makes it impossible to capture the essence of a thing in a patent application."[19]

> "An invention exists most importantly as a tangible structure or a series of drawings. A verbal portrayal is usually an afterthought written to satisfy the requirements of patent law. This conversion of machine to words allows for unintended idea gaps which

> cannot be satisfactorily filled. Often the invention is novel and words do not exist to describe it. The dictionary does not always keep abreast of the inventor. It cannot. Things are not made for the sake of words, but words for things." *Autogiro Co. of America v. United States*, 181 Ct. Cl. 55, 384 F.2d 391, 397 (1967). The language in the patent claims may not capture every nuance of the invention or describe with complete precision the range of its novelty.[20]

This imperfection of language principle pervades the opinion and is largely used to justify the standard set by the Court for the application of the doctrine of equivalents and prosecution history estoppel.

Since language is imperfect, patents cannot be limited to their literal terms; to do so would "greatly diminish" their value.[21] Accordingly, the Court rejected what it described as "the clearest rule of patent interpretation, literalism" as less than the most efficient, despite the potential for conservation of judicial resources.[22] Language remains imperfect after amendment, as before, and the patentee may have no greater insight into the proper language to define his invention at the time of amendment than when the original application was filed.[23] Thus, Literalism is no more appropriate for the amended than the unamended claim.[24]

The application and scope of estoppel in *Festo II* also are heavily influenced by the imperfection of language principle. "Prosecution history estoppel ensures that the doctrine of equivalents remains tied to its underlying purpose" to compensate for "language's inability to capture the essence of innovation."[25] Estoppel applies to the case "[w]here the original application once embraced the purported equivalent but the patentee narrowed his claims to obtain the patent or to protect its validity, [because] the patentee cannot assert that he lacked the words to describe the subject matter in question."[26] "In that instance the prosecution history has established that the inventor turned his attention to the subject matter in question, knew the words for both the broader and narrower claim, and affirmatively chose the latter."[27]

Finally, the Court's newly announced foreseeability bar is firmly rooted in the imperfection of language. *Festo II* appropriately notes that "[t]he patentee, as the author of the claim language, may be expected to draft claims encompassing readily known equivalents."[28] This is consistent with the imperfection of language principle, because the doctrine of equivalents is intended to protect only those equivalents whose essence cannot be captured by language; readily known equivalents—by definition—would not qualify.[29] The quintessential case for the application of prosecution history estoppel is when the patentee originally claimed the alleged equivalent subject matter but then narrowed the claim in response to a rejection to literally exclude the equivalent. In that case, he may not argue that the surrendered territory was *unforeseen* subject matter that should be held equivalent.[30] This, too, is consistent with the imperfection of language principle because the existence of a prior claim precisely describing the alleged equivalent elements undercuts the argument that the inventor lacked the words—that the *equivalent was unforeseeable* when the application was amended—and thus the basic premise to the doctrine of equivalents does not apply.[31] The Court therefore is internally consistent in following the imperfection of language principle while adopting the foreseeability bar.

IV. The Forseeability Bar—Finding a Balance Between Incentives and Notice

The thorny question before the *Festo II* Court was how to set a framework for determining the subject matter relinquished by narrowing amendment without entirely eviscerating the doctrine of equivalents. If the doctrine of equivalents is read too broadly, it threatens the notice function of the patent claims; if prosecution history estoppel is applied too strictly, it threatens the incentive function of the patent system. Thus, a balance is necessary between incentives and notice because, as one of the two doctrines is favored, one function benefits while the other is impaired.

The foreseeability bar was argued by one of the amici, the Institute of Electrical and Electronics Engineers – United States of America ("IEEE"), as an appropriate balance between the incentive function and the notice function of patents.[32] The IEEE argued that the doctrine of equivalents should apply, notwithstanding a patentability–based, narrowing amendment, "unless the limiting effect of the amended language with respect to an accused device would have been foreseeable at the time of the amendment."[33] This foreseeability bar would be applied objectively, from the perspective of a reasonable person skilled in the art.[34] This is not precisely the standard adopted by the *Festo II* Court—the Court focused on the foreseeability of the *equivalent*, not of the *limiting effect*—but the arguments concerning the relative merits of the foreseeability bar, the complete bar, and the flexible bar nevertheless are instructive.

The proposed standard was purported at once to be more equitable than the complete bar and more certain than the flexible bar. The Federal Circuit's complete bar shifted the balance between incentives and notice too far in favor of certainty and notice, and did so at the expense of protection for the essence of the invention and, therefore, incentives for future disclosure of inventions.[35] Indeed, the Court specifically rejected the complete bar as "inconsistent with the purpose of applying estoppel in the first place—to hold the inventor to the representations made during the application process and the inferences that reasonably may be drawn from the amendment."[36] Divorced from its legal roots, the complete bar can work an injustice by creating a roadmap for infringement, whereby potential copyists can abscond with the substance of the invention while making only insubstantial changes to the patented subject matter.[37] The negative implications of the complete bar have also been exacerbated by the broad reading of *Festo I* by the Federal Circuit and the lower courts prior to its nullification by *Festo II*.[38] Conversely, a return to the flexible bar would reintroduce the uncertainty and failure to provide adequate public notice that drove the Federal Circuit to adopt the complete bar in the first place.[39] Without predictability, the flexible bar utterly fails to provide public notice of the metes and bounds of the patent grant. It is also debatable whether the flexible bar actually favors incentives to disclose inventions; if the inven-

tor cannot know with some degree of certainty what will be protected by the claims of his patent, he may be reluctant to disclose his invention.[40] Rather than adopting the complete bar or reverting to the flexible bar—each with their recognized deficiencies—the Supreme Court forged a new standard to provide a more balanced approach to the competing doctrines.

Although not a complete bar, the standard set forth in *Festo II* is a far cry from the flexible bar of *Hughes* and its progeny and will permit resort to equivalents only in a limited number of cases. Certain portions of the *Festo II* standard remain unchanged from *Warner-Jenkinson*.[41] The Court also extends the holding of *Warner-Jenkinson* to make clear that estoppel may apply to any narrowing, patentability-based amendment, not just amendments to overcome the prior art.[42] It further expounds that when "the patentee originally claimed the subject matter alleged to infringe but then narrowed the claim in response to a rejection, he may not argue that the surrendered territory comprised unforeseen subject matter that should be deemed equivalent to the literal claims of the issued patent."[43] A patentee's decision to narrow his claims through amendment—and not to appeal the rejection—may be presumed to be a general disclaimer of the territory between the original claim and the amended claim.[44] This establishes a heavy presumption that estoppel applies to narrowing amendments made for reasons related to patentability. Moreover, the Court extended the logic of *Warner-Jenkinson* to require the patentee to show that the amendment does not surrender the particular equivalent in question.[45] To meet this burden, "[t]he patentee must show that at the time of the amendment one skilled in the art could not reasonably be expected to have drafted a claim that would have literally encompassed the alleged equivalent."[46] The foreseeability bar thus retreats from the literalism of the complete bar, while creating a presumption that estoppel applies and placing additional burdens of proof on the patentee to overcome that presumption that were not present under the flexible bar.

V. More Complexity and Potentially Similar Results

In practice, the foreseeability bar introduces a significant measure of complexity at trial and during prosecution. Under the new standard, the scope of prosecution history estoppel is based on what was foreseeable to one skilled in the art at the time the subject amendment was filed. The new emphasis on foreseeable equivalents likely will lead to additional expert testimony regarding what claims one skilled in the art could reasonably be expected to draft at the time of amendment. Bearing the burden of proof, the patentee must prove a negative—that the desired equivalent could not have been foreseen by one of skill in the art.[47] This will add another layer of complexity to trial and may make it considerably harder in practice to obtain coverage under the doctrine of equivalents than was the case under the flexible bar. It will be difficult to find documentary evidence that a particular equivalent was unforeseeable, forcing the patentee to rely predominantly on expert testimony to support his assertions of unforeseeability.[48] The accused infringer will need to bring forth evidence, expert or documentary, to refute the patentee's testimony that the particular equivalent was unforeseeable. This may prove an easier task for the infringer because he potentially can introduce documents showing that the equivalents were known at the time of amendment or at least to support an argument that the equivalent then was foreseeable. In patent prosecution, the complete bar provided a powerful incentive not to amend claims and instead to appeal rejections of pending claims to the Board of Patent Appeals and Interferences. The foreseeability bar avoids the literalism of the complete bar by allowing some flexibility in amending patent claims and providing a standard that is more understandable and predictable than the flexible bar; the pressure to appeal rather than amend should be somewhat less under the new standard. Inventors and their patent attorneys now must take care to claim all foreseeable equivalents and must evaluate foreseeability each time a new amendment is filed, but are not foreclosed from asserting any equivalents to amended claims. The Supreme Court accepted these inherent complications of the foreseeability bar as preferable to the harm to incentives inflicted by the complete bar.

Festo II does not provide an exhaustive list of the circumstances under which equivalents will be available to a limitation narrowed by an amendment substantially related to patentability, but does make clear that such circumstances will be the exception rather than the norm. The types of equivalents that may be allowed under the new standard, include: (1) equivalents unforeseeable at the time of the amendment and beyond a fair interpretation of what was surrendered; and (2) equivalents for aspects of the invention that have only a peripheral relation to the reason the amendment was submitted.[49] A literal reading of the first category requires that, to avoid estoppel, the equivalent sought by the patentee both (1) have been unforeseeable when the amendment was filed; and (2) be outside a reasonable interpretation of what was surrendered. This implies a two-part analysis whereby the court will consider, first, what the amendment reasonably surrendered and, second, what equivalents were foreseeable at the time. If the equivalent sought by the patentee falls within the either category, the patentee will be estopped from asserting the desired equivalent.[50] This two-part analysis significantly increases the likelihood of estoppel as compared to the flexible bar, which lacked the second step of the analysis. Thus, the foreseeability bar applies estoppel more broadly than the flexible bar and therefore will permit resort to the doctrine of equivalents in fewer cases. In fact, the combination of (1) the strong presumption that estoppel applies to narrowing, patentability-based amendments; (2) the burden on the patentee to prove the negative assertion that the proffered equivalent was not foreseeable at the time of amendment; and (3) the additional layers of analysis imposed on top of the flexible bar result in a more complete than flexible bar.

VI. Conclusions

The Supreme Court clearly adopted a new standard for the application of prosecution history estoppel—one based on the imperfection of language and the need for protection of equivalents to secure the proper incentives to promote science and the useful arts. The standard applies a foreseeability bar, which permits the doctrine of equivalents to protect only those

equivalents that were not foreseeable by one of skill in the art when the narrowing, patentability-based amendment was filed. In principle, the foreseeability bar is imminently reasonable and restores a balance between incentives and notice. The patentee and his attorneys should not be asked to do the impossible—to explicitly claim the unforeseeable. The new standard avoids the draconian loss of all equivalents imposed by the complete bar and permits greater flexibility in amending claims during prosecution. The foreseeability bar provides some guidance to patent practitioners to guide the amendment process and, therefore, should prove somewhat more predictable than the flexible bar.

In practice, however, the new standard adds another layer of complexity to both trial and prosecution. Although not a complete bar, the flexible bar places considerable burdens on the patentee, including the requirement to prove the negative proposition that the asserted equivalent was not foreseeable at the time of amendment. The heightened standard relative to the flexible bar of old likely will lead to more complete than flexible application of prosecution history estoppel and availability of equivalents in fewer cases than did the flexible bar. In the end, the greater complexity and uncertainty of the foreseeability bar compared to the complete bar is a necessary evil to provide adequate protection and incentives to disclose inventions. Although the forseeability bar represents a compromise between the complete and flexible bars, the utility of the new standard in maintaining the proper balance between incentives and notice will become clear only after case-by-case development.

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Footnotes

[1] 122 S. Ct. 1831 (2002). The doctrine of equivalents protects a patent holder "against efforts of copyists to evade liability for infringement by making only insubstantial changes to a patented invention," *id.* at 1835, while prosecution history estoppel allows competitors to rely on the public record of the patent proceedings, to limit the doctrine of equivalents. *Id.*

[2] The flexible bar was adopted in the Federal Circuit's 1983 decision in *Hughes Aircraft Co. v. United States,* which stated that prosecution history estoppel "may have a limiting effect" on the doctrine of equivalents "within a spectrum ranging from great to small to zero." 717 F.2d 1351, 1363 (Fed. Cir. 1983).

[3] *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 234 F.3d 558, 574 (Fed. Cir. 2000) (*en banc*) ("*Festo I*") ("We hold that prosecution history estoppel acts as a complete bar to the application of the doctrine of equivalents when an amendment has narrowed the scope of a claim for a reason related to patentability."), *vacated by* 122 S. Ct. 1831 (2002).

[4] The Supreme Court has granted certiorari for cases decided under the *Festo I* complete bar, vacated, and remanded for reconsideration in light of the new foreseeability bar. *See, e.g.*, *Pioneer Magnetics, Inc. v. Micro Linear Corp.*, 122 S. Ct. 2322, 2322 (2002) (granting certiorari, vacating, and remanding for further consideration in light of *Festo II*). This will provide an empirical opportunity to consider how often the application of the foreseeability bar changes the outcome of individual cases decided under the complete bar.

[5] U.S. Const., Art. I, § 8, cl. 8.

[6] *Festo II*, 122 S. Ct. at 1840 ("[E]xclusive patent rights are given in exchange for disclosing the invention to the public.") (citing *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 150-51 (1989)).

[7] 35 U.S.C. § 112.

[8] *Festo II*, 122 S. Ct. at 1837 (citing *Bonito Boats*, 489 U.S. at 150 (1989)).

[9] *See infra* note 12 and accompanying text.

[10] *Id.* at 1835

[11] *Winans v. Denmead*, 56 U.S. (15 How.) 330, 343 (1854).

[12] 339 U.S. 605, 607 (1950).

[13] 520 U.S. at 28.

[14] *Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 29 (1997) ("There can be no denying that the doctrine of equivalents, when applied broadly, conflicts with the definitional and public-notice functions of the statutory claiming requirement.").

[15] *Id.* at 1837.

[16] *Id.* at 1838 (noting that Winans and *Graver Tank* adopted the doctrine of equivalents over vociferous dissents while *Warner-Jenkinson* unanimously accepted the doctrine of equivalents based, at least in part, on its lengthy history).

[17] *Id.*

[18] *Id.* at 1839 ("The doctrine of equivalents is premised on language's inability to capture the essence of innovation. . . .").

[19] *Id.* at 1837.

[20] *Id.*

[21] *Id.*

[22] *Id*.

[23] *Id.* at 1841 ("After amendment, as before, language remains an imperfect fit for invention. The narrowing amendment may demonstrate what the claim is not; but it may still fail to capture precisely what the claim is. . . . The amendment does not show that the inventor suddenly had more foresight in the drafting of claims than an inventor whose application was granted without amendments having been submitted").

[24] *Id*. ("[T]here is no more reason for holding the patentee to the literal terms of an amended claim than there is for abolishing the doctrine of equivalents altogether and holding every patentee to the literal terms of the patent.").

[25] *Id.* at 1839.

[26] *Id.*

[27] *Id.*

[28] *Id.* at 1842.

[29] *See supra* note 18

[30] *See supra* note 26 and accompanying text.

[31] *Id.* at 1839.

[32] Brief of Amicus Curiae Institute of Electrical and Electronics Engineers – United States of America, at 18, *Festo II*, 122 S. Ct. 1831 (2002) (No. 00-1543) ("IEEE Brief"); *see also* Matthew J. Conigliaro et al., *Foreseeability in Patent Law*, 16 Berkeley Tech L.J. 1045 (2001) (adapted from IEEE brief).

[33] IEEE Brief, at 18.

[34] *Id.*

[35] For a general discussion of the flaws of the complete bar, see Conigliaro, *supra* note 32, at 1061-64.

[36] *Festo II*, 122 S. Ct. at 1840.

[37] *Festo I*, 234 F.3d at 627 ("[T]he [Federal Circuit's] new rule hands the unscrupulous copyist a free ride on potentially valuable patented technology, as long as the copyist merely follows the prosecution history road map and makes a change, no matter how trivial or insubstantial, to an element otherwise covered by such a narrowed claim limitation.") (dissenting opinion of Linn, J.)

[38] Conigliaro, *supra* note 32, at 1063 n.57 (citing cases).

[39] *Festo I*, 234 F.3d at 575 ("A problem with the flexible bar approach is that it is virtually impossible to predict before the decision on appeal where the line of surrender is drawn.").

[40] *See Festo II*, 122 S. Ct. at 1837 ("The inventor who chooses to patent an invention and disclose it to the public, rather than exploit it in secret, bears the risk that others will devote their efforts toward exploiting the limits of the patent's language.")

[41] The patentee continues to bear the burden of proving that a narrowing amendment was not made for reasons related to patentability, and a complete bar continues to apply to unexplained narrowing amendments. *Festo II*, 122 S. Ct. at 1841-42 ("In *Warner-Jenkinson* we struck the appropriate balance by placing the burden on the patentee to show that an amendment was not for purposes of patentability. Where no explanation is established, however, the court should presume that the patent application had a substantial reason related to patentability for including the limiting element added by amendment. In those circumstances, prosecution history estoppel would bar the application of the doctrine of equivalents as to that element.").

[42] *Id*. at 1839-40 ("We agree with the Court of Appeals that a narrowing amendment made to satisfy any requirement of the Patent Act may give rise to an estoppel."). The Court also left open the possibility that amendments unrelated to patentability could also lead to estoppel. *Festo II*, 122 S. Ct. at 1839 (citing *Warner-Jenkinson* for the proposition "that even if the amendment's purpose were unrelated to patentability, the court might consider whether it was the kind of reason that nonetheless might require estoppel.").

[43] *Id.* at 1838.

[44] *Id.* at 1842 (citing *Exhibit Supply*, 315 U.S., at 136-37 ("By the amendment [the patentee] recognized and emphasized the difference between the two phrases and proclaimed his abandonment of all that is embraced in that difference")).

[45] *Id.* ("Just as *Warner-Jenkinson* held that the patentee bears the burden of proving that an amendment was not made for a reason that would give rise to estoppel, we hold here that the patentee should bear the burden of showing that the amendment does not surrender the particular equivalent in question.").

[46] *Id.* at 1842.

[47] *See supra* note 46 and accompanying text.

[48] Although the absence of documentary evidence disclosing contemporaneous knowledge of the relevant equivalent or its interchangeability with the literal limitation may support a conclusion of unforeseeability, the patentee may only be able to prove that absence by expert testimony.

[49] *Id.* at 1840.

[50] This two-part analysis will not be necessary for equivalents for aspects of the invention that have only a peripheral relation to the reason the amendment was submitted, which are cited as an independent category of equivalents not foreclosed under the foreseeability bar. *Id.*

Labor & Employment Law

Overtime Collection and Class Actions: The Need for Reform

*By Paul DeCamp**

In years past, when a recently-terminated employee walked into an attorney's office to discuss possible legal action against a former employer, the first issue the attorney would usually want to explore was what protected class or classes the client belonged to and what evidence the individual had to support an inference of unlawful discrimination, harassment, or retaliation. These days, the initial consultation is at least as likely to focus on how the former employer paid the client and whether there are other employees in the same job category. Of particular interest to the attorney will be whether the client worked, and received premium pay for, overtime.[1] Two of the potentially costliest claims that employers face in this area are that employees have been misdesignated as "exempt" from the overtime laws, receiving a salary rather than the required premium hourly compensation, and that employees designated as "non-exempt" and paid on an hourly basis have not been paid for all hours worked, including overtime hours.

According to one study, in 2001 the number of collective actions brought under the Fair Labor Standards Act of 1938 (the "FLSA"), as amended,[2] exceeded the number of class actions brought in federal court under the equal employment opportunity laws by a margin of 79 to 77.[3] In certain states, class and other multiple-plaintiff cases under state wage and hour laws have likewise flourished. The presiding judge in the Los Angeles complex case division, for example, has publicly opined that approximately 160 overtime class actions are currently pending in southern California, and practicing attorneys estimate the state-wide figure to be in excess of 300 class actions.

Why have lawsuits involving pay practices become so prevalent? Two recent developments account for much of the dramatic upswing in this kind of litigation. First, some courts have expressed a willingness to consider plaintiffs' job duties on a group-wide basis, rather than evaluating job duties individual-by-individual. Second, plaintiffs have increasingly pleaded their claims under state law in conjunction with, or instead of, the FLSA in order to take advantage of the class action device, which generally enables plaintiffs to assemble a much larger body of claimants than would ordinarily elect to opt into an FLSA collective action. Wage and hour class actions have generated numerous multi-million-dollar settlements and have made a lot of lawyers a great deal of money, and there does not appear to be an end in sight, unless the FLSA and its regulations are substantially revised and the states likewise amend their wage and hour laws, or employers dramatically reduce the number of employees they designate as exempt.

Part I of this article provides a brief overview of the FLSA's ambiguous overtime exemption provisions, changes in the American workplace since the passage of the FLSA that have rendered the exemption criteria increasingly difficult to apply, and the origins of the "misdesignation" issue. Part II addresses the current state of collective and class action litigation concerning overtime. Part III considers the future of overtime law and overtime litigation and offers suggestions for reform. This article does not weigh in on the long-running debate over whether wage and hour regulation is in the public interest, whether from the perspective of economics, workplace safety, or employee quality of life. Instead, the core premise is that statutes and regulations that spawn substantial amounts of litigation raising issues unrelated to the core concerns giving rise to those laws in the first place are against public policy and should, at a minimum, be amended to reduce the likelihood of litigation. Bright lines that enable employers and employees to determine readily their rights concerning overtime are the surest way to protect the interests of all parties.

I. BACKGROUND: THE LAW OF OVERTIME

A. The FLSA And State Wage And Hour Laws

In 1938, while the nation was in the grip of the Depression, Congress enacted the overtime provisions of the FLSA in order to alleviate the hardship of unemployment. The theory is straightforward: by making a particular employee's labor significantly more expensive after forty hours in a workweek, Congress would provide employers a strong financial incentive to shift work to other employees who can be paid non-premium wage rates.[4] Congress exempted several categories of employees from the scope of the FLSA's overtime requirements, including, inter alia, "any employee employed in a bona fide executive, administrative, or professional capacity."[5] Employers were not required to pay overtime to individuals who met the "salary basis" and "duties" tests for these exemptions.[6] In the late 1930s, these exemptions had a readily ascertainable meaning in the context of the then-prevalent industrial workplace. Executive, administrative, and professional employees were the highly-compensated "white collar" employees, who were not seen as needing the overtime protections of the FLSA, as opposed to the less highly compensated "blue collar" and clerical factory employees whom the FLSA was designed to protect. For example, in a typical factory executive employees were the managers; administrative employees were the purchasing agents, labor relations directors, and personnel directors; and the professionals were the scientists, engineers, and accountants. In short, "white collar" employees performed office work, aided by clerical support staff such as secretaries and filing clerks, whereas "blue collar" employees performed the manual labor.[7]

The states followed suit, enacting wage and hour laws that in many respects mirrored the substantive provisions of the FLSA.[8] California, which had enacted wage and hour legislation well before the passage of the FLSA, has been one of the few jurisdictions to impose particularly severe regulation in this

area. For the most part, with the exception of California, the substantive requirements under state law for overtime exemption are similar or identical to the federal standard.

B. Changes In The American Workplace

In the decades following World War II, the American workplace changed fundamentally. More people went to college, the economy shifted away from heavy manufacturing, and the retail and service sectors flourished. Technology played an increasingly important role in the workplace, and businesses automated many of the physical tasks performed by workers in years past. The modern factory bears little resemblance to what Congress had in mind in the 1930s, and the retail, service, and information technology sectors of the twenty-first century economy are substantially beyond the scope of the industrial economy that Congress sought to address through the FLSA.[9]

In the modern workplace, outside the context of manual laborers and employees in jobs involving little or no discretionary or intellectual component, it is often very difficult to apply notions of "white collar" and "blue collar."[10] Regulations that focus on whether employees customarily and regularly exercise "discretion" and "independent judgment"[11] or whether their jobs are "directly related to management policies or general business operations of [the] employer or [the] employer's customers"[12] do not yield determinate results when applied to the job duties of many of today's employees. Job titles have proliferated as the number of job functions to be performed, and thus the opportunity for increased specialization, has grown. Employees with some engineering education operate as engineers without necessarily obtaining formal certification. Managers and assistant managers of retail establishments may earn substantial compensation, oversee the operation of a multi-million-dollar business, and direct the work of numerous subordinate employees, but they may also spend part of their working time interacting with customers, making sales, or even flipping hamburgers on a grill.[13] Employees in the insurance and financial sectors, often with college or advanced degrees, may perform any number of specialized functions requiring a high degree of skill and responsibility. Employees of a television station may or may not be exempt.[14] The status of paralegals is likewise unclear.[15] In short, the vision of the American workplace that prompted the passage of the FLSA is largely outdated.[16] Because many millions of American employees are designated as exempt and judged by these aging and increasingly inapt and unworkable standards,[17] and because the cost of incorrect exemption decisions can easily reach thousands of dollars per employee, proper exemption designation is of great importance to employers and employees alike.

C. Origins Of The Misdesignation Problem

Depression-era overtime exemptions are still very much the law of the land. As jobs have moved farther and farther away from the relatively clear paradigms of the 1930s, employers have had to make increasingly difficult decisions regarding whether to classify employees as exempt from the overtime provisions.[18] In many instances, those decisions, while sound as a matter of common sense, may not clearly satisfy all of the requirements for exemption under the FLSA or state law.[19]

There is a strong tendency for employers to desire to classify as exempt their highly compensated employees who perform nonmanual work. This is especially so where an employee has a college education and a substantial amount of responsibility and where the quality of the employee's job performance can have a significant impact on the employer's bottom line. Exempt employees more often see their interests as in line with those of their employer, and they view their job more in terms of the service and value they provide to their employer's operations than in terms of the quantity of work produced or the time required to produce that work.[20]

And there is often an equally strong tendency for employees, at least those who perform nonmanual work, to desire to be classified as exempt.[21] In the factory setting of the 1930s, "exempt" and "non-exempt" were largely synonymous with "management" and "labor." Being paid a salary, rather than having to punch a time clock several times a day, was and is a sign of status. The president and top management personnel of the company are paid a salary, whereas the manual laborers submit time cards, so for an employee to be paid a salary is one indicium of being more like the bosses than the laborers.

The risks inherent in classifying any number of positions in today's economy increase dramatically when an employer has many employees in a given job category. As businesses national and international in scope have emerged, and as chain retail establishments have proliferated, employers increasingly find themselves having to make difficult classification decisions concerning potentially hundreds or even thousands of employees in a particular job category. In an environment of such legal uncertainty, litigation is inevitable.

II. OVERTIME LITIGATION

A. Early Attempts To Maintain Collective And Class Actions Seeking Overtime

As noted above,[22] the FLSA authorizes an opt-in collective action in which one employee may litigate, in a representative capacity, on behalf of himself or herself and any other "similarly situated" employees who affirmatively join the litigation. Until the early-to-mid 1990s, collective actions under the FLSA involving more than a handful of employees generally focused on the method of compensation—the "salary basis" aspect of the exemption standard—rather than whether the job duties of the employees are consistent with the requirements of the relevant exemption.[23] Courts recognized that the "similarly situated" standard requires "a common thread unifying the putative class"[24] and precludes a collective action where "each party would need to provide evidence"[25] and "individual questions of fact [would] predominate over common questions of fact."[26] The courts acknowledged the significant case management difficulties that would arise if a collective action were allowed to proceed despite variations in the plaintiffs' factual circumstances and the presentation of defenses unique to each individual plaintiff.[27]

In light of the detailed regulations that must be consulted in adjudicating an employee's exempt status under the

FLSA and the issues that those regulations require a fact-finder to consider, courts have held that "a highly fact-specific inquiry into the tasks and responsibilities of the subject employees" is necessary.[28] Unlike "salary basis" determinations, which in many instances can be made based on an employer's pay policies rather than an examination of each employee's particular circumstances, "duties test" inquiries are quintessentially individualized in nature. Not surprisingly, few, if any, courts before the mid-1990s permitted collective actions under the FLSA, or class actions under state wage and hour laws, to proceed where the issue in the case was whether the putative class of plaintiffs satisfied the "duties test" for one or more of the overtime exemptions. The main exceptions appear to involve instances where the defendant concedes or does not dispute that the plaintiffs' job duties are sufficiently alike to satisfy the "similarly situated" standard of the FLSA or the "commonality" standard for class action treatment of state-law wage and hour claims.[29]

In the early 1990s, plaintiffs first began to file significant numbers of putative class and collective actions raising duties test challenges. Fortunately for employers, this first generation of duties test cases was largely unsuccessful and often resulted in orders denying certification of a class or collective action. These cases tended to involve exceedingly ambitious attempts to challenge in a single case an employer's exemption decisions involving dozens or even hundreds of different job categories, generally covering thousands of employees. The plaintiffs argued for collective treatment based on such purportedly common legal issues as the applicable statute of limitations and the employer's alleged willfulness, but these cases usually foundered because in the end there was no realistic way to avoid the fact that at trial a court would be required to examine the particular work experiences of very large numbers of employees.[30]

B. Emergence Of Three Dangerous Types Of Collective And Class Claims

As the courts rebuffed plaintiffs' attempts to bring duties test cases challenging en masse an employer's exemption decisions as to widely disparate groups of employees, plaintiffs' litigation strategy became more sophisticated. Eventually recognizing that in the context of class certification less might be more, plaintiffs began to file complaints challenging an employer's designation decisions as to only one or two job classifications at a time. Rather than seeking to bring an action involving 500 different job categories, each with maybe two or three employees, plaintiffs began to sue on behalf of classes of hundreds or even thousands of employees in a single job category. This second generation of duties test class cases thus involved groups of employees whose job duties were more homogeneous than in the first round of these lawsuits. As discussed below, most of these cases have fallen into two categories: (1) challenges by managers and assistant managers of California retail and service establishments classified as exempt under the executive exemption and (2) challenges by various nominally administrative, professional, or sales employees to their designation based on the argument that their primary duty falls outside the relevant exemption. In addition, a type of class claim has arisen that is brought by employees already designated as non-exempt: the claim that they have not been compensated for all hours they worked.

1. Quantitative Challenges Under California's Executive Exemption

California's overtime laws differ from the FLSA in several respects, but perhaps the most significant difference is the quantitative, rather than qualitative, approach to the exemption analysis. Stated broadly, the FLSA's exemption inquiry for a manager would examine whether the "primary duty,"[31] or essentially the main purpose, of the employee's job is to manage. Under California law, however, the test is very different: whether the employee is "primarily engaged in the duties that meet the test of the exemption."[32] Exemption in California thus depends on whether an employee spends more than fifty percent of his or her working time performing tasks that satisfy the exemption criteria.[33]

California's "primarily engaged in" test enables claims to proceed that would not have a significant chance of success under the FLSA. Consider the example of a restaurant manager, who during the course of a workweek might prepare employee schedules, interview prospective hires, discipline employees, interact with vendors, prepare food, serve customers, and generally be responsible for overseeing and directing the operations of the business. During peak meal times, the manager might run the grill, turning away from that function only to address specific employee or customer concerns or problems. Under the FLSA, the focus of the analysis would be on whether the manager was truly in charge of supervising the restaurant and its employees. If so, then the manager would almost certainly be held to be an exempt executive employee. Under California law, however, the inquiry would be whether the manager spent more time performing exempt tasks, such as hiring, firing, and disciplining employees, directing the work of others, and devising ways to make the restaurant run more profitably, than performing such potentially non-exempt tasks as preparing food, running a cash register, or serving customers. The manager's claim that he or she spends more than half of the workweek performing non-exempt tasks often has at least a possibility of succeeding on the merits.

a. How The Arguments Play Out In Court

Since the mid-1990s, plaintiffs in California have been very successful in bringing putative class actions under the state's wage and hour laws challenging the designation of employees as executives in chain retail and service establishments. These cases have generally focused on managers and assistant managers, and targets have included the automotive parts and service business, the fast food industry, managers of individual departments in multi-department retail establishments, and more or less any other chain business that has a large number of sites with at least one exempt employee per site. Once a putative class action lawsuit is filed against one employer in a particular line of business, lawsuits against many other entities in that same industry tend to follow shortly thereafter.

Even though California law, like the FLSA, purports to require a highly fact-specific examination of employee duties

in an exemption case where employee duties are at issue,[34] California trial courts have shown a remarkable willingness over the past five to seven years to certify state-wide class actions involving employees of a company in one or two job categories.[35] Such cases have a certain amount of surface appeal, because many judges will have an initial gut reaction that says that if you have seen one Starbucks coffee shop, or one Taco Bell restaurant, or one U-Haul vehicle rental facility, you have seen them all, and so employee duties are probably fairly uniform throughout the chain. Playing into that initial judicial reaction, plaintiffs have supported their motions for class certification by proffering declarations from the named plaintiffs and from other putative class members hand-picked by plaintiffs' counsel attesting to the similarity of the job duties performed by members of the putative class. Plaintiffs focus on company policies that purportedly constrain the managers' discretion, and they argue that in reality the district managers or other comparable individuals who do not work in the stores handle all the key managerial decisions.

Another factor working in the plaintiffs' favor is the pre-conceived notion on the part of some judges that in most smaller retail or service establishments, there simply is not all that much "managing" that needs to be done. Plaintiffs and their attorneys understand that few judges have spent significant amounts of time working in retail or in the restaurant business, and they take advantage of the court's possible views about how much intellectual activity it takes to manage a small business. Plaintiffs try to paint a picture of chain businesses as involving a corporate nerve center that makes all decisions of any significance, as distinct from the stores, where employees simply carry out the tasks assigned to them from headquarters. Plaintiffs attempt to peddle the theme that the jobs in the store require relatively little training, and once the employees at a given location understand their jobs the store will function more or less on its own, with "management" needed only to deal with the occasional customer problem or employee discipline issue. The declarations plaintiffs offer in support of their motion for certification often describe substantial amounts of time spent performing potentially non-exempt tasks such as sales work or other interaction with customers. The typical plaintiff in such a case, as well as the typical supporting declarant at the class certification stage, is a former employee, often one who had a poor work record while at the company and who was fired for disciplinary reasons.

Employers have opposed motions for class certification on the grounds that common factual issues do not predominate and that there is no way to adjudicate the exempt status of a group of employees under a duties analysis without examining the particular circumstances of each individual employee. Employers have offered declarations from their own preferred members of the putative class, attesting to the extensive variations across the employer's various locations. These differences often reflect different management styles, variations in store size or volume, differences in the number of employees from site to site, and patterns of business that may be peculiar to the time of year, the region within the state, or the neighborhood where a particular store happens to be located. In contrast to the often performance-challenged declarants proffered in support of class certification, the witnesses that a company tends to put forth in opposition to certification tend, if anything, to represent the other end of the spectrum: successful and high-performing managers who may have an eye on a promotion to district manager or beyond.[36]

In the end, many California trial courts[37] have justified certifying misdesignation classes by citing three broad principles. First, courts observe that public policy favors class actions where possible. Second, courts note that the plaintiffs' burden of establishing the prerequisites for a class action is very low, essentially amounting to a bare prima facie showing that is satisfied by a handful of declarations stating that all putative class members do virtually the same work.[38] Third, courts contend that because the employer has not made individual determinations as to the exempt status of each member of the putative class, it is not fair for the employer to insist on individualized determinations for purposes of litigation.

b. The Results

Until very recently[39] there has been no appellate guidance whatsoever in California concerning whether overtime cases based on alleged misdesignation should be allowed to proceed as class actions. Once a class is certified, the stakes for the employer increase substantially. A verdict that an entire class of hundreds or even thousands of employees has been misdesignated and is entitled to receive overtime reaching back up to four years before the lawsuit was filed[40] can expose the employer to a potential damages award in the seven, eight, or even nine-figure range. Employers have repeatedly petitioned the California appellate courts for interlocutory relief, arguing that their cases have been certified as class actions contrary to law, but in almost every instance the petitions have been summarily denied. Moreover, because of California's quantitative standard for evaluating exempt status, the evidence proffered in support of certification almost certainly precludes summary judgment in the employer's favor. The employer then faces a choice of either going to trial in what would often be a bet-the-company context or else settling the litigation.

Not surprisingly, overtime class actions have tended overwhelmingly to settle, both before and after rulings on class certification, and for very large dollar amounts. Reported settlements since January 1, 2000 of California misdesignation class actions involving the executive exemption include the following:

- RadioShack Corp.: $29.9 million to 1,300 store managers[41];
- Rite Aid Corp.: $25 million to 3,200 managers, assistant managers, and managers-in-training[42];
- Bank of America Corp.: $22 million to 6,000 personal bankers[43];
- Starbucks Corp.: up to $18 million to at least 1,500 managers and assistant managers[44];
- Taco Bell Corp.: $13 million to 3,100 managers and assistant managers[45];
- U-Haul International Inc.: $7.5 million to 475 managers[46];
- Mervyn's California Inc.: $7.3 million to 1,600 managers[47]; and
- Money Store Inc.: $4 million to 600 assistant managers and loan officers.[48]

Unless there is a substantial change in either California law concerning exemptions, and the executive exemption in particular, or else the way that employers conduct their business in California, there is every reason to believe that employers will continue to pay very large settlements in misdesignation cases.

2. Qualitative Challenges Under Various Other Exemptions

In addition to the quantitative challenges to exemptions that arise under California law in which an employee, usually one designated as an exempt executive, argues that he or she spent less than the requisite amount of time performing exempt tasks, plaintiffs can contest their exempt status under both state and federal law on a qualitative basis. Rather than debating how employees allocate their time across specific job tasks, plaintiffs in such cases argue more fundamentally that the employer has erred in making the exemption determination because for one reason or another their primary duty does not meet the criteria for exemption.[49] Unlike the quantitative challenges that arise under California law, where employers and employees tend to disagree sharply concerning how the employees actually spend their working time, qualitative tests often involve substantial agreement concerning the fact of how the employees spend their working time. In a qualitative challenge, the focus of the dispute is usually on the legal consequences that follow from the essentially undisputed facts. There may, of course, be occasion to argue at the margins in such cases concerning how much time the employees allocate to various tasks, as that consideration is certainly relevant to the "primary duty" inquiry under the FLSA and the law of most states, but the specific quantity of time spent on exempt tasks tends to play a much less significant role than in California's quantitatively driven overtime litigation.

As is the case with challenges involving the executive exemption under California law, plaintiffs bringing "primary duty" challenges have refined their approach in recent years, focusing a complaint on one or two job categories, rather than challenging all of a company's exemption decisions in a single litigation. These claims can arise in any number of circumstances. For example, Pacific Bell recently settled for $35 million a class action brought on behalf of 1,500 outside plant engineers and draftsmen, most of whom did not have professional engineering degrees, who challenged their designation as professional or administrative employees.[50] In 1999, the City of Houston, Texas settled for $10.6 million two class actions brought on behalf of 2,600 fire department dispatchers, arson investigators, and firefighters who contended that their job duties did not constitute "fire protection activities" under the FLSA such that the City could schedule them for more than forty hours per week without necessarily paying overtime.[51]

A few types of "primary duty" challenges, however, seem to pose especially acute risks for employers.

a. Administrative Employees In The Insurance Industry

In a case that has received national attention, a class of more than 2,400 claims representatives[52] for Farmers Insurance Company sued their employer, alleging that they had been improperly designated as exempt administrative employees under California law. The liability portion of the case was resolved by motion, with the trial court ruling as a matter of law that the plaintiffs are not exempt administrative employees, a ruling that was upheld on appeal before trial.[53] The state court relied expressly on the FLSA regulations construing the administrative exemption as an aid in interpreting California law, so the court's decision may have some relevance beyond California.[54]

According to the appellate court's description of the facts, Farmers Insurance Exchange "performs a specialized function within the Farmers Insurance Group of Companies, having delegated activities normally associates with an insurance business to other related companies."[55] The company does not engage in sales activity ordinarily associated with an insurance business. Instead, the company uses independent contractor agents to sell insurance policies.[56] In addition, Farmers Insurance Exchange is managed by a related company, Farmers Group, Inc., and those management functions would "normally be included within the executive and administrative functions of a corporation."[57] Farmers Group., Inc., handles on behalf of Farmers Insurance Exchange such functions as "human resources (including compensation and benefits); payroll financial oversight; development of sales and marketing strategy and techniques; development and pricing of insurance products; financial and regulatory auditing; public relations; legal counselling; underwriting; data processing and other non-claims related matters."[58]

The entire purpose of Farmers Insurance Exchange is, in the court's view, to handle claims, and this function includes "perform[ing] a substantial amount of claims handling work for other related companies within the Farmers Insurance Group of Companies."[59] According to the court, "[t]he undisputed evidence establishes that claims adjusting is the sole mission of the 70 branch claims offices where the plaintiffs worked."[60] The court then concluded that the plaintiffs "are fully engaged in performing the day-to-day activities of that important component of the business."[61] As a result, in the court's opinion, the plaintiffs were non-exempt "production" workers, rather than exempt "administrative" employees.[62]

With the question of liability already resolved against Farmers, an Oakland jury in July 2001 returned a verdict for the plaintiffs of just over $90 million in back overtime.[63] Two months later the court awarded an additional $34.5 million in pre-judgment interest.[64] Farmers has appealed the judgment.[65]

How broadly the *Farmers* holding will be construed remains to be seen. Although the result in *Farmers* may itself be unsound, because, among other things, the appellate court alluded to conflicts in the evidence that arguably preclude summary judgment,[66] it is clear that the facts in that case were rather peculiar. As described by the appellate court, the employer functioned much as would a claims adjusting department within a larger insurance company. Thus, the court was able to characterize the "business" of Farmers Insurance Exchange as handling claims, rather than as selling insurance. It is therefore unclear whether claims representatives for a traditional insurance company would be deemed to be non-exempt production

workers under the *Farmers* analysis. The FLSA regulations themselves list "claim agents and adjusters" as the types of employees who fall within the administrative exemption.[67]

Nevertheless, six days after the *Farmers* jury returned its verdict, a group of plaintiffs filed a putative class action on behalf of 500 claims adjusters for the Automobile Club of Southern California.[68] Counsel for the plaintiffs in that case was quoted as saying that "[t]he case law in California is that if you're an insurance company, adjusting claims is production work."[69] Given that the enormous *Farmers* judgment has been widely reported, it seems likely that a number of plaintiffs' attorneys will be willing to take a chance that a court may elect to follow *Farmers* and to construe the holding broadly. Similar suits regarding claims representatives and other administrative personnel in the insurance industry seem likely, and not just in California.

b. Delivery Personnel As Outside Salespersons

Many businesses that employ route personnel to travel from customer to customer delivering products and servicing accounts designate those employees as commissioned outside salespersons exempt from the overtime laws.[70] A number of recent class and collective actions have challenged whether such employees are properly treated as exempt. This year, for example, the Appellate Division of the New Jersey Superior Court affirmed, in a 217-page ruling, a determination by the state labor commissioner that Pepsi Cola Co. misdesignated customer representatives and bulk customer representatives who were not "devoting significant amounts of time to selling products."[71] According to the court, the primary duty of the plaintiffs was "something other than sales work."[72] Although the administrative decision concerns only thirteen employees, the ruling could ultimately apply to approximately 400 employees.[73]

The Washington Court of Appeals issued a similar ruling in 2001, addressing a putative class action brought by a route driver for a business that contracts with customers to place vending machines in their cafeterias, lunchrooms, and snack areas.[74] The trial court entered summary judgment for the employer, but the appellate court reversed, holding that as a matter of law the employee is not an exempt commissioned salesperson.[75] The court concluded that the employee "is not involved principally in selling a product or service," but rather "is a delivery driver who stocks vending machines; his job does not involve selling a product or service."[76]

These are not the only cases to present this issue. BCI Coca-Cola Bottling Co. of Los Angeles, an independent bottler, settled a class action brought on behalf of 1,100 route sales representatives for a reported $20.2 million.[77] McKesson Water Products Co., which sells bottled water, settled a similar class action brought on behalf of 850 "route sales people" for $8 million.[78] Corporate Express Delivery Systems, Inc. settled for $9.75 million a class action brought on behalf of 4,300 messengers who were paid on a commission basis.[79] And a putative class action is currently pending in Los Angeles Superior Court on behalf of route salespersons for Dr. Pepper/Seven-Up Inc.[80]

These cases demonstrate that where route salespersons do not spend a significant portion of their working time interacting with customers and attempting to solicit sales and new business, there is a significant risk of litigation, including a judgment that the employees are not exempt.

3. Failure To Compensate Non-Exempt Employees For All Work

Yet another type of overtime claim has emerged as a powerful weapon in the arsenal of the plaintiffs' bar: that the employer has failed to pay its hourly employees for all time worked. This type of claim does not allege misdesignation, because the employer already treats the employee as non-exempt and, at least in principle, pays the employee premium wages for overtime work. Instead, this kind of case involves an allegation of either a practice on the part of an employer of requiring employees to work "off the clock" without reporting all of their working time, or else a policy of not compensating the employee for certain specific kinds of work, such as preparatory or wrap-up work at the start or end of a shift. Where an employee can muster sufficient evidence that the employer enforces such a policy or practice against a large number of employees, a class or collective action may result. Such cases do not necessarily include claims for overtime, because an employee who routinely works thirty hours a week might allege that she has been paid for only twenty or twenty-five. Nevertheless, overtime is often a significant aspect of claims for uncompensated work.

a. "Off The Clock" Work

In cases seeking compensation for working "off the clock," plaintiffs come to court pursuing certification of a class of many or all of the employer's hourly personnel, alleging that the supervisors instructed or otherwise coerced the employees into not reporting all hours worked. The plaintiffs assert that some aspect of the company's management structure exerts pressure on supervisors to reduce the number of working hours reported. For example, plaintiffs might contend that the company's supervisors have limited "labor budgets" with which to deliver the results expected by management, budgets that cannot be exceeded even if the work cannot be completed in the time allotted. Plaintiffs may assert more generally that the supervisors receive bonuses or performance evaluations that depend at least in part on their ability to minimize the cost of their subordinates' labor. Or plaintiffs might take a different tack, arguing that the supervisors simply expected them to do more work than could be completed in the allotted time, and that the employees feared reporting their overtime because they did not want to seem inefficient or to receive negative performance reviews. Under each of these scenarios, the basic gist of the allegation is that the plaintiffs felt pressure from their bosses not to record all time worked.

Employers often respond to such allegations by noting that the plaintiffs signed time cards attesting to their hours. The plaintiffs tend to reply with the argument that given the choice of signing a false time card or facing the ire of the company's supervisors, the choice to submit the false time card was reasonable under the circumstances. They also contend that they were not aware that they had a right to be paid for time that they did not record, so there was nothing questionable about their not reporting all their time. As a practical matter, of

course, once the plaintiffs can articulate a basis for distancing themselves from their time cards, which are often the only physical records of the hours they worked, then the damages at issue can increase substantially, often constrained by little more than the plaintiffs' imagination.

Although such off-the-clock cases should rarely be appropriate for treatment as a class or collective action, given the potential for fragmentation of the lawsuit into numerous mini-trials concerning credibility issues and the interactions between individual employees or small groups of employees and their particular supervisors, these cases can carry exposure that is quite high. Albertson's Inc., for example, settled a case involving off-the-clock issues affecting as many as 150,000 employees for $37 million.[81] Best Buy Inc. settled an off-the-clock case involving approximately 70,000 employees for $5.4 million.[82] Wal-Mart Stores Inc. is currently defending an off-the-clock case in Washington state court potentially involving tens of thousands of employees.[83] Given the substantial risk that such claims present, especially where so many employees are concerned, settlement is almost a given, particularly if a class is certified, regardless of the merits of the plaintiffs' claims.

b. Preliminary And Postliminary Work

Another type of claim that has received a great deal of attention recently concerns certain tasks at the beginning or end of a shift, referred to as preliminary and postliminary activities,[84] for which employers do not compensate their employees. Examples of this type of activity can include a pre-shift staff meeting or post-shift cleaning of equipment in preparation for the next shift. The Portal-to-Portal Act of 1947, as amended,[85] relieved employers of the obligation to compensate employees for incidental pre-shift and post-shift activities.[86] In *Steiner v. Mitchell*,[87] the Supreme Court interpreted the Portal-to-Portal Act to mean that "activities performed either before or after the regular work shift, on or off the production line, are compensable . . . if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed and are not specifically excluded."[88] In *Steiner*, the Court held that employees working in a battery factory and who are exposed to toxic chemicals during their shift are entitled to be compensated for time spent changing their clothes and showering.[89] If the preliminary or postliminary activities are deemed to be part of the job, as opposed to purely personal matters or matters of a brief duration that benefit primarily the employee, then compensation for those tasks may be necessary.[90]

Recent litigation in this area has focused on time that employees in various food processing businesses spend putting on and removing their working attire and safety equipment, so-called "donning" and "doffing."[91] Cases analyzing such activities have reached somewhat contrary conclusions. In *Reich v. IBP, Inc.*,[92] the Tenth Circuit concluded that time spent by meat processing employees donning and doffing sanitary outergarments was not integral and indispensable to the employer and thus not compensable.[93] In *Tum v. Barber Foods, Inc.*,[94] by contrast, a federal magistrate judge in Maine recommended that the court deny summary judgment to a poultry processing company whose sanitation employees were required by government regulation to wear certain clothing and equipment, expressly recognizing that "[s]everal courts have held otherwise in cases that appear close on their facts."[95]

As with other types of wage and hour class and collective claims where the law is uncertain, cases involving donning and doffing have produced large settlements. In 2000, Swift & Co. agreed to pay $3 million to a class of 2,300 workers at two meatpacking facilities to cover time spent donning, doffing, and cleaning safety equipment.[96] In May of this year, Perdue Farms Inc. settled for an estimated $10 million a donning and doffing case brought by the Department of Labor on behalf of up to 25,000 poultry processing workers.[97] Three months later, Perdue settled for another $10 million a private collective action brought on behalf of up to 60,000 poultry processing workers in ten states.[98] The same day the Department of Labor filed a consent decree in the Perdue litigation, it filed a lawsuit concerning donning and doffing against Tyson Foods Inc., another poultry processor.[99]

With payouts this substantial, it seems likely that other businesses whose employees spend a few minutes before and after each shift donning and doffing equipment, or performing cleaning or organizing functions, may find their practices being scrutinized by the government or by private plaintiffs. These concerns do not seem confined to the food processing industry.

III. THE FUTURE OF OVERTIME LAW AND OVERTIME LITIGATION

A. Possible Clarification Of California Law, For Better Or For Worse

Two recent appellate rulings in California have caused a great deal of excitement and concern among the employment bar and employers in California. First, in December 2001, the California Court of Appeal sitting in Los Angeles issued its opinion in *Indian Head Water Co. v. Los Angeles County Superior Court*,[100] an unpublished, and thus unprecedential and not citable, ruling concerning the propriety of class certification in a misdesignation case. The plaintiff moved to certify a class of route sales representatives for a bottled water company, and the trial court granted the motion. The employer petitioned for a writ of mandamus, arguing that the certification of the class was improper. The Court of Appeal denied the petition in most respects.[101] According to the court, "[t]o measure how employees spend their time on a class basis, courts can look at survey evidence taken from the class members, and/or courts can consider testimony from representative employees regarding their job duties and work hours."[102] Based on little more than the plaintiffs' assertions regarding the similar nature of their duties, the court concluded that "[t]his case . . . is well suited for class treatment since it involves a relatively narrow, well-defined issue, a pre-defined group of employees, a clearly identified job position, extremely similar job duties for all class members, and corporate-wide policies and practices controlling all class members' job duties and responsibilities."[103] Although several groups submitted requests to the court to publish its opinion, as it was apparently the first appellate ruling in California addressing the propriety of class certification in a wage and hour class action, the court denied those requests and maintained the unpublished status of the decision.

Just a few months after the *Indian Head* ruling, in April 2002 a different division of the same California appellate district that decided *Indian Head* issued its decision in *Sav-On Drug Stores, Inc. v. Superior Court*.[104] In *Sav-On*, the trial court certified a class of between 600 and 1,400 current and former operating managers and assistant managers at the employer's 300 stores, and the employer petitioned for a writ of mandamus. The plaintiffs contended that they were entitled to overtime, and the employer argued that the employees were exempt executives and that exemption could not be adjudicated on a class basis.[105] In opposition to the plaintiffs' motion for class certification, the defendants submitted 51 declarations from putative class members establishing "significant variations from store to store and manager to manager"[106] that were based on such factors as "the [general manager]'s management style, experience level, and status as a[] [market manager]; the number of [operating managers] and [assistant managers]; the experience level of the [assistant manager] or [operating manager]; and the store location, type, size, and sales volume."[107] The court "conclude[d] based on all the circumstances of this case that the trial court abused its discretion in certifying this class action,"[108] noting that the employer has established "that the stores and the circumstances under which the [assistant managers] and [general managers] operate are not identical but rather involve significant variations affecting their tasks and the amounts of time spent on those tasks."[109] Issuing the writ, the court held that "in *this* case, with so many stores and managers operating under different conditions, plaintiffs failed to sustain their burden to show that common issues predominate over individual issues."[110]

The *Sav-On* opinion was originally issued as an unpublished decision, once again depriving the bench and the bar of much-needed guidance in this area. After the court received numerous requests to publish the opinion, however, the court redesignated the opinion as a published opinion, thereby making it citable as precedent. The opinion appeared to sound the death knell for overtime class actions in California, at least with respect to managerial employees seeking to establish that they are not within the executive exemption.

On July 17, 2002, however, the California Supreme Court granted the plaintiffs' petition for review. The grant of review has the effect of superseding the Court of Appeal opinion and rendering that opinion of no further precedential weight. It is not clear whether the California Supreme Court took the case to resolve the disagreement among the courts of appeal, to reverse the holding in *Sav-On*, or for some other reason. What is certain is that virtually the entire employment bar in California is watching the *Sav-On* case very closely. Oral argument has not yet been scheduled, and it may be late 2003 or even 2004 before the case is decided.

B. The Need For Reform

The current situation is not good for anyone other than lawyers. Defending an overtime class action through the initial pleading and motion stages can cost hundreds of thousands of dollars, and that figure does not include the cost of taking a case to trial or paying a settlement. In addition to the significant financial costs, class actions tie up key corporate resources, because the defense attorneys need to conduct a thorough factual investigation that often requires substantial interaction with the heads of the human resources and sales departments, as well as top corporate officers. At the same time, class action plaintiffs find themselves subject to lengthy depositions as well as written and document discovery. The filing of an overtime class action also generates suspicion and distrust on the part of employees unfamiliar with the arcana of wage and hour law, who are left to wonder whether their employer has somehow treated them unlawfully. In addition, the pendency of an overtime class action is problematic from the standpoint of co-employee interactions, as it engenders divisions among current employees who opt to side with the employer in favor of exemption as against those who choose to side with the plaintiffs.

By and large, employers desire to comply fully with the law. Employees want to earn a fair wage for a fair day's work, and they do not want their health threatened by unsafe working conditions. Employers and employees alike welcome a certain degree of flexibility to structure compensation arrangements in ways that are mutually beneficial. Neither side wishes to find itself locked in high-stakes litigation over the meaning of overtime exemptions, or other wage and hour concepts such as preliminary and postliminary work, that are ambiguous and difficult to apply in specific cases. Indeed, it is inherent in the nature of class and collective litigation under state and federal wage and hour law that legal uncertainty leads to expensive litigation and to large settlements that, in the end, do not achieve real justice for anyone.

If the rules were clear, then employers could make informed choices ex ante regarding whether to pay overtime, and employees would be able to determine readily whether their compensation complied with the law. Part of the problem with allowing recovery of back overtime in the context of a misdesignation case is that the damages represent a pure windfall for the employees, who already willingly agreed to work at their former compensation level.[111] Assuming that the employee does not meet the criteria for exemption, the damages inquiry purports to put the employee in the position she would have occupied had she been properly designated in the first place. The fallacy, though, is the implicit assumption that the parties would have set the employee's hourly rate without taking into account the overtime hours that the employee would be required to work.[112]

For example, an employee who works sixty hours a week and earns a salary of $31,200 per year and is found to be misdesignated would be entitled, depending on how one calculates the back overtime, to either an additional $5,200 or $23,400 per year.[113] The total annual compensation for that employee would thus be adjusted upward from $31,200 to either $36,400 or $54,600, which reflect hourly compensation for sixty hours per week at a rate of either $10 or $15 per hour. But who can seriously contend that $10 or $15 per hour is the hourly rate that the parties would have agreed on if they were negotiating for an hourly rate at the outset of the employment? Common sense says that if the employer was willing to pay $31,200 for the job,

and the employee was willing to receive $31,200 for the job, and all parties knew approximately how many hours the job would involve, then the freely negotiated hourly rate would be $8.57, the figure that yields annual earnings of $31,200 at sixty hours per week for fifty-two weeks, including premium pay for overtime. For the compensation package to be converted from $31,200 per year to over $50,000 per year based on a technical violation of the wage and hour laws makes no sense.[114]

Most wage and hour litigation, therefore, has little or nothing to do with vindicating settled employee expectations. By and large, employees agree to a compensation scheme that seems reasonable and lawful, and they willingly provide services to their employer. Once their employment ends, or once they become upset with their employer and contact an attorney or a state or federal enforcement agency, the dispute is not about protecting worker rights except in the most legalistic and technical sense. Instead, the paradigm is standard zero-sum litigation: getting as much for the plaintiffs, at the expense of the employers, as possible.

Overtime laws can and should operate so as to facilitate the employer-employee relationship, not to undermine it. The primary rationale for the overtime provisions of the FLSA—spreading work in order to minimize unemployment—may be worth reexamination. Unemployment levels today, of course, are substantially lower than they were in 1938, so there seems to be much less need to use the overtime laws to distribute work. With regard to the issue of employees being overworked, the FLSA's exemptions indicate that Congress did not believe that all employees need protection from long hours. Federal and state minimum wage laws already provide substantial protection for employees at the low end of the income distribution, and the multitude of government social welfare programs that have come into existence since the enactment of the FLSA have created a measure of protection for employees that FLSA-mandated compensation structures cannot match.[115] In most instances, the FLSA affords more protection to a college-educated office worker earning $50,000 a year than to a manager of a fast food restaurant earning $25,000 a year, and it is time to bring the FLSA into line with current notions of public policy. If reform does not come, then the risk and expense of collective and class action litigation may compel employers to reclassify millions of employees as non-exempt, a change that is in the interest of neither the employees nor their employers.

C. Suggestions For Reform

Calls to reform the FLSA are certainly not new. As a matter of political reality, the FLSA is in no danger of being repealed any time soon, so the focus is properly on how to make the FLSA work for employers and for employees. Although there are numerous ways in which the FLSA and state wage and hour laws could be reformed so as to protect employees' rights while minimizing the present legal uncertainties that spawn litigation, three areas of reform seem to have a particularly strong likelihood of achieving these purposes: establishing a bright line compensation level such that employees above that level are exempt regardless of job duties or salary basis considerations, clarifying the appropriate formula for calculating back overtime in misdesignation cases, and setting clear burdens of proof for establishing that employees are "similarly situated" for purposes of maintaining a collective or class action.

1. A Clear Compensation-Based Standard For Exemption

Reform proposals have centered on bringing clarity to the exemption standards by establishing bright lines that responsible employers can readily observe. The most potentially beneficial proposals have emphasized establishing a straight compensation threshold for determining exemption: if an employee earns more than a certain amount of money, regardless of that employee's job duties, then that employee is not entitled to overtime.[116] Otherwise, the employee is non-exempt. Proposed thresholds have included five times the minimum wage[117] and six and one half times the minimum wage.[118] These proposals are headed in the right direction, although they still potentially leave the door open for litigation by linking the threshold wages to the number of hours worked.[119]

In order to provide clear guidelines that all parties concerned can understand, the most appropriate standard should not depend on the number of hours the employee worked, because fact issues could well arise concerning the workloads of employees whose compensation is at the low end of the exempt range. For example, if the exemption threshold were five times the minimum wage, an employee who earns a salary equal to five times the minimum wage based on a fifty-hour workweek might file suit alleging that he or she actually worked sixty hours per week, thereby falling below the exemption threshold. Instead, exemption should turn exclusively on the amount of an employee's total dollar compensation. An employee who works forty hours a week for fifty-two weeks will have a total of 2,080 hours for the year. Setting the threshold compensation level for exemption at a multiple of the minimum wage of $5.15,[120] applied to the 2,080 hours, establishes a straightforward method for determining whether an employee is entitled to overtime. At four times the minimum wage, for example, the required annual compensation would be $42,848.[121] If an employer pays an employee at or above the appropriate annual rate, perhaps judged on a monthly basis, then the employee should be exempt.[122] Such an arrangement protects employees by ensuring a substantial level of compensation, encourages employers to increase the compensation of employees who currently receive compensation somewhat below to the threshold, and eliminates one friction point between employers and employees. The ideal threshold will be sufficiently low to avoid depriving willing employees of the opportunity to be salaried, but sufficiently high to ensure that exempt employees who find themselves dissatisfied with their particular working situation will presumably have other employment options readily available.[123]

2. Clarifying The Proper Measure Of Damages In Misdesignation Cases

An important fuel that fires overtime litigation is the substantial uncertainty over what formula the court will use to determine damages for back overtime in a misdesignation case. Unlike a case involving a company that fails to pay hourly employees for all hours worked, in which the damages calcula-

tion is a straightforward arithmetic matter once the number of hours at issue has been determined, the courts have not adopted a consistent methodology for calculating back overtime where employees paid on a salary basis have been found to be non-exempt. As noted earlier,[124] there are two main competing schools of thought regarding how to calculate damages in such a case: one that treats salary as earned during all hours worked and another that treats salary as earned during only the first forty hours of work per week. Depending on whether the court adopts the methodology followed by such cases as *Blackmon*,[125] *Rushing*,[126] and *Zoltek*[127] on the one hand, or *Cowan*,[128] *Rainey*,[129] and *Skyline*[130] on the other, the result will vary by more than three-fold, because these methodologies differ in their assumption concerning whether the employer has already received, in effect, "straight" time for all hours worked, and thus whether the employee should receive half-time or time and one half for the overtime hours. In addition, because these methods differ in how they calculate the employee's hourly rate, as being based either on all hours worked in a week or only on the first forty hours, the differences between these two formulae become more pronounced as the number of hours at issue increases. Where the employee alleges 45 hours of work per week, the back overtime resulting from the *Cowan-Rainey-Skyline* line of cases is 3.375 times greater than the result obtained from the *Blackmon-Rushing-Zoltek* line. At 50 hours per week, the difference is 3.75 times; at 55 hours, 4.125 times; at 60 hours, 4.5 times; at 65 hours, 4.875 times; and at 70 hours per week, the difference between the two methodologies is a whopping 5.25 times.

Eliminating the ambiguity in the damages calculation could go a long way toward reducing the volume of overtime class and collective action litigation. Any form of back overtime damages for a misdesignated employee represents a form of windfall, but where the court might opt for the *Cowan-Rainey-Skyline* method for calculating damages, the extent of the windfall is magnified several times over. Such large potential jackpots encourage litigation, complicate negotiated resolutions of lawsuits, and extort excessive settlements from employers divorced from the merits of the plaintiffs' claims. Congress should clarify that the appropriate way to calculate back overtime in a misdesignation case is to follow the *Blackmon-Rushing-Zoltek* approach.

3. Specifying Burdens Of Proof For The "Similarly Situated" Standard

The third significant area in which the FLSA should be reformed is in the standard used to determine whether a group of potential plaintiffs are "similarly situated"[131] for purposes of maintaining a collective action. In many instances, the "similarly situated" standard has worked just fine, such as where an employer's admittedly uniform pay practice has been applied to all members of the putative plaintiff collective. In other instances, though, collective actions should not be available, such as where there is a significant chance that the case management problems inherent in making individualized inquiries may overtake the benefits of collective adjudication. Until recently, courts have properly applied the "similarly situated" standard, denying collective action status to cases in which the duties of a potentially diverse set of employees would be in issue. Now, however, in light of California's willingness to entertain class actions alleging the misdesignation of one or more entire job categories based on the duties of the employees, as well as the significant amount of recent off-the-clock mega-litigation involving tens of thousands of employees per case, there is a need to clarify the approach that courts are to take when determining whether to allow an FLSA case to proceed as a collective action.

Currently, a plaintiff must make a prima facie showing that the individuals within the proposed description of the putative class are "similarly situated," such that the court may adjudicate the claims of all individuals within the defined group, who elect to opt in to the lawsuit, on the basis of the representative testimony of one plaintiff or a handful of plaintiffs. The employer then has the opportunity to argue that the case is not appropriate for class treatment. At that point, the courts frequently certify the case as a collective action on a conditional basis, noting that they can make a final determination after the opt-on period has run as to whether the case should then proceed to trial on a collective basis or instead be decertified.[132] The problem with this approach, however, is that it leads too readily to certification, ignoring the substantial pressure that even a conditional certification ruling places on an employer to settle the case.

The better approach would be to set forth, within the FLSA itself, that once a plaintiff has made a prima facie showing that a collective action is appropriate, the burden shifts to the defendant to come forward with evidence sufficient to support a finding that the relevant facts concerning more than a de minimis number[133] of the individuals in the putative collective plaintiff group differ materially from the circumstances alleged by the putative representative plaintiff or plaintiffs concerning the main issue or issues in the case. This approach may at first seem to run counter to the shibboleth that in deciding whether to grant class certification, a court should not inquire into the merits of the case.[134] In reality, though, such an approach is the only practical way for a court to determine whether the case is appropriate as a collective action. If it cannot be said with certainty that a judgment of liability or non-liability will be correct as to every individual whose rights are adjudicated, then allowing the case to proceed as a collective action deprives the employer of due process insofar as it permits individuals to prevail who are not legally entitled to do so. This is not to say that where a plaintiff seeking certification comes forward with 100 declarations setting forth very similar duties, an employer should be able automatically to defeat certification by presenting a single declaration from one unusually well-qualified employee. But where the employer can present declarations showing that at least as to a non-trivial portion of the proposed collective plaintiff group, a determination of liability would necessarily involve an employee-specific presentation of proof concerning such issues as exemption, whether the employee worked off the clock, or whether the employee has been paid on a salary basis, certification is not appropriate.

This approach would not directly contradict the principle of avoiding consideration of the merits of the case at the

class certification stage, because the inquiry would not address the merits of the claims presented by the named plaintiffs, but rather would examine whether the employer can make a showing that individualized inquiry is necessary, generally by pointing to other potential plaintiffs whose testimony and experiences and circumstances will differ markedly from those of the proposed representative. If the employer can present substantial evidence to support the position that more than a de minimis number of potential plaintiffs will testify in a manner inconsistent with the views of the representative plaintiff or plaintiffs, or that there are facts unique to more than a de minimis number of potential plaintiffs that would preclude collective adjudication, then the court would be forced to conduct a plaintiff-by-plaintiff analysis to resolve the merits. There is no reason to assume, ex ante, that all employees in a given job category are necessarily either exempt or non-exempt, or that they have or have not been compensated for all time worked.[135] For a court to corral a disparate group of potential plaintiffs into a one-size-fits-all liability determination deprives employers of their substantive rights under the FLSA. Where an employer intends to present non-frivolous defenses that are specific to each potential plaintiff, or at least to more than a de minimis number of the potential plaintiffs, then case management concerns dictate that the litigation not proceed as a collective action.[136]

CONCLUSION

Overtime litigation on a class or collective basis has imposed an increasingly significant burden on employers throughout the country. Unless the antiquated standards established by the FLSA and state law are updated to reflect the realities of the modern workplace, as well as the dynamics of multi-party litigation, employers will continue to be targeted by opportunistic suits threatening multi-million-dollar liability, and often insolvency, based on nothing more than a technical violation of arcane wage and hour rules. Otherwise, employers will be forced to abandon exemptions en masse, a result that is not in the public interest.

As a post-script, it bears noting that changes to the FLSA alone do not necessarily accomplish much unless the states modify their wage and hour laws accordingly. California may well be a lost cause, at least in the near term, given the substantially anti-business mentality of the legislature. Nevertheless, most states have been willing in the past to follow the lead of the federal government by adopting rules that track the substantive exemption requirements of the FLSA, and it is conceivable that many would do so again if the FLSA were reformed along the lines addressed here. If Congress tackles FLSA reform and the states do not amend their laws accordingly, then the effectiveness of the federal legislative activity will be substantially undercut. The FLSA in its current form does not prevent states from imposing upon employers wage and hour burdens that exceed those set forth under federal law.[137] The possibility of continued overtime class action litigation under state law even after FLSA reform raises the question whether the FLSA should be given broad pre-emptive scope to ensure that state law does not frustrate a federal policy of providing bright lines and minimizing the risk of litigation. Even though such pre-emption might seem like a good idea in the short term,[138] in the long run expanding the power of the federal government in that manner at the expense of the states is probably not the most prudent approach.[139] Instead, addressing reform in the states with the same arguments that would be made to Congress with regard to the FLSA seems to offer the best hope for long-term positive results for both employers and employees.

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Footnotes

[1] Under federal law and the law of most states, covered employers must generally provide premium pay for work in excess of forty hours per week. Some states define overtime differently, requiring premium pay for work beyond a weekly number of hours other than forty, a certain number of hours in a day, or a certain number of days in a week.

[2] 29 U.S.C. §§ 201-219, 255, 260. The FLSA permits "any one or more employees" to sue "for and in behalf of himself or themselves and other employees similarly situated," although "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." 29 U.S.C. § 216(b). Because this type of multiple-plaintiff suit authorized by the FLSA is limited to those individuals who affirmatively "opt in" to the case, it is commonly referred to as a "collective action," as distinct from a traditional "class action," which ordinarily covers every individual within the class description except those who affirmatively "opt out" of the case.

[3] Nancy Montweiler, *Discrimination: Wage-Hour Class Actions Surpassed EEO In Federal Court Last Year, Survey Shows*, Daily Lab. Rep. (BNA), Mar. 22, 2002, at C-1.

[4] *See, e.g.*, Michael A. Faillace, *Automatic Exemption of Highly-Paid Employees and Other Proposed Amendments to the White-Collar Exemptions: Bringing the Fair Labor Standards Act into the 21st Century*, 15 Lab. Law. 357, 360-61 (2000); Robert D. Lipman et al., *A Call for Bright-Lines to Fix the Fair Labor Standards Act*, 11 Hofstra Lab. L.J. 357, 359-60 (1994).

[5] 29 U.S.C. § 213(a)(1).

[6] *See generally* 29 C.F.R. Part 541 (Department of Labor regulations and interpretive guidelines implementing executive, administrative, and professional exemptions); Mark J. Ricciardi & Lisa G. Sherman, *Exempt or Not Exempt Under the Administrative Exemption of the FLSA . . . . That Is the Question*, 11 Lab. Law. 209, 212-16 (1995) (discussing requirements of executive, administrative, and professional exemptions).

[7] *See* Shawn D. Vance, *Trying to Give Private Sector Employees a Break: Congress's Efforts to Amend the Fair Labor Standards Act*, 19 Hofstra Lab. & Emp. L.J. 311, 314-16 (2002); Faillace, *supra* note 4, at 361-62. For a broader overview of some of the other issues that arise under the FLSA, see Joseph E. Tilson, *FLSA Cases: The New Wave of Employment Litigation*, 664 PLI/Litig. 789 (2001).

[8] *See* Daniel V. Yager & Sandra J. Boyd, *Reinventing the Fair Labor Standards Act to Support the Reengineered Workplace*, 11 Lab. Law. 321, 323 (1996).

[9] *See* Faillace, *supra* note 4, at 361-62.

[10] *See* Vance, *supra* note 7, at 315-16 & n.40; Yager & Boyd, *supra* note 8, at 331-36.

[11] 29 C.F.R. §§ 541.1(d) ("customarily and regularly exercises discretionary pow-

ers" in executive exemption "long test"), 541.2(b) ("customarily and regularly exercises discretion and independent judgment" in administrative exemption "long test"), 541.3(b) ("consistent exercise of discretion and judgment" in professional exemption "long test"). *See also* 29 C.F.R. §§ 541.214(a) ("exercise of discretion and independent judgment" in interpretive guideline specifying administrative exemption "short test"), 541.315(a) ("consistent exercise of discretion and judgment" in interpretive guideline specifying professional exemption "short test"). The so-called long tests set forth in the regulations specify several factors that must be met in order for an employee to be exempt. The so-called short tests contained in the interpretive guidelines provide that where an employee's earnings exceed a threshold higher than the compensation level established for the long test, the employer will be required to establish fewer of the factors included in the long test. The short tests reflect the presumption that increased compensation correlates with a greater likelihood of exempt status. *See, e.g.*, Ricciardi & Sherman, *supra* note 6, at 212-14. The current compensation levels for the short tests were established in 1975 and have not since been increased. As a practical matter, in light of state and federal minimum wage requirements, virtually all arguably exempt employees meet the compensation levels of the short tests.

[12] 29 C.F.R. §§ 541.2(a)(1) (administrative exemption), 541.205 (interpretive guidelines attempting to define distinction between exempt "administrative" work and non-exempt "production" or "sales" work).

[13] *Compare* Donovan v. Burger King Corp., 672 F.2d 221 (1st Cir. 1982) (finding assistant managers of Burger King restaurants exempt, even though they spend part of their time taking customer orders and preparing food), *and* Thomas v. Jones Restaurants, Inc., 64 F. Supp. 2d 1205 (M.D. Ala. 1999) (finding restaurant manager exempt), *with* Cowan v. Treetop Enters., Inc., 163 F. Supp. 2d 930, (M.D. Tenn. 2001) (finding Waffle House unit managers non-exempt).

[14] *Compare* Dalheim v. KDFW-TV, 918 F.2d 1220,1228-32 (5th Cir. 1990) (finding nineteen general assignment reporters, producers, directors, and assignment editors are not exempt), *and* Nordquist v. McGraw-Hill Broad. Co., 38 Cal. Rptr. 2d 221 (Ct. App. 1995) (finding sports director/anchor not exempt), *with* Mandelaris v. McGraw-Hill Broad. Co., 1 W&H Cas. 2d (BNA) 64 (E.D. Cal. 1992) (finding sports director/anchor who was successor to plaintiff in *Nordquist* with same position and with same employer exempt).

[15] *See, e.g.*, Xavier Rodriguez, *Paralegal Overtime: Yes, No, or Maybe? An Update*, 63 Tex. B.J. 266, 267-68 (2000).

[16] *See generally* Faillace, *supra* note 4, at 367-86 (analyzing difficulties inherent in applying FLSA and its regulations to modern workplace).

[17] Tilson, *supra* note 7, at 797 (noting that according to a 1999 study by the federal government, between 20 and 27 percent of all full-time American workers are covered by the three "white collar" exemptions).

[18] Lipman et al., *supra* note 4, at 379.

[19] *See* Ricciardi & Sherman, *supra* note 6, at 209, 219, 223-24.

[20] Employee rights advocates would also argue a more cynical motivation on the part of employers: designating individuals as exempt so that the employers can demand more work from the employees at no marginal cost. Although it is questionable whether any employers actually think along those lines when deciding whether to designate an employee as exempt or non-exempt, there is plainly a benefit to the employer in knowing in advance how much the labor of a particular employee will cost, a determination that cannot necessarily be made with the same degree of precision where an employee is compensated on an hourly basis.

[21] Not surprisingly, in the context of overtime litigation, plaintiffs, who are generally former employees with no on-going stake in the defendant's business operations, vehemently assert that they were overworked and undercompensated. In hindsight, they may contend that they would have preferred to be designated non-exempt so that they would not have had to work so hard or so that they could have earned more money for their efforts. Litigation posturing aside, however, few, if any, current employees ever express a preference for hourly pay rather than a salary.

[22] *See supra* note 2.

[23] *See, e.g.*, Auer v. Robbins, 519 U.S. 452, 460-63 (1997) (addressing when employee's wages are sufficiently subject to reduction for quantity or quality of work to undermine "salary basis" of compensation); Boykin v. Boeing Co., 128 F.3d 1279, 1281-82 (9th Cir. 1997) (holding that paying employees premium pay for certain overtime hours does not, by itself, undermine "salary basis"); Martin v. Malcolm Pirnie, Inc., 949 F.2d 611, 617 (2d Cir. 1991) (exemption fails based on salary basis test); Abshire v. County of Kern, 908 F.2d 482, 490 (9th Cir. 1990) (same); Brock v. Claridge Hotel & Casino, 846 F.2d 180, 189 (3d Cir. 1988) (same).

[24] EEOC v. MCI Int'l, Inc., 829 F. Supp. 1438, 1445-46 (D.N.J. 1993) (denying collective action treatment to putative class of claimants under Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 621-634, which by virtue of 29 U.S.C. § 626(b) incorporates the FLSA's enforcement provisions, including the "similarly situated" provision in 29 U.S.C. § 216(b)).

[25] St. Leger v. A.C. Nielsen Co., 123 F.R.D. 567, 569 (N.D. Ill. 1988) (denying collective action status in FLSA case).

[26] *Id.*

[27] *See* Lusardi v. Xerox Corp., 122 F.R.D. 463, 465-66 (D.N.J. 1988) (denying reconsideration of order decertifying ADEA collective action); Mooney v. Aramco Servs. Co., 54 F.3d 1207, 1214-16 (5th Cir. 1995) (affirming denial of collective action status in ADEA case based on plaintiffs' disparate factual circumstances and individualized nature of defenses).

[28] D'Camera v. District of Columbia, 693 F. Supp. 1208, 1210 (D.D.C. 1988).

[29] *See, e.g.*, Murray v. Stuckey's, Inc., 939 F.2d 614 (8th Cir. 1991) (concerning managers at gas station / convenience stores); Atlanta Professional Firefighters Union, Local 134 v. City of Atlanta, 920 F.2d 800 (11th Cir. 1991) (concerning fire department captains); Dalheim v. KDFW-TV, 918 F.2d 1220 (5th Cir. 1990) (concerning various employees of television station).

[30] *See infra* Part II.B.1.

[31] 29 C.F.R. §§ 541.1(a) (executive exemption "long test"), 541.119(a) (executive exemption "short test").

[32] Cal. Lab. Code § 515(a).

[33] *See, e.g.*, Cal. Lab. Code § 515(b)(2)(e); Ramirez v. Yosemite Water Co., 978 P.2d 2, 10 (Cal. 1999) (construing outside salesperson exemption).

[34] *See, e.g.*, Ramirez v. Yosemite Water Co., 978 P.2d 2, 13 (1999) ("[T[he court should consider, first and foremost, how the employee actually spends his or her time. But the trial court should also consider whether the employee's practice diverges from the employer's realistic expectations, whether there was any concrete expression of employer displeasure over an employee's substandard performance, and whether these expressions were themselves realistic given the actual overall requirements of the job.").

[35] California law does not have a "salary basis" test precisely analogous to the salary basis requirement of the FLSA, although exempt executive, administrative, and professional employees must receive "a monthly salary equivalent to no less than two times the state minimum wage for full-time employment." Cal. Lab. Code § 515(a).

[36] Plaintiffs generally deride such declarations by current employees as either coerced by the defendant or reflecting the declarants' incentive to further their own careers by providing testimony potentially favorable to the company.

[37] Opinions of California trial courts are not published and thus may not be cited as precedent. *See* Cal. R. Ct. 977(a). The author has reviewed many California trial court opinions certifying overtime class actions and has attended class certification hearings where these arguments have been made time and time again.

[38] These courts take comfort in the proposition that class certification decisions remain subject to reconsideration throughout the pendency of a case and can be revisited if, at some later date, it becomes clear that trial on a class basis is not appropriate.

[39] *See infra* Part III.A.

[40] Cal. Bus. & Prof. Code § 17208. *See* Cortez v. Purolator Air Filtration Prods. Co., 999 P.2d 706 (Cal. 2000) (allowing recovery for denial of overtime pursuant to general unfair business practices law, with four-year limitations period, rather than restricting recovery to three-year limitations period applicable to overtime statute).

[41] *RadioShack to Pay Employees $30 Million in Settlement of Overtime Exemption Claim*, Daily Lab. Rep. (BNA), July 18, 2002, at A-9.

[42] *Workers Awarded $90 Million In Class-Action Overtime Suit*, 11 Cal. Emp. L. Letter 1 (2001).

[43] *California News In Brief*, 11 No. 16 Cal. Emp. L. Letter 7 (2001).

[44] Tom Gilroy, *Starbucks Settles Two California Lawsuits Filed Over Alleged Wage And Hour Violations*, Daily Lab. Rep. (BNA), Apr. 24, 2002, at A-13.

[45] Alan J. Liddle, *Taco Bell Shells Out $13 Million in OT Suit*, Nation's Restaurant News, Mar. 19, 2001, at 1.

[46] Tom Gilroy, *U-Haul Agrees to Preliminary Settlement with California Managers in Overtime Suit*, Daily Lab. Rep. (BNA), May 1, 2001, at A-8. U-Haul appears to have been the very first of these large California overtime misdesignation cases to proceed all the way to trial on the merits. Before trial, the plaintiffs intentionally waived their overtime claims under the Labor Code and elected to proceed to trial solely on the basis of California's general unfair business practices statute, Section 17200 of the Business and Professions Code. By proceeding under only Section 17200, the plaintiffs waived a claim to attorney fees, which are recoverable under the Labor Code but not under Section 17200, but at the same time they enabled the matter to be heard by a judge and not a jury, as an action under Section 17200 is regarded as equitable in California. The plaintiffs' gambit paid off, as the judge issued a ruling approving of class treatment and finding U-Haul liable for misdesignation as to the entire class. The matter settled before a further trial could be held to determine damages.

[47] Karen Pilson, *California Court Approves $7.3 Million Settlement of Store Managers' Overtime Suit*, Daily Lab. Rep. (BNA), Mar. 22, 2002, at A-3.

[48] *Suit by Home Loan Company Workers Seeking Overtime Pay Settled for $4 Million*, Daily Lab. Rep. (BNA), Sept. 21, 2000, at A-10.

[49] Naturally, such claims can also arise under California's quantitative approach to exemptions, because if the main function that the employee performs falls outside the exemption, then the employee will in all likelihood not spend sufficient time

performing exempt duties to satisfy California's standards.

[50] Joyce Cutler, *Court Gives Preliminary OK to $35 Million Settlement Between Pacific Bell, Engineers*, Daily Lab. Rep. (BNA), Dec. 7, 2001, at A-6.

[51] Susanne Pagano, *Firefighters to Get $2.8 Million in Legal Fees to Close Case on Unpaid Overtime Wages*, Daily Lab. Rep. (BNA), July 21, 2000, at A-9; *see generally* 29 U.S.C. § 207(k) (specifying alternative maximum hours provisions for employees "in fire protection activities").

[52] The trial court certified three subclasses of claims representatives "assigned to handle property, automobile physical damage and liability claims." Bell v. Farmers Ins. Exch., 105 Cal. Rptr. 2d 59, 61 (Ct. App.), *review denied* (Cal.), *and cert. denied*, 122 S. Ct. 616 (2001). Two justices of the California Supreme Court dissented from the denial of review.

[53] *Id.* at 76.

[54] *Id.* at 69-72.

[55] *Id.* at 72.

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.* at 74.

[61] *Id.*

[62] *Id.* at 76.

[63] *Employer Held to Have Broken Law on Overtime*, NAT'L L.J., Feb. 4, 2002, at C9.

[64] *Id.* In addition, the plaintiffs' attorneys have reportedly moved for $11 million in attorneys' fees, over and above the previous award they received of 25% of the $90 million judgment. That request is pending before the trial court.

[65] *Id*.

[66] 105 Cal. Rptr. 2d at 72-74.

[67] 29 C.F.R. § 541.205(c)(5).

[68] Joyce E. Cutler, *As Many As 500 Claims Adjusters Seek Overtime Pay From Southern California AAA*, Daily Lab. Rep. (BNA), July 18, 2001, at A-5.

[69] *Id.*

[70] *See* 29 U.S.C. §§ 207(i) (exempting employees of retail or service establishments who earn at least one and one half times the minimum wage and for whom "more than half" of the "compensation for a representative period (not less than one month) represents commissions on goods or services"), 213(a)(1) (exempting outside salespersons); 29 C.F.R. §§ 541.5, 541.500-.508 (defining outside salesperson exemption).

[71] New Jersey Dep't of Labor v. Pepsi-Cola Co., No. A-918-00T5, 2002 WL 187400, at *77 (N.J. Super. Ct. App. Div. Jan. 31, 2002), *cert. denied*, 798 A.2d 1271 (N.J. 2002).

[72] *Id.* at *76.

[73] *See* Deborah Billings, *Pepsi Product Deliverers, Shelf Stockers Found Due Overtime Under New Jersey Law*, Daily Lab. Rep. (BNA), May 24, 2000, at A-7.

[74] Stahl v. Delicor of Puget Sound, Inc., 34 P.3d 259, 261 (Wash. Ct. App. 2001).

[75] *Id.* at 267.

[76] *Id.*

[77] *California Court Approves $20.2 Million Deal in Overtime Pay Class Action Against Bottler*, Daily Lab. Rep. (BNA), Nov. 6, 2001, at A-6.

[78] Tom Gilroy, *Court Approves $8 Million Settlement for Water Delivery Drivers in California*, Daily Lab. Rep. (BNA), July 13, 2001, at A-8. That settlement followed the California Supreme Court's ruling in Ramirez v. Yosemite Water Co., 978 P.2d 2, 13-14 (1999), which cast doubt on whether a route sales representative for a bottled water company was an exempt outside salesperson.

[79] *Delivery Company to Pay $9.75 Million to Settle Wage Claims by Messengers*, Daily Lab. Rep. (BNA), July 31, 2000, at A-6.

[80] *Seven-Up Route Salespersons File Class Suit Over Overtime Pay Against Company, Bottler*, Class Action Litig. Rep. (BNA), Dec. 14, 2001, at 829.

[81] *Settlement of "Off-the-Clock" Class Suit Against Albertson's Signed by Federal Judge*, Daily Lab. Rep. (BNA), Sept. 12, 2000, at A-1.

[82] *Best Buy Will Pay $5.4 Million to Settle Overtime Dispute, DOL Says*, Daily Lab. Rep. (BNA), July 5, 2001, at A-1.

[83] Nan Netherton, *Complaint Against Wal-Mart Alleges Violation of State Minimum Wage Law*, Daily Lab. Rep. (BNA), Sept. 14, 2001, at A-3.

[84] 29 U.S.C. § 254(a)(2).

[85] 29 U.S.C. §§ 216(b), 251-262.

[86] 29 U.S.C. § 254(a)(2).

[87] 350 U.S. 247 (1956).

[88] *Id.* at 256.

[89] *Id.* at 250.

[90] *See* Reich v. IBP, Inc., 38 F.3d 1123, 1125-26 (10th Cir. 1994) (defining work as "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer") (quoting Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 598 (1944)).

[91] The FLSA excludes from the definition of working time "any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee." 29 U.S.C. § 203(o).

[92] 38 F.3d 1123 (10th Cir. 1994).

[93] *Id.* at 1125. *See also* Anderson v. Pilgrim's Pride Corp., 147 F. Supp. 2d 556, (E.D. Tex. 2001) (holding, after bench trial, that the less than ten minutes per day spent by poultry processors donning and doffing sanitary and safety equipment was de minimis and not integral and indispensable to the employer's operations, and thus not compensable), *aff'd*, No. 01-40477 (5th Cir. June 26, 2002).

[94] 145 Lab. Cas. (CCH) ¶ 34,463 (D. Me. Jan. 23, 2002).

[95] *Id.*

[96] *Swift to Pay $3 Million to Settle Suit by Meatpacking Workers in Minnesota, Iowa*, Daily Lab. Rep. (BNA), Jan. 11, 2001, at A-3.

[97] Angela Swinson, *Perdue Settles Donning, Doffing Dispute; DOL Sues Tyson Foods on Similar Charges*, Daily Lab. Rep. (BNA), May 10, 2002, at A-5.

[98] Victoria Roberts, *Perdue Agrees to Settle Class Action Donning, Doffing Lawsuit for $10 Million*, Daily Lab. Rep. (BNA), Aug. 8, 2002, at AA-1.

[99] Swinson, *supra* note 97, at A-5.

[100] No. B146565, 2001 WL 1659525 (Cal. Ct. App. Dec. 28, 2001).

[101] *Id.* at *8-9. The court did grant the petition in part. The trial court attempted to deal with the declarations proffered by the several witnesses for the employer attesting to the fact that the route sales representatives spend most of their working time on exempt activities by simply excluding those individuals from the class. The Court of Appeal concluded that this attempt to carve up the class based on the relative merits of their claims was erroneous. *Id.* at *9-10. In fact, the trial court's ruling, if allowed to stand, would have worked substantially more mischief than the Court of Appeal acknowledged. In effect, the trial court's ruling would enable plaintiffs to proceed to trial based on a dramatically skewed picture of the class. Certifying a class in a duties test misdesignation case is bad enough, given the multitude of individualized inquiries that must be made, but certifying a class that ends up being only those individuals who meet the class description but have not submitted evidence favorable to the employer potentially deprives the employer of any kind of meaningful opportunity to present its defenses.

[102] *Id.* at *7.

[103] *Id.* at *9.

[104] No. B152628, 2002 WL 505114 (Cal. Ct. App. Apr. 4, 2002), *review granted and opinion superseded* (Cal. July 17, 2002) (No. S106718).

[105] *Id.* at *2-3.

[106] *Id.* at *5.

[107] *Id.*

[108] *Id.* at *7.

[109] *Id.*

[110] *Id.*

[111] Yager & Boyd, *supra* note 8, at 340.

[112] *Id.*

[113] One view of the damages calculation is that *overtime due = (weekly pay / weekly hours) x 0.5 x number of hours beyond 40*. *See, e.g.*, Blackmon v. Brookshire Grocery Co., 835 F.2d 1135, 1138-39 (5th Cir. 1988); Rushing v. Shelby County Gov't, 8 F. Supp. 2d 737, 743-45 (W.D. Tenn. 1997); Zoltek v. Safelite Glass Corp., 884 F. Supp. 283, 286-88 (N.D. Ill. 1995). The Department of Labor's FLSA "fluctuating workweek" regulation expressly contemplates this type of calculation. *See* 29 C.F.R. § 778.114. The theory behind this calculation is that the employee's salary is intended to compensate for all hours worked, so all that remains is the difference between straight-time and time-and-a-half premium pay for the overtime hours. The hourly rate is fixed by dividing total pay by total hours worked. Under this view, the employee earning $31,200 per year, or $600 per week, and working 60 hours per week would be entitled to back overtime as follows: *overtime due = ($600 / 60 hours) x 0.5 x 20 = $100 per week*. Over the course of a year, that back overtime would amount to $5,200. A different view of overtime, and the one that plaintiffs not surprisingly advocate, is that *overtime due = (weekly pay / 40 hours) x 1.5 x number of hours beyond 40*. *See, e.g.*, Cowan v. Treetop Enters., Inc., 163 F. Supp. 2d 930, 939-42 (M.D. Tenn. 2001) (using regular rate of total pay divided by all hours agreed upon for week); Rainey v. American Forest & Paper Ass'n, 26 F. Supp. 2d 82, 99-102 (D.D.C. 1998); Skyline Homes, Inc. v. Department of Indus. Relations, 211 Cal. Rptr. 792, 795 (Ct. App. 1985), *overruled on other grounds*, Tidewater Marine W., Inc. v. Bradshaw, 927 P.2d 296 (Cal. 1996). This method appears to be required under California law. *See* CAL. LAB. CODE § 515(d). The theory behind that kind of calculation is that the employee's salary is not intended to compensate for more than the first forty hours of work. The hourly rate, therefore, is established by dividing total earnings by up to forty hours. That rate is then multiplied by a full time-and-a-half for each hour beyond forty. Under that view, the employee earning $31,200 and working 60 hours per week would be entitled to back overtime as follows: *overtime due = ($600 / 40 hours) x 1.5 x 20 =$450 per week*. Over the

course of a year, that back overtime would amount to $23,400.

[114] Plaintiffs will contend that such a result is appropriate because the burden of compliance with the FLSA and state law is on the employer, and if the employer is not certain that the employee meets the exemption criteria then the employer should simply pay the employee on an hourly basis and avoid the risk of litigation. Such contentions ignore the significant benefits that exempt designations provide to employer and employee alike. *See supra* Part I.C. In short, if employers designated as exempt only those employees who without any doubt meet the exemption criteria, then employers and employees alike would be significantly worse off than with the current pattern of exemption determinations.

[115] To the extent that safety is a concern with respect to overtime, that concern is already being addressed at the state and federal level. Where long hours pose a genuine safety risk to employees in certain occupations, agencies such as the Department of Transportation and the Federal Aviation Administration are far better situated to enact appropriate regulations tailored to specific circumstances, as opposed to the FLSA's clumsy exemption scheme.

[116] Yager & Boyd, *supra* note 8, at 340-41.

[117] *See, e.g.*, Faillace, *supra* note 4, at 387.

[118] *See, e.g.*, Lipman et al., *supra* note 4, at 383.

[119] *See* Faillace, *supra* note 4, at 387-88 (proposing to exempt "all employees who earn income equivalent to five times the minimum wage on an hourly, weekly, semi-monthly, or other basis," as well as providing a duties-based exemption for administrative employees earning between two and five times the minimum wage); Lipman et al, *supra* note 4, at 384-88 (proposing to exempt "employees earning more than six and one-half times the minimum wage," as well as an exemption for employees earning between three and six and one half times the minimum wage, subject to a written agreement with various requirements).

[120] 29 U.S.C. § 206(a)(1).

[121] It is not the purpose of this article to press for the use of a particular multiple of the minimum wage so much as to suggest a framework for establishing a threshold that minimizes the risk of litigation. Plainly, arriving at a particular multiple would involve intense political debate. In many respects, simply having a clear number is more important than what the number actually is. Nevertheless, even representatives of organized labor would probably acknowledge that where employee compensation is substantial, eliminating overtime "would not offend the core purposes of the FLSA." Nicholas Clark, *Fair Labor Standards Act Reform—It's Not Broke, So Don't Fix It*, 11 LAB. LAW. 343, 346 (1996) (noting that exempting from FLSA salary test regulations employees earning more than $80,000 per year would not be inconsistent with policy of FLSA).

[122] Eliminating a strict salary basis test for exemption also seems appropriate as a means of avoiding litigation. So long as the employer pays the employee the required amount of money each month, it should make little difference whether the employee was "treated" as an hourly employee through docking of pay for partial day absences, a requirement of maintaining records of working time, mandatory adherence to a rigid work schedule, or any of the other types of considerations that can potentially defeat an exemption under the FLSA.

[123] This particular reform proposal addresses only misdesignation issues and does not purport to offer an answer to some of the other wage and hour issues that have haunted employers, such as off-the-clock time or payment for donning and doffing. It is not clear that the issue of off-the-clock work is in need of a legislative fix so much as increased attention by employers to corporate policies and the conduct of supervisors and managers, although courts should continue to give very careful consideration to whether such cases really are appropriate for class or collective treatment. The question of donning and doffing, and other preliminary and postliminary work, seems to be working its way through the courts and may yield clearer standards over the next few years.

[124] *See supra* note 113.

[125] Blackmon v. Brookshire Grocery Co., 835 F.2d 1135, 1138-39 (5th Cir. 1988).

[126] Rushing v. Shelby County Gov't, 8 F. Supp. 2d 737, 743-45 (W.D. Tenn. 1997).

[127] Zoltek v. Safelite Glass Corp., 884 F. Supp. 283, 286-88 (N.D. Ill. 1995).

[128] Cowan v. Treetop Enters., Inc., 163 F. Supp. 2d 930, 939-42 (M.D. Tenn. 2001).

[129] Rainey v. American Forest & Paper Ass'n, 26 F. Supp. 2d 82, 99-102 (D.D.C. 1998).

[130] Skyline Homes, Inc. v. Department of Indus. Relations, 211 Cal. Rptr. 792, 795 (Ct. App. 1985), *overrruled on other grounds*, Tidewater Marine W. Inc. v. Bradshaw, 927 P.2d 296 (Cal. 1996).

[131] 29 U.S.C. § 216(b).

[132] *See, e.g.*, Thiessen v. General Elec. Capital Corp., 267 F.3d 1095, 1102-03 (10th Cir. 2001) (ADEA case applying 29 U.S.C. § 216(b)), *cert. denied*, 122 S. Ct. 2614 (2002); Mooney v. Aramco Servs. Co., 54 F.3d 1207, 1213-14 (5th Cir. 1995) (same). *Cf.* Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 169-74 (1989) (approving early involvement of court in facilitating notice to potentially "similarly situated" plaintiffs under ADEA).

[133] A de minimis threshold of the lesser of five percent of the proposed group of plaintiffs or fifty individuals seems appropriate. As with the proposed bright-line compensation threshold for establishing exemption, however, *see supra* note 121, it is less important that the threshold be any particular number than that it be fixed and known to the parties and to the court before the certification issue arises.

[134] *See, e.g.*, Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974).

[135] Of course, where the employer cannot come forward with evidence that even a de minimis number of individuals potentially within the group for which the plaintiff seeks certification are not entitled to prevail, then certification will most likely be appropriate. For example, if the employer has classified non-supervisory assembly-line workers as exempt on the theory that they are professional employees, and the employer cannot make even an arguable showing that the designation is correct as to a de minimis number of these employees, then collective adjudication of their claims would cause no real prejudice to the employer.

[136] Nor is it an answer to suggest that the parties can sort out their contentions during discovery. An employer is entitled under due process principles to a meaningful opportunity to investigate and to present all of its defenses. Yet much of the justification for having a collective or class action in the first place is undermined if the employer has to conduct discovery as to all or a substantial number of the potential plaintiffs to determine which defenses to press and which witnesses to present as to each individual. Where an employer makes the showing suggested here, all parties would be spared the enormous burden of conducting class-wide discovery concerning what, in all likelihood, would turn out to be a case inappropriate for class treatment.

[137] 29 U.S.C. § 218(a).

[138] This dilemma is particularly acute for employers in California, a state whose laws are almost uniformly at least as burdensome on businesses, if not more so, than federal law. The only real hope for a "pro-employer" fix with respect to California often seems to be broad federal pre-emption of state law, a result that, while tempting from the standpoint of obtaining immediate results, is also distinctly at odds with traditional notions of federalism.

[139] William J. Kilberg, *Rethinking Federalism: Is It Time for a "New Deal" for Employers?*, 28 EMPL. REL. L.J. No. 2, at 1-5 (Autumn 2002).

LITIGATION

STATE FARM V. CAMPBELL:

FEDERALISM AND THE CONSTITUTIONAL LIMITATIONS ON PUNITIVE DAMAGES

*BY THEODORE J. BOUTROUS, JR. & THOMAS H. DUPREE, JR.**

Punitive damages will be back before the United States Supreme Court this fall. The Court granted certiorari in *State Farm Mutual Automobile Insurance Company v. Campbell*, No. 01-1289, to consider whether a Utah jury's $145 million punitive damage award against the insurer State Farm violates the Constitution. The case presents a host of important questions concerning federalism and due process, including whether a jury in one State can punish a corporation for the way it does business in another State—and whether the jury may impose a harsher punishment on a corporation solely because it is very profitable.

The *State Farm* case is the latest in a series of recent high-profile punitive damage rulings. Last fall, a federal appeals court struck down a $5 billion punitive damage award an Alaska jury had imposed against Exxon Corporation for its conduct leading to the *Exxon Valdez* oil spill. *See In re Exxon Valdez*, 270 F.3d 1215, 1246-47 (9th Cir. 2001). And a few weeks before the *Exxon* ruling, another federal appeals court erased a South Carolina jury's $250 million punitive damage award imposed against DaimlerChrysler Corporation in a design defect case. *See Jimenez v. DaimlerChrysler Corp*., 269 F.3d 439 (4th Cir. 2001).

These rulings—and the Supreme Court's decision to grant *certiorari* in *State Farm*—suggest a growing judicial awareness that in recent years punitive damage awards have spiraled out of control and often bear little relation to the corporate conduct supposedly deserving of punishment. But despite the guidance provided by the Supreme Court and several federal courts of appeals, it is not clear that this teaching has filtered down to the trial courts and some state appellate courts, many of which continue to permit juries to impose excessive and unconstitutional punitive damage awards on large corporations. *State Farm* thus offers the Court an opportunity to reaffirm the constitutional limitations on punitive damages and send a strong message to the lower courts that it is their duty to ensure these limitations are enforced with consistency and rigor.

I. The *State Farm* case exemplifies how a skillful plaintiffs' lawyer can manipulate and misuse evidence of a corporation's business practices and aggregate wealth to persuade a jury to impose a mammoth and wholly unjustified punitive damage award. Plaintiffs Curtis and Inez Campbell sued Mr. Campbell's insurer, State Farm, in Utah state court for declining to settle third-party claims against Mr. Campbell arising from his involvement in an automobile accident. (The facts are drawn from the opinion of the Utah Supreme Court, available at 2001 WL 1246676.) The trial was bifurcated. In the first phase, the jury found that State Farm's decision not to settle within policy limits was unreasonable because there was a substantial likelihood of an excess judgment against Mr. Campbell.

The jury considered the plaintiffs' punitive damage claim in the second phase. Although State Farm moved *in limine* to exclude evidence of alleged conduct that occurred outside of Utah, the trial court denied the motion. The plaintiffs proceeded to introduce large amounts of evidence of State Farm's alleged extraterritorial conduct, including evidence supposedly showing State Farm's business practices in other States. The plaintiffs portrayed this alleged out-of-state conduct, the vast majority of which had no bearing on Utah or its citizens, as part of a purported nationwide "scheme" to reduce claims payouts. The plaintiffs also introduced evidence they claimed showed State Farm's overall "wealth" and nationwide profits.

The plaintiffs expressly based their claim for punitive damages on State Farm's alleged out-of-state conduct. In his opening statement during the trial's second phase, counsel for plaintiffs argued that this case "transcends the Campbell file" because it "involves a nationwide practice." He then asked the jury to punish State Farm for its business practices in other States, telling the jurors that they were "going to be evaluating and assessing, and hopefully requiring State Farm to stand accountable for what it's doing across the country, which is the purpose of punitive damages."

The jury awarded the plaintiffs $2.6 million in compensatory damages and $145 million in punitive damages. State Farm moved for remittitur, arguing that the punitive damage award was unconstitutional because it improperly punished out-of-state conduct and was excessive under *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). The trial court reduced the compensatory award to $1 million and cut the punitive award to $25 million.

Both parties appealed. The Utah Supreme Court held that the trial court erred in remitting the punitive damages award, and it reinstated the jury's $145 million verdict. In canvassing the evidence supporting the award, the court noted that "the trial court allowed the Campbells to introduce extensive expert testimony regarding fraudulent practices by State Farm in its nation-wide operations," and underscored the trial court's finding that "State Farm is an enormous company with massive wealth."

II. The Supreme Court will likely decide whether the Due Process and Commerce Clauses permit state courts to do what the Utah Supreme Court did here: invoke a company's

out-of-state business activities, and its aggregate nationwide wealth, as a basis for a punitive damage award. Basic principles of federalism, and the Court's ruling in *BMW*, strongly suggest the answer is no.

A. The Constitution enshrines the bedrock principle that "[n]o State can legislate except with reference to its own jurisdiction. . . . Each State is independent of all the others in this particular." *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881). Consequently, a State's laws are "presumptively territorial and confined to limits over which the law-making power has jurisdiction." *Sandberg v. McDonald*, 248 U.S. 185, 195 (1918). Both the Commerce Clause and the Due Process Clause protect state autonomy by generally prohibiting each State from punishing or regulating conduct occurring within the jurisdiction of sister States.

The Supreme Court has applied these principles in a variety of contexts. Recognizing that the Commerce Clause acts as "a limitation upon the power of the States," *Freeman v. Hewit*, 329 U.S. 249, 252 (1946), the Court has repeatedly "'preclude[d] the application of [state law] to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State.'" *Healy v. Beer Institute*, 491 U.S. 324, 336 (1989) (quoting *Edgar v. MITE Corp*., 457 U.S. 624, 642-43 (1982) plurality opinion). Similarly, in *Barclays Bank PLC v. Franchise Tax Board of California*, the Court stated that "[t]he Due Process and Commerce Clauses of the Constitution . . . prevent States . . . 'from tax[ing] value earned outside [the taxing State's] borders.'" 512 U.S. 298, 303 (1994) (quoting *ASARCO, Inc. v. Idaho State Tax Comm'n.* 458 U.S. 307, 315 (1982)) (brackets in original).

In *BMW*, the Court rejected an Alabama court's attempt to impose punitive damages on the basis of the defendant's business activities in other States. The Court explained that "each State has ample power to protect its own consumers, [and] none may use the punitive damages deterrent as a means of imposing its regulatory policies on the entire Nation." 517 U.S. at 585. The Court emphasized that "one State's power to impose burdens on the interstate market . . . is not only subordinate to the federal power over interstate commerce, . . . but is also constrained by the need to respect the interests of other States." *Id*. at 571. Consequently, "principles of state sovereignty and comity" dictate "that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States," because such punishment would unconstitutionally interfere with the policy choices of other States. *Id*. at 572. To safeguard the autonomy of other States, a punitive damages award therefore "must be analyzed in light of [in-state conduct], with consideration given only to the interests of [the State's] consumers, rather than those of the entire Nation." *Id*. at 574.

In reaching this conclusion, the *BMW* Court expressly relied on *Healy*, in which the Court underscored "the Constitution's special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres." 491 U.S. at 335-36. The *Healy* Court had struck down a Connecticut statute that regulated commercial conduct in other States, emphasizing that the Commerce Clause bars "the projection of one state regulatory regime into the jurisdiction of another State." *Id*. at 337.

Permitting courts to predicate punitive damage awards on a defendant's alleged out-of-state conduct would allow States to circumvent the Constitution's ban on extraterritorial regulation and punishment and evade *BMW* and *Healy*. Although a State plainly has a legitimate interest in "protecting its own consumers and its own economy," *BMW*, 517 U.S. at 572, it has no interest in regulating and punishing conduct occurring in other States. Such punishment amounts to "the application of [state law] to commerce that takes place wholly outside of the State's borders," *Healy*, 491 U.S. at 336 (quoting *Edgar*, 457 U.S. at 642-43), and is constitutionally forbidden.

Moreover, allowing a State to punish extraterritorial conduct would effectively enable that State to project its laws and establish public policy on a national level, thus overriding the laws of the forty-nine other States in the process. By imposing punishment for business activities that other States have declared permissible, the decision of a single state court could effectively supplant and override the considered policy judgments of other States.

It is no answer to say that States may impose extraterritorial punishment for certain types of conduct—such as "fraud" or "negligence"—that are considered wrongful in all fifty States. As an initial matter, highly generalized characterizations of primary conduct are improper bases for imposing specific liability. In *BMW* itself, for example, the Court might have reasoned, but did not, that all States prohibit "deceptive practices." The Court instead chose to focus on the details of the specific type of wrongdoing alleged by the plaintiff. Moreover, the essence of federalism is that States may (and do) elect to address even the same general problems in different ways, balancing the risks and benefits of particular activities in whatever manner is suitable to the particular circumstances of each State. That many States share the same general goals says nothing about the precise contours of a particular State's law. For example, torts that share the same name may have different elements in different States, or may lead to different remedies--not all States permit punitive damages for all torts (or even for any torts), and some States put strict limits on punitive damages when they are available. As the Court has observed, it "frustrates rather than effectuates legislative intent" to assume that "*whatever* furthers" a conceded legislative objective "must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (emphasis in original).

B. The Utah Supreme Court's decision offends the Constitution in another respect. Although *BMW* sets forth three constitutionally mandated "guideposts" for determining when a punitive damages award is unconstitutionally exces-

sive,[1] the Utah court relied upon State Farm's alleged wealth and national "profits" as a means of trumping the three guideposts. Particularly where there has been no showing that all of the company's wealth or profits resulted from the challenged conduct, it is unfair and unconstitutional to use these types of aggregate numbers as a basis for calculating a punitive damage award.

A defendant's wealth cannot by itself justify a heightened penalty. In *BMW*, the plaintiff had argued before the Supreme Court that a defendant's aggregate wealth should be part of the constitutional calculus and that BMW's great wealth justified upholding the $2 million punitive damage award. But the Court rejected that argument, declining to adopt the defendant's wealth as a guidepost and declaring: "The fact that [a defendant] is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business. Indeed, [a corporation's] status as an active participant in the national economy implicates the federal interest in preventing individual States from imposing undue burdens on interstate commerce." 517 U.S. at 585.

Evidence of a defendant's wealth, to the extent it has *any* legal relevance, does not trump the three-factor constitutional analysis required under *BMW* and salvage a punitive damage award that would otherwise be deemed excessive. As the Court recognized in *Pacific Mut. Life Ins. Co. v. Haslip*, "the factfinder must be guided by more than the defendant's net worth." 499 U.S. 1, 19 (1991); *see also Pulla v. Amoco Oil Co*., 72 F.3d 648, 659 n.16 (8th Cir. 1995) (opinion of retired Justice White, sitting by designation) ("[A] defendant's wealth cannot alone justify a large punitive damages award"); *Cont'l Trend Res., Inc. v. OXY USA*, 101 F.3d 634, 641 (10th Cir. 1996) ("From the [*BMW*] Court's statements we conclude that a large punitive damage award against a large corporate defendant may not be upheld on the basis that it is only one percent of its net worth or a week's corporate profits."). The Utah court's reasoning amounts to an end-run around *BMW* and the Due Process Clause by automatically deeming large corporations to have had "fair notice" of virtually *any* monetary punishment that a jury conceivably could impose.

The court further erred by looking to State Farm's *overall* profits, rather than the profits directly resulting from the alleged misconduct. Allowing a jury to consider a large corporation's overall wealth is a recipe for a punitive damages award that is grossly disproportionate to the challenged conduct. A punitive damages award—to the extent that it may be supported by reference to a defendant's wealth or profits *at all*—must be directly linked to the wealth or profits that are shown to have resulted from the alleged wrongdoing. In other words, a punitive damages award must closely reflect the precise amount of the wrongful gain, and be reduced by any compensatory damage award arising from the challenged conduct. *See Cooper Indus., Inc. v. Leatherman Tool Group, Inc*., 532 U.S. 424, 442 (2001) (punitive damage award based on sales revenues is unconstitutionally excessive when "it would be unrealistic to assume that all of [the defendant's] sales . . . would have been attributable to its misconduct").

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As one federal court of appeals put it, "a sort of game-show mentality leads some contemporary juries to award punitive damages in amounts that seem utterly capricious." *Moreno v. Consolidated Rail Corp*., 99 F.3d 782, 792 (6th Cir. 1996) (en banc). The *State Farm* case provides the Court with an excellent opportunity to eliminate these types of arbitrary and unfair verdicts, and reaffirm the constitutional limitations on punitive damage awards.

*Mr. Boutrous and Mr. Dupree, attorneys at Gibson, Dunn & Crutcher LLP, represent Ford Motor Company as *amicus curiae* in the *State Farm* case, and represented DaimlerChrysler Corporation in the appeal cited in this article.

Footnote

[1] Those three guideposts are the reprehensibility of the defendant's conduct, the ratio of the compensatory award to the punitive award, and the amount of civil or criminal penalties that could be imposed for comparable misconduct. *See BMW*, 517 U.S. at 574-75.

ASBESTOS: THE NEXT LIABILITY EXPLOSION?

*FRED BARON, PROFESSOR THEODORE EISENBERG, VICTOR SCHWARTZ, & MARK BEHRENS**

MR. MARK BEHRENS: We have an incredible panel today to address asbestos litigation issues. I am going to introduce the panelists very briefly in the order in which they will speak.

Our first speaker is going to be Fred Baron. Fred may be the most recognized national lawyer in the plaintiffs' bar, certainly in the field of asbestos. He is King of asbestos litigation in Texas, and is widely recognized as a trailblazer in the mass tort area. "In the field of toxic torts," one reporter wrote, "if the frontier were the American West, Fred would have been driving the first wagons onto the plains." He is the immediate past president of the Association of Trial Lawyers of America, and has been listed by the *National Law Journal* as one of the 100 most influential lawyers in the United States.

Our next speaker will be Victor Schwartz. Victor is a senior partner at Shook, Hardy and Bacon, L.L.P., where he chairs our firm's Public Policy Group. Victor is co-author of the leading torts casebook in the United States, *Prosser, Wade and Schwartz's Torts*, which is now in its tenth edition. He is a former law dean and professor. He also has been listed by the *National Law Journal* as one of the 100 most influential lawyers in America. Victor is counsel to the American Tort Reform Association and counsel to the Coalition for Asbestos Justice. The Coalition is a nonprofit group formed in 2000 by major property and casualty insurers to address and improve the asbestos litigation environment.

The last speaker will be Ted Eisenberg. Ted is the Henry Allen Mark Professor of Law at Cornell Law School. He is one of the leading experts in the nation in empirical legal research. Ted has written two casebooks, one on civil rights and one on bankruptcy – an important issue in the asbestos litigation environment. He is also a former clerk to United Supreme Court Chief Justice Earl Warren.

MR. FRED BARON: I represent people. They are ordinary, everyday people who go to work and do what they are told, and unbeknownst to them, were for years exposed on a daily basis to an extremely hazardous material, asbestos. Each of the people I represent has been diagnosed with some form of an asbestos-related disease. I represent people who come to my office complaining: "Wait a minute, I just went to work. Nobody told me asbestos was there on the job; if they had told me about it, I would have done something to protect myself. Unlike tobacco, I am not addicted to asbestos. I would have avoided it because I do not want to have the problems that I am now having." That is what I routinely hear.

My job as a lawyer for victims is to find a way to deal with their individual problems. So, when I look at the issue of asbestos litigation, I view it as a sad human tragedy because even a cursory review of the history of asbestos-related diseases, clearly shows that by at least the turn of the last century, in the United Kingdom, and certainly, by the '20s, and if you want to stretch it, the '30s and '40s, in the U.S., there was no question but that exposure to asbestos could cause fatal diseases.

Asbestos, though, is different than most other hazards that kill you because it takes a very long time to happen. When you are exposed to asbestos — and particularly nowadays, when exposures are not particularly heavy, it can take 30 or 40 years for the disease to manifest. There are two types of diseases: malignant and non-malignant. In most of the asbestos malignancies, life expectancy is less than a year. Non-malignant disease, some believe that non-malignant asbestos diseases are worse because they always progress, they are irreversible, and they can be terminal if you do not die of something else first.

So, again, my job as a plaintiff's lawyer is to help each individual family that is faced with the reality of asbestos related injuries. Of course, the issues, such as fair allocation of assets and other similar issues are indeed very significant problems that I have to be concerned about. But like so many of you in the Federalist Society, I believe in the efficacy of state law. I particularly believe in the importance of state common law, interpreted by in the state courts. I believe that people who work hard, pay their taxes and are good citizens have an absolute right to use the state courts to adjudicate whatever claims they have, legitimate or otherwise.

I would like to try to debunk some of the myths that seem to surround asbestos litigation. Myth 1: plaintiffs' lawyers notoriously go out with x-ray vans, find people who work in factories, and develop large numbers of clients. Quite honestly, I am offended when somebody criticizes me for providing free medical services to a person who is working in a factory and who has been exposed to asbestos. If you are an executive at a company, you are probably going to get a free physical every year, and it is probably going to be the best doctor in the city. But if you are working in some industrial facility, maybe a petroleum plant in Brazoria County, Texas, you are not likely to have ready access to free medical examinations by specialists.

Hundreds and hundreds of people who have developed cancer have first learned that they had cancer, hopefully early enough to save their life, as a result of x-ray screenings that were provided either by their union or by plaintiff's counsel. I am offended when people tell me that, "it's terrible that you are giving free medical treatment to working people who end up filing suits." I do not buy that argument. When a victim is diagnosed with a disease and somebody is legally responsible under state law, there should be no barrier to that individual filing a suit to reclaim their rights.

Myth 2: unimpaired asbestos claimants are flooding the courts. Let me stop for a minute before I discuss this issue. I have a genetic defect: I went to law school. That defect causes all kinds of problems, as so many of us know, but it particularly binds those of us who have it to the doctrine that we were taught in our torts course in our first year: "If someone does something negligently and causes injury to another person, that person is entitled to seek recompense in court." I can't remember anything in the law anywhere that says "if

someone does something negligently and causes impairment to somebody, only then can that person can seek recompense."

It is like somebody is trying to re-write the law only as it applies to asbestos injuries. Many of us know that people who are involved in automobile accidents often develop a sore neck. Maybe that is a minor injury but we all agree that the injured party is absolutely entitled to recover whatever medical expenses and other damages from that injury. There is no requirement that the injured party lose work. There is no requirement of total disability. So why is it now that some of our great scholars are telling us that asbestos injury cases, unlike auto injury cases, should not be filed unless the plaintiff is impaired? There is absolutely no such requirement under any state law. Yes, I do represent people who are at the beginning stages of non-malignant asbestos-related diseases who are not yet impaired. These people should have the same rights as anyone who is involved in an automobile accident to file a claim for recompense. Juries evaluate those cases all the time.

Myth 3: new non-traditional companies are being wrongfully added to the litigation. Who are these "new defendants?" Obviously the old defendants were the manufacturers of asbestos, who manufactured this horrible material and put it onto the stream of commerce. It is a fact that more people ultimately died from asbestos-related disease as a result of working in the shipyards in World War II, than died in the United States Navy during the War.

In the early stages of asbestos litigation, it was easy for us to just sue only the manufacturers because they were clearly liable. They never warned anybody; they never told anybody of the deadly hazards that they had internally identified. But, unfortunately most of these companies have sought protection under Chapter 11 of the bankruptcy code. I would emphasize that Chapter 11 reorganization has been the route that most of these manufacturers have taken—Johns Manville today, as you probably know, is owned by Berkshire Hathaway and employs more people than it did when it went into bankruptcy in 1982. In these reorganizations, companies put up some money and their stock into a trust for victims and re-enter the open market—so nobody is losing jobs in asbestos-related bankruptcies. So as counsel for victims it is our job to look for other defendants who are legally responsible under the laws of the state that are applicable.

I do not see any great problem with us doing that. That is what we are paid to do. When somebody comes in my office and says, "I have got an asbestos-related disease and I want to sue somebody for my losses because I want to be sure my family is taken care of," it is my job to identify defendants who are legally liable under the laws of the applicable jurisdiction. If they are not legally liable, the odds are that they will get out of the case.

Myth 4: any exposed person can file a case even if they are not ill: If my client cannot prove that he has an asbestos-related disease, we are going to lose the case. It is totally false to believe that claimants are people that just come in off the street and say, "I was exposed to asbestos," and then file a lawsuit. In all 50 states, it is required that the plaintiff produce qualified medical testimony that he has an asbestos-related disease before a case can get past summary judgment.

In summary, I am a believer that the state laws work and that it should remain intact and not be operated under a different set of values for asbestos victims who have worked hard all of their lives and are now merely trying to redeem their rights, as they are entitled to under our Constitution.

Myth 5: the courts are hopelessly clogged with asbestos cases. Although commentators speculate about clogged courts, the best source of empirical data on this issue is a journal that is published every year that tracks each of the state and federal court trials in asbestos cases every year. Let me give you some quick statistics. During the year 2001, there were 61 asbestos trials in all 50 states in all the state and federal courts. The year before, there were 55 trials. The year before that, there were 52. Last year, about 35,000 claims settled. The year before that, it was about the same number. Does this system work? Are the courts clogged? Any system that produces 35,000 settlements without the necessity for a trial, and only 60 trials per year in all of the state and federal courts in the United States, is, in my judgment, working very well.

So, what is the pressing problem with this litigation? The problem is simply that there are too many victims of asbestos disease and too great a need to find adequate resources for the victims. The asbestos defendants and the insurance companies who insure them do not like that fact and the unfortunate truth that they cannot see light at the end of the tunnel. I sympathize with that; if I was representing a large company that had a significant asbestos liability, I would be concerned, too.

But, by and large, the position papers that have been sent out by industry advocates have been dramatically misleading—and when I say "sent out" I mean it literally—in Texas. I started getting calls from judges telling me that they were getting inundated with literature, mailed, *ex parte*, from lawyers for the asbestos defendants, telling them how they should do their jobs as judges, which, needless to say, they found offensive. I was amazed that somebody would have the chutzpa to send out such *ex parte* communications to judges telling them how to do their jobs. But, it is still happening. I believe the spin meisters on K Street in Washington, D.C. have made more money from asbestos litigation than probably any other faction of this whole industry. Every year, K Street hucksters promise that they can deliver restrictive legislation. Their clients want a fix. And every year they are promised a strong public relations campaign to make it look like all the plaintiffs are not sick, that the courts are clogged, and there is a major crisis in asbestos litigation.

If you are a client of these PR and lobby firms, I have got to tell you, before you fall for that song and dance and before you write your checks, take a look at history. Asbestos legislation was first proposed in 1979 by Millicent Fenwick, a House member from Manville, New Jersey. She tried her best to create what was then called the White Lung Act, not unlike the recently passed Black Lung Bill for coal miners. By the way, the coalminers' bill was estimated to cost $300 million a year at the time of its passage. By the early '80s, its actual cost was over a billion dollars per year. By now, it is a couple of billion dollars a

year. Congress would not legislate asbestos then and certainly in this atmosphere, with tight budgets and deficit spending, it will not do it now. After 20 plus years of repeated efforts to get restrictive legislation, and 20 plus years of failure, I think it is very unlikely that anything will happen on Capitol Hill regarding an asbestos litigation "fix."

So, what has been the fallback position of the industry advocates? Try to pollute the jury pool through national public relations campaigns complaining about how the system is being manipulated by uninjured victims and greedy lawyers. Trust me, if the system were indeed being manipulated, the state courts would have straightened it out by now. Occasionally there are some aberrant verdicts and there are indeed some cases where people get a large sum of money when they really do not have a significant injury. But, in my judgment, those represent only two, three, four, perhaps five individual cases every year of the tens of thousands that are resolved each year. Any system that delivers 99.99 percent appropriateness is a pretty damned good system. In reality those big verdicts for people who do not seem to be particularly injured that you hear about all the time almost always get reversed. Anecdotal cases should not be the basis to formulate public policy.

In conclusion, the thought that I would leave you with is that before you start drawing conclusions about how asbestos litigation actually works (or doesn't) to compensate victims—and particularly the myths that I have identified—take a closer look at the facts, and take a closer look at what really happens. When you look under the covers, you are going to see something very different than has been presented by those who have a private rather than public agenda.

Thank you.

MR. VICTOR SCHWARTZ: In the mid '70s, I did plaintiffs work and I was a law professor. It was not simply because I did plaintiffs work that I agreed with Fred Baron. Fred Baron was a pioneer in asbestos litigation. He helped uncover documents that showed that some companies knew of great dangers. Unlike cigarettes, the plaintiffs knew absolutely nothing about the risks. And unlike cigarettes, the plaintiffs were not engaged in some self-indulgent behavior like smoking. They were working. These were cases that had a lot of meaning, and the defendants had done a lot of wrong. He was a pioneer in this litigation, and I agreed with him 100 percent.

But today, I believe things are quite different. Most of the plaintiffs are not sick – I will discuss that in detail in a moment — and many of the defendants have little or no relationship with the actual injury. There is a crisis, and the crisis is affecting everybody in America. At least 55 companies have gone into bankruptcy, most of them very recently. Every time another company goes into bankruptcy, it increases the likelihood that another company will fail because greater liability is being imposed on fewer and fewer companies. The way the law works — and those of you who are lawyers know — the concept called joint liability means those defendants who survive, even if they are just a little bit at fault, pay for those who have already fallen.

The asbestos litigation crisis affects workers. It is true that Manville reorganized itself. But a lot of jobs have gone overseas, and I predict many more will follow because of the number of companies going into bankruptcy. It is not an automatic transfer of one job to another. People who own stock in a company like Eagle-Picher, which was a so-called widows and orphans stock, saw their stock open at $46 a share, and drop to less than 20 cents. Maybe Eagle-Picher was involved in cases that were very serious and the company had knowledge, but companies today that are getting impacted have little or no involvement.

I counsel Morgan Stanley, J.P. Morgan, and Prudential. The number one thing that they are talking to me about is asbestos. It is a crisis that affects the most victims. If Dickey Scruggs were here, he would talk about victims and people who are really injured. Steve Kazan and other plaintiffs' lawyers feel that the system today is hurting those who are really sick.

What has caused the current problem? Some of it is shoddy practices. Fred practices well, but there are people who send the trucks out. There are photographs of them. They go into neighborhoods with working-class people, taking x-rays, hoping to find cases. It is open solicitation. This occurs most often in some areas that Mr. Scruggs calls "magic jurisdictions." I call them "judicial hellholes." They are the same thing.

In these jurisdictions, an x-ray with very little scrutiny can be introduced into evidence. A doctor testifies. The doctor has never really seen the patient, and the doctor is not testifying in a way that would seem scientifically credible to many of us.

In some of these hellhole jurisdictions, plaintiffs that have completely different claims are aggregated together. Some people who are really sick are grouped with people who are not sick. The result: When the cases are settled, the people who are really sick often get less and the people who are not sick get more. The plaintiffs' lawyers do quite well. That is their business. But false consolidation of cases is unsound.

In many jurisdictions, the hellholes, the identification of the defendant has become unimportant. A fundamental of American law — who did this to somebody? — is ignored. If I go back to when Fred started his practice, the asbestos defendants primarily included maybe 50 companies. Now there are estimates that between 2,000 and 6,000 companies are involved in the litigation. Why all of a sudden are they being sued? If they were wrong, if they were guilty, if they had done bad things, why is it that all of a sudden in 2002 they are being brought into the litigation? I think the question answers itself.

If judges do not scrutinize identification testimony, if judges let cases go to juries without careful identification, that web is going to spread further and further. We will be here five years from now, and there will be many more bankruptcies of premier companies that supply a lot of jobs.

Judges will not, in some of these hellhole jurisdictions, let defense attorneys take depositions of plaintiffs, to find out if they are sick. Is something wrong with these plaintiffs? Where were they exposed? How much were they exposed? This is Civil Procedure 101 and Torts 101, but the rules are ignored.

Judges do this sometimes for very benign and good reasons. If you were working as a judge and all of a sudden, 10,000 cases were dumped on your lap, what would you want

done with them? The very thing that Fred talked about: settle them. The cases settle because defendants must be concerned with what will happen to them if they do not settle. That is the engine for settlement. The decision to settle is not necessarily based on the merits.

If five people in Mississippi who are unimpaired, who say from the stand that they can do everything that every one of us do and maybe more, get $25 million apiece, and you ran a company and somebody else came along and said they wanted to settle a case, what would you do? Settlement does not mean that the system is working well. The few outrageous verdicts drive cases to be settled at figures that are exorbitant.

I think the crisis can be solved, and I do not think the solution is complicated. Judges just have to be judges, and the hellholes have to close. The courts have to stop dragnet joinders of people, false consolidations. They have to apply sound medical procedures. They have to require that plaintiffs adequately identify defendants. They have to be responsible gatekeepers for sound science and make sure that shoddy science is out and good science is in. They need to permit proper discovery. But, more needs to be done.

The Supreme Court of the United States recently agreed to hear an asbestos case called *Norfolk & Western Railway Co. v. Freeman Ayers et al*. The case involves a law called the Federal Employers' Liability Act ("FELA"), which governs suits by railroad employees against their employer railroads. The Court has a chance to say whether people who make a base claim of emotional distress ought to be given money under FELA. The Court also has a chance to say whether joint liability is going to continue to be imposed in FELA cases, creating a domino effect and additional bankruptcies.

Judge Jack Weinstein of the Eastern District of New York also has the Manville trust in front of him. In the next six months, he is going to decide whether people who are unimpaired are going to continue to be paid. By unimpaired — and Fred will disagree with me about the definition of impairment — I mean people who the American College of Thoracic Surgeons say are unimpaired.

In addition, there are judicial rulings on punitive damages that can help; they can hurt too. The federal MDL Panel, Judge Weiner of the Eastern District of Pennsylvania, has put an end to multiple punitive damages in federal asbestos cases. I think this is a sound ruling. No one today is going to make asbestos-containing products and expose people. Deterrence and punishment has had its impact.

Other courts have taken steps to solve key problems in the asbestos litigation. Judicial rulings in a few jurisdictions – Boston, Massachusetts; Baltimore, Maryland; and Chicago, Illinois, — have set up pleural registries so that people who are unimpaired can have their right to sue preserved until they may develop an impairment.

If I were still a plaintiff's lawyer, I would face a dilemma that Fred faces in some states. If you do not bring the case now, the plaintiffs' rights can expire under statutes of limitations, and then they get nothing when they are really sick. It is a dilemma, but I think there is a solution to the dilemma. That is, if under objective criteria the person is unimpaired, they should have their claim preserved until they get sick. Pleural registries, or inactive dockets, can solve that problem.

Asbestos litigation is not like somebody injured in an auto accident, who cannot move his neck and has some actual illness or something wrong with him. Many asbestos cases involve somebody who doctors say can function fine. Judges in the jurisdictions that have implemented a pleural registry say the system works very well. Judges can impose that system themselves, as some have done.

Congress can help, too. A proposal may come before Congress to try to set objective medical criteria to separate the claims of the truly sick from the unimpaired, and to set forth fair venue rules. The venue rules would allow someone to sue in the state they live in or were exposed. It bothers me that there is a need for such venue rules. But, those rules are needed because some plaintiffs lawyers can selectively pick certain hellholes in which to sue. As a result, about 33 percent more asbestos cases are brought in Holmes County, Mississippi, than people who live there. So, venue rules would be set. But I agree with Fred on this. The Congress of the United States has never been one that has been particularly friendly to situations that might create balance in litigation.

These are just some thoughts. Asbestos litigation is a problem. Maybe plaintiffs and defendants in this area will find some agreement. There are some plaintiffs who have agreed with us that the litigation is a crisis, and it does need to be resolved. The solutions are not overly complicated.

PROFESSOR THEODORE EISENBERG: I am an empiricist. Most of my scholarship counts things, and I find asbestos a little frustrating in that some of the best studies on asbestos done by, for example, the Rand Institute for Civil Justice, say how difficult it is to know what is going on in the asbestos world. There seems to be agreement that there is something going on that is very significant.

Our legal system is simply deficient in the way it gathers data because I do not think anyone really knows the number of asbestos cases, or the number of future asbestos cases, or the number of settlements. And, asbestos is one of the most studied areas. I think the implications for other mass torts, or the mass torts of the future, are a little discouraging because it may be that we are ten years into a crisis before we even know what is going on. As some of you may know, the Administrative Office of U.S. Courts created a category for asbestos in the late '70s or early '80s, but we do not know what was happening before then, and only for asbestos do we know now. We do not even know the number of cases in other mass tort areas.

The other sort of plea I would have for empirical analysis is not just case counting, but there are a lot of reference to the golden jurisdictions and hellholes. Those claims often seem to me to turn out, when pressed, to be unwarranted. I would urge people who are saying that there are places that are either wonderful or terrible for plaintiffs, or either wonderful or terrible for defendants, to actually fund or do the work that is involved to find out whether shoddy practices are going on, whether doctors have to meet with patients to claim that they are ill, and whether

courts are mindlessly aggregating cases they should not be aggregating. These practices may well be going on. But persuasive studies that policymakers might want to base decisions on are rare in the tort reform area, and I would encourage people — both defendants and plaintiffs — to fund the studies that would actually let us know what is going on.

If I could generalize a little bit from the asbestos experience, it is perhaps surprising to some of you, but maybe not to others, that the best studies we have of claiming rates, ligitiousness by Americans, suggest that Americans in general are quite unlitigious. They are very reluctant to seek claims; and they are very reluctant to consult lawyers; they are very reluctant to file claims. The one major exception historically has been automobile accident cases.

We seem to have this sort of machine in place through insurance and other things that lead people to file, perhaps, more automobile claims than actually occur, as in the New York City bus analogy. But automobile accidents are very distinctive. One of the interesting aspects of asbestos is, I suspect, claiming rates in asbestos are quite high compared to other areas of tort. That is a combination of circumstances. One, the litigation is very well-known now. Two, perhaps there are lawyers out looking for claimants. Three, lots of people were exposed to asbestos. Four, you now have highly skilled and reasonably well-funded attorneys willing to take these cases.

What we have in asbestos is an illustration that in some sense is truly frightening. And that is, what if we actually sought to achieve justice for everyone who was harmed? What if everyone exposed to asbestos, or if not impaired in the sense of being able perform life functions, impaired in that under state law they are entitled to recover something — the vast majority of asbestos victims — filed a claim? We see a system that to some people is just broken down. At least to most neutral observers, it is in need of serious study, if not reform.

What if we really had a system where victims — not just of asbestos but of everything — systematically abandoned their low rates of litigation and really did file and try to seek justice? I think the asbestos crisis gives us a little bit of a hint that we just cannot afford that system. We cannot afford mass justice for every tort that occurs in society, and asbestos may be this frightening window on what happens when we become serious about providing mass justice. I am not sure if it should be frightening, but we should be prepared to recognize that full compensation for all harms is not easily attained, nor perhaps do we really want to attain it as a society.

What solutions have been proposed for asbestos? There, it seems to me, I have one comment and one set of skepticisms. It is sort of interesting to me that the legislative solutions are written off — "It's not going to happen," or, I guess from Mr. Baron and Mr. Schwartz, we get "Perhaps it shouldn't happen; the judges can handle it." It seems to me that the judges handling the litigation provide an interesting angle on how we feel about, for want of a better term, judicial activism—if people do come in with what is a traditional claim under state law and we have creative solutions that may well be the right solutions. If the judge says, "You have a valid claim under state law, but you're not as sick as this other guy, so I am going to move this claim ahead of yours and you are not going to get paid anything." That may be the right answer from the point of view of justice and economic efficiency. But it is hard to see how judges have the authority to do that.

If the traditional tort law of a state is that if you have got a claim within the meaning of Texas law, you come to court and you get paid, I do not think there is anything in Texas law that says the sickest get paid first. I do not think there is anything in Texas law that says the judge gets to decide which of the suits that get filed get treated better, more quickly, or more efficiently than others. The more creative judges, like Judge Weinstein, have been highly criticized for their creativity.

If we were writing on a slate in which we think that judicial creativity is the answer to the asbestos crisis, we ought to at least pause to think that somewhere down the line, someone is going to say that those judges are activists. That is because they have ignored the law of the state or imposed their own vision of justice, when the people speaking through their legislature or through the common law really have a different set of rules. As I said, it may be that the just result is the one that says what perhaps even Victor is proposing. But we ought to recognize that judges who do that are probably going to pay a price in reputation with at least some groups.

This leads one to ask the question, why is legislation not on the table here? Perhaps people are just more realistic and it just cannot happen. Why not? Well, one reason, it seems to me, is a fairly common pattern, and that is the legislature and perhaps also the executive really like having the courts — and if not just the courts, juries especially — as the fall guys.

It is really very convenient to say "It's terribly complicated; we will leave it to the courts, and business, you should really be upset with those judges and those juries because they are the ones that caused that problem. If we could just have good judges and juries, everything would be okay." And the legislature and the executive remain stunningly silent on what is recognized as a widespread social problem. I think the political economy of asbestos plays out the way a lot of things do.

The other branches like the courts as fall guys. The courts cannot stand up for themselves; they are very weak at defending themselves; they have a lot less lobbying power. And juries are the weakest of all. They are not repeat players and they do not have offices. Very few people stand in the shoes of jurors and try to represent them in the national scene, which leads me to join the skepticism — or Victor's saying prescriptively, perhaps a legislative solution is not needed; Mr. Baron is saying we are not going to get one. I think I agree; we are probably not going to get one.

Then, I take a step back. What would legislation look like if we could get it? Suppose we could push a button and say, "You will legislate." It seems to me that asbestos raises an enormous set of problems. Just to highlight one, that is the problem of long-range planning.

Let us say serious asbestos litigation was born in the 1970s and blossomed in the 1980s. You can say, "Well, I have a crystal ball and I can see that in 2002, we may be less than halfway through cycling the asbestos claims through; let's sit

down in 1982 and plan for 20 years in the future." If you really have a major social problem that requires 20 years of foresight, I think that is pretty close to hopeless because I do not know anyone who can plan well 20 years ahead.

We can barely do it — and I am not sure we do it so well — for social security, where things seem to be almost purely numerical. Social security does not have all the issues that asbestos litigation has. So, if you think of your own life, what did things look like five years ago compared to today? Did you have any idea 20 years ago where you would be today? Do you want to sit down and project what should be solved for society 20 years from now? To the extent that we have long-range planning needs for major social problems, that is the nature of asbestos, I guess.

Long-range planning needs for social problems — I guess I am skeptical that even if we could get the legislators to act, they would come up with anything that would be much better than the solutions that Mr. Baron and Mr. Schwartz propose, that are not quite the same. So, I guess that is a note of pessimism on which to end.

Thank you.

* This transcript is from the proceeding of a Federalist Society panel discussion held on June 18, 2002 at the National Press Club. The panelists were:
Fred Baron, Baron & Budd, P.C.
Professor Theodore Eisenberg, Cornell Law School
Victor Schwartz, Shook, Hardy and Bacon, L.L.P.
Mark Behrens, Shook, Hardy and Bacon, L.L.P., *Moderator*

PROFESSIONAL RESPONSIBILITY

LEGAL FEES AWARDED IN THE STATE TOBACCO SUITS AND OTHER MASS TORT AND CLASS ACTION CASES FACE NEW ETHICS AND LEGAL CHALLENGES

*BY MARGARET A. LITTLE**

Some recent court proceedings that have received little attention in the mainstream news media suggest that the enormous wealth transfers to trial lawyers that have taken place in the context of class action, tobacco, and other suits brought by or on behalf of government entities – usually the states – are coming under new and refreshing critical legal scrutiny. In Manhattan, Supreme Court Justice Charles E. Ramos has asked the New York attorney general's office and several law firms awarded $625 million in attorney's fees by the Tobacco Fee Arbitration Panel – reportedly $13,000 per hour – as part of New York State's $25 billion tobacco settlement to explain why this fee award should not be set aside. Justice Ramos, who has raised the issue *sua sponte*, noted that the arbitrators who awarded such enormous fees may have "manifestly disregarded well established ethical and public policies." Justice Ramos suggested that his court had the power not only to set aside the award of such fees, but to vacate the entire $25 billion state settlement, approved by another judge in 1998, if such action was warranted.[1]

At a hearing in late July, the proceedings became explosive with one attorney, Harvey Weitz, angrily shouting at Justice Ramos that he was being "sandbagged"; Mr. Weitz was later escorted from the courtroom under threat of contempt. Another attorney walked out of the proceedings and still others directed imperious demands and wounded invective at Justice Ramos — such as calling him "reprehensible." One of the few reporters to cover these proceedings described the hearing as "unparalleled for its vitriol, much of it aimed at the judge," and noted that the hearing "took on an air of unreality" with the judge becoming the butt of angry accusations and bitter complaints and the lawyers imploring him to end the inquiry, or at worst, refer the matter to the secret and largely unreviewable world of attorney disciplinary proceedings.[2] As any lawyer knows, that self-regulated arena operates in near total secrecy, lacks the jurisdiction and powers of a court and meaningful appellate review. The attorneys were particularly concerned about how the press got wind of the judge's order to show cause and argued strenuously that any proceedings should be confidential, without press or public scrutiny.

In California, citing an "unreal world of greed" in which class-action firms such as New York's Milberg Weiss Bershad Hynes & Lerach are being awarded fees in arbitration, a state appeals court upheld a trial court ruling vacating an $88.5 million fee awarded by a three man arbitration panel to Milberg Weiss and four other law firms, holding that it was an unconstitutional gift of public funds, unauthorized by law, to which neither the state, the legislature nor any court could lawfully agree.[3] In Texas, a series of judges are juggling the "political hot potato" of claims asserted by Houston attorneys Joseph Jamail and Wayne Fisher that former Texas attorney general Dan Morales had demanded a $1 million campaign contribution and the "fronting" of the state's legal expenses from any firm seeking to be awarded the job of representing the State of Texas in the tobacco suits.[4] The fees awarded to the Texas attorneys in arbitration came to $3.3 billion – or $92,000 per hour – to five law firms, all major Democratic party donors.[5]

Justice Ramos initiated his inquiry into the New York tobacco fees *sua sponte* because neither the tobacco companies paying the arbitration awards nor the attorney general's office have contested these excessive and ethically indefensible fees. This is because the tobacco companies explicitly agreed not to oppose the fee applications in arbitration as part of the tobacco settlement. Practically speaking, the attorneys presenting their claims before the Tobacco Fee Arbitration Panel are arbitrating against no one. Nonetheless, the absence of an opposing party in the fee arbitrations does not appear to be protecting these politically well-connected profiteers from judicial scrutiny. These state-sponsored lawsuits were brought in the state courts, which have plenary authority to regulate the conduct of attorneys practicing before them. And, as attorneys representing the public as special attorneys general, and as officers of the court, the attorneys owed the highest duties of loyalty and honesty to their clients. Rule 1.5(a) of the Rules of Professional Conduct provides that "[a] lawyer's fee shall be reasonable." ABA Model Code Disciplinary Rule 2-106 requires that a "lawyer shall not enter into an agreement for, charge, or collect any illegal or clearly excessive fee." The leading treatise on legal ethics notes: "The requirement that a fee be reasonable in amount overrides the terms of the contract, so that an 'unreasonable' fee cannot be recovered even if agreed to by the client."[6]

Even more fundamental, the contingency fee contracts entered into by the states with their attorneys are unlawful and unethical. State and federal case law and statutes widely recognize that attorney's fees awarded in any action belong to the party, not his attorney,[7] and that it is unlawful for any governmental agency to make or authorize an expenditure or contractual obligation without an existing legislative appropriation.[8] The purported contractual obligation to pay state funds made by the attorney general's signature on the original contingency fee contract, the obligations of which are now arbitrated before the Tobacco Fee Arbitration Panel, not only committed the state to pay the private law firms' fees and expenses in excess of appropriations, but in the absence of any appropriation at all. No state official has this power.

The contingency fee contracts also violated state codes of ethics, rules of professional conduct and constitutional limitations of power in that they conferred a direct and substantial personal financial stake in the litigation upon outside counsel prosecuting these state sovereign actions. State codes of ethics prohibit anyone performing such governmental functions from having any direct monetary gain or loss at stake by reason of his official activity.[9] Further, long-established Supreme Court law consistently holds that private entities are forbidden to perform governmental functions on a contingency fee basis because it constitutes a violation of state and federal constitutions' guarantees of due process before the law.[10] The Supreme Court has unequivocally held that the appointment of an interested prosecutor fundamentally undermines the integrity of a judicial proceeding, violates due process, and further, that the "mere existence" of such an unethical situation "calls into question the conduct of an entire prosecution."[11] Contingency fee arrangements are simply not consistent with the duty of public attorneys to pursue equity, justice and fairness on behalf of the people they represent.

The importance of this rule regarding legislative approval and oversight of such contracts and gifts to the open and ethical conduct of our political branches is obvious. One of the most disturbing consequences of these contingency fee agreements occurred when Maryland's contingency fee counsel, Peter G. Angelos, bartered half of his 25 percent contingency fee in exchange for retroactive changes in the law that would assure him a win in court:

> Mr. Angelos…agreed to accept 12.5 % if and only if we agreed to change tort law, which was no small feat. We changed centuries of precedent to ensure a win in this case. [12]

Peter Angelos essentially purchased the law that would be applied to his case – with the state's own money.

Given these manifold illegalities and constitutional infirmities, it is far easier to see why these fee awards should be vacated than to put forth any justification for them. Perhaps this is why, when Fox News invited legal affairs commentator and Manhattan Institute fellow Walter Olson, a long-time critic of these class action and tobacco fees, and the attorneys receiving the fees and/or a representative of the American Trial Lawyers Association to debate the question, only Mr. Olson was willing to appear.[13]

Indeed, the state attorneys general tacitly understood that their original fee contracts were unenforceable when, in 1998, they awoke to the fact that the mind-boggling 25% fee typically awarded under the contracts, or the transfer of some $61.5 billion dollars of a $246 million settlement to private citizens (and in most cases their political cronies), was simply politically untenable. The state attorneys general openly took the position that they were no longer bound by the contracts. While lawsuits to enforce the contracts proliferated, most of the private attorneys agreed as part of the settlement, to seek their fees, at least in the first instance, in arbitration in which the tobacco companies were bound not to oppose the application.

Nearly every disinterested commentator that has taken the time to bring some transparency to these proceedings has come to understand that the fee arbitration is a subterfuge, a secretive process that shields from public view distribution of funds belonging to the state extracted from the tobacco companies through the exercise of the state's enforcement powers. Public health advocates that had been so crucial to the success of the state lawsuits have consistently leveled sharp criticisms at the legal fees, noting that they are totally out of control.[14] A permanent class of state-enriched tycoons has been established using public funds. Nationwide, these lawyers, many of whom bankrolled the attorneys generals' political campaigns, will split a $750 million pot every year during the first five years of the settlement, which then declines to $500 million annually payable for untold years to come. Further, even the mainstream press has come to understand that the Master Settlement Agreement has been cynically used as an off-budget revenue cash cow funding otherwise unbudgeted state programs that increase the size of state government with no budgetary controls. In at least in one state, North Carolina, close to 73% of the funds paid to date are being spent on tobacco marketing and production.[15]

What is less generally understood is that the suits and their settlements should be found to violate the federal constitution's taxation, commerce and compacts clauses (among others), their own state laws and constitutional doctrines of separation of powers. The MSA has created a tobacco cartel with the state managing the diversion of the cartel's monopoly profits into their own treasuries, the hands of the trial lawyers and the tobacco companies. Smaller companies that did not consent to the agreement and new market entrants, who did not even exist at the time of settlement and have engaged in no misconduct, are required under the settlement agreement to pay huge damages into escrow to cover any future liability from smoking related illnesses. These barriers to entry for new market entrants and non-settling tobacco companies were obviously designed to prevent such companies from undercutting the collusively raised tobacco prices and diminish, or extinguish, the market share of the big tobacco companies and to protect the flow of the cartel profits to the states, their attorneys and the tobacco companies. As law professor Michael DeBow has noted: "In a nutshell, the tobacco litigation meant *de facto* increases in cigarette taxes, obscene enrichment of politically connected trial lawyers, and states acting as cartel managers for giant cigarette makers."[16] The MSA represents an agreement among the states to repeal the Sherman Act for the tobacco industry and further effectively levies interstate taxation and imposes interstate regulation beyond the territorial reach of the states. The compacts clause of the federal constitution provides that "[n]o state shall, without the consent of Congress…enter into any Agreement or Compact with another State," and the taxation and commerce clauses grant Congress the exclusive power to levy national taxes and regulate interstate commerce.

The effects of these state-sponsored redistributions of wealth to a core group of politically well-connected lawyers are certain to affect judicial appointments and elections. Economists at Emory University who have been studying the legal profession over the decades note that the law has come to

favor the economic interests of attorneys, and they add that lobbying a legislature with respect to a particular industry is less effective than lobbying to obtain favorable appointments or elections of judges, because greater economies of scale apply to a judiciary that can change the law on any issue the lawyers bring before them.[17]

The class-action, mass tort and tobacco lawyers are collecting billions of dollars and openly announcing their intention to expand their prosecution of these mega-torts to new industries. They are routinely hired by the state attorneys general that made them millionaires or billionaires, with the states' attorneys general unleashing them on the asbestos, firearms, lead paint, latex, and HMO industries. New York State Comptroller, H. Carl McCall was just recently reported to have hired three firms, including Milberg Weiss, to sue industries on behalf of the state in matters where the fee awards have in some instances come to more than $10,000 per hour.[18]

These lawyers are among the most generous contributors to political and judicial candidates. From 1999 to the beginning of 2002 contributions from trial lawyers to candidates of all political parties reportedly totaled close to $13 million, with tobacco settlement lawyers prominent among the top givers.[19] Former President Clinton's videotape in support of the $3.4 billion fee application by the consortium of attorneys (that came to include his brother-in-law, Hugh Rodham), who were seeking fees for early-settling states including Florida and Texas was reported last year.[20] Democratic National Committee chairman Don Fowler's 1995 call sheet to solicit long-time Democratic donor Walter Umphrey, one of the Texas lawyers who was awarded the tobacco work, read "Sorry you missed the vice president: I know [you] will give $100K when the President vetoes tort reform, but we really need it now. Please send ASAP if possible."[21] President Clinton vetoed federal tort reform legislation in the spring of 1996.

Inevitably some large portion of these fees will get channeled back to candidates who are committed to the expansion of this disturbing recent phenomenon of regulation by litigation. Democratic Senator Joseph Lieberman, a supporter of tort reform, has characterized trial lawyers as "a small group of people who are deeply invested in the status quo, who have worked the system very effectively and have had a disproportionate effect."[22]

This new phenomenon of state-sponsored regulation by litigation reflects a profound cultural illiteracy with respect to our state and federal laws and constitutions, even, or perhaps one should say especially, among many who possess a legal education. These new judicial inquiries and recent opinions represent a hopeful turn in this dangerous development in our political and legal affairs of state-sponsored litigation pursued in open contempt of the citizens' state and federal laws and constitutions. These inquiries also represent the fulfillment of observations made in 1999 by Palm Beach County Circuit Judge Harold J. Cohen, the presiding judge in the Florida governmental tobacco case, when he called the Florida fee demands "unconscionable" and presciently warned that "[i]f you ever put any of these issues to a public vote, they will come down hard on the lawyers and on the courts… . [t]he reverberations go way beyond this case."[23] At the time of the tobacco settlement, former Health Education and Welfare Secretary Joseph Califano acidly observed that the lawyer's fees in the tobacco settlement represent "the most sordid piece of money-changing in the temple of the American bar."[24] The outrageous courtroom misbehavior and vitriol directed towards the Manhattan judge questioning these arrangements and the attorneys' desperate pleas for secrecy reflect nothing more than a visceral acknowledgement that these transactions will not withstand public scrutiny and judicial oversight and review. Of course these inquiries should take place in court before judges sworn to uphold the laws and constitutions of this nation and who are members of an independent constitutional branch and are publicly accountable and subject to press oversight and appellate review.[25] It is precisely the backroom dealmaking and secrecy in which these settlements, fee agreements and arbitrations were engineered that has led to these fee debacles. A wit once noted that "greed, like the love of comfort, is a kind of fear"[26] and as Edmund Burke has amplified, "[n]o passion so effectually robs the mind of all its powers of acting and reasoning as fear."[27] At long last, it looks as if the judiciary is starting to scrutinize this scandalous blot on the American legal landscape. One can only hope that these courts and judges will have the courage and wisdom to cast a fearless eye on these arrangements and rise above efforts at invective and intimidation by financially interested parties hopelessly entwined in these unethical, unlawful and unconstitutional affairs.

Editor's Note:

As this article was going to press, a September 27, 2002 report in The New York Law Journal reported that a nearly $1.3 billion attorney fee award to a consortium of attorneys in the California tobacco litigation issued by an arbitration panel in connection with the 1998 nationwide settlement of state litigation against the tobacco industry was overturned on September 25th by Manhattan Supreme Court Justice Nicholas Figueroa. The judge noted that the amount of the award was "irrational" and that the arbitrators had exceeded their powers in awarding this sum to the consortium.

Sources: Daniel Wise, *$1.3 Billion Tobacco Attorney Fee Overturned,* New York Law Journal, 9/27/02; William McQuillen *Court Throws Out $1.25 Billion Award to California Tobacco Lawyers,* Bloomberg.com, 9/26/02.

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Footnotes

1. Daniel Wise, New York Law Journal, 6/20/02 and 7/12/02. The three New York law firms defending their 45% of the $625 million fee award are Schneider, Kleinick, Weitz, Damashek, & Shoot ($98.4 million), Sullivan Papain Block McGrath & Cannavo ($98.4 million) and Albany law firm, Thuillez, Ford, Gold & Johnson ($84.3 million). The three national firms awarded the remaining $343.8 million of fees in the New York settlement are Ness, Motley, Loadhoalt, Richardson & Poole, of Charleston, S.C., The Scruggs Law Firm of Pascagoula, Miss. and Hagens & Berman of Seattle, Wash. *See also*, *Tobacco Settlement a Windfall for Lawyers,* Fox News, 8/01/02.

2. Daniel Wise, *New York Tobacco Fee Hearing Has Lawyers Smoking,* New York Law Journal, 7/26/2002.

3. *Jordan v. California Dept. of Motor Vehicles,* 2002 Cal. App. LEXIS 4421.

4. Clay Robison, *Morales' Tobacco Fee Under Fire,* Houston Chronicle 7/12/02, JoAnn Zuñiga, *Judge Delays Decision on Questioning Lawyers About Fees in Tobacco Case,* Houston Chronicle 8/13/02. *See also* Daniel Fisher, *Smoke This*, Forbes 8/15/02.

5. Marianne Lavelle & Angie Cannon, *A Handful of Trial Lawyers Are Rocking CEOs and Politicians,* U.S. NEWS & WORLD REP., Nov. 1, 1999, at 36 (reporting that "[l]awyers representing the first three states that settled—Florida, Mississippi, and Texas—were awarded $8.2 billion in legal fees"); Bob Van Voris, *That $10 Billion Fee*, NAT'L L.J., Nov. 30, 1998, at A1 (reporting that in Texas the hourly rate in the tobacco settlement was calculated at $92,000 per hour).

6. G. Hazard, Jr. & W. Hodes, The Law of Lawyering 1, 5:205 *Fee Litigation and Arbitration,* at 120 (1998 Supp.).

7. *Venegas v. Mitchell,* 495 U.S. 82, 87-88 (1990); *Erickson v. Foote*, 112 Conn. 662, 666 (1931) ("The costs allowed in an action belong to the party and not to his attorney.") ; *See also, Brown v. General Motors Corp.* 722 F.2d 1009, 1011 (2d Cir. 1983) (The prevailing party, not the attorney is entitled to award of attorneys' fees.) 7A C.J.S. *Attorney and Client* §283 (1980) ("A judgment for costs and attorney's fees is the property of the client, and not the attorney.)

8. State law uniformly provides that state funds may only be expended through the appropriations process. 63 Am.Jur.2d Public Funds §37 (1984) ("The power of the legislature with respect to the public funds raised by general taxation is supreme, and no state official, not even the highest, has any power to create an obligation of the state, either legal or moral, unless there has first been a specific appropriation of funds to meet the obligation….The object of such [legal] provisions is to secure regularity…in the disbursement of public money, and to prohibit expenditures of public funds at the mere will and caprice of those having the funds in custody, without direct legislative sanction therefor.") This firm rule applies equally to all state funds and not just funds raised through taxation. *See, e.g.,* 81A C.J.S. States, §233 (1977)("General funds, available for general state purposes, which are deposited in the state treasury, are subject to constitutional requirements as to appropriations with respect to their disbursement, and this is true regardless of the source from which such funds are derived.")

9. *See, e.g.,* 63A Am.Jur.2d *Prosecuting Attorneys* § 20 (1984). ("Those powers and duties imposed upon a prosecuting attorney by law which require the exercise of judgment and discretion…cannot be delegated to another without express legislative authority."). *Young v. United States,* 481 U.S. 787, 804, 809-10 (1987).

10. *Marshall v. Jerrico, Inc.,* 446 U.S. 238, 249-50 (1980); 63C Am.Jur.2d *Prosecuting Attorneys* §26 (1997) ("A trial court has the power to disqualify a prosecuting attorney…where he or she has a pecuniary interest in the outcome.") For a recent application of this constitutional principle, see, *Yankee Gas Company v. City of Meriden,* 2001 Conn. Super. LEXIS 1119.

11. *Young v. United States*, 481 U.S. at 808-814 (1987).

12. Statement of Maryland State Senate President Thomas V. Mike Miller, Jr. reported in Daniel LeDuc, "Angelos, Md. Feud Over Tobacco Fee, $4 Billion Payout to State Will Be on Hold as Lawyer Argues for 25%," *Washington Post*, Oct. 15, 1999, B1. Ironically, despite the public announcement of this 12.5% fee surrender to purchase the retroactive law that would assure him of a win in his case, Mr. Angelos persisted in seeking the entire 25% fee, or $1 billion, and only recently resolved his fee claim with the state.

13. *Tobacco Settlement a Windfall for Lawyers,* Fox News, August 1, 2002.

14. David Kessler has described the lawyer fee requests as "outrageous. . . [a]ll the legal fees are out of control." Barry Meier, *Case Study in Tobacco Law: How a Fee Jumped in Days*, N.Y. TIMES, Dec. 15, 1998, at A16. (Noting that one firm, Milberg Weiss Bershad Hynes & Lerach, raised its fee request for public relations work attacking Joe Camel from $50 million to $650 million; "Rightly or wrongly," said the attorney, "I decided to ask for hundreds of millions of dollars so that I won't be crushed by the amounts other people were asking for." That attorney stated that he would be "crazy" not to take his fees into arbitration given the prior awards.).

15. Seth Mnookin, *The Tobacco Sham*, Newsweek 8/19/02, p.33.

16. Michael DeBow, *Out of Control AGs,* National Review, 5/21/2002.

17. Paul H. Rubin & Martin J. Bailey, *The Role of Lawyers in Changing the Law,* 23 J. Legal Stud. 807, 813, 827 (1987).

18. Shaila K. Dewan, *Donors to McCall Profit in Cases State Pursues Against Corporate Wrongdoers,* N.Y. Times, 8/14/02 p. B4. The three law firms, Bernstein Litowitz Berger & Grossmann, of New York, Barrack, Rodos & Bacine of Philadelphia and Milberg Weiss of New York are all major contributors to Comptroller McCall's campaign for candidacy for governor of New York.

19. American Tort Reform Foundation, *Tracking the Trial Lawyers,* available at http://atrf.trkcinc.com.

20. Barry Meier, *Rodham and Group Seeking Legal Fees Uses Clinton Testimonial*, N.Y. TIMES, Mar. 8, 2001, at A15.

21. Kate O'Beirne, *Cash Bar – How Trial Lawyers Bankroll the Democratic Party,* National Review, August 20, 2001.

22. Id.

23. John Gibeaut, "Getting Burned" *ABA Journal,* Sept. 1998, 44. In the 1999 Florida proceedings, Judge Cohen denounced the state's twenty-five percent contingency contract that came to $233 million per lawyer, which "shocked the conscience of the Court." He calculated that if the state's lawyers had worked twenty-four hours per day, seven days per week for the forty-two months they had represented the state, they still would earn $7,716 per hour. "No evidentiary basis can possibly exist for fees of that nature and this Court can never enter an order justifying such hourly rates on any grounds." *Id.*

24. Joseph A. Califano, Jr., *Tobacco: The Moral Issues,* America, August 15, 1998.

25. As Justice Ramos noted, the requirement that a *judge* review and approve a fee award in a class action is "a slam dunk." *Supra*, note 2. Fee awards under class action, trade regulation and other statutory enforcement proceedings are routinely subject to judicial review.

26. Cyril Connolly, *The Unquiet Grave,* pt.1 (1944).

27. Edmund Burke, *The Origin of our Ideas of the Sublime and Beautiful,* pt.2, ch.2 (1756).

The Supreme Court Limits State Censorship of Judicial Campaign Speech

*By Michael DeBow**

The election of state judges has been controversial at least since the Progressive Era.[1] For many years those uncomfortable with selecting judges through popular vote were successful, to one degree or another, in muzzling the speech of judicial candidates. In *Republican Party of Minnesota v. White*,[2] a five member majority of the Court struck down one of the most restrictive of these regulations, and set the stage for further debate on the proper conduct of judicial elections.

At issue was Minnesota's canon of judicial conduct that directed a "candidate for judicial office, including an incumbent judge" not to "announce his or her views on disputed legal or political issues."[3] Candidates who violated Canon 5(A) were subject to stringent penalties. Sitting judges could be removed, censured, suspended without pay, or subject to civil penalties. Lawyer-candidates faced disbarment, suspension, or probation.

The Minnesota canon was based on Model Canon 7(B) of the 1972 American Bar Association Model Code of Judicial Conduct. This canon, known as the "announce clause," was followed by eight other states that adopted strict limitations on judicial candidates' speech.[4] *Republican Party of Minnesota v. White* effectively ends state regulation through the "announce clause." What states may now do, consistent with the First Amendment, to regulate judicial campaign speech is not entirely clear from the face of the decision.

Procedural history. Gregory Wersal was a Republican candidate for the Minnesota Supreme Court in 1996 and 1998. His 1996 campaign literature included criticism of several past decisions of that court. One publication averred generally that the court "has issued decisions which are marked by their disregard for the Legislature and a lack of common sense." Wersal specifically criticized decisions that 1) excluded "from evidence confessions by criminal defendants that were not tape-recorded," 2) struck down "a state law restricting welfare benefits," and 3) required "public financing of abortions for poor women".[5]

Wersal's speech (along with other activities of his campaign not relevant here) provoked someone to file a complaint with the state agency charged with the enforcement of the Canons against lawyer candidates. However, that agency dismissed the complaint, in relevant part because of "doubts about the applicability of the announce clause to Wersal's campaign statements" and questions about "whether the clause was enforceable." Nonetheless, Wersal withdrew from his race, citing fears "that further ethical complaints would jeopardize his ability to practice law." When Wersal entered the 1998 race, he asked the agency for an advisory opinion as to whether it intended to enforce the announce clause of Canon 5. The agency declined to give the advice requested, because Wersal had not "provided . . . any particular statements he wished to make" for review and because the agency continued to have "significant doubts as to whether or not [the announce clause] would survive a facial challenge . . . ."[6]

Shortly after Wersal received this news he filed suit. The district court upheld Canon 5(A), finding that Minnesota had a compelling interest in "maintaining the actual and apparent integrity and independence of the judiciary" and that the canon was "narrowly tailored."[7] The latter finding depended to a large degree on the district court's construction of the Canon as applying only to candidate statements on issues "likely to come before the candidate if elected" and the weight it gave an earlier decision by the state Judicial Board that the canon "does not prohibit candidates from discussing appellate court decisions."[8]

A divided panel of the Eight Circuit upheld the district court. The appellate court approved of the district court's invocation of "[t]he longstanding principle that courts should construe laws to sustain their constitutionality,"[9] and likewise assessed not the text of the Canon as written, but as augmented by the gloss it had received from the state's enforcement agencies.[10]

Majority opinion. Justice Scalia, writing for the majority, declared the gloss on Canon 5(A) "not all that [it] appear[s] to be" for three reasons. First, the state acknowledged at oral argument that criticism of past appellate opinions is "*not* permissible if the candidate also states that he is *against stare decisis*." Second, "limiting the scope of the clause to issues likely to come before the court is not much of a limitation at all," since virtually anything now can be the subject of a lawsuit. Third, the state's construction of the clause to permit "'general' discussions of case law and judicial philosophy" is of little importance because such discussions are too abstract and bloodless to communicate much to voters.[11]

Justice Scalia then analyzed the canon using the "strict scrutiny" test, which requires that Minnesota "prove that the announce clause is (1) narrowly tailored, to serve (2) a compelling interest."[12]

The state continued to assert two "compelling interests" – preserving both the impartiality of the state judiciary, and the appearance of its impartiality. Justice Scalia's analysis of Minnesota's proffered interests is the most significant contribution the decision makes to the broader debate over state judicial selection. He noted that the state was "rather vague" about the meaning of "impartiality," and then considered three possible definitions. The state lost as to all three.

Justice Scalia dubbed the first definition – "lack of bias for or against either *party* to [a judicial] proceeding" — the "root meaning" and "the traditional sense in which the term is used." He concluded that the announce clause "is not narrowly tailored to serve impartiality . . . in this sense" because "it does not restrict speech for or against particular *parties*, but rather for or against particular *issues*."[13]

The second meaning – "lack of a preconception in favor of or against a particular *legal view*" – did not rise to a compelling state interest, because "[a] judge's lack of predis-

position regarding the relevant legal issues in a case has never been thought a necessary component of equal justice, and with good reason. For one thing, it is virtually impossible to find a judge who does not have preconceptions about the law." Justice Scalia concluded his discussion of this point – perhaps the most insightful portion of the opinion – by noting that "since avoiding judicial preconceptions on legal issues is neither possible nor desirable, pretending otherwise by attempting to preserve the 'appearance' of that type of impartiality can hardly be a compelling state interest either."[14]

The third possible meaning – "openmindedness," described as a judge's willingness "to consider views that oppose his preconceptions, and remain open to persuasion" when hearing a lawsuit – was also rejected by the Court. Justice Scalia explained that the announce clause is so "woefully underinclusive" with respect to that goal "as to render belief in that purpose a challenge to the credulous."[15]

In the final section of the opinion, the majority rejected the argument that the announce clause fits within the category of "universal and long-established" traditions whose prohibition of certain conduct creates "a strong presumption" that the prohibition is constitutional. Justice Scalia noted the long history of state judicial elections (stretching back to 1812), and the long evolution of a variety of approaches to their regulation. In this light, the announce clause "relatively new . . . and still not universally accepted, does not compare well with the traditions deemed worthy of our attention in prior cases."[16]

What next for judicial elections? It is not clear what elements of state regulation of judicial speech would survive the same analysis deployed by the majority in *Republican Party of Minnesota v. White*. The litigation did not question the constitutionality of Minnesota's so-called "pledges or promises" canon, which prohibits judicial candidates from making "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office."[17] (A number of states have such a regulation, modeled on the ABA's 1972 Code of Judicial Conduct.) The Minnesota decision also had no occasion to discuss the provision in the ABA's 1990 Model Code that is, in effect, the replacement for the announce clause. The 1990 provision, known as the "commitment clause," prohibits a judicial candidate from making "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court."[18]

Would either the pledges or promises clause or the commitment clause pass muster under *Republican Party of Minnesota v. White*? On the one hand, the majority opinion states clearly that it "neither assert[s] nor impl[ies] that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office."[19] On the other hand, it contains several passages that likely upset opponents of judicial elections, such as the observations that "We have never allowed the government to prohibit candidates from communicating relevant information to voters during an election."[20] Along the same lines, the penultimate paragraph of the majority opinion explains that opposition to judicial elections "may be well taken . . . but the First Amendment does not permit it to achieve its goal by leaving the principle of elections in place while preventing candidates from discussing what the elections are about."[21] Doubtless there will be more constitutional litigation over state regulation of judicial elections. The four dissenters in *Republican Party of Minnesota v. White* clearly favor state regulation of judicial elections, and Justice O'Connor's concurrence shows real ambivalence due to her intense dislike of judicial elections.[22] In addition, the American Bar Association has expressed its strong disapproval of the majority opinion, and launched a public relations campaign to support new regulations on judicial campaign speech.[23] Given this lineup, the decision in *Republican Party of Minnesota v. White* may prove a victory of only limited scope for supporters of judicial selection through the electoral process.

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Footnotes

[1] Readers interested in the broader debate over state judicial selection should consult the recent Federalist Society white papers on this subject, reprinted as *The Case for Judicial Appointments*, 22 U. Tol. L. Rev. 353 (2002), and *The Case for Partisan Judicial Elections*, 22 U. Tol. L. Rev. 393 (2002).
[2] 536 U.S. ___, 122 S.Ct. 2528 (2002), *rev'g* Republican Party of *Minn. v. Kelly*, 247 F.3d 854 (8th Cir. 2001).
[3] Minn. Code of Judicial Conduct, Canon 5(A)(3)(d)(i) (2000).
[4] According to the National Law Journal, seven other states used this form of the "announce clause." See Marcia Coyle, "*New suits foreseen on judicial elections*," National Law Journal, July 8, 2002, at A1.
[5] 122 S.Ct. at 2532-33.
[6] 247 F.3d at 858-59.
[7] *Id.* at 860.
[8] *Id.* at 881-82.
[9] *Id.* at 881.
[10] *Id.* at 881-83.
[11] 122 S.Ct. at 2533-34 (emphasis in original).
[12] *Id.* at 2534.
[13] *Id.* at 2535 (emphasis in original).
[14] *Id.* at 2536.
[15] *Id.* at 2536-37.
[16] *Id.* at 2540-42.
[17] *Id.* at 2532.
[18] Quoted in id. at 2534 n.5 (noting that the commitment clause was adopted by the ABA "in response to concerns that the [announce clause] violated the First Amendment. . . .").
[19] *Id.* at 2539.
[20] *Id.* at 2538.
[21] *Id.* at 2541.
[22] *Id.* at 2542-43 (O'Connor,J., concurring). For his part, Justice Kennedy firmly cautioned against a blanket condemnation of elected judges. *Id.* at 2545-46 (Kennedy, J., concurring).
[23] http://www.manningproductions.com/ABA245/OMK/main.html and http://www.manningproductions.com/ABA245/OMK/release.html

Religious Liberties

Democracy, Secularism and Religious Faith in America

by Robert P. George

Remarks at Ave Maria Law School
March 22, 2002

As American citizens, we participate in a regime of democratic republican government. Most of us are also religious believers—people of faith. How does the religious faith of Americans shape our politics? That is an interesting and important question, but not the one on which I will focus in my remarks today. Rather, I invite you to reflect with me on a different question or set of questions: What is the impact of our particular form of civic order—as it has actually developed—on Americans' free exercise of religion? How has it shaped the religious practice and faith of Americans?

The matter immediately poses a methodological challenge. Strictly speaking, there is no "faith of Americans." There are, rather, "faiths"—plural. And it is to be expected that the interaction of faith and American democracy will vary significantly depending on the nature of the particular faith in question. Even within broad communities of faith (such as Catholicism, Protestantism, and Judaism) democracy's impact upon religion—and its free exercise—has been different for different individuals and subcommunities.

The experience of Orthodox Jews has differed from the experience of Reform Jews; the experience of mainline Protestants has differed from that of Evangelicals. Getting hold of any one of these experiences requires a grasp of the religious convictions, the structure of communal life, and what may be called the spirituality that together largely constitute the faith or the community of faith; and beyond that, of course, knowledge in history, sociology, and perhaps other disciplines is required. I'm tempted to plead that I lack the time this afternoon to do the subject justice; the truth, however, is that it is my lack of learning is the real culprit here.

I am at best an amateur historian, and, as my colleagues in sociology at Princeton would enthusiastically assure you, I am no sociologist at all. But I have some sense of the course of my own faith—Catholicism—through American history. That history sheds a certain light upon our topic; for Catholicism has been suspected and derided, in season and out, as a peculiarly undemocratic religion, more than faintly un-American.

Please be assured that I pause over this perennial suspicion and criticism not to settle accounts or to call for reparations. I pause because we can learn from it the articulated expectations that the American regime has of religion. Unless we naively suppose the regime to have been wholly ineffectual in shaping belief to its needs, we can infer from these expectations (or demands) something of a global answer to our question, derive the elements of a comprehensive account. Here we have a common hydraulic pressure, a centripetal force ranging across the various faiths, impelling them to a common center. Call it an answer from the top down, truly faith under democracy. Of course, we can leave it to the specialists—the historians and sociologists of religion—to gauge the precise extent to which a particular religion has been shaped by this force.

The Bill of Particulars in the indictment against Catholicism has been remarkably constant. But one charge was effaced by the course of European history: the claim that Catholics owed allegiance to a foreign temporal prince. That charge was characteristically joined to one that survives: Catholicism is undemocratic because it compromises the individual's proper spiritual autonomy. Related to this accusation is another charge: that Catholics do not think for themselves in political matters. They instead follow slavishly the dictates of their priests, where they do not serve contemptible party bosses, or both. Catholics have long been said to behave undemocratically by not trusting their personal religious "experience" as a guide to authentic spiritual life; rather, they hold to "immutable" (read: ossified) "metaphysical" truths. Between WW II and the Second Vatican Council, Catholics were criticized for rejecting the linchpin of democracy, the First Amendment's "separation of church and state."

Finally: perhaps the central charge made since Vatican II is that Catholics behave undemocratically by trying to "impose their morality" upon others in defiance of the principles of our pluralistic democracy. This charge most often pertains to abortion and matters of sexual morality generally. This charge could only have arisen, as it did, after the abandonment by so many other churches and communities of faith of the common Judaeo-Christian morality, or of a commitment to a decent public morality, or both.

No wonder politically ambitious Catholics such as William Brennan (in his Senate confirmation hearings) and JFK felt obliged to say that they would separate their religion from their public responsibilities. To my knowledge, members of no other church were similarly expected to privatize their faith. Maybe it was taken for granted that they already had.

* * *

The abiding commitment of our cultural, political, and legal authorities to a specifically "democratic" religion explains more—much more, in my judgement—about our constitutional law of church and state than anything Madison ever wrote, more even than is explained by what the Religion Clause of the First Amendment actually says. (Consider, in a stray moment with a bottle of Jack Daniels in hand, how precious little of our constitutional law about religion is explained by, or even loosely connected to, the language of the Constitution.) Anti-Catholicism as such is a huge causal factor. Several scholars, including our own Gerry Bradley, have made this case in scholarly writings. Harvard University Press is bringing out this summer a book by Phil Hamburger, of the University of Chicago Law

School, which overwhelmingly documents the point. And, for those with the taste for lawlerly synopses, I recommend Briefs by the Becket Fund and by the Catholic League in *Mitchell v. Helms* and *Zelman v. Simmons-Harris*, the voucher case.

* * *

The question — Faith Under Democracy — is especially challenging for another reason: any answer is subject to the objection that it proposes a specious or question-begging correlation. Who is to say with confidence that change in this faith or that has to do with democracy, and not with economic upward mobility, migration, or some other variable? I surprise myself by, at least for this fleeting moment, envying those who can do—and even more remarkably have the taste to do—regression analysis.

And those are some challenges to description. Evaluation—for good or ill—introduces additional perils, mostly of the moral philosophical and theological kind. Regression analysis won't help there. But at least we are now talking about disciplines I can stake some claim to.

I am a philosopher by trade, concentrating on law, political theory, morality, and their often complex relations. What insights does my craft enable me to add to today's able panelists' contributions? I notice that the question has been interpreted by others as calling for an evaluation of how faith has fared throughout the American experience. But the question is about faith under democracy. The questions are not the same. We might have a lively debate about whether America really is a democracy. Based upon my contribution to a famous *First Things* symposium a few years back, some say that I think we live, not in any democracy, but under a judicial oligarchy. And, while that is an oversimplification, I do believe that judicial usurpation has damaged American democracy**.** But I leave that discussion to another occasion.

We might also have a lively debate about when, and to what extent, Americans have talked about America as a democracy. Manifestly, our Founders preferred other terms to describe their handiwork; "republic" and "republican" chief among them. I leave aside that discussion, too.

* * *

What I want to address is this question: when and why did the Supreme Court begin to treat "democracy" (and cognates, including "democratic theory") as the political theory of the Constitution, with implications for the religious character of the citizens. Put differently, what did the Court say and do when it decided that there was such as a judicially cognizable thing as a "relationship between faith and democracy". When and why did "democracy" take over the constitutional law of religion? What did it do after it took over?

The answers: it took over during WW II. And "democracy"—as the concept was wielded in the hands of the judges—imposed a secular public sphere; it privatized religion.

Let me explain.

We know that the war against fascism, framed by a wider worry about atheistic communism, called forth among Americans a profound re-commitment to "democracy" (and "freedom"). That is what we were fighting for. We were not fighting for an impersonal system, or for a set of political practices. We fought for "the democratic way of life," a political culture with deep roots in character, belief, and psyche. Competent secondary literature—here I draw your attention to Paul Gottfried's fine contribution to New Forum Books, an imprint for Princeton Press which I am pleased to administer— explains how "democracy" or ("democratic theory") was splintered into two camps. One group held beliefs much like those articulated in our time by Pope John Paul II: democracy is defensible in moral terms and depends for its legitimacy on the moral values it advances and protects.

The opposing camp saw moral truth as a phantom, a superstition which, when it gained control of citizens' minds, led straight to authoritarianism, if not to outright fascism. These folks favored a pragmatic scientific spirit, and a polite relativism in morals. In the courts and the elite sector of the culture, these folks won. We see, right there in the Supreme Court cases during and shortly after the War, an explicit link between our "democratic way of life" and secularism, particularly, and in a very aggressive form, in public education.

Here is a nice illustration of the point. It is from the oral argument in *McCollum*, which took place on December 8, 1947, just ten months after the Court in *Everson v. Illinois* declared a constitutional prohibition of any and all government help to religion, even if the help is non-discriminatory and non-coercive.

Justice Felix Frankfurter was jaw to jaw with the lawyer for the Champaign, Illinois school district, John Franklin. Franklin's performance at oral argument was audacious, and masterful. He forcefully argued (and proved in his 100-plus page brief) that public authority was free, under the Constitution, to promote religion, so long as there was no discrimination in favor of, or against, particular faiths. This, Franklin said, was what everyone understood non-establishment to mean, until the day before yesterday.

An aside: Justice Black, author of the *Everson* stricture, was (the transcript reveals) dumbfounded, tongue-tied, by Franklin's assault upon the *Everson* rule which, it should be said, Franklin correctly described as dictum. It is a wonder why— since Black's own penultimate draft for the *Everson* court had taken precisely the same position: to wit, non-establishment meant non-discrimination. In any event, Black produced for the Court no refutation or rejoinder, no rebuttal or counterargument. In full, the Court's response reads: "We are unable to accept th[e] argument. As we stated in Everson we must keep the wall high and impregnable." The *McCollum* Court's imperviousness, or indifference, to evidence and cogent argument is, unfortunately, characteristic of the church-state cases.

Back to the Frankfurter story. Frankfurter made this point to John Franklin:

> I put my question again: we have a school system of the United States on the one hand, and the relation it has to the democratic way of life. *On the other hand we have the religious beliefs of our people*. The question is whether any kind of scheme which introduced religious teaching into the public school system is the kind of thing we should have in our democratic institutions. [emphasis added].

Frankfurter answered his own question: because a few religious groups opposed Champaign's shared time program, it was "offensive" and caused "controversy." Its incompatibility with "our democracy" needed no further proof.

The worry at the heart of McCollum was most succinctly expressed by Justice Brennan, in the Bible-reading case, *Abington School District v. Schempp*, wherein he referred to the choice "between a public secular education with its uniquely democratic values and some form of private or sectarian education, which offers values of its own." You need look no further for an understanding of Establishment Clause jurisprudence since 1947—at least the vast swath of it involving K-12 education.

With computer assisted research into Supreme Court opinions since the Founding, one can see at a glance that in the mid-1940's the Court confronted—or constructed—an unprecedented problem concerning religion and democracy. What does that glance reveal? Told to locate all uses of the terms "orthodox" "dogma" "secularism" "irreligion, "no religion," "atheism" "inculcate" and "indoctrinate" the computer search revealed a chasm at around 1943: before then, almost none; then the debut of some of these terms followed by dozens of uses, in quick succession. Atheism, for example, appears for the first time in *McCollum*. More than 40 times since. The 1940 *Gobitis* case marks the debut of "indoctrinate" and "indoctrination"; words which since then have become synonymous with religious teaching. "Orthodoxy"'s career begins with the Second Jehovah's Witness case, *West Virginia v. Barnette*, in 1943. There the Court said: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." But not, interestingly enough, in science, or law. *Barnette* cited no case— none, zero, nil—to support this principle.

By 1944 the Court spoke of our "democratic faith" (in the *Baumgartner* case). In *Prince v. Massachusetts* (the Jehovah's Witness child labor "street preaching" case), the Court stated that "a democratic society rests, for its continuance, upon the growth of healthy, well-rounded group of young people into full maturity as citizens, with all that implies."

* * *

Because I aim to conclude with a note of challenge to the Court-imposed secularist orthodoxy, I wish to note that it is still very much the governing judicial ideology. Note well: despite some very positive developments since 1990 in the constitutional law of church and state, we still live in *Everson's* world. Under *Lemon v. Kurtzman's* test of constitutionality—battered but still standing—all acts of public authority must have a secular purpose and a primary effect which does not advance or aid religion. Aiming to care for and favor religion—even without a trace of favoritism or hostility to any particular religion—is a prohibited "non-secular" purpose. It is unconstitutional per se. In recent years, starting with *Agostini* (in 1997) and on through *Mitchell v. Helms* (2000), the second prong of the Lemon test has been made appreciably more sensible. But, according to what remains the Supreme Court's master principle of church-state law, public authority may do nothing which aids religion as such, or that favors religion over "nonreligion" or "irreligion".

Indeed: even as refashioned by *Agostini* and *Helms*, the "effects" test still requires that religious beneficiaries receive favor under a different description, as a member of a class of recipients defined without reference to religion. The advances of recent years, up to and including the Court's approval of the Cleveland voucher program, have not dented this master principle. What we have seen instead is the nearly complete eradication of discrimination against religious speech, institutions, and individuals. In other words, something near a true equality of religion with other forms of belief and expression. The religious speech cases (e.g., *Rosenberger, Good News*) established that believers' free speech is as broad as that of nonbelievers. The aid cases, notably *Zelman*, have been presented as applications of "neutrality" and "private choice" principles.

Conclusion

What the civic order—democracy, if that is what you care to call it—hath taken away, might the civic order giveth back?

You have heard a capsule argument for the proposition that the secularist project is a judicially-adopted orphan. It has no genuine constitutional pedigree; indeed, no judicial lineage to speak of prior to its birth in the crucible of the 1940's. The judicially (or, more comprehensively, the elite) felt needs of "democracy" gave us secularism as a kind of established religion. Many of us in this room, myself among them, believe that true democracy—and fidelity to the Constitution—instead calls for a basis in faith, in the Creator as the ultimate source of fundamental rights and governmental obligations, in objective norms of justice and right, if it is not to degenerate into the domination of the weak by the strong.

Indeed, the problem for the free exercise of religion for Catholics and many other people of faith in the United States has not been too much democracy, but, rather, too little. It has been above all the short-circuiting of democratic deliberation—the judicial imposition in the name of "democracy" of a secularist orthodoxy—that has constrained the ability of Catholics and others to transmit their faith to their children and act on their convictions to shape a public environment—a moral ecology—in line with virtue as they conceive it—and as they would be prepared to defend it to their fellow citizens in open deliberation and fair democratic political contestation.

The Grand Finale is Just the Beginning: School Choice and the Coming Battle Over Blaine Amendments

*by Eric W. Treene**

The oral arguments in the Cleveland school choice case, *Zelman v. Simmons-Harris*, held on February 20, left choice supporters publicly encouraged and privately ebullient. After years of nudging the Supreme Court toward acceptance of the idea that the genuine and independent choices of parents to direct public aid toward private education do not "establish" religion, and years of being tempted by coquettish signals from the Court in *Rosenberger,*[1] *Agostini*,[2] and most recently in both the plurality and the concurring opinions in *Mitchell v. Helms*,[3] school choice activists now can barely contain themselves. While none yet dares declare victory, the bench appeared so skeptical of NEA General Counsel Robert Chanin's insistence that the program was jury-rigged to aid religion, and there was such a general sense in the air of the passing of an old order and the ascendancy of an idea whose time has come, that there is now more talk of whether the decision will be 5-4 or 6-3, and how fact-specific the Court's decision will be, than there is of whether school choice will be upheld.

If the Cleveland program is indeed held by the Supreme Court not to violate the Establishment Clause, the decision will rightly be heralded as a triumph opening the door to school choice across the nation. For it is the Court's Establishment Clause jurisprudence that has occupied center stage in the legal debate over school vouchers. It has been the Establishment Clause that has barred numerous well-meaning aid programs, like the special education services for kids in parochial school initially struck down in *Aguilar v. Felton*[4] and resurrected in *Agostini v. Felton*.[5] And it was the Establishment Clause that very well might have barred the modest tax deductions for private school expenses in *Mueller v. Allen*[6] and the government-paid sign language interpreter at a parochial school in *Zobrest v. Catalina Foothills School District*,[7] had these 5-4 decisions gone the other way. Given all of this—plus the fact that a plan of partial reimbursement for private school tuition, albeit of a markedly different character from the program being tested in the Cleveland case, had been struck down in 1973 in *Committee for Public Education and Religious Liberty v. Nyquist*,[8] it was quite natural that school choice activists and opponents formulating litigation strategies have honed in on the Establishment Clause. It also explains why the media as well have focused on the U.S. Constitution whenever school choice is discussed.

Moreover, the effort to overcome the Establishment Clause barrier has presented a nail-biting, fighting-for-every-beach-head battle full of high drama, adding to the sense that we are headed toward a great climax. School choice proponents had won an important victory in the Wisconsin Supreme Court upholding the Milwaukee voucher plan in 1998, despite fierce opposition by the teachers' unions and strict separationist groups.[9] This, coupled with the Arizona Supreme Court's decision upholding a tax credit for contributions to private school scholarship funds in January 1999, gave real momentum to the school choice movement.[10] Then two decisions came down in April and May of 1999 that dampened the enthusiasm. The Supreme Court of Maine[11] and the First Circuit[12] both ruled that that Maine's rural tuitioning plan, under which students in communities without high schools are given tuition grants toward education at a nearby private or public school, could not be extended to include private religious schools without violating the federal Establishment Clause. This discouraging development was quickly eclipsed by the June 1999 decision of the Ohio Supreme Court that the Cleveland voucher plan did not violate the Establishment Clause.[13] After the Ohio legislature modified the Cleveland plan to comply with some technical state law requirements, school choice opponents tried their luck in federal court, and persuaded District Court Judge Solomon Oliver to issue a preliminary injunction blocking the program on Establishment Clause grounds. The Sixth Circuit let it stand, but the Supreme Court reversed the injunction. Judge Oliver went on to invalidate the program on Establishment Clause grounds as expected,[14] and the Sixth Circuit then gave the High Court with an offer it could not refuse: it upheld Judge Oliver's decision,[15] leaving one interpretation of the Cleveland choice plan's constitutionality in state court and the opposite in federal court.

Which is all to say that should the Supreme Court uphold school choice, the decision will rightly be seen as the glorious end of a long and hard-fought struggle. But the end is just the beginning. Not that I will refrain from popping a champagne cork or two, and relishing the weeping and gnashing of teeth in the papers the next morning, but a victory on the Establishment Clause question is only the start of a long, state-by-state battle to roll back the barriers to school choice. And this is not a state-by-state battle only in the positive sense of placing the issue in the hands of the people of each state and their elected representatives, to enact or reject school choice plans as they may deem best. The next battle to a large extent will not be in the laboratories of democracy, but in the courts. While in some states school choice will simply be a hotly contested policy debate, in a majority of states there will be protracted legal battles over provisions that generally have been out of the public eye in the school choice debate: state constitutional restrictions on aid to religious schools, often known as Blaine Amendments.

Barriers to School Choice

Thirty-seven state constitutions have provisions placing some form of restriction on government aid to religious schools beyond that in the United States Constitution. The vast majority of these—legal scholars place the number at between 29 and 33 states[16]—were enacted in the wake of the failed attempt of U.S. House Speaker James G. Blaine to add a provision to the United States Constitution to bar states from giving any aid to religious schools. These state "Blaine Amendments" are modeled on the language of Representative Blaine's amendment, which would have provided:

> No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects or denominations.[17]

The Blaine Amendments are all variations on this basic text, and tend to be more specific that the "under the control of" language in the original. Delaware's Blaine Amendment (Article 10 § 3), for example, states: "No portion of any fund . . . shall be appropriated to, or used by, or in aid of any sectarian, church or denominational school." Missouri's (Article 9 § 8) is even more thorough, and emphatic, stating that no government body "shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever."

Some of the Blaine Amendments have little or no case law interpreting them. Others have been interpreted to be limited in scope. But many have been expansively construed to bar forms of school aid that the Supreme Court has expressly upheld under the Establishment Clause. The clearest example is the State of Washington, which, after the Supreme Court unanimously held in *Witters v. Washington Department of Services for the Blind*[18] that it would not violate the Establishment Clause for a blind man to use state vocational training aid to attend a seminary in ruled on remand that such aid would violate the state constitution's Blaine Amendment.[19] Similarly, bus transportation to private religious schools, upheld against Establishment Clause challenge in *Everson v. Board of Education,*[20] has been invalidated by state courts interpreting their Blaine Amendments,[21] as have textbook loan programs similar to the one upheld in *Board of Education v. Allen,*[22] and a proposed tax deduction for private school tuition similar to the one upheld in *Mueller v. Allen*.[23]

These Blaine Amendments thus potentially could derail school choice efforts in states throughout the country. Even if the Supreme Court were to catch us by surprise and invalidate the Cleveland voucher plan, Blaine Amendments could pose a threat to tuition tax credit and deduction plans, tax credits for contributions to scholarship funds, and other choice proposals. One survey of how Blaine Amendments have been interpreted found that seventeen states have "restrictive" Blaine Amendments, ten others have Blaine Amendments of "uncertain" interpretation, and eight states have Blaine Amendments "permissive" toward state aid.[24] If these numbers are correct, and our internal research at the Becket Fund to date tends to support them, then school choice will either be a non-starter in more than half the states or will at least face contentious litigation over the scope of such states' Blaine Amendments.

The most obvious strategy would be a case-by-case effort to convince courts that their state's Blaine Amendment should not be construed to bar aid to families that only reaches religious schools through parental choice. In some states with strictly interpreted Blaine Amendments, however, this will not be possible. The only choice in such states is to make the Blaine Amendments disappear as a factor entirely. This could be done by two means. The first is by state constitutional amendment. The second is for courts to find that applying Blaine Amendments to bar school choice violates the United States Constitution. While the latter may give some Federalists pause as federal overbearing on state autonomy, the Blaine Amendments, as will be shown below, were no ordinary constitutional amendments. They were a direct result of the nativist, anti-Catholic bigotry that was a recurring theme in American politics throughout the 19th and early 20th centuries. Indeed, in some cases, the Blaine Amendments adopted by states were themselves a result of federal heavy-handedness: the Congress required many states to adopt Blaine language as a condition for admittance to the Union.

The Blaine Amendments represented a deliberate attempt to suppress the growth of the Catholic schools, and give the public schools a monopoly on the inculcation of values with public funds. And the public schools of the time were markedly Protestant in character, undercutting any claim that they were based on lofty Madisonian motives of keeping government out of religious matters. As Justice Thomas said in his plurality opinion in *Mitchell v. Helms*, describing how the bar on aid to "sectarian" schools in the Supreme Court's jurisprudence derived from Blaine's amendment:

> [H]ostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow. . . . Opposition to aid to "sectarian" schools acquired prominence in the 1870s with Congress's consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that "sectarian" was code for "Catholic." . . . This doctrine, born of bigotry, should be buried now.[25]

An understanding of the nefarious history of Blaine's failed amendment and the state versions that followed is critically important to the school choice movement for three reasons. First, their true purpose should be brought to light and made clear to judges who are interpreting how a given Blaine Amendment's terms should be applied. Second, in any repeal efforts, it should be made clear to the public what these provisions are: remnants of 19th century bigotry hamstringing educational reform in the 21st century. And finally, as will be explained in greater detail below, the purpose behind the original passage of the Blaine Amendments makes them particularly vulnerable to challenge under the Free Exercise and Equal Protection clauses of the United States Constitution.

The Pre-Blaine Nativists and the Common School

The story of Blaine Amendments starts not with Blaine himself, but much earlier in the 19th century, for the wave of

nativist, anti-Catholic sentiment that he sought to exploit in the 1870s was but one of a series of nativist outbursts that ebbed and flowed throughout the 19th and early 20th Centuries.

During the first half of the 19th Century, with the growth the public or common schools, educators such as Horace Mann sought to ensure that the schools were non-sectarian. But by this they did not mean secular. They believed "that moral education should be based on the common elements of Christianity to which all Christian sects would agree or to which they would take no exception," including the "reading of the Bible as containing the common elements of Christian morals but reading it with no comment in order not to introduce sectarian biases."[26] As Horace Mann stated in 1848:

> [S]ectarian books and sectarian instruction, if their encroachment were not resisted, would prove the overthrow of the schools . . . . Our system earnestly inculcates all Christian morals; it founds its morals on the basis of religion; it welcomes the religion of the Bible; and in receiving the Bible, it allows it to do what it is allowed to do in no other system, to speak for itself.[27]

However, as Catholic immigrants grew in numbers throughout the nation, they began to raise the objection that what was called "non-sectarian" was in fact a form of "common" Protestantism focused on individual interpretation of the Bible.

In New York, this conflict between "non-sectarian" and "sectarian" religion came to a head in 1842. The New York Public School Society, which administered the common schools, could not appreciate Catholics' objections to required readings, without note or comment, of the "nonsectarian" King James Bible. The King James Version was strictly forbidden to Catholic children, who read the Douai version. They were thus forced to choose between disobeying their parents and priests or disobeying their teachers. Catholics also objected to textbooks describing Martin Luther as "the great reformer. . . . The cause of learning, of religion, and of civil liberty, is indebted to him, more than any man since the Apostles," and to others with passages openly disparaging "Popery."[28] Catholics proposed that a portion of the school fund be given to them for the support of their own alternative schools.

The Public School Society did agree to make certain proposed textbook revisions, but these failed to settle the controversy. After a series of fruitless meetings over proposed changes, the Public School Society's trustees expressed their frustration that, to the Catholics, "[e]ven the Holy Scriptures are sectarian and dangerous 'without note or comment'; and certainly no comments would be acceptable other than those of their own church."[29] The legislature attempted to end the controversy by enacting a law establishing a City Board of Education to establish free public schools, and barring the distribution of public funds to "sectarian" schools, legislation that was the precursor to New York's enactment of a Blaine Amendment to its constitution in 1894. The law also prohibited the teaching of sectarian doctrine in the public schools. This did not end the controversy, or make the public schools any less sectarian. The first Board of Education elected after the school controversy was supposedly settled hired a prominent nativist as Superintendent of Education, and the schools included daily readings from the Protestant Bible. Catholics objected, but the Board ruled that reading the Bible "without note or comment" did not constitute sectarianism.[30]

As the numbers of Irish, German, and other European Catholic and Jewish immigrants surged, nativist sentiments across the country did too, spurring the growth of organized nativist groups. In New York, nativist societies combined to form the American Republican Party in 1843, which evolved into the powerful (and national) Know-Nothing party in the 1850s.[31] The Know-Nothings, pledged to oppose Catholicism and support the reading of the King James Bible in the public schools, were active throughout the country and particularly strong in the Northern and border states, sending seventy-five Congressmen to Washington in 1854.[32] Abraham Lincoln wrote of the Know-Nothings:

> As a nation we began by declaring that "all men are created equal." We now practically read it, "all men are created equal, except Negroes." When the Know-Nothings get control, it will read "all men are created equal except Negroes and foreigners and Catholics." When it comes to this, I shall prefer emigrating to some country where they make no pretense of loving liberty.[33]

Nowhere, though, was the party more successful than in Massachusetts. The elections of 1854 swept the Know-Nothing party into power. Know-Nothings won the governorship, the entire congressional delegation, all forty seats in the Senate, and all but three of the 379 members of the House of Representatives.[34] Armed with this overwhelming mandate, they turned quickly to what Governor Henry J. Gardner called the mission to "Americanize America."[35] The Know-Nothings required the reading of the King James Bible in all common schools; they proposed constitutional amendments (which passed both houses of the legislature) that "would have deprived Roman Catholics of their right to hold public office and restricted office and the suffrage to male citizens who had resided in the country for no less than twenty-one years"; they dismissed Irish state-government workers; and they banned foreign-language instruction in the public schools.[36] The official bigotry is perhaps best—and comically—illustrated by the removal of a Latin inscription above the House Speaker's desk and the establishment by the legislature of a "Joint Special Committee on the Inspection of Nunneries and Convents."[37] This Committee was charged with the task of liberating women thought to be captive in convents and stamping out other "acts of villainy, injustice, and wrong . . . perpetrated with impunity within the walls of said institutions."[38]

Most notable with regard to the school choice issue is the fact that the Know-Nothings also succeeded in adding an amendment to the Massachusetts Constitution, a "Blaine Amendment" that predated Blaine's proposed U.S. Constitutional amendment by twenty years. It provided: "Moneys raised by taxation in the towns and cities for the support of public schools, and all moneys which may be appropriated by the state for the support of common schools . . . shall never be appropriated to any religious sect for the maintenance exclu-

sively of its own schools."[39] The amendment's proponents were open about their motives:

> Sir, I want all our children, the children of our Catholic and Protestant population, to be educated together in our public schools. And if gentlemen say that the resolution has a strong leaning towards the Catholics, and is intended to have special reference to them, I am not disposed to deny that it admits of such interpretation. I am ready and disposed to say to our Catholic fellow-citizens: "You may come here and meet us on the broad principles of civil and religious liberty, but if you cannot meet us upon this common ground, we do not ask you to come."[40]

A number of other states added pre-Blaine non-sectarian amendments to their constitutions during this period, including Minnesota (1857), Ohio (1851), and Wisconsin (1849). A number of other states passed similar measures in the form of legislation, but it would not be until the mid-1870s that the move to amend state constitutions would take hold in earnest.

James Blaine's Revenge

After becoming more muted during the Civil War and Reconstruction, nativism raged again in the 1870s. In 1875, President Grant decried the Roman Catholic Church as a source of "superstition, ambition and ignorance." Representative James G. Blaine, the speaker of the House of Representatives and a presidential hopeful, sought to capitalize on the resurgence of nativism by seeking passage of the amendment that bears his name. As the Supreme Court of Arizona so succinctly described the legislative history in *Kotterman v. Killian*[41]: "[C]ontemporary sources labeled the amendment part of a plan to institute a general war against the Catholic Church."

Blaine's amendment barely failed in the Congress, passing the House 180-7 but falling four votes short of the Senate. And Blaine's nativism came back to haunt him. His failure to distance himself from a prominent supporter in New York who gave an infamous speech condemning Democrats as the party of "Rum, Romanism, and Rebellion" was said to have cost him New York state and the presidency. But Blaine had his revenge, state by state.

Over the next fifteen years, states either voluntarily adopted similar "Blaine Amendments" to their constitutions,[42] or were forced by Congress to enact such articles as a condition of their admittance into the Union.[43] This period was marked by a sustained organized nativist movement with the growth of groups such as the Junior Order of United American Mechanics, who sought "to maintain the public-school system of the United States, and to prevent sectarian interference therewith [and] to uphold the reading of the Holy Bible therein."[44] Most prominent among these groups was the American Protective Association, whose oath included a pledge to "use my utmost power to strike the shackles and chains of blind obedience to the Roman Catholic Church from the hampered and bound consciences of a priest-ridden and church-oppressed people . . . that I will use my influence to promote the interest of all Protestants everywhere in the world that I may be; that I will not employ a Roman Catholic in any capacity if I can procure the services of a Protestant."[45]

This was the environment in which the Blaine Amendments were passed. Rather than being separationist measures in the spirit of Madison and Jefferson, they reflect the fears and prejudices of later generations and were indeed the very opposite of separation. They were unabashed attempts to use the public school to inculcate the religious views and values of the majority and to suppress minority, or "sectarian," faiths. As Professor Ira Lupu noted, reflecting on 19th century roots of 20th century doctrines barring the funding of religious schools: "The Protestant paranoia fueled by waves of Catholic immigration to the U.S., beginning in the mid-nineteenth century, cannot form the basis of a stable constitutional principle."[46] On a similar note, Professor Joseph Viteritti observes that:

> Although Blaine never won his party's nomination or secured passage of his controversial amendment, his name would live in perpetuity as a symbol of the irony and hypocrisy that characterized much future debate over aid to religious schools: employing constitutional language, invoking patriotic images, appealing to claims of individual rights. All these ploys would serve to disguise the real business that was at hand: undermining the viability of schools run by religious minorities to prop up and perpetuate a publicly supported monopoly of government-run schools.[47]

And just as the Supreme Court has affirmatively rejected the influence of the Blaine Amendments on the Court's jurisprudence—namely, as discussed above, Justice Thomas' rebuke that the "pervasively sectarian" doctrine grew out of the Blaine Amendments and that "hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow. . . . This doctrine born of bigotry should be buried now."[48]—so too should the Blaine Amendments themselves be viewed with singular suspicion today.

Freeing 21st Century Education Reform from 19th Century Anachronisms

Blaine Amendments are a formidable obstacle to school choice, with, as noted earlier, as many as twenty-seven being either strictly interpreted or having insufficient case law to know how much of a threat they pose. In the school choice cases decided thus far, they have not proven to be much of a barrier, which is perhaps a reason why they have been given such little attention by the media. The Ohio Supreme Court ruled, in *Simmons-Harris v. Goff,* that its Blaine Amendment (Section 2, Article VI of the Ohio Constitution), which states that "no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state" was not violated by the Cleveland school choice plan because school funds would only reach such "sects" through the "independent decisions of parents and students."[49] Similarly, in *Jackson v. Benson,* the Wisconsin Supreme Court found that its Blaine Amendment, which provides "nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries" was not violated by the Milwaukee school choice plan, because "for the benefit of," was to be construed strictly and did not apply to merely incidental benefits. Arizona's Supreme Court did not

merely give its Blaine Amendment a narrow construction, but suggested that the circumstantial evidence of its connection to the original Blaine Amendment undermined its validity. The court observed that "[t]he Blaine amendment was a clear manifestation of religious bigotry, part of a crusade manufactured by the contemporary Protestant establishment to counter what was perceived as a growing 'Catholic menace.'"[50]

The issue did not arise in the Maine Supreme Court in *Bagley* because Maine has no Blaine Amendment. In *Chittenden Town School District v. Vermont Department of Education,*[51] the Vermont Supreme Court did hold that school choice would violate the state constitution. But Vermont also has no Blaine Amendment. It rested its decision on the state's corollary to the Establishment Clause, which holds that no person "can be compelled to . . . support any place of worship . . . contrary to the dictates of conscience." While Ohio and Wisconsin's narrowing of their Blaine Amendments was encouraging, *Chittenden* suggests that even narrow language not directed at schools at all can be construed to encompass school choice.

There are three ways that Blaine Amendments can be eliminated as an obstacle to school choice: interpreting them narrowly, repealing them, or finding them to violate the United States Constitution.

1. Interpretation

Encouraging courts to interpret Blaine Amendments narrowly is a strategy that the Ohio and Wisconsin cases suggest can be successful. The growing awareness of the Blaine Amendments' connection to 19th century nativist excesses, reflected in the *Mitchell* decision, the Arizona Supreme Court's decision in *Kotterman*, and recent scholarship,[52] should be used by school choice activists to encourage courts to limit the interpretation of their Blaine Amendments.

The Becket Fund submitted a brief to the Washington State Supreme Court, which as noted earlier has a strict Blaine Amendment, urging the court not to use it to bar educational opportunity grants used at colleges with a religious affiliation.[53] We described the history of the Blaine Amendments generally and the adoption of Washington State's version, and, arguing that it was "a law with a shameful history," urged the court to avoid broadly construing it. We also argued that the court would, by adopting a narrow construction, avoid the constitutional questions of the sort described in section 3 below. We are awaiting a decision from the court.

This would be a particularly effective strategy in states where the case law interpreting a state's Blaine Amendment has been mixed. For example it is unclear whether New York's Blaine Amendment would be construed to bar school choice. The New York Court of Appeals struck down, in a 4-3 decision, the provision of bus transportation to parochial school children in 1938.[54] This was overturned by constitutional amendment the same year. In 1968, the Court of Appeals held that the loan of secular textbooks to parochial school did not violate the New York Blaine Amendment or the Establishment Clause in *Board of Education v. Allen*[55] (the Establishment Clause holding of which was affirmed by the U.S. Supreme Court). But the Court of Appeals decision in *Allen* was 4-3, and it is unclear how the court would rule on a school choice plan like Cleveland's today. Under these circumstances, the well-documented history of the school battles between nativists and Catholics throughout the 19th century in New York should certainly be brought into play, and may prove decisive.

2. Amending the Constitutions

A second way that the history of the Blaine Amendments can be used to open the door to school choice is through campaigns to repeal them. The rejection by voters in 2000 of proposals that included repeal of Blaine Amendments in California and Michigan should not be interpreted to mean that repeal efforts cannot generate popular support. The California initiative, Proposition 38, was a complicated amendment that did not merely alter the Blaine Amendment, but also wrote into the state constitution a voucher system that guaranteed every child in the state $4,000 in vouchers for private school, regardless of income. The Michigan initiative, Proposal 1, was likewise a complicated constitutional amendment that set up a voucher plan at the same time that it altered the Blaine Amendment.

A straightforward constitutional amendment to permit school choice would be much more likely to succeed. In particular, it allows school choice proponents to highlight the nefarious history behind the Blaine Amendment, and leaves the merits and specifics of school choice programs for another day. Such campaigns would present the simple argument that legislators should be free to consider or reject school choice on its merits, and not have the debate cut off by anachronistic measures from a dark episode in American history.

The Becket Fund is currently representing a group of Massachusetts parents who seek to amend the state's anti-aid amendment (which as noted earlier came earlier in the 19th century and is thus not technically a Blaine Amendment) to permit school choice measures such as vouchers and tax credits. Their initiative petition to get this question on the ballot, however, was blocked by a 1917 constitutional amendment that bars citizen initiative petitions that seek to alter or repeal the anti-aid amendment. This measure was added at a time when Catholic political power was growing in the state and many of the same fears and prejudices expressed in 1854 resurfaced. We have filed a federal suit on their behalf under the Free Exercise Clause and the Equal Protection Clause against enforcement of this discriminatory provision. Under a preliminary injunction permitting them to collect signatures as the suit proceeds, our clients gathered more than 80,000 signatures—well beyond the required number. A showdown ensued between the pro-choice House Speaker and the teachers'-union-backed Senate President, resulting in the measure being blocked from moving forward. Our lawsuit is scheduled for trial this summer. But a poll released by the Pioneer Institute at the time of the showdown in the legislature revealed that 58 percent of Massachusetts voters supported a constitutional amendment that would permit school choice legislation. The poll results suggest that while school choice remains contentious, when the issue is presented as a question of whether the legislature should even be permitted to take it up, people view the issue as one of democratic openness. When educated about the motives behind the Blaine Amendments, people will rightly see them for what they are:

barriers to the democratic process that were not based on the protection of fundamental rights and the rule of law, but which were in fact sheer exercises of power by a religious majority against a feared and despised minority.

3. U.S. Constitutional Challenges to the Blaine Amendments

The Blaine Amendments are vulnerable to challenge under the Free Exercise Clause and the Equal Protection Clause, both because of their discrimination against religious families and because of their sordid past.

The Supreme Court consistently has held that laws that discriminate on the basis of religion violate the Free Exercise Clause, most recently in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah.*[56] The Blaine Amendments, with only a few exceptions, do just that: they bar aid to religious or "sectarian" schools while permitting identical aid to secular schools. Such discrimination violates the Free Exercise Clause. In *Peter v. Wedl*,[57] the Eighth Circuit held that the Free Exercise Clause barred a town from denying aid to disabled children attending religious schools that they would receive if they attended private secular schools. The court in *Peter* noted that the type of aid at issue had been found to be constitutional by the Supreme Court under the Establishment Clause, and therefore separation of church and state concerns did not justify the discrimination. This holding is supported by the First Circuit's decision in *Strout v. Albanese*, discussed above, which held that Maine could exclude religious private schools from its rural tuitioning plan without violating the Free Exercise Clause, on the grounds that this discrimination was required by the Establishment Clause. But the First Circuit stated that had the voucher-like aid sought by the plaintiffs *not* violated the Establishment Clause, the state of Maine's discrimination against the plaintiffs would not be permitted. Thus if vouchers are found by the Supreme Court to be constitutional, such discrimination should be found to be a Free Exercise Clause violation. The Ninth Circuit has disagreed, however, finding on facts nearly identical to those in *Peter v. Wedl* that there was no Free Exercise violation in the denial of aid.[58]

Similarly, such discrimination constitutes a violation of the Equal Protection Clause. The Supreme Court has stated in *dicta* that religion is a suspect classification like race or alienage that is subject to strict scrutiny. Probably because of the availability of the Free Exercise Clause to litigants, though, it has never had to so rule. But the origins of the Blaine Amendments in nativist bigotry and a deliberate intention to suppress Catholic schools make the Equal Protection Clause a particularly appropriate vehicle for challenging them. In other Equal Protection cases, the Supreme Court has closely examined the purpose behind constitutional amendments. In *Hunter v. Underwood*,[59] the Court struck down an Alabama constitutional amendment disenfranchising people convicted of crimes of "moral turpitude," since it was demonstrated that the constitutional convention of 1901 that enacted the amendment was motivated by a desire to disenfranchise blacks. The passage of time, and the fact that the law was not implemented in the modern day with similar motivation, did not purge the taint of the constitutional amendment's origins. Also relevant is the Supreme Court's *Romer v. Evans*[60] decision, which found that a Colorado constitutional amendment barring local gay rights laws was motivated by irrational animus and thus could not survive even rational basis review. Certainly if the constitutional amendment at issue in *Romer* could not pass rational basis review, the Blaine Amendments, if *Romer* is applied with any degree of logical consistency, cannot possibly pass the strict scrutiny applied to suspect classifications.

Conclusion

If June brings good news from the Supreme Court, celebration is undoubtedly in order. But supporters of school choice must not believe we have moved on from the endless court battles and that the choice issue may join the educational reform dialogue on an equal footing with other proposals. A heavy set of shackles will have been removed, but there is yet another ball and chain to be dealt with: the Blaine Amendments, forged in dark nativism more than a century ago. By casting light on the true purpose of the Blaine Amendments and their discriminatory effect on religious families today, hopefully choice will eventually be permitted to stand or fall based on what it promises for the future, and not hobbled by the bigotry of the past.

Editor's Note: Since preparation of this article, the Supreme Court has sustained the Cleveland vouchers program in *Zelman v. Simmons-Harris.*

* Eric W. Treene: Senior Counsel, The Becket Fund for Religious Liberty, Washington, D.C. Portions of this article are drawn from the Becket Fund's amicus briefs in *Zelman v. Simmons-Harris* and *Mitchell v. Helms*, and I am particularly indebted to my colleague Roman Storzer, the principal author of the *Mitchell* brief. Both briefs are available at www.becketfund.org. All expressions of opinion are those of the author.

Footnotes

[1] *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995).
[2] *Agostini v. Felton,* 521 U.S. 203 (1997).
[3] *Mitchell v. Helms,* 530 U.S. 793 (2000).
[4] 473 U.S. 402 (1985).
[5] 521 U.S. 203 (1997).
[6] 463 U.S. 388 (1983).
[7] 509 U.S. 1 (1993).
[8] 413 U.S. 756 (1973).
[9] *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998), *cert. denied*, 525 U.S. 997 (1998).
[10] *Kotterman v. Killian*, 972 P.2d 606 (Az. 1999), *cert. denied*, 528 U.S. 921 (1999).
[11] *Bagley v. Raymond Sch. Dept.*, 728 A.2d 127 (Me. 1999), *cert. denied*, 528 U.S. 947 (1999).
[12] *Strout v. Albanese*, 178 F. 3d 57 (1st Cir. 1999), *cert. denied*, 528 U.S. 931 (1999).
[13] *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Oh. 1999).
[14] 72 F. Supp.2d 834 (N.D.Oh. 1999).
[15] 234 F.3d 945 (6th Cir. 2000).
[16] *See* Note, *School Choice and State Constitutions*, 86 VA. L. REV. 117, 123 n.32 (2000) (reporting the conclusions of several law review articles on how many state constitutional provisions are properly called Blaine Amendments). The number depends on how one classifies the language adopted by different states constitutions, which vary range in their similarity to the precise Blaine language, and on

how long beyond the mid-1870's enactment of such a measure should be termed a Blaine Amendment.

[17] LLOYD LLL JORGENSON, THE STATE AND THE NON-PUBLIC SCHOOL, 1825-1925, at 138-139 (1987).

[18] 474 U.S. 481 (1986).

[19] *Witters v. State Com'n for the Blind*, 771 P.2d 1119 (1989).

[20] 330 U.S. 1 (1947).

[21] *See, e.g., Epeldi v. Engelking*, 488 P.2d 860 (Idaho 1971), *cert. denied*, 406 U.S. 957 (1972).

[22] 392 U.S. 236 (1968). *See, e.g., California Teachers Association v. Riles*, 632 P.2d 953 (Cal. 1981); *McDonald v. School Bd. of Yankton Indep. Sch. Dist.*, 246 N.W. 2d 113, 117 (S.D. 1985).

[23] 463 U.S. 388 (1983). *See Opinion of the Justices*, 514 N.E.2d 353 (Mass.1987) (proposed bill to provide a tax deduction to parents for private and public school expenses would violate Massachusetts' Anti-Aid Amendment).

[24] *See* Frank R. Kemerer, *The Constitutional Dimension of School Vouchers*, 3 TEX. FORUM ON CIV. LIB & CIV. RTS. 137, 181 (1998).

[25] 530 U.S. at 828-829.

[26] R. FREEMAN BUTTS, THE AMERICAN TRADITION IN RELIGION AND EDUCATION 118 (1950).

[27] Report to the Board of Education in 1848, quoted in 2 ANSON STOKES, CHURCH AND STATE IN THE UNITED STATES 57 (1950).

[28] DIANE RAVITCH, THE GREAT SCHOOL WARS: NEW YORK CITY, 1805-1973, at 52 (1974).

[29] *Id.* at 50.

[30] *Id.* at 80.

[31] *See* LLOYD P. JORGENSON, THE STATE AND THE NON-PUBLIC SCHOOL, 1825-1925, 94-95.

[32] *Id.* at 71.

[33] Letter from Abraham Lincoln to Joshua Speed (Aug. 24, 1855), *reprinted in* 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 320, 323 (R. Basler ed., 1953).

[34] JOHN R. MULKERN, THE KNOW-NOTHING PARTY IN MASSACHUSETTS 76 (1990).

[35] *Id.* at 94.

[36] *Id.* at 102.

[37] *Id.* at 102-103.

[38] *Id.* at 103.

[39] MASS. CONST. amend. art. XVIII (superseded by MASS. CONST. amend. art. XLVI).

[40] OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE STATE CONVENTION ASSEMBLED MAY 4, 1853 TO REVISE AND AMEND THE CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS, Vol. II, at 630 (Mr. Lothrop).

[41] 972 P.2d 606, 624 (Az. 1999).

[42] *See, e.g.,* N.Y. CONST. art. XI § 3 (adopted 1894); DEL. CONST. art. X § 3 (adopted 1897); KY. CONST. § 189 (adopted 1891); MO. CONST. art. IX § 8 (adopted 1875).

[43] *See, e.g.,* Act of Feb. 22, 1889, 25 Stat. 676, ch. 180 (1889) (enabling legislation for South Dakota, North Dakota, Montana and Washington); Act of June 20, 1910, 36 Stat. 557 § 26 (1910) (enabling legislation for New Mexico and Arizona); Act of July 3, 1890, 26 Stat. L. 215 § 8, ch. 656 (1890) (enabling legislation for Idaho); S.D. CONST. art. VIII § 16; N.D. CONST. art. 8 § 5; MONT. CONST. art. X § 6; WASH. CONST. art. IX § 4, art. I § 11; ARIZ. CONST. art. IX § 10; IDAHO CONST. art. X § 5

[44] *Derry Council, No. 40, Junior Order United American Mechanics v. State Council of Penn.*, 47 A. 208, 209 (Pa. 1900).

[45] *Oath No. Four of the APA*, quoted in HUMPHREY J. DESMOND, THE A.P.A. MOVEMENT, A SKETCH 36 (1912).

[46] Ira C. Lupu, *The Increasingly Anachronistic Case Against School Vouchers*, 13 NOTRE DAME J. OF L., ETHICS & PUB. POL. 375, 386 (1999).

[47] Joseph P. Viteritti, CHOOSING EQUALITY 153 (1999). *See also* Nicole Stelle Garnett & Richard W. Garnett, *School Choice, the First Amendment, and Social Justice*, 4 TEX. REV. L. & POL. 301, 337-338 (2000).

[48] 530 U.S. at 828-829.

[49] 711 N.E.2d at 212.

[50] *Kotterman* v. *Killian,* 972 P.2d 606, 624 (1999).

[51] 738 A.2d 539, 547 (Vt. 1999), *cert. denied*, 528 U.S. 1066 (1999).

[52] *See, e.g.*, notes 16, 46 and 47, *supra*.

[53] Available at www.becketfund.org/litigate/WashBlaineBrief.pdf.

[54] *Judd v. Board of Educ.*, 278 N.Y. 200 (1938).

[55] *Board of Educ. v. Allen*, 20 N.Y.2d 109 (1967).

[56] 508 U.S. 520 (1993).

[57] 155 F.3d 992 (8th Cir. 1998).

[58] *KDM ex rel. WJM v. Reedsport Sch. Dist.*, 196 F.3d 1046 (9th Cir. 1999), *cert. denied*, 531 U.S. 1010 (2000).

[59] 471 U.S. 222 (1985).

[60] 517 U.S. 620 (1996).

The Federalism Side of School Vouchers

*by John C. Eastman**

By upholding Ohio's school voucher program against an Establishment Clause challenge to the inclusion of religious schools in the program, the Supreme Court issued what is easily the most significant case of the 2002 term. As a result of the decision, thousands of poor, often minority students will be able to escape the inadequate inner city public education.

The most far-reaching aspect of the decision comes not in the majority opinion, however, but in the concurring opinion by Justice Clarence Thomas. In what is becoming sort of a trademark in his jurisprudence, Justice Thomas has invited the Court to reconsider, "as a matter of first principles," the wholesale incorporation of the Establishment Clause against the states that occurred, without *any* analysis, in the 1947 case of *Everson v. Board of Education*. It is an invitation worthy of the Court's reply.

Contrary to many recent ACLU-driven court decisions, the First Amendment's prohibition on the Establishment of Religion was not drafted out of hostility to religion. It was drafted, rather, out of concern that the national government might interfere with existing state support of religion if it established a national church of its own. James Madison's first draft of what would ultimately become the Establishment Clause of the First Amendment prohibited Congress from establishing a national religion. During the debate, some Representatives contended that Madison's language did not give enough protection to religion as it was then supported in the states, and the language was ultimately changed to provide that *Congress* shall make no law *respecting* the establishment of religion, perfectly capturing the intended prohibition both of a national church and of federal interference with existing state support of religion.

None of this original purpose was considered by the Supreme Court when it held in *Everson* that the Due Process Clause of the 14th Amendment, adopted nearly 80 years earlier, actually required the federal courts to do the very thing that the First Amendment expressly forbade, namely, interfere with state support of religion. And not only interfere with it, but actually to prohibit any state support of religion whatsoever.

After the last decade of revival of a jurisprudence of federalism, it should be clear just how serious an intrusion on states rights this "incorporation" of the Establishment Clause really is. It is an axiomatic principle of constitutional law that one of the key powers not delegated to the federal government but reserved to the states is the power to regulate the health, safety, welfare and morals of the people – the so-called "police" power. The Founders believed that the effective exercise of this power, particularly the focus on the morals of the people, was critical to developing and sustaining the kind of virtuous citizenry they thought necessary to the perpetuation of our republican form of government.

Yet the Founders also believed that reliance on and support of religion was a critical component of the exercise of this core state power. Indeed, as President George Washington noted in his Farewell Address, "reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle." Pennsylvanian Benjamin Rush was even more blunt: "Where there is no religion, there will be no morals." The famous Northwest Ordinance, enacted by the Continental Congress in 1787 and re-enacted by the very first Congress—the same Congress that approved the Establishment Clause of the First Amendment—declared: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."

The Founders' views on religion in the states are thus fundamentally incompatible with the strict separationist view of the Establishment Clause that has prevailed in the Supreme Court over the past half century. Whether or not that view is legitimate vis-à-vis the federal government, its application to the states clearly constitutes an intrusion on state sovereignty that makes the other intrusions that have recently given the Supreme Court pause look like child's play. Worse, depriving the states of one of the essential tools, if not *the* essential tool, in their police power arsenal has proved a recipe for disaster. As Justice Thomas noted, it may well be that state action with respect to religion should be evaluated on different terms than similar action by the Federal Government. His proposed test is a simple one: "While the Federal Government may 'make no law respecting an establishment of religion,' the States may pass laws that include or touch on religious matters so long as these laws do not impede free exercise rights or any other individual religious liberty interest." That test gives full protection to the religious liberty interests of the Free Exercise Clause that are properly made applicable to the States via the Fourteenth Amendment, but also protects the States ability to rely on religion—its most potent tool—when fulfilling its police power obligation to protect the health, safety, welfare and morals of the people. If the Court accepts Justice Thomas's invitation, we may finally find the means to reverse the moral decline of our nation and restore to our citizenry the kind of moral virtue our nation's founders thought critical to sustain our republican form of government.

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TELECOMMUNICATIONS

KILLING THE MESSENGER:
PENNSYLVANIA'S NEW CHILD PORNOGRAPHY STATUTE IS AIMED AT THE WRONG PARTIES

*BY ANDREW G. MCBRIDE & KATHRYN L. COMERFORD**

The "network of networks" that is the Internet has proven an incredibly powerful medium for the organization and dissemination of vast amounts of information in a wide variety of formats. For many users, the Internet is library, theatre, mall, newspaper, and workplace all rolled into one. As the Supreme Court has recognized, "[i]t is no exaggeration to conclude that the content on the Internet is as diverse as human thought."[1] The dark side of this diversity is the use of the Internet to disseminate harmful and illegal material, such as child pornography. On February 21, 2002, the Commonwealth of Pennsylvania enacted a new section 7330 of the state criminal code, which requires an Internet service provider ("ISP"), upon five days' notice, to remove or disable access to content determined by the state officials to constitute "child pornography items."

Although the goal of eradicating child pornography is unquestionably a laudable one, the means Pennsylvania has chosen to pursue this goal conflict with provisions of the federal Communications Act, and are of dubious constitutionality. In this situation, the medium is not the message, and ISPs should not be forced to police content on the Internet in a manner that will suppress legitimate speech and constitute Pennsylvania as the nationwide arbiter of appropriate Internet content.

The New "Internet Child Pornography" Law. Pennsylvania's new Internet child pornography law is unprecedented in scope. At its core, the new statute provides:

> An Internet Service Provider shall remove or disable access to child pornography items residing on or accessible through its service in a manner accessible to persons located within this Commonwealth within five business days of when the Internet Service Provider is notified by the Attorney General . . . that child pornography items reside on or are accessible through its service.[2]

The law requires only an *ex parte* showing that information available on the Internet "constitute[s] probable cause evidence" of a violation of Pennsylvania's child pornography laws.[3] The statue provides for a series of graduated criminal penalties for ISPs that fail to block Internet content designated under the law, including felony treatment for a third offense.[4] As discussed below, a survey of the new law's key provisions demonstrates that it suffers a host of flaws that render its enforcement highly problematic under federal law and the Federal Constitution.

Section 7330 defines "Internet Service Provider" broadly to include any "person who provides a service that enables users to access content, information, electronic mail or other services offered over the Internet."[5] This definition reaches not only traditional commercial Internet access services (such as AOL or Verizon.net) but could easily extend to any physical location that provides Internet service, such as coffee shops, hotels, and non-profit entities, including universities and public libraries. Under the new Pennsylvania law, any of these businesses or organizations could be required to alter its services to preclude access to material that *might* violate Pennsylvania's child pornography law.

Even as applied to traditional commercial ISPs, the duties imposed by the Pennsylvania law are breathtaking. An ISP "must remove or disable the [alleged child pornography] items *residing on or accessible through* its services," *id*. at § 7330(g)(3)(iii) (emphasis added). This means the ISP is not only responsible for content it creates, or even content that its users create through web pages that are hosted on the ISP's own servers. Rather, the statute purports to require the ISP to disable or remove content "accessible through" its services, which includes every information storage device connected to the Internet. This is rather like making the Librarian of Congress responsible for the content of every copy of every book registered with that depository, wherever the copy is actually located.

Nor does Pennsylvania's new law contain any geographic limits on its reach. The only required geographic nexus to Pennsylvania is the requirement that the ISP make the items inaccessible to users located within the Commonwealth. Thus, under the new law, Pennsylvania could require a library located in Texas to disable its web page's search engine if that search engine would enable a Pennsylvania resident to access alleged child pornography created and uploaded to the Internet in Nebraska. Presumably, the law applies to content from other countries as well. Because ISPs do not possess the technology necessary to identify and selectively block content to Internet users located only in Pennsylvania, what Pennsylvania law enforcement officials ban under this law is banned nationwide (and perhaps even worldwide). With the emergence of wireless access to the Internet through readily portable devices, isolating "Pennsylvania Internet users" is impossible under current technology.

Finally, there is no mechanism for the Pennsylvania Attorney General to review and update the order based on the ever-changing landscape of the Internet. Thus, despite expressly disclaiming that Section 7330 "impos[es] a duty on an Internet Service provider to actively monitor its service or affirmatively seek evidence of illegal activity,"[6] it apparently places the onus on the ISP to determine whether a particular user or website has altered its content sufficiently that its dissemination would not violate a pre-existing notice under Section 7330. ISPs must thus become expert in identifying child pornography, with mistakes punishable by criminal sanctions.

Federal Immunity and Preemption. As part of the Telecommunications Act of 1996, Congress enacted Section 230 of the Communications Act. Section 230 grew out of a concern over individual states

holding ISPs liable for content created by others. Specifically, Section 230 broadly states that "[n]o provider or user of interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[7] Because enforcement of Pennsylvania's new law would, in effect, treat ISPs as publishers by holding them responsible for content created by others, it runs headlong into the federal immunity created by Section 230.

Numerous federal courts have held that Section 230 bars civil suits even where the plaintiff has previously notified the Internet service provider that allegedly unlawful content was stored or accessible through its service.[8] As the Fourth Circuit explained in the seminal opinion interpreting Section 230, as soon as an ISP receives notice of the allegedly unlawful content available on its service, "it is thrust into the role of a traditional publisher."[9] At this point, the ISP is in the same position as a publishing house that receives a threat of a libel or infringement suit based on the content created by one of its authors. This is exactly the situation that the federal immunity is meant to prevent. As the Fourth Circuit has put it, "[e]ach notification would require a careful yet rapid investigation of the circumstances surrounding the posted information, a legal judgment concerning the information's [unlawful] character, and an on-the-spot editorial decision whether to risk liability by allowing the continued publication of that information," which "would create an impossible burden in the Internet context."[10] The Pennsylvania law imposes exactly the kind of burden that Congress meant to eliminate in Section 230—ISPs are forced to police content created by the tens of millions of Internet users who can disseminate content directly or indirectly through their service.

While the broad immunity provided by Section 230 cannot be "construed to impair enforcement of . . . *Federal* criminal statute[s]," [11] there is no corresponding exception for state criminal laws. Indeed, Section 230 expressly references the federal child pornography laws, raising the inference that similar state laws are otherwise covered by Section 230's immunity provision unless expressly exempted. Federal courts have concluded that civil actions based upon the violation of state criminal laws, including state pornography laws, can be barred by the immunity created by Section 230.[12] Because Section 7330 treats ISPs as publishers of material and creates criminal liability on that basis, its enforcement is barred by the federal immunity created by Section 230.

Section 230 also contains an express preemption provision. That provision directs that "[n]o cause of action may be brought *and no liability may be imposed* under any State or local law that is inconsistent with [Section 230]."[13] Section 230 provides not only for immunity from republication liability, it also protects an ISP's voluntary decision to block (or to decline to block) access to "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable content." In these so-called "good Samaritan" provisions, Congress sought to place the decision whether to block content created by others in the hands of ISPs, to the exclusion of state or federal authorities. The goal of Section 230 is to create an environment where ISPs "self-regulate the dissemination of offensive material over their services."[14] Because the new Pennsylvania law supplants self-regulation in favor regulation by law enforcement authorities under penalty of criminal sanction, it is inconsistent with and frustrates the purpose of the federal law. [15]

Constitutional Concerns. In addition to raising serious questions under Section 230, Pennsylvania's new Internet child pornography law presents numerous constitutional problems, including concerns under the First Amendment and the Commerce Clause.

The First Amendment. Although child pornography is not protected speech,[16] the vast majority of content on the Internet is protected under the First Amendment. If access to the two—protected and unprotected speech—could be easily separated, there might be little cause for First Amendment alarm. Because they cannot be, enforcement of Pennsylvania's Section 7330 risks restricting access to protected speech and thus raises a serious threat of substantial overbreadth. This is particularly so where an *ex parte* showing of probable cause results in what appears to be a permanent ban of designated content from the Internet.[17] As the Supreme Court has explained, the probable cause standard is significantly lower than a preponderance of the evidence, and is best characterized as facts creating some probability that a proposition is true.[18] While temporary intrusions on liberty, such as search warrants or wiretaps might be based upon such a standard, Section 230 permanently bans content from the Internet based only upon this showing.

In addition, the new Pennsylvania statute ignores the reality that content stored at a single Uniform Resource Locator ("URL") or web address may be accessible through literally thousands of Internet avenues, including myriad search engines, newsgroups, electronic mail systems, and chat groups, that provide access to protected as well as unprotected speech. As the Supreme Court has noted, "these tools constitute a unique medium . . . located in no particular geographic location but available to anyone, anywhere in the world, with access to the Internet."[19] Furthermore, the "methods [of Internet retrieval] are constantly evolving and difficult to categorize precisely."[20] Because there is no simple way for an ISP to navigate through this labyrinth and isolate a single avenue to alleged unlawful content,[21] an ISP faced with a Pennsylvania order to cut off access to particular child pornography items will most likely be forced to shut down numerous avenues, which lead to protected as well as unprotected speech destinations.[22] Accordingly, although Pennsylvania's goal may be to "aim specifically at evils within the allowable area of government control," the means it chose to reach that goal—requiring an ISP to disable access to items beyond the ISP's control—is overbroad.[23]

Likewise, the statute shows no awareness on the part of Pennsylvania's legislators that a single URL address can contain numerous items, produced by independent authors, only one of which may be unprotected child pornography. This reality makes it difficult if not impossible for ISPs to comply with Section 7330 orders without the substantial risk of cutting off access to or removing protected speech. Although the underlying child pornography items created by individuals unconnected to the ISPs may provide a "core of easily identifiable and constitutionally proscribable conduct,"[24] the prohibited conduct of the *ISP* is not so easily identifiable. There is no explanation in the new law, for example, as to whether an ISP may maintain open access to a web site containing primarily protected speech even if it also contains a hyper-link to unprotected child pornography. Nor does the law make any allowance for an ISP to continue to offer access to a site that itself

contains a split screen, including separate child pornography and non-child pornography items. The Pennsylvania law shifts the burden to the ISP to devise a way to separate protected and unprotected speech. It is exactly this kind of blunderbuss approach to the regulation of speech that the First Amendment forbids. As the Supreme Court recently put it, "the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted."[25]

The Commerce Clause. In addition to running afoul of the First Amendment, Pennsylvania's new Internet child pornography law raises serious Commerce Clause concerns.[26] Because communications over the Internet are themselves interstate commerce, because users of the Internet participate in interstate commerce as Internet consumers, and because the Internet, as a conduit, is an instrument of commerce, there is no question that "the Internet fits easily within the parameters of interests traditionally protected by the Commerce Clause."[27]

First, there is a need for uniformity in regulating, or not regulating, this unique international medium,[28] as Congress has recognized in identifying the federal policy to "preserve the vibrant and competitive free [Internet] market, . . . unfettered by Federal or State regulation."[29] Pennsylvania's own attempt to regulate ISPs which, by virtue of the ambiguous and potentially broad reach of the "disable access to" mandate, forces Internet service providers located anywhere in the world to conform to the Commonwealth's child pornography laws, thwarts this uniform approach.[30] Second, Pennsylvania's local interest in applying its tort law to Internet communications is far outweighed by the strong federal interest in maintaining the Internet free of state regulation, particularly as to content. Congress made this calculation when it chose, through Section 230, to preclude state attempts to hold ISPs responsible for the content of others. Indeed, Section 230 reflects a congressional decision to strike the balance between *incentivizing* ISPs to create better screening technology and *forcing* ISPs to develop new technology through the threat of civil or criminal sanctions; Congress has chosen the former approach as a nationwide policy. Finally, because Pennsylvania's new law threatens to upset this balance and, through overreaching in light of present technology, risks "directly control[ling] commerce occurring wholly outside the boundaries [of the Commonwealth]," enforcement of the new law could "exceed the inherent limits of [Pennsylvania's] authority."[31]

Conclusion. Like many aspects of modern technology, the Internet has magnified both positive and negative aspects of the human experience. The Internet's great potential for legitimate commerce and the dissemination of art, literature, and news is matched by its a possible abuse as a tool for trafficking in contraband such as child pornography. Rather than continuing to attack those who knowingly create and traffic in child pornography, Pennsylvania has chosen to attack the medium itself. This approach promises little in the way of law enforcement gains and substantial losses in the areas of personal freedom to create and receive expressive content over the Internet. Because Pennsylvania's new law conflicts with federal law and raises serious constitutional questions, no court should sanction its enforcement. Rather, Pennsylvania in particular, and the law enforcement community in general, should direct their efforts at the sources of the noxious content, rather than the new mode of delivery.

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Kathryn L. Comerford, Associate, Wiley Rein & Fielding LLP. Ms. Comerford is a former law clerk to Justice Clarence Thomas and Judge J. Michael Luttig. The authors would like to thank Clint N. Smith, former Vice President and Chief Network Counsel at WorldCom, for his thoughtful comments on this article.

Footnotes

[1] *Reno v. American Civil Liberties Union*, 521 U.S. 844, 852 (1997) (internal quotation marks omitted).
[2] Pa. Stat. Ann. tit. 18, § 7330(a).
[3] *Id.* at § 7330(f).
[4] *Id.* at § 7330(c)(1)-(3).
[5] *Id.* at § 7330(j).
[6] *Id.* at § 7330(b).
[7] 47 U.S.C. § 230(c)(1).
[8] *See, e.g.*, *Zeran v. America Online, Inc.*, 129 F.3d 327 (1997); *Doe v. America Online, Inc.*, 783 So.2d 1010 (Fla. 2001); *Stoner v. eBay Inc.*, 2000 WL 1705637 (Cal. Sup. Nov. 7, 2000).
[9] *Zeran*, 129 F.3d at 332.
[10] *Id.* at 333.
[11] 47 U.S.C. § 230(e)(1) (emphasis added).
[12] *See Doe*, 783 So.2d at 1011-12 (holding that plaintiff's negligence claim based on the service provider's alleged permitting of a third party to violate Florida's criminal child pornography distribution statute was barred by Section 230).
[13] 47 U.S.C. § 230(e)(3) (emphasis added).
[14] *Zeran*, 129 F.3d at 331; *see also Blumenthal v. Drudge*, 992 F. Supp. 44, 52 (D.D.C. 1998) (explaining that Congress created federal ISP immunity "as an incentive to [ISPs] to self-police the Internet for obscenity and other offensive material, even where the self-policing is unsuccessful or not even attempted").
[15] *See English v. General Elec. Co.*, 496 U.S. 72, 79 (1990).
[16] *See New York v. Ferber*, 458 U.S. 747, 764 (1982).
[17] *Cf. Blount v. Rizzi*, 400 U.S. 410, 420 (1971) ("[I]t is vital that prompt judicial review on the issue of obscenity—rather than merely probable cause—be assured . . . before the [Government's] severe restrictions . . . are invoked.").
[18] *See, e.g.*, *Illinois v. Gates*, 462 U.S. 213, 235 (1983); *United States v. Arvizu*, 122 S. Ct. 744, 751 (2002).
[19] *Reno*, 521 U.S. at 851.
[20] *Id.*
[21] Indeed, as a federal court in California recognized in refusing to enforce a French order that would force Yahoo! to restrict all access by residents of France to Nazi items available through its service, it was technologically impossible for Yahoo! to limit access by a geographically limited set of users to particular content and items available through its service. *See Yahoo!, Inc. v. La Ligue Contre le Racisme et L'Antisemitisme*, 169 F. Supp. 2d 1181 (N.D. Cal. 2001).
[22] For example, in order to block access to offending material, an ISP might have to restrict access to an entire website. It might also have to disable search engines' ability to lead to that website by blocking any combination of words that would uncover the website. Many of these word combinations could lead to legitimate speech as well as child pornography.
[23] *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940). Moreover, the statute may well effect a prior restraint on speech to the extent it suppresses speech before viewers receive it. *See, e.g.*, *Blount*, 400 U.S. 410 (holding unconstitutional as a prior restraint provisions of postal laws that enabled the Postmaster General to halt delivery of mail to individuals). Such a prior restraint "'bear[s] a heavy presumption against its constitutional validity,'" *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)), and "'avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system,'" *id.* at 559 (quoting *Freedman v. Maryland*, 380 U.S. 51, 58 (1965)).
[24] *Maryland v. Joseph H. Munson*, 467 U.S. 947, 965-66 (1984).
[25] *Ashcroft v. Free Speech Coalition*, 122 S.Ct. 1389, 1404 (2002) (quoting *Broadrick*, 413 U.S. at 612).
[26] *See, e.g.*, *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 167 (S.D.N.Y. 1997); *Cyberspace Commun., Inc. v. Engler*, 142 F. Supp. 2d 827 (E.D. Mich. 2001); *PSINet, Inc. v. Chapman*, 108 F. Supp. 2d 611 (W.D. Va. 2000).
[27] *American Libraries*, 969 F. Supp. at 167, 173-74.
[28] *Reno*, 521 U.S. at 851.
[29] 47 U.S.C. § 230(b)(2); *see also id.* at § 230(a)(4) (finding that "[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of governmental regulation").
[30] *See, e.g.*, *American Libraries*, 969 F. Supp. at 183; *Wabash, St. L. & P. Ry. Co. v. Illinois*, 118 U.S. 557 (1886) (holding railroad rates exempt from state regulation because of the need for uniform national regulation).
[31] *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989).

The Future of American Spectrum Policy

*By FCC Commissioner Kathleen Q. Abernathy**

When I arrived at the Federal Communications Commission about a year ago — after stints in wireless, satellite, incumbent and competitive wireline telephony businesses, as well as in government — I had a pretty clear set of general regulatory principles.[1] Those principles continue to prove useful, but over the last few months I have devoted significant energy to organizing and honing my views on spectrum policy. There is a reason so many Commissions have struggled with this issue — it is extremely complex. But regardless of the difficulties, I believe I and the FCC have an obligation to tackle it.

My remarks today will focus on four areas: first, why spectrum management is important; second, the contours of the spectrum policy debate and the FCC's role; third, the key values and considerations I believe should guide that debate; and fourth, where we go from here. My goal is to provide a framework for my consideration of spectrum issues, give advocates a sense of my thinking, and hopefully contribute to the larger debate that continues on the Hill, in industry, and as a part of the FCC's own Spectrum Policy Task Force.[2]

I. Why is spectrum management important?

Although it may seem obvious, explicitly identifying the answer helps to guide and focus the spectrum debate.

In my view, spectrum is important because it is a finite natural resource with immense potential value to the American people. Fallow spectrum, in general, has little value. Developing the potential value of commercial spectrum is the task of private parties. So in many ways, the goal of the FCC is to create regulatory policies that foster effective investment to deliver services to the American people. If private parties don't invest, any intellectualized spectrum policy is meaningless, because the Commission must rely on the private sector to make it all happen.[3]

Making it happen is exactly what our licensees have done in many spectrum bands. The mobile phone industry is transforming Americans' lives, increasing penetration rates, continuing their build out, and driving innovation.[4] Our DBS satellite licensees have broken the monopoly hold of cable.[5] The unlicensed service bands are creating a vast series of wireless local areas networks that are solving the "last hundred feet" problem.[6] And that is only what is happening today; there is so much on the horizon for tomorrow.

II. The Contours of the Spectrum Policy Debate

So spectrum policy is important. But before setting out our path, it's important to figure out where we are today. As an FCC Commissioner, there is this temptation to think big — we should move this over there, grant these licenses this way, and behave like we have tens of megahertz of virgin undeveloped spectrum. Needless to say, that is not the case. The Commission's spectrum management policies must be implemented in the context of numerous restraints, some legal and some factual.

The Commission is limited by the scope of its legal authority over spectrum. In addition to the shared responsibility with NTIA,[7] the Commission's discretion is also statutorily constrained.[8] My job is not to question these constraints but rather to work within them. In addition to the legal limitations, we are also limited by the fact that the spectrum is largely encumbered. There are exceptions of course. The Commission recently initiated a rulemaking to develop rules for the 70, 80 and 90 GHz bands.[9] But these bands are a rare new frontier for U.S. spectrum policy. But most bands under our jurisdiction have significant incumbencies, which means that any new spectrum policy must be implemented with a recognition of the rights of incumbents.

Within these legal and factual limits, the FCC is charged with three main stages of spectrum decision-making. First, the Commission promulgates an allocation — for example, fixed or mobile, aeronautical or satellite. Second, the Commission develops service rules to guide the use of the spectrum within the confines of the allocation. Third, the Commission adopts a method for distributing the rights (defined by the allocation and service rules) to private parties. In performing these tasks, the FCC also must exercise its fundamental responsibility to limit harmful interference to spectrum users.

I will examine each of the three roles played by the Commission. Unfortunately, I believe there has been a "squish problem" in the spectrum policy debate. Advocates tend to squish all the respective roles and stages of spectrum policy together. This undermines policymakers' ability to focus on the tasks at hand. So, in an effort to prevent the "squish problem," I will assess each aspect of the policy process separately.

A. Allocations

Spectrum policy making at the FCC begins with an allocation. The radio spectrum is divided into blocks or bands of frequencies for categories of services. Allocation decisions, more than any other aspect of spectrum decision-making, is closely linked to international decision-making. For example, it may do little good for the United States to allocate a spectrum band for an international non-geostationary satellite service, unless the rest of the world is prepared to do the same. This global approach is necessary because non-geostationary satellites must have the ability to traverse the globe and utilize roughly the same spectrum bands in each country in order to be viable. Even outside the satellite context, harmonized international allocations can create the scale economies that are essential for the private sector to invest resources in, and in turn for Americans to be able to utilize, the spectrum resource. In this regard, the International Telecommunications Union ("ITU")[10] process, and the World Radio Conferences in particular, play a significant role in spectrum management.[11] Therefore, United States leadership in these forums is essential to robust spectrum management that opens the door to innovation and fosters successful markets.

There was a time when allocations — like most spectrum management — were very detailed and narrow. For example, an allocation would allow for Fixed Point-to-Point Microwave and nothing more. Times have changed at the Commission; the Commission is increasingly inclined to grant broad and flexible allocations where internationally permitted to do so. Now allocations are more often very broad, for example, including all fixed and mobile uses. Gaining such flexibility has been, and continues to be, our goal in international fora, such as the ITU. I believe this is clearly the right approach.

B. Service Rules

We have similarly evolved in our approach to service rules. There was a time when the Commission would decide that a licensee would provide mobile wireless services to the forestry industry in this band and load at least "X" number of mobiles per base station within "Y" months. Thankfully, that approach has now changed. Today the Commission uses its broad discretion in crafting service rules in the public interest to grant far more flexibility to our licensees.

A couple quick caveats that apply to both the trend toward flexible service rules as well as flexible allocations:

First, the Commission remains committed to preventing harmful interference. If the Commission is going to create an environment conducive to investment and deployment, we must recognize that service providers and investors need to understand the rules of the interference road. Knowing the rules of the road will also allow private parties in the marketplace to negotiate private interference protection arrangements where they advance the parties' interests. Nonetheless, government may itself eschew flexible allocations and service rules in order to prevent harmful interference through some spectrum "zoning" that attempts to group similar types of allocations and services together to maximize overall utility.

Second, Congress has limited the Commission's authority to decide on a license distribution mechanism based on the type of allocation or service rules involved. So, for example, spectrum allocated and used for international satellite services cannot be distributed via auction.

Bottom line: To the extent the Commission has discretion to act, the Commission will generally grant significant flexibility in the allocation and service rule stages of spectrum policy. However, interference concerns and/or distribution considerations may limit that flexibility.

C. Rights Distribution

Over the years the FCC's spectrum rights distribution mechanism has evolved — from first-come, first-served to comparative hearings; from lotteries to auctions. This has largely resulted from shifts in the Commission's statutory authority and mandate.[12] As a result, there is no current uniformity in the distribution mechanism used across spectrum bands — even among like services. While today's broadcaster may pay at auction, yesterday's did not. Cellular licensees did not pay, PCS did.

In response, I believe policymakers should make the "Legacy Concession." That is, we cannot go back and make everyone equal — and it will tie us in knots if we try. Instead, the Commission must maximize the public interest from where we sit today. Although I recognize what may appear to be the "unfairness" of this approach, I have been unable to develop any paradigm that would allow us to achieve retroactive uniformity. So I believe making the "legacy concession" is a condition precedent to a productive discussion of future spectrum policy.

To summarize: There is widespread agreement that flexibility in allocations and service rules advances the public interest, and the Commission has substantial discretion in formulating the bundle of rights associated with that flexibility. In developing these rights, however, interference protection remains one of our paramount concerns. Once the allocation and service rules have been developed consistent with interference protections, the Commission then must determine how best to distribute that bundle of rights. This third decision point is where Congress has most limited the agency's discretion and where some of the most heated spectrum battles are likely to be waged in the years ahead.

III. The Key Battleground in the Spectrum Debate: How to Decide Who Gets the Rights?

A. To License or Not to License?

So what is FCC licensing?

It's a way of government distributing a good and sanctioning its appropriate use.

What should be the Commission's goal?

To maximize the efficiency of commercial spectrum use by promptly getting as many rights as possible into the marketplace, while protecting licensed uses from harmful interference.

Two effective paradigms for rights distribution are: (1) private property rights; and (2) the "commons." Although the U.S. economy provides examples of each — and a number of blended examples — I believe these two paradigms are useful in analyzing spectrum policy.

First, an example of the property rights paradigm: Land is distributed through market-based mechanisms and, in a second step, government sanctions the appropriate use of that land through zoning, building permits, and liability rules. The rules provide protection against owners who may otherwise be able to externalize costs to other, often adjacent, land owners.

Second, government may distribute rights via the "commons" model by allowing some goods to be enjoyed by all people so long as certain government-sanctioned norms are followed. So, for example, while land is largely distributed by a market-based private property mechanism, the use of the roads that connect private lands is sanctioned as a common. So long as users obey certain government imposed norms — don't speed, use a safe vehicle, have reasonable eyesight, have insurance — users are free to use the common.

The distribution of rights to spectrum can be analyzed as a continuum between these two paradigms; from a full property rights model to a pure commons model.

B. Law or Technology Triumphs?

The private property-like rights model is a lawyer's dream, in which spectrum rights are distributed like any other piece of property. Ideally this occurs mostly in a secondary

market with limited government involvement. But full implementation of this model is foreclosed by the statutory bar on ownership interests in spectrum licenses. The Act's Section 301 states: "It is the purpose of this Act to provide for the use of such channels, but not the ownership thereof."[13] In recent years, however, the Commission has utilized the flexibility granted under the Act[14] to move towards a quasi-property rights model (*e.g.*, the auction process).[15] Under the property-like approach, maximizing flexibility in service rules and allocations serves the public interest by allowing the "property" to be developed to the greatest degree. The "property" is then sold to the highest bidder in a very efficient auction process, and the government role is complete. The market in spectrum becomes a series of secondary transactions with little government intervention.

In contrast, the pure commons approach, as exemplified by the FCC's unlicensed bands, is an "engineer's dream." The unlicensed bands do not provide for any real interference protection or for any exclusive licensee rights to spectrum. Instead, guided by some technical limitations, the bands are open to all comers so long as they operate approved equipment. This openness eliminates the entry barrier created by the auction price in the property-like rights model, but creates a different kind of barrier by imposing the more detailed technical rules of the common. In unlicensed bands, users rely on technology to overcome the risk of the traditional tragedy of the commons by engineering their devices so as to avoid any harmful interference. Traditionally, property rights theorists have noted that "commons," absent adequate safeguards, are inherently prone to suffer from the "tragedy of the commons."[16] In other words, communal use will result in such reckless abuse or overuse by individual users (who have minimal individual interest in the health of the common) that the common may become useless to the whole group. In the spectrum context, full implementation of a true common — that is, without any restrictions on use — would similarly render it virtually impossible for anyone to responsibly invest in equipment in the band. However, like commons operated by government today, such as parks and roads, spectrum commons can and have survived through more restrictive allocations and service rules that inhibit an individual's ability to spoil the common for the whole.

One observation on the commons model — lawyers are not as comfortable with it because it's very messy! Terms of use are less clear, interference from other services is always possible, and this approach sometimes relies on future technological developments for survival. These characteristics make the commons unpredictable and an act of technological faith. These are not characteristics favored by lawyers. Similarly, the capital community can be nervous about the lack of property rights associated with a core business input like spectrum. I believe it is important to emphasize, however, that one of the challenges faced by the agency is to overcome this inherent skepticism in order to secure full acceptance of the commons model as a consistent, viable, yet distinct, alternative to licensed use.

IV. Where do we go from here?

In light of these two polar views of spectrum policy, what is a regulator to do?

The Commission is well served by utilizing both the property-like rights approach and the commons model. Just as a city has private land linked together by common roads and parks, so too may the spectrum community enjoy and fully utilize both private property and the commons.

A. Licensed Spectrum

What should be the guiding principles of licensed spectrum policy?

In order to maximize spectrum utility, the FCC should endeavor to get spectrum rights rapidly into the hands of those who can use them most completely.

The first and fundamental policy question is whether the band should be licensed or unlicensed. As set out above, I believe the Commission should utilize both models. For ease of intellectual administration, I have separately set out the policy process for licensed and unlicensed bands below. The initial decision as to which model should apply will depend in large part on the current supply and demand for each type of service in the current marketplace at the time the rights are to be distributed.

The method for achieving this goal will depend largely on the nature of the bands involved.

1. Virgin Spectrum Bands

For virgin bands to be licensed, the Commission must determine whether the likely potential uses are mutually exclusive of one another. Mutual exclusivity is important because it is the statutory trigger as to whether the Commission is required to auction the spectrum (although of course there are statutory exceptions).[17]

a. Mutually Exclusive Applications

Flexibility in the Commission's service rules and allocations makes predicting the types of uses likely in a given band very difficult. Without any certainty about the types of services that would be offered in the band, it is virtually impossible to state that mutual exclusivity will not occur. Therefore, in order to maintain the viability of flexibly allocated bands with similarly broad service rules, the Commission generally presumes mutual exclusivity and requires an auction. This ensures that any resulting licensee will be free to provide its service of choice and gives licensees flexibility to allow the services to evolve to higher valued uses over time.

Auctioning also requires us to address the auction exemptions. We have a number of ongoing dockets looking at these issues, but I will only note that there should be auction-exempt spectrum specifically designated for public safety, non-commercial and educational broadcasters, and international satellite services. But we must not allow the existence of these exemptions to undermine flexibility.

b. Non Mutually Exclusive Applications

There are rare cases where the allocation, the service rules, or the nature of the technology are so discrete and narrow that the Commission can say with certainty that mutually exclusive applications will not be filed. In those cases, the Commission should move promptly to distribute the rights. There

has been a tendency within the FCC to feel compelled to auction everything. Although that approach has an appealing symmetry, it is not what the statute requires, and it does not fit every factual circumstance. So, while I believe auctions do offer an efficient rights distribution mechanism, it does not mean all auctions all the time.

2. Spectrum with Incumbencies

In the vast majority of spectrum proceedings, the FCC will be faced with incumbents occupying the band. The FCC will be asked to evaluate whether new services should be permitted into the band either to share with the incumbent or to supplant it.

When faced with incumbent licensees in this situation, the Commission should first ask itself: What is the bundle of rights associated with the current licensee? Licensees must be granted certainty about the bundle of rights they have acquired to enable investment and innovation.

Once government affirms the bundle of rights held by the incumbent, the Commission must turn to the advocates of the new services. Does the incumbent hold the rights to the spectrum use proposed? If the answer is yes, I believe one possible approach is to allow the advocates of the new service to negotiate with the rights-holding incumbent to obtain (or not obtain) the necessary authorization.[18] Of course this policy preference is only possible if there is an effective secondary market for spectrum — a topic I will return to in a moment.[19]

If the answer is no, that is, if the incumbent does not hold the rights to the spectrum use proposed, then we turn to the next inquiry.

a. Is Sharing Possible?

Are the proposed new uses mutually exclusive with the current use? In other words, would sharing result in harmful interference or substantial efficiency losses?

There are times when this question is easier to answer than others. For example, if the incumbents' or new entrants' rights are extremely narrow, it is easy to assess the potential for sharing.

The most difficult aspect is defining what rises to the level of harmful interference? Or what rises to the level of substantial loss of efficiency? This analysis is further complicated when the proposed new uses represent a new technology or are not clearly defined.

I'm not going to address those issues here. My goal is to sketch out a spectrum policy decision tree — not to draw the leaves on every branch. I will save these questions for another day, but they do represent a significant spectrum management challenge.

i. Sharing is Possible

If sharing is possible, then I believe the Commission should treat the subset of rights available as a "virgin" spectrum resource and handle them as described above. So if a domestic satellite use can be made available without harmful interference or substantial efficiency losses to the incumbent terrestrial licensee, the Commission should get those rights into the hands of commercial interests as set out above.

ii. Sharing is Not Possible

If sharing is not possible, the Commission is faced with another question: Should the incumbent be forcibly moved, or should the proposed new rights be granted to the incumbent? When granted discretion, I begin with the presumption that relocation of incumbent service providers is complex, imposes costs on the economy, takes time, and may undermine investment incentives. Moreover, I am generally very reluctant to insert government into the marketplace on the basis of some asserted "better understanding" of what is the "right" service offering in a band.

Nonetheless, there may be cases where government is fairly certain that a new use is more highly valued than the current use or that the incumbent would not rationally exercise the rights if they were granted to them. I have defined three situations where it may be justifiable for government to forcibly relocate incumbents: (a) Failure of the Secondary Market; (b) the Irrational Holdout Problem; and (c) Temporal Urgency.

(a) Failure of the Secondary Market

Granting incumbents rights that they may not themselves use works only if there is an effective secondary market in spectrum rights — something we do not have today. Absent a secondary market, incumbents may be unable to sell the additional rights, thus preventing spectrum from evolving to its higher valued use. There may be situations where the sheer number of incumbents or their identity (such as public safety licensees) may also inhibit a secondary market. In these cases, forced relocation may be the only way to maximize utility through the introduction of new services. Obviously if the incumbents will utilize the rights themselves, the importance of a secondary market in rights distribution is less significant.

Nonetheless, our secondary markets proceeding is an essential piece of our future spectrum policy. We must have secondary markets (that will withstand judicial scrutiny) if the property-like rights-driven license model is to succeed. We must overhaul the antiquated test set forth in *Intermountain Microwave;*[20] we must speed spectrum transactions that do not raise competitive concerns; and we must facilitate spectrum leasing. The secondary markets proceeding is therefore critical to effective spectrum management.[21]

(b) The Irrational Holdout Problem

The irrational holdout problem is one reason government has the power of eminent domain — to prevent any individual property holder from irrationally blocking the property from evolving to its most valued use. This can be a real problem even in fully functioning markets. So, on rare occasions, the Commission should be prepared to step in to force holdouts out of a band. If the secondary market is functioning, however, I generally believe the Commission should do so only reluctantly, and on a case-by-case basis.

(c) Temporal Urgency

Finally, government may consider forcible relocation when there is some temporal urgency. Sometimes markets take time to develop and, in extremely rare circumstances, the Commission may need to intervene to enable the offering of some new service immediately essential to the public welfare.

To the extent we ultimately force relocation, we presumably would have already identified potential uses and implemented a relocation scheme that keeps incumbents

whole. We would then move to assess the allocation, service rules, and license distribution issues described above.

B. Unlicensed Spectrum

As I mentioned before, on the other end of the spectrum continuum from the property-like rights/licensed approach we have the commons/unlicensed approach. Unlicensed spectrum services are the first spectrum-based services at the broadband party. And our history of regulatory restraint in these bands provides a useful lesson in the benefits of allowing nascent services to develop.[22] Unlicensed devices have rapidly become commonplace in the American home and office.[23] They are relied upon for many everyday functions in consumers' lives, encompassing appliances from cordless phones, computers, baby monitors, garage door openers, and PDAs to wireless local area networks.

To take one example of this growth, in 1990 there were only 50 authorizations for unlicensed spread spectrum devices, compared to close to 350 authorizations in 2000.[24] Recently, the Synergy Research Group reported that the Wireless LAN market posted its eighth consecutive quarter of double-digit growth and grew by more than 150 percent from 2000.[25] It was estimated that 5 million Wireless LAN adapters were shipped in 2001.[26] It has also been predicted that 21 million Americans will be using Wireless LANs by 2007.[27] Today, millions of unlicensed devices are in operation, either independently or complimenting licensed services. Ironically, this explosion of services and providers was largely unanticipated when unlicensed services were first authorized. In fact, the flexibility afforded licensees was largely a function of the initial lack of interest in these bands. Our challenge will be to exercise such restraint when everyone knows the stakes are high. Regardless of how we got here, unlicensed spectrum services dramatically illustrate the power of spectrum-based services and effective regulatory policy.

1. The Rules of the Common

The success of the unlicensed approach (as with licensed services) depends in large part on the Commission's willingness and ability to clearly define the rules that govern the service. This is important if capital is to flow to service providers, and, in turn, services are to reach the American people. The threat of the tragedy of the commons is real. And the Commission must recognize that risk and respond accordingly if it is to protect the vital contribution of unlicensed services.

But we also must be clear what the unlicensed bands are not. They do not create property-like rights but rather focus on communal use. Some will be tempted to change the common into individual property by squatting or other forms of adverse possession, and we must not give in to the temptation to transform these spectrum rights. Instead we must protect their inherent communal nature without restricting use to the point of creating quasi-property rights for individual uses or users.

The Commission does have considerable discretion in creating allocations and service rules and then distributing rights via the designation of a band as "unlicensed."[28] Part 15 and the use of unlicensed devices began in 1938 and continued more or less along a consistent path through 1989.[29] In 1989, the Commission added additional flexibility to the types of devices eligible for certification and opened the 2.4 GHz band to unlicensed development.[30] In 1997, the UNII bands at 5 GHz were added to the mix.[31] Today additional spectrum around 60 GHz and 76 GHz are available for unlicensed use and additional bands in the 70, 80, and 90 GHz bands are under consideration.[32]

In supervising these bands or designating new ones, our rules should be as clear as practicable, strictly enforced, and maximize utility. Some commons may have more stringent rules than others, where such rules justifiably allow for diverse uses. People don't drive their cars on the bike trails, or have picnics in the middle of a highway. But each is a valuable common, and society benefits from the picnickers and drivers so long as they are in the appropriate spot with similarly-situated neighbors.

I also believe there is significant benefit to internationally harmonizing unlicensed bands where practicable. Unlicensed bands benefit from the scale and scope that international harmonization can provide. The FCC must lead the international effort to ensure U.S. commercial interests are advanced through global harmonization of licensed and unlicensed bands.

Finally, we must resist the temptation to constantly change the rules of the common and therefore undermine investment. The commons is a precarious place. Although the temptation at times will be great, constantly changing rules do not benefit anyone. We must endeavor to craft rules in the first instance that allow for technological advancement without a technological train wreck. Our rules should be flexible and agile to provide the foundation on which to continue to build an industry.

2. New Commons?

Once we have established the types of rules necessary, the question remains when and where to implement spectrum commons.

Based on limitations in our statutory authority, I believe government currently is unlikely to force the relocation of existing licensees to permit unlicensed use. Most significantly, it is not clear that government would be prepared — or is currently authorized — to pay the price tag for moving incumbents to create a common. Unlike the property-like rights model, which has new entrants willing to pay at auction to relocate incumbents, government creates and maintains the commons — and only government is currently available to pay the price to move incumbents. There may come a day when, like a state building a new highway, government will pay auction revenue or tax dollars to relocate spectrum licensees to make way for common use. Going forward, I think the FCC and the industry must think creatively about what can be done on the regulatory side — and the industry and Congress must similarly think creatively on the statutory side. We must assess where and how new commons opportunities can be created.

In addition to relocation, the FCC could establish a commons through an overlay authorization. Under this regime, the Commission concludes that sharing between current users and unlicensed devices is possible and issues corresponding technical rules. Any sharing should be designed so as to allocate only those rights not granted to existing licensees. So, for example, when the Commission permitted Ultra Wide Band devices, it concluded they would operate below the current noise

floor and would not cause harmful interference.[33] I am generally skeptical of these types of overlay unlicensed operations because of the difficult technical issues involved and the degree to which they may diminish the property-like rights associated with licensed services. Nonetheless it remains another way to develop additional unlicensed services.

Finally, there are some finite opportunities to create additional commons in virgin spectrum. The Commission must first make a call about the most valuable use for a given band. In reaching this policy, the challenges faced by the unlicensed community are somewhat unique: The decision to allocate to unlicensed use must almost absolutely be made as part of the initial allocation and service rules. Plus, the unlicensed community by definition will not "own" the spectrum rights. Thus, there is little incentive for any individual company to invest in advocacy for the creation of a commons — a challenge similar to that faced by the environmental community seeking to buy land as communal green space. So, there is some imperative for the unlicensed community to organize and to identify potential virgin bands extremely early in the process and then press for designation for unlicensed use. I think it is fair to say that between the positive experiences with the rights-driven model and the revenue associated with spectrum auctions, the quest for additional unlicensed bands from virgin spectrum may prove difficult.

The power of the unlicensed bands — and the corresponding boom in consumer utility — is one of the great success stories of U.S. telecommunications policy. I think we have learned important lessons from those experiences that can inform and shape future spectrum policy.

Conclusion

The importance of our spectrum resource commands a thoughtful and deliberate approach to its management. The United States cannot afford to use spectrum inefficiently or allow it to lay fallow. Although difficult, the task of developing a new spectrum management paradigm is not insurmountable. Rather, we must build on what we have learned, be creative in our policies, and focus on maximizing spectral use to maximize the public interest.

* Commissioner Abernathy was nominated by President George W. Bush on May 1, 2001. She was unanimously confirmed by the Senate on May 25, 2001, and sworn in as FCC Commissioner on May 31, 2001. Her term ends June of 2004. Before her appointment to the FCC, Commissioner Abernathy was Vice President of Public Policy at BroadBand Office Communications, Inc.; a partner in the Washington, DC, law firm of Wilkinson Barker Knauer, LLP; Vice President for Regulatory Affairs at U.S. West; and Vice President for Federal Regulatory Affairs at AirTouch Communications. She was also legal advisor to FCC Commissioner Sherrie Marshall and Chairman James Quello. Major portions of this article were originally part of two spectrum policy speeches delivered in July 2002. For the full text of those remarks and other information on Commissioner Abernathy, visit her website at www.fcc.gov/commissioners/abernathy/.

Footnotes

[1] Kathleen Q. Abernathy, *My View from the Doorstep of FCC Change*, 54 Fed. Comm. L. J. 199, 199-223 (2002).
[2] *See* Spectrum Policy Task Force — FCC Homepage (available at < www.fcc.gov/sptf/#sec3>).
[3] Obviously spectrum is also vital to non-commercial activities, such as homeland security, radio astronomy and amateur radio. Moreover, the Department of Commerce, through NTIA, administers spectrum utilized by the federal government. While these spectrum users are significant, they are subject to a distinct set of policy considerations outside the scope of this article.
[4] *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993/Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, Seventh Report*, FCC No. 02-179, at 4-5 (rel. July 3, 2002).
[5] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Eighth Annual Report*, CS Docket No. 01-129, at 4, 17 FCC Rcd. 11,579 (rel. June 14, 2002).
[6] *Sixth Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, FCC No. 01-192, at A11-13 (rel. July 17, 2001).
[7] *See* Communications Act of 1934, as amended, 47 U.S.C. § 902 (hereafter "the Act").
[8] *See, e.g.,* 47 U.S.C. § 309 (j) (auction exemptions for international satellite, public safety).
[9] *See generally Allocations and Service Rules for the 71-76 GHz, 81-86 GHz and 92-95 GHz Bands*, WT Docket No. 02-146 (rel. June 28, 2002); Commissioner Kathleen Q. Abernathy, *Separate Statement Re: Service Rules for Use of the 71-76 GHz, 81-86 GHz and 92-95 GHz Bands, Notice of Proposed Rulemaking* (adopted June 13, 2002) (available at: <www.fcc.gov/commissioners/abernathy/statements2002.html≥).
[10] *See* International Telecommunications Union Homepage (available at < www.itu.int/home/≥).
[11] *See* 2003 World Radiocommunication Conference — FCC Homepage (available at <www.fcc.gov/wrc-03/≥).
[12] *See* 47 U.S.C. § 309(j).
[13] *See, e.g., id.* § 301.
[14] *See id.* § 151 *et seq*.
[15] *See, e.g., id.* § 309(j).
[16] *See* Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).
[17] 47 U.S.C. §§ 309(j)(1) & (6)(E)(2000).
[18] There may be rare circumstances under which government could become involved in this process if the new entrant's service were designed to compete with the incumbent's service.
[19] For a general discussion, *see In the Matter of Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, Notice of Proposed Rulemaking*, WT Docket No. 00-230, 15 FCC Rcd. 24,203 (rel. Nov. 27, 2000) ("Secondary Markets NPRM").
[20] *Intermountain Microwave*, 24 Rad. Reg. (P&F) 983.
[21] *See* Secondary Markets NPRM.
[22] *See generally* The Nascent Services Doctrine, Remarks of Kathleen Q. Abernathy before the Federal Communications Bar Association, New York Chapter, July 11, 2002 (available at <www.fcc.gov/Speeches/Abernathy/2002/spkqa217.html>).
[23] *See Amendment of Part 15 of the Commission's Rules Regarding Spread Spectrum Devices*, ET Docket No. 99-231, at 56, 17 FCC Rcd. 10,755, (rel. May 30, 2002).
[24] Equipment Authorization Statistics compiled by Office of Engineering and Technology, Federal Communications Commission, 2000.
[25] Synergy Research Group, *Worldwide WLAN Equipment Market Grew 150% in 2001* (available at <www.synergyresearchgroup.com/2-25-02.html≥).
[26] Joanne Jaffe, *Wireless Data LANs*, Communications Week Int'l, Dec. 17, 2001.
[27] Michael Pastore, *Big Years Ahead for WLAN Market* , Markets Wireless, Feb. 14, 2002 (available at <cyberatlas.internet.com/markets/wireless/article/0,,10094_974711,00.html≥).
[28] *See generally* 47 C.F.R. § 15 (2001).
[29] *Id*.
[30] *Amendment of Parts 2 and 15 of the Rules with Regard to the Operation of Spread Spectrum Systems*, Gen. Docket No. 89-354, 5 FCC Rcd. 4123 (rel. July 9, 1990).
[31] *Amendment of the Commission's Rules to Provide for Operation of Unlicensed NII Devices in the 5 GHz Frequency Range*, ET Docket No. 96-102, 12 FCC Rcd. 1576 (rel. Jan. 9, 1997).
[32] *Allocations and Service Rules for the 71-76 GHz, 81-86 GHz and 92-95 GHz Bands*, Docket No. WT 02-146, 17 FCC Rcd. 12,182 (rel. June 28, 2002).
[33] *Revision of Part 15 of the Commission's Rules Regarding Ultra-Wideband Transmission*
Systems, RM-98-153, 17 FCC Rcd. 7435 (rel. Apr. 22, 2002).

New Communications Technologies and Winning the War on Terror

*By Edward Hearst**

In winning the war on terror, the West has the option of confronting radical Islam with what it fears most, access for the citizens of Islamic nations to a free flow of ideas and information. One of the best weapons we have at our disposal is an aggressive and calculated use of the World Wide Web.

Supporters of radical Islam attack the West in part because they fear the people they seek as adherents will find the ideas, rights, culture or practices in the West more attractive than what the extremists are preaching. This is the real clash of civilizations, one that radical Islam is losing. Even in friendly Islamic countries like Pakistan and Saudi Arabia, traditional or theocratically focused educational systems create the basis for confrontation between civilizations. Controlled presses that publish false or misleading information about the West fan the flames of hatred.

Recent technological developments give us the opportunity to change all this. The U.S. and its allies now have an opportunity to reach opinion leaders and the people more broadly in many Islamic nations. This is a result of the unprecedented spread of content and number of users on the World Wide Web, new and inexpensive distribution technologies, and new software innovations that allow secure communications.

New distribution technologies can make the Web widely available. Satellites can now enable people anywhere in the world to access the Internet through a dish similar to that used for satellite television. New wireless web technologies are such as Wi-Fi or Ultra-Wideband allow very low cost wireless networks.

New developments in software are also having a significant impact on this equation. One fear of potential Web users in the Islamic world is that oppressive governments or religious police will block access to unapproved information or even take action against those who seek out or discuss new ideas. There are now Web technologies that allow users overseas to surf web pages anonymously. There are also companies that serve as middlemen between the end user and a web site and encrypt information to and from a users' computer. Pretty Good Privacy (PGP) is an encryption technology that allows private communications via e-mail between two users who have installed PGP and have access to a secret key.

The result of these new developments is that Internet can be used to undermine the hatred, ignorance, and distortions of radical Islam that help provide the recruits, finance and political support for terrorism. Something similar was done in the Cold War through an earlier technology, radio. Radio Free Europe and the Voice of America played a critical role in undermining Communism behind the Iron Curtain.

A key question facing policy makers is whether the West will take a passive approach with respect to promoting a free flow of ideas, or whether it will take a proactive approach as it did in the Cold War. When the Defense Department recently floated the idea of creating an office to put forward its take on events, it was immediately shot down in the press as a propaganda office.

This new form of public diplomacy is an innovative way for the U.S. to implement an offensive information warfare strategy. Such a strategy could include tactics already in the arsenal. For example, the U.S. and its allies can create and support targeted Web sites and chat rooms to make available the views of moderate Islamic scholars, thus providing information useful to those who might want to challenge the radicals.

We can also combat the negative impact of government-inspired newspapers and television in much of the Islamic world which fan hatred of the West by translating and posting on the Web objective newspaper articles both from sources in Islamic nations and the Western press. Translating and organizing existing stories will not create the same political firestorm, and will have more credibility, as having the government write the stories.

The U.S. can support the creation of Web sites that "out" or expose those individuals, charities or companies that financially or politically support radical Islam in a way we could not do officially as a government. These could be interactive sites where people can anonymously enter information in chat rooms and bulletin boards.

Congress can also mandate that our international aid and financing programs be used to promote the distribution networks and infrastructure to expand access to the Web in countries where radical Islam has made inroads.

Using new technologies to promote our national security interests is also consistent with our fundamental principles of promoting democracy overseas. It is time for our government to use the technological and informational resources our democratic, free market system has created.

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Implications of the Supreme Court's *Verizon v. FCC* Decision

*By Adam Thierer**

Telecommunications deregulation suffered a serious setback on May 13 when the Supreme Court handed down its eagerly awaited decision in *Verizon Communications v. Federal Communications Commission*, and held that federal regulators could continue to force incumbent local telephone companies to share elements of their networks with rivals at heavily discounted rates. Although it remains unclear how big a blow the ruling will be to ongoing industry liberalization efforts, it will certainly make the transition to a free market in telecom services more difficult than was previously expected.

The case was significant because it offered the Court the chance to rule on the constitutionality of infrastructure-sharing rules that the FCC put in place almost six years ago, and in the process, to help bring an end to the constant legal wrangling and litigation nightmare that has followed the passage of the Telecommunications Act of 1996. Importantly, this is the second major case to reach the Supreme Court regarding the FCC's implementation of the interconnection and network access provisions of the Telecom Act. In its 1999 decision, *AT&T Corp. v. Iowa Utilities Board*, the Court partially overturned the sweeping FCC mandates on the sharing of unbundled network elements (UNEs) owned by Regional Bell Operating Companies, or "Baby Bells."

The Court's latest decision in *Verizon v. FCC* looked at the other half of the equation: how to determine just compensation for the Bells when they are forced to share UNEs with competitors. Specifically, the Court reviewed the pricing methodology the FCC devised to determine what network "costs" and investments would be compensated. The cost model the FCC invented to accomplish this is known as TELRIC, which stands for "total element long-run incremental cost." This model is highly controversial because it estimates costs by imagining what it might cost to construct and operate a hypothetical, efficiently designed network from scratch. Was the FCC's cost model fair? Did it adequately compensate the Bells? Did TELRIC encourage enough industry investment? On all these questions the 7-1 majority for the Court ruled in the affirmative and vindicated the FCC's six-year effort to divine "costs" through some rather creative regulatory reasoning and controversial economic models.

As hordes of economists have pointed out in recent years, however, a fairy tale regulatory model like TELRIC does not mesh with economic reality since it fails to account for the actual costs of building and maintaining networks. As a consequence, TELRIC poses a threat to industry investment, innovation, and genuine *facilities-based* competition. Alfred Kahn, noted regulatory economist and former chairman of the Civil Aeronautics Board, has referred to the logic behind TELRIC as "regulatory arrogance" and argued in Cato's 1998 book *Regulators' Revenge,* "By their meddling, under enormous pressure to produce politically attractive results, regulators have violated the most basic tenets of efficient competition—that it should be conducted on the basis of the respective actual incremental costs of the contending parties; and it is that competition, rather than regulatory dictation, that should determine the results." Likewise, technology guru George Gilder argued in a *Wall Street Journal* editorial last August, "Like any price-control scheme, TELRIC choked off supply, taking the profits out of the multibillion-dollar venture of deploying new broadband pipes." That regulatory system, Gilder added, discourages broadband investment by "privatizing the risks and socializing the rewards." Moreover, he said, "No entrepreneurs will invest in risky, technically exacting new infrastructure when they must share it with rivals." In addition to concerns about economic efficiency and investment incentives, the Baby Bells argued that TELRIC rules represented an unconstitutional taking of their property by forcing them to surrender space on their networks at generously discounted rates that failed to compensate them for their historic investments.

Sadly, only Justice Stephen Breyer gave those arguments any credence. It should be noted that Justice Breyer was a respected expert on the law and economics of regulation long before he joined the Court and is the author of *Regulation and Its Reform*, a standard textbook for students of the regulatory process. This expertise shined through in Breyer's scathing dissent to the majority decision in which he raised the important question of whether there was any rational connection between the regulations the FCC promulgated and the Telecom Act's stated goal of deregulating this sector. As Breyer argued: "The problem before us—that of a lack of 'rational connection' between the regulations and the statute—grows out of the fact that the 1996 Act is not a typical regulatory statute asking regulators simply to seek low prices, perhaps by trying to replicate those of a hypothetically competitive market. Rather, this statute is a deregulatory statute, and it asks regulators to create prices that will induce appropriate new entry." Breyer goes on to correctly note that FCC's TELRIC pricing rule and UNE requirements, "bring about, not the competitive marketplace that the statute demands, but a highly regulated marketplace characterized by widespread sharing of facilities with innovation and technological change reflecting mandarin decision-making through regulation rather than decentralized decision-making based on the interaction of freely competitive market forces. The majority nonetheless finds the Commission's pricing rules reasonable. As a regulatory theory, that conclusion might be supportable. But under this deregulatory statute, it is not."

The majority for the Court didn't buy any of these arguments but downplayed the negative disincentives posed by such infrastructure sharing and simply deferred to the FCC's "by any means necessary" crusade to encourage new rivals to enter this marketplace. Through its actions, the agency has essentially proclaimed that a numerical nose count of new entrants is more important than network investment and genuine facilities-based competition. The wisdom of that policy has been put to the test by economic theorists and in the actual business market and has been found wanting.

In a comprehensive survey of the Competitive Local Exchange Carrier market, Brookings Institution economist Robert Crandall has found that: "CLECs are best able to produce revenue growth by building their own networks or significant parts of their own networks. CLECs that only resold the establish carriers' services were generally unable to convert investments into revenues, and these companies were likely to fail." So the Supreme Court's decision cannot change the fact that network sharing has not been a very good business model. On the other hand, the decision perpetuates that model and encourages companies to continue to petition the regulators to rig the rules in favor of generously discounted access to existing and future communications networks and technologies. One cannot help but shudder at the thought of years of additional regulatory proceedings on this matter and wonder what the implications will be for long-term investment and innovation in the U.S. telecommunication sector.

But all hope is not lost. Led by the deregulatory-minded chairman Michael Powell, the FCC is currently pursuing several proceedings that question the wisdom of some of these rules. With any luck, Powell will receive the support of his superiors in the Bush Administration in this endeavor and begin to roll back the destructive regime of price controls and infrastructure-sharing mandates that threaten the new investment and innovation in communications infrastructure that America so desperately needs.

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Book Reviews

States' Rights and Social Progress: A Review of *Contempt of Court: The Turn of the Century Lynching that Launched a Hundred Years of Federalism* by Mark Curriden & Leroy Phillips, Jr.

*By Josiah B. Brownell**

Contempt of Court: The Turn of the Century Lynching that Launched a Hundred Years of Federalism is a fascinating and important narrative on a topic that has been largely ignored in the literature. It is both a jurisprudential history of one of the seedlings of modern constitutional federalism, and a powerful human drama with obvious biblical parallels about innocence, fear, racism, vengeance and a grave injustice.

On the jacket of "Contempt of Court" the publisher states that the book is written "[i]n the tradition of *Gideon's Trumpet"* and so it is that this book takes on much the same form as that book and others in this genre. It is a well written and thoroughly researched narrative that examines a topic that had up to this point been buried within the yellowing pages of the *United States Reports*. The authors, a journalist and a trial attorney, tell with passion the story of the trial, appeal, and eventual lynching of a black man, Ed Johnson, accused of raping a white woman in turn-of-the-century Chattanooga, Tennessee.

Ed Johnson denied he attacked the woman and provided names of people who would corroborate his alibi. Nevertheless, he was arrested and charged with the rape on the basis of one unconvincing eye-witness sighting. The state court trial that followed was littered with what today would be obvious constitutional defects and Johnson was quickly convicted by the all-white jury and sentenced to death.

Johnson's lawyers, after their appeal was rejected by the Supreme Court of Tennessee, filed a petition for habeas corpus review in federal court on the bases of alleged violations of Johnson's federal constitutional rights. The lower federal court declined to rule, but stayed the execution until Johnson had the opportunity to submit an appeal to the Supreme Court of the United States. The Supreme Court agreed to hear the appeal and telegrammed the state officials informing them of the lengthened stay of execution pending appeal to the high court. The next night, as news of the stay spread around the community, a lynch mob formed outside the jail and with the acquiescence of the responsible state officials, entered the jail and lynched Ed Johnson. On Johnson's dead body a sign was hung reading: "To Justice Harlan. Come get your nigger now."[1]

The defiance infuriated the justices of the Court and in response, the Court held a hearing to decide if they had jurisdiction to charge members of the mob and certain state officials with contempt. The Court ruled that they had the requisite jurisdiction and began the unprecedented contempt trial of nine people, who included both members of the mob and the state officials responsible. This hearing still constitutes the only time the high court has ever heard a criminal trial. At the conclusion of this unorthodox trial, the Supreme Court found six people guilty of contempt of court and sentenced them to jail. This unique trial was also the only time the Supreme Court has ever enforced its own ruling.

The Contempt of Court title obviously refers to the charges the final six defendants were convicted of, and in addition, the title applies to the contempt that the residents of Chattanooga felt for the "meddling" of the Supreme Court into affairs they viewed as the exclusive prerogative of the state of Tennessee and the city of Chattanooga. It also applies to the federal government's, and the authors', contempt for the Chattanooga trial court that convicted Ed Johnson.

In the preface, the authors reveal the subtext of the book. The authors appear to view the Chattanooga court that convicted Ed Johnson in 1906 as rather indicative of how state courts operated, and perhaps still operate. There is a subtle condemnation of the dual federal system as something inherently flawed as evinced by this passage:

> The events in the book culminate in a unique and historical trial before the nation's highest tribunal. They represent a step in the long march of African-Americans seeking freedom, equality, and justice. The story provides unique insight into our dual criminal justice system, that of state and federal courts.

The inclusion of the last sentence in the context of the paragraph leads one to conclude that the "insight" provided in regards to the dual criminal justice system is that it is quite seriously flawed. The sentence is not in past tense and presumably must refer to the current dual system, which is impliedly still thwarting the advancement of "freedom, equality, and justice."

At the time of the appeal, the rights afforded individuals under the Bill of Rights were not binding upon state criminal courts. The Habeas Corpus Act of 1867 created a means for defendants to appeal state court convictions to federal courts to seek relief if they believed their imprisonment was in violation of their federal constitutional rights. These constitutional violations, however, were viewed very narrowly at the time and did not encompass much of what are considered violations today. The lynching obviously halted the Court from hearing the appeal and having to decide the case. The potential impact of the case if the court held that Johnson's federal constitutional rights were violated, would have been enormous. But as history would have it, that is mere conjecture.

Almost all of the alleged rights that were violated in the Johnson case have later been held to be binding on the states. This case, though stopped prematurely, proved to be a seedling of modern constitutional criminal procedure. Afterwards, the federal courts began to intervene more vigorously in

state court matters, although most authorities would argue that the causation between this case, in which the actual legal precedent set was limited, and the subsequent rise in federal power is somewhat attenuated[2]. The subtitle of the book suggests that the incidents that took place in the book "Launched a Hundred Years of Federalism", but the authors do not make a convincing argument that they did. The authors seem mostly to rely on the falacious reasoning of *post hoc ergo propter hoc*— after this, therefore because of this. The model set forth in the contempt case, while it delivered a strong public message, was never again followed. The lynching was important more because of the increased awareness it raised of the injustices of mob law, rather than its establishment of any legal groundwork for federal intervention. This, of course, does not discount the effect this increased awareness had on subsequent events, and in that way, the outrage over the lynching, more than the actual legal case, seems to have been the seed that was planted that led to the dramatic increase in federal involvement in state criminal trials.

But to praise the planting of a seed does not, however, prevent one from supporting the pruning and trimming of that tree once it becomes overgrown. The inroads made by the federal government into the sphere of state affairs have increased manifold since (and at least partially because of) the Johnson lynching. This state of affairs has in many ways been beneficial to the realization of the rights of the downtrodden, but it is not the unqualified success the authors make it out to be. The habeas corpus petition filed by Johnson's lawyers was a rarity at the time and a legal long-shot, but today such petitions have become a matter of course. In fact, there is probably a valid cause for a malpractice or an ineffective assistance of counsel claim if *not* filed in a state capital case. The flood of habeas corpus petitions over the years in part prompted the passage of the Antiterrorism and Effective Death Penalty Act of 1996, that attempted to stem the tide. Because of the constant flow of habeas corpus petitions, it now seems to be the case that even state supreme courts have been reduced to the status of the lower courts of the United States, a situation that makes a mockery of our federal system.

States' rights arguments have unfortunately been viewed by many as merely a transparent justification for the oppression of minorities. Upon a superficial historical survey, the factual backgrounds of the great federal-state power struggles that have dominated so much of our history seem to bear this out. This view of history, which the authors of this book seem to share, is overstated as it seems to teleologically point to the gradual growth of the federal government and the concomitant withering away of the anachronistic sovereignty of the states. This is viewed by proponents as an unqualified victory of progress over regress, of enlightened inclusiveness over racism, and of the common good over parochial self-interest. As a result, the persistent march of the federal government in our history is viewed by many as a triumph of not only a more efficient form of government, but a system that is morally superior to the federal system of dual sovereignty originally put in place by our founders. This is perhaps one of the "insight[s]" into the dual system that readers are supposed to come away from this book with. These sentiments, however, are too simplistic and discount the deeper political and theoretical issues involved in these struggles.

The dual system of government was originally viewed as a buffer for the protection of individuals from undue central government interference. In the minds of the Founders, and in the minds of many today, the states play an important role in defending the people against an overbearing federal government. Contrary to widespread belief, the states are not always and inherently more reactionary than the federal government. A obvious example of this can be shown through the recent controversy over same-sex marriages, where following a Hawaiian court ruling allowing the practice, the United States Congress immediately stepped in and limited the impact of the state ruling through federal legislation. This is perhaps only the most glaring example. Federal courts have interpreted the thresholds of federal constitutional rights as a basement, not a ceiling. Consequently, many state constitutions provide much greater protections than those required under the federal constitution. There are many structural advantages to the dual federal system that was wisely put in place by the Founders that are too often overlooked and disregarded for reasons of political expediency and short-sightedness.

The federal intervention into the Johnson case was wise and it was moral, as were many of the other interventions since then. However, the unfettered growth of federal power since the Johnson lynching is not an unqualified positive, but instead the "Hundred Years of Federalism," celebrated in the book's title as an almost utopian period in America's legal history, has in many ways threatened the very nature of our federal system.

Despite its subtitle, "Contempt of Court," does not delve as deeply into the political ramifications of the evolving federal-state relationship following the Johnson lynching as perhaps it should. Nonetheless, the book is important because it draws attention to a dramatic and tragic story and uncovers a long forgotten origin of modern criminal procedure. It is a compelling daguerreotype of race relations, the justice system, and society as a whole in the South around the turn of the century and it deserves a choice spot on the bookshelf not only of legal scholars, historians, and sociologists, but anyone interested in the history of our country.

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Footnotes

[1] The trial and death of Ed Johnson in many ways paralleled Jesus Christ's trial and execution as described in the New Testament. In addition to many other similarities, such as the bloodthirsty mobs, the politically savvy government officials who signed off on both their deaths, and the remarkable serenity of both victims when facing death, the sign that was stuck into Ed Johnson upon his death reads in the same mocking style and was intended to deliver the same message as the sign that was hung above Jesus Christ's crucifix during his execution that read : *Iesus Nazarenus, Rex Iudaeorum* (I.N.R.I.) - "Jesus Christ, King of the Jews."

[2] This point is made in great detail by Daniel Hoffman professor in the Department of Social Sciences, Johnson C. Smith University, in his review of the same book for the Law & Politics Book Review. http://www.polsci.wvu.edu/lpbr/subpages/reviews/curriden.html.

Punitive Damages: How Juries Decide by Cass R. Sunstein, Reid Hastie, John W. Payne, David A. Schkade, and W. Kip Viscusi

*By Deborah J. LaFetra**

Tort reformers look at outrageously large punitive damages as one of the most visible signs of a justice system gone awry. The rule of law depends on consistent remedies applied to tortious wrongs. Instead, the newspapers trumpet punitive damage awards in ever-increasing amounts, leading many pro-reform commentators to label the phenomenon, "Jackpot Justice." The anecdotes have become familiar: the old lady who got millions from McDonald's after she spilled hot coffee in her lap while driving; the BMW paint touch-up worth $4,000 in compensatory damages and $4 million in punitive damages, and the granddaddy of them all: the $145 billion tobacco verdict.

The most frequently suggested reform is a cap on the amount of punitive damages, either an absolute dollar amount or a multiple of the compensatory damages awarded in the case. Another suggested reform is to make punitive damages awards payable in whole or in part to the state or some fund other than the plaintiffs' pocket. The results of the studies in this book, however, suggest that these types of reform will, at best, remedy certain symptoms of a dysfunctional punitive damages award system, but still largely ignoring the root causes of wildly varying awards.

Authors Cass R. Sunstein, Reid Hastie, John W. Payne, David A. Schkade, and W. Kip Viscusi combine their expertise in law, economics and psychology with a series of controlled experiments to determine how individual jurors, juries, and judges approach the critical issues underlying an award of punitive damages. Their research takes them systematically through individual and group determinations of (1) liability; (2) whether punitive damages are appropriate, and (3) the amount of punitive damages. The book follows the authors through a series of studies, described in sufficient but not exhaustive depth, and including tables relating the statistical results. Fortunately for those whose education stopped short of regression analysis, the narrative fully explains the results without too much resort to statistical lingo.

Many of the results build on previous studies of individual and group decision-making processes, but the results in the punitive damages context bring an interesting twist. For example, it comes as little surprise that jurors engage in hindsight bias, given our fine national tradition of Monday-morning quarterbacking. The General Motors "Ford Pinto" memo comparing accident costs to investment costs before deciding where to place the gas tank in that ill-fated vehicle was an early, but often-repeated instance where jurors slam corporations for conducting cost-benefit analyses, even when those analyses are required by government regulations. Perhaps blinded by what jurors apparently view as "cold" corporate behavior, juror conduct veers even more perversely by awarding higher punitive damages to corporations that conduct cost-benefit analyses with placing a *higher* value on human life.

Some of the findings suggest that the conventional wisdom about juror behavior is flat out wrong. Sunstein et al conducted experiments on hundreds of mock juries to determine whether the act of deliberation worked to smooth out variances in the amount of punitive damages individual jurors were willing to award. As it turns out, the act of deliberation not only fails to adjust especially high or low damage amounts to a more moderate overall award, but there is a systematic shift to higher awards in all cases. In fact, in 27% of the juries studied, the final award after deliberation was higher than the highest award a juror found appropriate before deliberation. The authors attribute this phenomenon to two primary factors: First, once the jury has decided that some amount of punitive damages is appropriate, the jurors have little guidance to translating their outrage into a dollar amount. Second, the jurors favoring high awards have a rhetorical advantage in arguing for ever-increasing dollar amounts to "send a message."

The findings recounted here scratch only the surface of this in-depth treatment of jury behavior. The authors find jurors to be well-intentioned and serious about the task set before them. Nonetheless, the complexity of determining the appropriate amount of punitive damages (if any) is simply beyond the jurors' capabilities. Their erratic and unpredictable punitive damages awards prompted the authors to test an alternative: judges. Sunstein et al conducted empirical studies that demonstrate judges have at least three huge advantages over jurors when it comes to deciding whether punitive damages are appropriate and what the dollar amount should be. First, they actually understand the legal concepts (as compared to jurors, only 5% of whom could accurately recount the jury instructions containing the relevant legal principles). Second, they have a wealth of experience with comparable cases that gives judges a far better gauge of how to translate reckless behavior into a dollar amount. Finally, they are simply more accurate, coherent, and consistent in their reasoning about probabilities and application of the law.

In conclusion, the authors provide some very general suggestions for reforming punitive damages. The suggestions range from a modest proposal to make available to jurors the same sort of comparative data that would be available to judges to a more radical plan to create "damages schedules" that would function as something of a cross between criminal sentencing guidelines and workers' compensation valuation of injury. The ideas are presented in broad strokes, leaving to the tort reformers in the state legislatures the task of translating the authors' important empirical findings into a workable mechanism for awarding punitive damages.

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Debt's Dominion: A History of Bankruptcy Law in America by David A. Skeel, Jr.

*By Todd J. Zywicki**

As this review was being written, after failures in the past two Congresses, Congress was once again on the verge of passing a comprehensive bankruptcy reform bill. At the same time, WorldCom, Enron, Global Crossing, and their ignominious peers continue to set records for the size, expense, and public attention drawn to business bankruptcy. Consumer bankruptcies soar toward the 1.5 million per year mark, continuing an irresistible upward trend. Meanwhile, as law firms announce layoffs and salary freezes in most departments, bankruptcy professionals prosper amidst the despair, billing $20 million per month on the Enron case alone—even as creditors and shareholders sit by awaiting payment. Clearly we are witnessing a profound and unprecedented change in the political, social, and economic framework of bankruptcy.

How did we get here and where are we headed in the future? These are the questions brilliantly addressed by David A. Skeel, Jr., in his book, *Debt's Dominion: A History of Bankruptcy Law in America*. Told with a sound understanding of theory, law, and an eye for detail, Skeel's book is an instant classic—a comprehensive and intriguing history of bankruptcy law in America. But to characterize it as "history" is to slight the book's reach and importance. In a concise and readable 250 pages, Skeel brings to life not only the political and economic history of bankruptcy law, but also the fascinating history of the bankruptcy bar itself, including such memorably-drawn figures as "Rough Rider" Jay Torrey who stormed San Juan Hill at the side of Teddy Roosevelt, before going on to spearhead the drive for the first permanent bankruptcy law in American history at the end of the nineteenth century. Modern gurus such as Harvey Miller, the inventor of modern Chapter 11 practice, and consumer practitioner Henry Sommer, are also artfully drawn. Finally, Skeel deftly leads the reader through the fundamental theoretical debates that have shaped bankruptcy law during the past century, including the contentious intellectual debates between "Progressive" academic theorists and their rivals from the "Law and Economics School." Skeel has at once written a book that will serve as the definitive work on the history of bankruptcy law for bankruptcy experts while also crafting a book accessible to the interested generalist in law or business who seeks a comprehensive guide to how the modern American bankruptcy system developed.

Skeel divides the history of bankruptcy law in America into three historical stages: the Nineteenth Century, the era of the 1898 Bankruptcy Act and the Great Depression, and the modern era of the 1978 Bankruptcy Code. As Skeel notes, the shape of bankruptcy law and practice throughout American history is at least as much a factor of political considerations and influence as economic considerations. To develop his point, Skeel draws on the fields of public choice and social choice, both of which use economics to explain politics. The use of these economic tools to shape his narrative provides Skeel's argument with an analytical edge that prior historical studies of American bankruptcy law have lacked. In particular, American bankruptcy law can be understood as resulting from the clash of three sets of interests: pro-debtor ideological interests (often spearheaded by law professors), creditors, and bankruptcy professionals (including bankruptcy judges). Although the outcome of this three-way political wrestling match is unclear at any given moment, the dominant course of evolution of American bankruptcy law has been towards increasingly generous bankruptcy laws that provide strong incentives for both individual and corporate debtors to file bankruptcy.

The first era of American bankruptcy legislation was rooted in the Constitution's enumeration of Congress's power to "establish uniform laws on the subject of Bankruptcies throughout the United States." Like the other economic provisions of the Constitution, the primary purpose of the Bankruptcies Clause of the Constitution was to reign in the pro-debtor excesses of state legislatures under the Articles of Confederation.[1] Under the Articles of Confederation, creditors confronted numerous obstacles to their attempts to collect judgments, including judgment-jumping from one state to another and efforts by some states to discharge obligations owed by debtors, primarily at the expense of out-of-state creditors.[2] According to James Madison, regulation of bankruptcy was "intimately connected with the regulation of commerce, and [would] prevent so many frauds where the parties or their property may lie or be removed into different states that the expediency of it seems not likely to be drawn into question."[3] Subject to these powers designed to augment the power of creditors to recover judgments, most debtor-creditor relations were to remain governed by state law, an allocation of power which remains the case today.

During the nineteenth century, the federal government enacted three bankruptcy laws prior to the 1898 Act: the Bankruptcy Acts of 1800, 1841, and 1867 (p. 25). Each Act was spawned in the midst of financial crisis and was repealed soon thereafter. The 1800 Act lasted only three years, the 1841 Act lasted only two years, and the 1867 Act was repealed eleven years later. All together, therefore, these three acts lasted a total of sixteen years. In the intervening periods, debtor-creditor relations remained wholly the province of state law. Skeel attributes this legislative transience to "legislative cycling," a phenomenon identified by economists and political scientists that can arise where lawmakers hold three or more positions which cannot be aligned on a simple linear spectrum of choices (p. 28). Where such cycling occurs, legislative outcomes will be highly unstable across time.

This legislative cycling continued until the enactment of the first permanent bankruptcy law in 1898. The impetus for the 1898 Act came from creditors who were increasingly frustrated with the difficulties of using state court systems to collect interstate debts. The increasing nationalization of the American economy following the Civil War made it necessary to develop a coherent national debt-collection system. Skeel observes that, although the impetus came from creditors, the

legislative process was almost immediately captured by pro-debtor interests, who produced a more pro-debtor bill than originally anticipated. Moreover, the law rejected the English model of treating bankruptcy as an administrative proceeding, instead implementing a litigation-oriented, court-driven process that primarily benefited bankruptcy lawyers rather than creditors. As Skeel observes of the final product, "These characteristics—the generally debtor-friendly approach to bankruptcy, and the primacy of lawyers rather than an administrator—distinguish U.S. bankruptcy law from every other insolvency law in the world." (p. 43).

The 1898 Act remained in place until supplanted by the 1978 Code. During this period, however, bankruptcy law and practice were certainly not static. Skeel deftly works his way through the fascinating economic and political history of the period. The intervention of the Great Depression, the reorganization of the railroads through equity receiverships, and William O. Douglas's high-profile hearings while Chairman of the Securities and Exchange Commission are among the pivotal events. From this economic and political process emerged the Chandler Act amendments to the Act, which increased governmental oversight of the bankruptcy process. The end result of these developments was to drive prestigious Wall Street law firms and practitioners from bankruptcy practice, including most notably, Paul Cravath, whose firm essentially invented reorganization practice through railroad equity receiverships. At the same time, ordinary bankruptcy lawyers remained unscathed, and in many ways richer and more influential than ever before.

The process replicated itself in the enactment of the 1978 Bankruptcy Code. Again the reform effort was initiated by creditors, in this case seeking to restrain the growing consumer bankruptcy filing rates of the 1970s and to streamline business reorganization procedures. Instead, reform efforts were once again captured by bankruptcy lawyers and pro-debtor ideological advocates. By making bankruptcy more attractive to individuals, personal bankruptcies have risen from less than 200,000 in 1978 to almost 1.5 million annually. By making bankruptcy more attractive for corporations as well, it has routinized corporate bankruptcy, turning it into a business and strategic decision rather than a last resort. Perhaps the biggest beneficiaries of the 1978 Code, however, were bankruptcy lawyers, who dramatically increased their wealth and prestige during that time. Once considered an unsavory ghetto, today the largest and most prestigious law firms in America have thriving bankruptcy practices, as do leading investment banks, accounting firms, and consultants. Today, bankruptcy is big business.

Skeel highlights three groups as being especially influential in the shaping of bankruptcy law from 1898 to the present: (1) creditor interests, (2) pro-debtor ideological interests, and (3) the interests of bankruptcy professionals. Although it is often thought that creditors will be the most powerful of these groups, in practice Skeel concludes that "bankruptcy professionals are the ones who have most strongly influenced the shape of U.S. bankruptcy law in the century since its enactment in 1898." (p. 81). Moreover, bankruptcy professionals and pro-debtor ideological interests will often share similar positions on bankruptcy legislation issues. Pro-debtor ideological interests favor expansion of debt relief on ideological grounds. It is, of course, a misnomer to characterize them as "consumer advocates," in that increasing the leniency of bankruptcy increases the risk of lending. In turn, this increased risk is passed on to all borrowers in the form of higher interest rates, higher downpayments, greater reliance on secured debt, and fewer customer benefits. Bankruptcy professionals favor increased bankruptcies because they get paid only if there are bankruptcies. More bankruptcies increases the wealth and prestige of bankruptcy professionals. The combination of pro-debtor ideological interests and bankruptcy professionals has proven to be a formidable political alliance.

Skeel's analysis thus helps to unravel the politics surrounding the Bankruptcy Reform Act of 2002 (the "BRA"), which was finally ready to be passed in August 2002 after an arduous legislative process that consumed almost a full decade. There are some dramatic differences in the new political environment, however, which help to explain why reform will likely succeed this time, whereas it has failed in the past. First, the traditional dominance of pro-debtor ideology in Congress appears to have been counterbalanced by the rise of a new "personal responsibility" ideology. The takeover of Congress by the Republicans in 1994 ushered in a new conservative majority that has tended to view consumer bankruptcy as a moral and social issue of personal responsibility. This has led to an ideological movement for less tolerance of bankruptcy fraud and abuse. Second, creditors have succeeded in overcoming the collective action problems that have frustrated them in the past. Unsecured and secured creditors have worked together to craft a compromise that is acceptable to both groups. Finally, the clout of bankruptcy professionals on Capitol Hill has weakened substantially as a result of the Republican control of Congress. Moreover, the irresponsible and inflammatory rhetoric that bankruptcy professionals have deployed to try to thwart reform has dramatically backfired on them. Their reckless accusations have squandered the one trump card they held to influence Congress—their image as neutral and technical purveyors of advice to Congress. The result has been to substantially weaken their image and influence in Congress.

In the final chapters of the book Skeel turns to the future of bankruptcy, reviewing many of the current "hot topics" in bankruptcy law and policy, as well as offering predictions about the future of bankruptcy law, both domestically and internationally. Of particular interest is the impact of globalization on the future evolution of American bankruptcy law. Somewhat surprisingly, Skeel concludes that globalization will have little impact on the structure of American bankruptcy law. "Although the new, world economy will have important effects," he writes, "the basic parameters of American bankruptcy law are unlikely to change. We will continue to see the same three forces—creditors, pro-debtor ideology, and bankruptcy professionals—and the shape of the bankruptcy process will remain roughly the same." (p. 241). In particular, Skeel observes, despite the many criticisms of American bankruptcy law, under the pressures of globalization, bankruptcy law in much of the world is evolving to look *more* like the American bankruptcy system, rather than less. On both business bank-

ruptcy and consumer bankruptcy, Skeel observes, the rest of the world is loosening its bankruptcy laws. Thus, even though foreign bankruptcy laws generally remain stricter than in the United States, the direction is clear—they are moving toward more generous bankruptcy laws. He writes, "The important point, however, is that all of the pressure unleashed by globalization is pushing in this direction. All around the world, other nations are beginning to adopt some of the features of U.S. bankruptcy law. There is little evidence of a trend in any other direction, in the United States or elsewhere." (p. 243).

Skeel is correct that the rest of the world is adopting more generous bankruptcy laws, but in the United States there is in fact clear evidence of a counter-trend as exemplified by the BRA. Not only does the BRA temper the pro-debtor character of consumer bankruptcy, it also streamlines business bankruptcies to reduce the cost and delay of the Chapter 11 process. There is no viable constituency for the adoption of new pro-debtor laws. In addition, creditors are becoming increasingly ingenious in devising contractual and other "self-help" mechanisms for effectively opting-out of bankruptcy completely, or for devising mechanisms to minimize the expense, risk, and delay of being entangled in America's notorious bankruptcy morass. These legislative and practical attempts to reign in the excesses of the American bankruptcy system manifest a clear trend toward more restrictive bankruptcy access in the United States in the future.

Contrary to Skeel's predictions, therefore, globalization probably will not create a uniform trend toward American-style bankruptcy systems. Rather, the likely result will be global *convergence* of bankruptcy regimes. Regimes that are excessively pro-debtor, such as the United States, will tend to become less so; regimes that are insufficiently pro-debtor, such as Europe, will tend to liberalize. The effect of globalization will be to establish a process of competition in economic policy that will tend to reward countries that adopt efficient economic policies and punish those that do not, leading to a convergence on efficient rules. In fact, this has been what has happened with respect to interstate competition in the American system of federalism. Given the free flow of capital around the world today, it is likely that such pressures will increasingly shape corporate governance rules around the world. Excessively pro-debtor regimes such as the United States will be forced to temper their excesses in order to remain competitive in the global environment, whereas Europe and elsewhere will tend to liberalize in order to increase entrepreneurship and capital development in their moribund economies.

To the extent that Chapter 11 raises the costs and risks of investing in America, international investors will direct their capital to more efficient markets. In short, the pressures on the United States to adopt more efficient bankruptcy laws is much greater than in the past. Moreover, as it becomes increasingly expensive to indulge the ideological desires of the bankruptcy progressives, it can be predicted that their influence over the future of bankruptcy law will become increasingly muted. In the consumer bankruptcy arena, the BRA reflects a similar trend in the direction of greater restrictions on access to bankruptcy. American society is gradually reestablishing traditional values in the wake of what Francis Fukuyama has dubbed "the Great Disruption" of the past several decades.[4] Promiscuous consumer bankruptcy laws were just one of the many social experiments of recent decades that have proven unsuccessful in the face of human nature and inconsistent with the needs of successful societies.[5] The movement toward greater accountability in consumer bankruptcy represents a necessary step of social self-correction after a period of chaos and revolution.

David Skeel has written a brilliant and comprehensive book on the history of bankruptcy law in America. The use of cutting-edge analytical tools makes it possible for him not only to persuasively explain the history of American bankruptcy law, but also to offer insightful predictions about the future evolution of bankruptcy law in America. It is certainly the most important book on bankruptcy law that has been published since Thomas Jackson's acclaimed *The Logic and Limits of Bankruptcy*. Given the prominence of bankruptcy in today's business and political headlines, this is a book that should gain a wide audience. Bankruptcy lawyers will feast on its comprehensive history of bankruptcy law and its colorful portrayals of famous bankruptcy figures. General business lawyers will find it a rich introduction to the world of bankruptcy and its interaction with other areas of law. Finally, readers of general business history books will be fascinated to learn of the ways in which the bankruptcy system has shaped American economic history in the past and will continue to do so in the future.

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Footnotes

[1] *See* Todd J. Zywicki, *The Bankruptcy Clause*, *in* THE HERITAGE GUIDE TO THE CONSTITUTION (forthcoming 2002).

[2] Thus, although conventional wisdom has it that the Bankruptcy Clause of the Constitution was a protection for debtors, it actually was intended primarily to assist creditors. Indeed, many states maintained imprisonment for debt well into the Nineteenth Century. *Id.*

[3] *See* THE FEDERALIST NO. 42 (James Madison).

[4] FRANCIS FUKUYAMA, THE GREAT DISRUPTION: HUMAN NATURE AND THE RECONSTITUTION OF SOCIAL ORDER (1999).

[5] *See* Todd J. Zywicki, *Bankruptcy Law as Social Legislation*, 5 TEX. REV. L. & POL. 393 (2001).

Cyber-Threats, Information Warfare, and Critical Infrastructure Protection: Defending the U.S. Homeland by Anthony H. Cordesman

*By Mark Nance**

"Government is naturally obsessed with itself," writes Anthony Cordesman of the Center for Strategic and International Studies in *Cyber-Threats, Information Warfare, and Critical Infrastructure Protection: Defending the U.S. Homeland*. Perhaps it is an understatement, but one borne out nonetheless by dozens of pages quoting "findings" and "recommendations" by numerous federal organizations empanelled to sort out the nation's critical infrastructure vulnerabilities. The fact that the author devotes only a one-page chapter to the role of local and state governments, and only two pages to Chapter 7, *Role of Private Industry* is telling. Without a doubt there are areas where the federal government will play first (and only) chair in cyberwarfare and defense, but the feds will not find the resources to maintain superiority by looking inward. Much of the excerpted testimony and quoted government-speak in *Cyber-Threats* seems to fall in the category of bureaucratic navel gazing. That is not to say that valid points are not made, it is more to say that the same points seem to get made year after year in study after study.

Professor Cordesman provides a valuable digest of both obvious and not so obvious issues in his *Conclusions and Recommendations*, where he advises that:

> There is no practical way that the federal government will ever develop the technical skills, and overcome its lack of specialized competence in ways that enable it to defend the vast majority of physical nodes in America's critical infrastructure or critical e-commerce, computer, and information systems. In fact, 90% of the burden of the day-to-day defense must fall on the private user or corporation.

In this passage, the author is attempting to distinguish between *cybercrime* and *cyberwarfare*, which given what we have learned about al Qaeda since September 11, seems like a somewhat academic exercise, notwithstanding the obvious questions of degree with respect to cybercrimes. Asymmetric warfare, such as that likely to be waged against the U.S. in the near future**,** presents more of a Potter Stewart "know it when I see it" definition rather than a neat taxonomy. The importance of this sort of flexibility further highlights the value of active participation by the private sector and local governments. Professor Cordesman is also critical of the federal government's apparent myopic focus on defensive capabilities, especially solely technical solutions such as firewalls, versus a more complete orientation that includes offensive capabilities combined with an integrated defensive posture.

Notably missing from the book is a discussion of the role and capabilities of domestic U.S. intelligence and law enforcement agencies, principally, the FBI. Current and former federal law enforcement officials report that they are somewhere between 8 and 10 years behind private sector technology capabilities. In terms of remediation, the press reports that the FBI is now buying new PCs, and reassigning personnel from garden-variety criminal cases to work on national security issues—things that might properly have been done some time ago (but the federalization of the criminal code is another issue). The FBI is composed largely of intelligent and motivated agents. Unfortunately, it does not yet appear that all of them have been convinced of the gaping holes in their computer and data competencies. This ramp up in technology apexed in the private sector around Y2K with the purchase of some rather questionable systems and solutions. Today's corporate consumer is pretty sophisticated and unlikely to buy much in the way of snake oil.

The networked computer has (or should have) supplanted the firearm as law enforcements' primary non-organic tool. Accordingly, technical and personnel proficiency at all levels of computer and network security are vital so that personnel are able efficiently to use the vast assets that should be made available to them for national security and other criminal investigative purposes. Like any other large bureaucracy, there are members of the FBI and other agencies who are content to remain blissfully ignorant of the state of the art. We should no more tolerate outdated professional skills in our federal law enforcement ranks than we do in our physicians or military leaders.

Cyber-Threats provides a quick tour through some of the executive and legislative history surrounding critical infrastructure defense issues as a well as a brief look at the threat (as seen through the eyes of policy makers). Its target audience is wonks not technology professionals. Perhaps the best reading in the book is to be found in the final chapter where Professor Cordesman proposes thirty recommendations to improve U.S. capabilities in cyberwarfare and defense, which should alleviate the need for any more blue-ribbon panels. In the final analysis, however, the book would be well-served by additional attention to the private sector and local government contributions, especially where industries such as financial services have invested so heavily in effective counter-measures.

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The Rule of Law in America by Ronald A. Cass

*By Randolph J. May**

It doesn't take a Lexis/Nexis search to know that over the last half dozen years there has been an upsurge of interest in—and posturing about—the "rule of law." With impeachment proceedings and all that for the sake of ease may be put into the category of the Clinton troubles, and now with a long-term War on Terror confronting us, we have witnessed with what facileness the "rule of law" mantle is used by partisans of all stripes. What a powerful rhetorical sword or shield it makes!

Indeed, as Ronald A. Cass, Dean and Professor of Law at Boston University School of Law, points out in his new book, *The Rule of Law in America*, the idea of the rule of law is so powerfully engrained in our constitutional culture that, amidst all the passions of the contested 2000 election, both Al Gore and George W. Bush "were prepared to accept courts as the ultimate arbiters of matters crucial to their ambitions." Certainly, the foreknowledge that court decisions would be accepted in a contest over power to lead the government distinguishes America from the majority of the world's nations.

But what do we really mean when we invoke the rule of law? Has there been an erosion of the rule of law in America? And, if so, what should be done in the way of implementing corrective measures. These questions are at the heart of Dean Cass's book.

On the first point, Dean Cass dissects in considerable detail each of the crucial elements of any "rule of law" regime worthy of the name. In his view—and that of the majority of commentators, ancient and modern—these elements are: (1) fidelity to rules; (2) of principled predictability; (3) embodied in valid authority; (4) that is external to individual government decision makers. Putting these elements together somewhat less formally but nevertheless elegantly, Cass explains that the rule of law "pulls society in the direction of knowable, predictable, rule-based decision making, towards limitations on the alignment of power with legitimacy." Reduced even further to its core, the rule of law implies a system in which the exercise of government power against individuals is constrained by what Cass calls "extrinsic rules of principled predictability."

Cass's explication of what the rule of law means is entirely serviceable, especially for those not already steeped in jurisprudential theory. But it is on the second question—are we witnessing the rule of law's erosion?—that the book makes its most signal contribution to our present understanding. For, through reasoned and dispassionate argument, Dean Cass asserts, and goes a long way towards demonstrating, that, in the main, in resolving cases most judges, "feel inhibited from moving outside the bounds of authoritative sources even when their intuition strongly suggests that a particular outcome is just." By examining data, such as high settlement and low appeal rates, indicators that judges' actions typically fall within a narrow range of predicted outcomes, he supports this general proposition fairly convincingly.

Obviously, in most cases there is some degree of running room for the exercise of discretion because the case is not "on all fours" with controlling authority. But most of the time, as a result of constraints ranging from reversal aversion to desire for approval from their professional colleagues, judges act as "translators of the law" in the sense that adhere closely to text in performing their interpretative tasks. In one of the many instances in which he employs instructive analogies, Dean Cass contrasts this prevalent mode of judging with what he describes as Ronald Dworkin's "chain-novel" model. In that mode, a judge feels relatively unconstrained by existing text, taking his or her task to be the employment of creative impulses to contribute to the continuing evolution of the law as a work in progress.

Cass freely acknowledges that not all judges fit the "translator" mold, and even the ones that largely do, sometimes stray into the "chain-novel" mode. It is landmark Supreme Court decisions, of course, that attract the most public attention. Cass highlights a few cases, including *Brown v. Board of Education*, which he believes are rooted more in moral principles than analysis of the external legal authorities. But these are the exception, not the rule.

What about the Supreme Court's *Bush v. Gore II* decision, effectively ending the 2000 presidential contest? Wasn't that a prime example of a "political" decision? A meaningful discussion of *Bush v. Gore* is beyond the scope of this review. Suffice it too say that Cass's analysis, consistent with the tone of his book, is measured. In his view, the four dissenters had the better legal argument on the remedy question, that is, whether to simply stop the recount process. That aspect of the decision gives some sway to the "law as politics" contention. But Cass points out, as I have elsewhere as well, that despite differences of party and perspective, all the justices except Stevens and Ginsburg, agreed on the substantive issue—that the indisputably different standards being used to count votes violated the Constitution's equal protection guarantee. (While Cass also points out that the case presented unusual issues in a context unlikely to recur, and that a decision had to be reached quickly, I am not sure these factors ought to carry much weight in the debate over whether the decision was based more on law or politics.)

Finally, in the last part of *The Rule of Law in America*, Cass examines the extent to which problems, such as excessive punitive damage awards and abusive discovery and class action practices, undermine public confidence in the rule of law. While offering some modest suggestions for reform, he is careful to note even here that not-so-informed press coverage often fuels public perceptions that exaggerate the extent of the problems.

Having set forth the case that by and large the rule of law remains strong, perhaps Dean Cass next can turn to a more complete analysis—with more detailed practical reform recommendations—than offered in this book. In the meantime, he has done well to remind that if we assert too often, without a sound basis, that judges act unconstrained by the rule of law, we may actually create a self-fulfilling prophecy that "encourages judges to try a hand at creating the legal solutions they deem best suited to solve whatever problems they see." If that were to happen, it would be a tragedy not only for us here at home, but for those abroad that look to America as an example of a constitutional republic in which the rule of law prevails.

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What Went Wrong: Western Impact and Middle Eastern Response by Bernard Lewis

By Aaron Mannes

Briefly in the 1980s many Americans came to feel that the United States was losing its economic and technological pre-eminence to Japan. As it turned out, the 1980s were not Japan's moment, but at the time, this historical ripple caused some sharp reactions. Disgruntled autoworkers smashed Toyotas while corporate managers avidly studied the secrets of Japanese management.

But imagine reactions to a more dramatic situation, extended over centuries and compounded by a string of political, military, and commercial failures. And worse, attempts to import successful foreign ideas exacerbate the situation by tearing apart the social fabric. In *What Went Wrong: Western Impact and Middle Eastern Response*, Professor Bernard Lewis shows that this is precisely what happened in the Middle East. The results for the region have been poverty, oppression and a bullying, stubborn radicalism. Although Professor Lewis, the West's leading authority on Islam and the acknowledged dean of Middle Eastern historians, wrote this slim volume before 9/11, it is prescient in describing the depth and nature of the anti-American sentiment prevailing in the Middle East. In the aftermath of September 11th, senior national security officials including Vice President Cheney and Secretary of Defense Rumsfeld have been reportedly consulting Prof. Lewis.

But *What Went Wrong* is not a narrowly focused book on current affairs. Professor Lewis takes a broad historical view, beginning over 500 years ago when Muslim civilizations were the most sophisticated in the world. Muslim scholars had an impressive legacy that combined and expanded upon the knowledge of the ancient cultures of the Middle East and that of India and China. Muslim treatment of religious minorities was, by the standards of the time, moderate and European dissidents fled towards the relative freedom offered under Islamic rule.

These achievements were accompanied by military strength. The leading power of the Muslim world was the Turkish Ottoman Empire. In 1453, the Ottomans captured Constantinople, ending the ancient Byzantine Empire. In 1526, the Ottoman Empire conquered Hungary and in 1529 laid siege to and nearly captured Vienna. An organized political class and effective legal administration helped make the Ottomans the envy of Europe for a time. This was the Empire's peak.

At first the decay was on the fringes. Western merchants and warships took control of trade in the far East. This trade, particularly in spices, had been a major source of wealth to the Middle East, and its control by the Europeans had enormous economic consequences. This condition was made worse by the mismanagement of agrarian resources resulting from the absence of a true landed class. On the military side, Ottoman support for allied Muslim states to the north was ineffectual in the face of Russian advances. In 1682, the Ottoman Empire launched a new war against Austria, laying final siege to Vienna in the summer of 1683. It ended as an utter defeat. A few years later, the Ottomans were expelled from Hungary. Defeat followed defeat.

As the Middle Eastern power that most directly confronted Europe, it was the Ottoman Empire that was the most directly affected by the rise of the West. Lewis also discusses Arab and Persian reactions, but for most of this period the Arabs were under Ottoman control and the Persians were somewhat buffered from the Europeans by the Ottoman Empire. (In fact the Persian Empire frequently made alliances with European powers in its wars against the Ottomans.)

Beyond the geopolitical ramifications, European successes raised a theological problem. Islam, according to Muslims, had superseded Christianity and Judaism and was the final revelation. The Ottoman Empire was a Muslim state, its law was the holy law of Islam, Shari'a, and so a theological problem had political implications for the state itself. For the Christian West to consistently prevail over an Islamic polity implied an inconceivable shift of divine favor.

The Ottoman leadership recognized that something was wrong. Lewis writes that Ottoman memorialists often asked, "Why is it that in the past we were always able to catch up with the new devices of the infidels, and now we are no longer able to do so?" Lewis carefully observes that the Ottomans did not ask why it was always the infidels introducing the new devices.

As Western military superiority became evident, the Ottomans were determined to rectify their ignorance during a series of 19th century reforms. European military experts were imported. Ottoman officials traveled through Europe, gathering information.

But the Ottoman Empire continued to recede in defeat. They searched for deeper causes, sending students to Europe, learning how different European society was from Middle Eastern society. After initial focusing on the military, they began looking at European technology and economics, followed by European politics and culture. As they adopted, adapted, and bought Western factories, educational systems, and administrative institutions that seemed successful, the Ottoman decline was not stemmed. Western forms were readily adopted, but the substance underpinning them was not as easily transplanted – and in some cases, particularly the political realm, the transplant proved malignant.

Historically the civilizations of the Middle East have not been democracies but there were boundaries as to what is permissible and obligations and understandings binding the ruler and the ruled. But importing Western politics, without the principles that underpinned them only damaged these bonds.

For example, in 1839 the Ottoman Empire declared that existing laws and rights applied equally to all Ottoman subjects. But the Ottoman Empire was an Islamic state and Islam defines the role of the unbeliever. When the unbeliever acquired a new "equal" social status, Islamic society was not able to accommodate this change. At the same time, this equality meant that the established perquisites enjoyed by the minority communities were lost, undermining the freedoms they had long enjoyed. Other Western political ideas like nationalism and democracy spread, and minorities began demanding self-determination, Westernized elites began calling for Parliamentary rule. When Parliaments were established however, they only made things worse. Powerless, Middle Eastern parliaments only whetted popular appetites for democratic government without satisfying it. The practical result of this Western reform was to undermine civil society and lead to the breakdown of the existing order.

This is only one arena in which imported Western ideas had a deleterious affect on the old order. Perhaps the most striking example is the impact of Western technology. Because only the rulers had the resources to invest in large-scale Western technology, rather than expanding individual freedoms, Western technology actually enabled some Middle Eastern rulers to build totalitarian states.

Middle Easterners did not limit their borrowing from the West to engines of military, economic, and political power. To grasp the impact of Europe's rise on Muslim civilization, Lewis points out that the Ottomans not only reorganized their army along European lines, they also adopted European uniforms. Throughout Middle Eastern society aspects of Western culture were adopted. Basketball and soccer became popular sports. As early as the 18th century Western architectural influences began appearing on mosques. Despite the language barrier, Western literary forms were adopted and in time there were Middle Eastern plays and novels. The extent of this cultural borrowing gives some sense as to how deeply the rise of the West shattered the cultural self-confidence of the Muslim world.

The decline continued unabated. By every international measure of prosperity and freedom, the current Middle East places poorly. The exceptions are Israel (which was founded by Jews who emigrated from Europe) and Turkey. After World War I, the Allies disassembled the Ottoman Empire, and governed its Arab territories, but the Turks were able to establish Turkey as an independent state. Lewis discusses how Turkey then underwent a dramatic Westernizing and secularizing process led by its founder Mustafa Kemal Atathrk. It is now a democracy irreconcilable with the rest of the Middle East, which is dominated by dictatorships clinging to failed ideologies, whether borrowed or indigenous. And for all of their borrowing of western technology and ideas, most of the Middle East remains mired in poverty and intolerance. Perhaps most painfully, despite their tremendous focus on building military power, the states of the Middle East are regularly defeated when they challenge Western armies directly – as testified by the Gulf War and by Israel's victories. The missing ingredient that underpins Western (and the increasingly Asian) success remains a mystery viewed suspiciously in the Arab world.

Lewis does not provide a pat answer. Instead, he explores the implications of three areas in which Western ideas and practices have not made substantial inroads: women's rights, science, and music.

The difference in the status of women between the West and the Middle East is an issue of substance, not form. Muslim travelers to 18th century Europe were struck by the apparent freedom of European women. In the mid-19th century a few Turkish intellectuals speculated that the comparative lack of freedom for women was depriving them of the talents of half of the population, and thereby putting them at a disadvantage vis-à-vis Europe. But, unlike establishing powerless Parliaments, freedom for women strikes at the heart of Muslim culture. Lewis writes, "The emancipation of women, more than any other single issue, is the touchstone of difference between modernization and Westernization… The emancipation of women is Westernization; both for traditional conservatives and radical fundamentalists it is neither necessary nor useful, but noxious, a betrayal of true Islamic values."

Ottoman reformers recognized the benefits scientific research brought to the Europeans, and attempted to establish a modern science program. But little came of it. Today, outside of Israel, the Middle East plays a marginal role in scientific research. This failure is particularly curious in light of the tremendous scientific achievements of Muslim scientists during the Middle Ages.

Muslim rulers attempted to import Western music as a possible element of the West's success. Music seemingly had fewer barriers to its importation than many other cultural imports. But Western music characterized by large philharmonic orchestras has not found a Middle Eastern audience (outside of Israel and to a lesser extent Turkey). Lewis explores whether this reflects something profound about the cultures of the Middle East:

> A distinguishing characteristic of Western music is polyphony, by harmony or counterpoint…. Different performers play together, from different scores, producing a result that is greater than the sum of its parts. With little imagination one may discern the same feature in other aspects of Western culture – in democratic politics and in team games, both of which require the cooperation, in harmony if not in unison, of different performers playing different parts in a common purpose.

At the end of the book, discussing the ingredient Middle Eastern society seems to be missing, Prof. Lewis writes:

> To the Western observer, schooled in the theory and practice of Western freedom, it is precisely the lack of freedom – freedom of the mind from constraint and indoctrination, to question and inquire and speak; freedom of the economy from corrupt and pervasive mismanagement; freedom of women from male oppression; freedom of citizens from tyranny – that underlies so many of the troubles of

> the Muslim world. But the road to democracy, as the Western experience amply demonstrates, is long and hard, full of pitfalls and obstacles.

So far, most of the Middle East has not started on that road. Instead it has led to the all-too-human reaction of blaming others for the catastrophe, and that is the habit into which the Middle East has fallen. Paranoid conspiracy theories are trumpeted in the mass media, the United States and Israel are held responsible for Arab ills. The various ethnicities of the region blame each other. Secularists blame Islam, although Lewis discounts this because of Islam's prominent role in what was the leading civilization of its time. Islamists blame the secularists, and all who have deviated from the path of pure Islam. This line of thinking has motivated Wahhabism (a Saudi fundamentalist spin-off of traditional Islam) and more recently the Iranian revolution, the Taliban, and bin Laden.

In it, Lewis provides timely warning: "If the peoples of the Middle East continue on their present path, the suicide bomber may become a metaphor for the whole region, and there will be no escape from a downward spiral of hate and spite, rage and self-pity, poverty and oppression, culminating sooner or later in yet another alien domination…"

However, Lewis also notes that there is hope for the Middle East. Some have stopped playing the blame game and have started asking, "What did we do wrong?" and "How do we put it right?"

This is a crucial first step. But if the Middle East is to travel towards freedom, it must break the patterns of its history, while also bearing its burdens. *What Went Wrong* illustrates the weight of those centuries of failure on the modern Middle East.

Many prior works of Lewis over the past sixty years have described similar historical themes in greater detail, but *What Went Wrong* provides a compact, accessible and fresh summary for new readers and Lewis disciples alike. But as important as *What Went Wrong* is as a general primer for the Western strategist, it ought to cause more useful introspection among those readers who are the book's subject.

James Madison and the Future of Limited Government Edited by John Samples

By Dustin Kenall

Last year John Samples, director of The Cato Institute's Center for Representative Government, invited a dozen scholars to reflect on James Madison as "a font of ideas for the future." This year with the release on Independence Day of the subsequent articles, the general reader may invite himself as well. A salute to the 250th year anniversary of his birth, these brisk two-hundred-and-score pages celebrate the principled constitutionalism of this arguably most cerebral of Founding Fathers. Erected as the frame of government to shelter the infant twins of democracy and liberty and conduct the "great republican experiment" resolving whether or not men can govern themselves, Madison's constitutionalism bends, groans, and collapses under the weight of majoritarianism in this present age. This new compilation bends our minds toward the domestic recrudescence of self-government in all spheres—local, state, and federal—and its possible global application and diffusion.

On one level, the book is a catalogue of the several obstacles that have hampered the project of Constitutional Union historically, not a few of them improvidently engineered by Madison himself. The famous *Virginia and Kentucky Resolutions* which Jefferson penned and with which he inveigled a reluctant Madison to concur provided ammunition for later Southern Nationalists to justify their secession from and bifurcation of the government on the theory of the Union as a compact of sovereign states. Robert MacDonald observes in his essay "The Madisonian Legacy: A Jeffersonian Perspective" how the compact theory "made the union the handmaiden of its constituent parts," flattening the dual sovereignty principle and consequently attenuating those bonds between the states individually, among the states aggregately, and between the state and the nation constitutively.

In his *Memorial and Remonstrance Against Religious Assessments,* Madison posited the then-and-still controversial idea that government should take no cognizance whatsoever of religion. As elsewhere in the book, two articles tackle the topic. The redoubtable Walter Berns pens the first in which he remonstrates Madison for precluding any public role for moral education (almost always substantively religious in character), while contradictorily asserting "that any form of government will secure liberty or happiness without any virtue in the people is a chimerical idea." Michael Hayes constructs a defense of Madison, mining support from the intellectual sub-strata of conservative thought with reference to Oakeshott, Hayek, and Weaver.

As a book of ideas the work soars. One readily espies a multitude of topics over which to mull: Madison as the reconciler of Hamiltonian realism and Jeffersonian idealism, Madison as the proponent of deliberative democracy, Madison as market-associational visionary and progenitor of Hayek and his "Great Society," Madison as early Public Choice theorist, and sometime Madison as just-plain-wrong.

The articles shed ample light on his blind spots. In *Federalist* No. 10 he responded to Anti-Federalist qualms about a remote, self-aggrandizing state by hypothesizing that federal government checks the tyranny of majorities through a proliferation of factions. Even at the end of his life during the Missouri Compromise he supported the extension of slavery into the territories, purblind to the fact that the polity was polarizing not fractionalizing. The Civil War era tragically exposed the limits of constitutionalism (called a "compact with death" by abolitionist William Lloyd Garrison) when economic and cultural divergence sundered a people.

While Madison was keen to the threat posed by "passions of the majority" to order and liberty, he did not anticipate the emergence of a political insider class and a rent-seeking government culture. John Samples' essay on direct democracy qualifiedly supports initiatives and voter referenda as a palliative to the modern disease of highly organized, efficacious factions. Insofar as they dislodge the barnacles of special interest from the ship of state by expressing the anti-government preferences of contemporary Americans, and are consistently checked by the Judiciary when they very rarely veer into violations of minority rights, initiatives and referenda are consonant with the ends of Madisonian theory (limited government) if dissonant with its means (representative democracy).

Judicial review also confounded Madison who saw it as a usurpation of the prerogative of the legislature which "was never intended and can never be proper." It devolved upon Hamilton in *Federalist* No. 78 to argue that the Constitution could limit government "in no other way than through the medium of the courts." The next one-hundred-fifty years of Constitutional jurisprudence would prove the latter correct, as the Court stood strong for property rights and limited government until directly threatened in its own sphere by FDR.

With commensurate brevity and insight the other essays deal with the general welfare and spending clauses, American Indians, and the negative cost-benefit ratio of legislating morality. One intriguing if prolix article is Tom Palmer's fifty page disquisition on group rights in which he leads the reader to an ineluctable if improbable conclusion descrying the synonymy of political thought between radical Blacks' Rights theorists and reactionary John C. Calhoun, States' Rights champion nonpareil.

The book closes on two essays: one hortative the other speculative. The first by James Dorn exhorts developing nations East and West to temper their newfound democratic freedom with economic liberty, mindful of the failures of democratic socialism and Milton Friedman's proposition that "While economic freedom facilitates political freedom, political freedom, once established, has a tendency to destroy economic freedom." Constitutionalism binds political action for the short-term, requiring deliberative policy based on suasion rather than force and with a view to long-term benefits.

Finally, John Tomasi considers the permutations of Madisonian federalism in an international environment constituted of democratic, market states. He concludes that a sedulous review of Madison's precepts and proscriptions for a compound republic must precede the inauguration of any international federation with pretensions to power and legitimacy.

At the adjournment of the Constitutional Convention in 1787 a reporter asked Benjamin Franklin what had been created, a republic or a monarchy. The sage paused to reflect. "A republic," he concluded, "if you can keep it." John Adams admonished that "liberty once lost is lost forever." H.L. Mencken, elevating ornery pessimism to a level undreamt of even by the brooders of the Adams clan, despaired "Government is actually the worst failure of civilized man." Madison's transformation of government into our noblest triumph secures his recognition by posterity not as the wisest political theorist of his age (which he was) nor the greatest statesman (which he most certainly was not), but as the first and only alchemist ever to turn dross into gold.

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