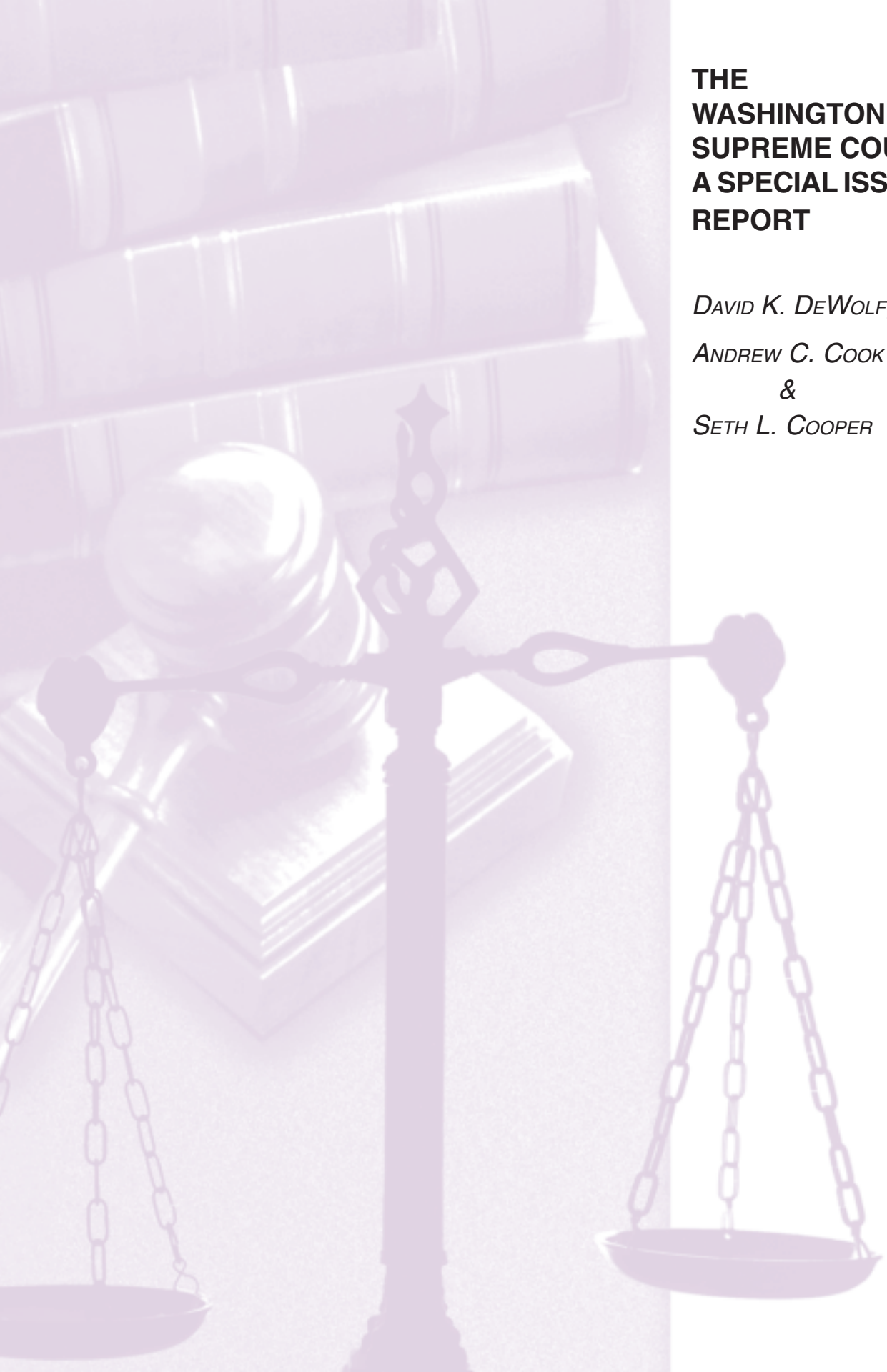

THE WASHINGTON SUPREME COURT: A SPECIAL ISSUE REPORT

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By David K. DeWolf, Andrew C. Cook & Seth L. Cooper*

In *Federalist* No. 47, James Madison wrote that the accumulation of legislative, executive and judicial powers into the same hands "may justly be pronounced the very definition of tyranny."[1] Alexander Hamilton, however, offered words of reassurance to Americans contemplating the proposed federal constitution. In *Federalist* No. 78, Hamilton explained that the judiciary will always be the "least dangerous branch" to individual rights because its role is limited to the exercise of judgment.[2] To take inspiration from Chief Justice John Marshall, it is emphatically the province and duty of the judiciary to say what the law is, but we ought to say with equal conviction that it is *not* the province of the judiciary to say what the law should be.[3]

The Washington Territory had the benefit of 100 years of collective history under the federal constitution prior to the drafting and ratification of the Washington State Constitution in 1889. As a condition for statehood, Congress's Enabling Act required that the Washington Territory's new constitution be consistent with the principles of the Declaration of Independence and the federal constitution. Accordingly, Article IV, section 1 of the Washington Constitution appropriately declares that "[t]he judicial power of the state shall be vested in a supreme court" and other inferior courts.[4]

But, in light of the American constitutional understanding of the separation of powers, we need to examine whether the Washington Supreme Court has properly exercised its judicial power. Has the court protected and preserved the great constitutional traditions? When called upon to interpret the Constitution or the laws of the state, has the court been faithful to the understanding of those who wrote and ratified them? Or has the court succumbed to the temptation to impose the judgment of the individual justices as to what the public policy of the state should be? Has the court recognized the proper role of the judiciary in interpreting and applying the laws enacted and enforced by other branches of government, or has the court over-extended itself, usurping powers belonging to the other branches or infringing rights reserved to the people themselves?

The best way to begin to answer these important questions is to consider some of the landmark decisions that have been handed down by the Washington Supreme Court in recent years. The court decides matters of critical import each term: a wide variety of issues come before the court and its rulings frequently affect the daily lives of Washingtonians. The court's decisions have a direct impact on the rights of voters, taxpayers, parents, property owners, small business owners, contractors, laborers, political activists, criminal defendants and crime victims. Its rulings define the powers of local governments and administrative agencies and demarcate the respective powers of the executive, legislative and judicial branches of the state government.

This Special Issue Report contains concise summaries of several noteworthy cases decided by the Washington Supreme Court in the last few years. It also includes brief descriptions of significant rulings that are forthcoming from the court. It is the authors' hope that this Report will generate greater public awareness of the recent rulings by the Washington Supreme Court and increase public discussion about the proper role of the courts in our constitutional system.

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RECENT DECISIONS BY THE WASHINGTON SUPREME COURT

In re Personal Restraint of Andress, 147 Wn.2d 602 (2002)

In re Personal Restraint of Andress is one of the most significant criminal cases decided by the Washington Supreme Court in recent years. In a 5-4 ruling, the court overturned prior case rulings to conclude that assault cannot serve as the predicate for second degree felony murder.

Washington's felony murder statute provided that a person is guilty of second degree murder when he commits or attempts to commit *any* felony (other than the felonies listed in the first degree felony murder statute), and in the course of and in furtherance of the crime causes the death of another person who was not a participant in the crime.

Defendant Shawn Andress was involved in a fight with two individuals outside of a bar. During the fight, Andress stabbed both individuals. One of those individuals died as a result of injuries. Andress was convicted of second degree felony murder for committing an assault resulting in the death of another person.

In a 5-4 majority opinion by Justice Barbara Madsen, joined by Chief Justice Gerry Alexander and Justices Charles Johnson, Richard Sanders and Charles Smith,[5] the court reversed Andress's conviction, ruling that assault could not be the predicate felony for second-degree murder. Justice Madsen contended that changes to the state's pre-existing felony murder statute that were made in 1975 and subsequent decisions by the court do not allow assault to serve as a predicate for felony murder.

The dissenting opinion by Justice Faith Ireland,[6] joined by Justices Bobbe Bridge, Susan Owens and Tom Chambers, argued that Washington statutory law unambiguously provided that "a person is guilty [of second degree felony murder] when he or she 'commits or attempts to commit any felony other than those enumerated in [the first degree felony murder statute].'" Justice Ireland wrote that the majority's decision overrode legislative intent "clearly expressed in the statute," resulting in "an invasion of legislative power to define crimes."

The court's ruling in *Andress* ultimately freed or significantly reduced the sentences of many felons who were convicted under the second degree felony murder where assault was the predicate felony. The *Andress* decision was subsequently overturned by a change in the statute. Shortly after the court decided *Andress*, the Washington Legislature amended state law to explicitly provide that assault can serve as the predicate for second degree felony murder.

Washington Farm Bureau Federation v. Reed, 154 Wn.2d 668 (2005)

In *Washington Farm Bureau Federation v. Reed*, the Washington Supreme Court refused to issue a writ of *mandamus* ordering the Secretary of State to accept a proposed referendum measure and thereby place the referendum on the ballot for voters. The proposed referendum would have overturned legislation suspending state law requiring a two-thirds vote of each house of the legislature to raise taxes.

In 2005, the Washington Legislature amended RCW 43.135.035's super-majority requirement for raising taxes. The amended legislation, SSB 6078, provides that, until June 30, 2007, any legislation raising taxes or other revenues need only be approved by a simple majority of each house of the Legislature. SSB 6078 also includes an emergency clause. The Legislature subsequently proceeded to enact four bills that raised taxes, none of which received a super-majority vote of approval. Although Article II, Section 1 of the Washington Constitution provides that the people of the state may overturn legislation via referendum, the section does not allow referenda for legislation based upon public emergency or necessary to support the state government and its existing institutions.

A 6-3 majority concluded that SSB 6078's emergency clause declaration was valid and that the legislation was therefore exempt from any referenda. Upon that basis, the majority denied the petitioning citizen's request that the Secretary of State be ordered to accept a proposed referendum measure on SB 6078.

The court's opinion, written by Justice Charles Johnson, joined by Chief Justice Gerry Alexander and Justices Susan Owens, Bobbe Bridge, Barbara Madsen and Mary Fairhurst, stated that any doubts about the validity of a legislative declaration of emergency should be resolved in favor of the Legislature. The Legislature

receives substantial deference when declaring emergencies. His analysis cited and relied heavily upon *CLEAN v. State of Washington,* 130 Wn.2d 782 (Wash. 1996), in which the Washington Supreme Court upheld the emergency clause in the stadium act that financed the construction of SAFECO Field in Seattle. The majority further opined that recent tax revenue bills were passed in light of budget projections, and that there were no facts in the record demonstrating that the Legislature's declaration of emergency was in any way a sham.

In a short dissent, Justice Richard Sanders asserted that the majority's opinion sets a precedent whereby proposed referendum measures can effectively be thwarted by permitting the Secretary of State to refuse to accept them. His dissent, as well as the dissent by Justice James Johnson, emphasized that the authority to determine whether a declaration of emergency is valid does not lie with the Secretary of State.

In his dissent, Justice James Johnson reiterated that the Secretary of State has a constitutional duty to accept proposed referendum measures. Justice Johnson stated that the Secretary of State acts in prior restraint of the people's constitutional right of referenda by refusing to accept proposed referenda. Justice Johnson interpreted the exemption from referenda for emergency declarations as a narrow one. Contrary to Justice Charles Johnson's majority opinion, Justice James Johnson wrote that any doubts about the existence of an emergency should be resolved in favor of *permitting* a referendum rather than quashing one. Justice James Johnson noted that SB 6078 suspends spending limits approved by the people via Initiative 601. He concluded that the supermajority requirement is a procedural safeguard against excessive taxation, and that the facts in the record failed to demonstrate a genuine emergency.

In another dissent, Justice Tom Chambers stated that the court should have provisionally granted the request for a writ of mandamus, thereby allowing signature gathering to go forward.

In re Election Contest Filed by Coday, 156 Wn.2d 485 (2006)

In re Election Contest Filed by Coday presented four challenges to the 2004 gubernatorial election. The Washington Supreme Court dismissed all four contestants' challenges in a consolidated opinion, including a challenge raised by Suzanne D. Karr (*In re Karr* (No. 76500-6)).

Chief Justice Gerry Alexander wrote the majority opinion for the court that dismissed all four separate challenges. He was joined by Justices Charles Johnson, Susan Owens, Barbara Madsen, Bobbe Bridge, Tom Chambers and Mary Fairhurst. Pursuant to the election contest statute, RCW 29A.68, Chief Justice Alexander concluded that Karr raised a cognizable claim, but that her claim was barred by res judicata.

Under res judicata, noted Chief Justice Alexander, prior court judgments bar litigation of subsequent claims, if the prior judgment has a concurrence of identity in: (1) subject matter, (2) cause of action, (3) persons and parties and (4) the quality of the persons for or against whom the claim is made. Chief Justice Alexander concluded that Karr's claim was identical to the contest decided in *Borders v. King County*—an unappealed 2005 decision by the Chelan County superior court.

Chief Justice Alexander asserted that Karr's contest to the 2004 gubernatorial election was identical in subject matter to the *Borders* contest, since Karr also alleged misconduct committed by election officials and illegal votes cast by persons disqualified from voting. Additionally, Chief Justice Alexander wrote that, while Karr was not a participant in the *Borders* contest, she was acting in the same capacity as the *Borders* contestants through her own contest. Finally, Chief Justice Alexander concluded that Karr's interests in her election contest were similar to those in the *Borders* contest, in that she wanted to obtain a fair, just and accurate election.

Justice Richard Sanders penned a dissenting opinion, joined by Justice James Johnson, focusing exclusively on Karr's contest. His dissent, however, also disagreed with the majority's decision concerning the other three election contests.

In his dissent, Justice Sanders maintained that the unappealed trial court proceeding in *Borders* did not trigger application of *res judicata*, and that Karr's contest should not be barred. He noted that Karr filed her contest only three days after the *Borders* contest was filed, and that nothing in the record suggests Karr had a mutual or successive relationship with the contestants in *Borders*. Justice Sanders also asserted that, unlike the *Borders* contestants, Karr alleged misconduct under RCW

29A.68.020(1) for misconduct by a member of a precinct election board member. He therefore concluded that Karr's claim was not identical to the claim in *Borders*.

HTK Management, L.L.C. v. Seattle Popular Monorail Authority, 155 Wn.2d 612 (2005)

In *HTK Management, L.L.C. v. Seattle Popular Monorail Authority*, the Washington Supreme Court upheld the Seattle Monorail's condemnation of the Sinking Ship garage in downtown Seattle for the construction of a monorail station. Although the Monorail Authority conceded that only one-quarter to one-third of the parcel would be permanently needed for the station, it initiated condemnation proceedings for the property owners' entire parcel. The property owners presented evidence to the trial court that the Monorail sought to use the remainder of the parcel for its own profit by selling the remaining property at an increased price following construction of the station.

A 7-2 majority of the Washington Supreme Court voted to uphold the Monorail's condemnation of the entire parcel. Writing for the majority, Justice Barbara Madsen concluded that the Monorail's determination of whether the entire parcel's condemnation proceeded in furtherance of a "public use" was entitled to "great weight." Justice Madsen also wrote that a local authority's determination of whether condemnation proceedings are supported by a "public necessity" is a "legislative question," and not a judicial one. Chief Justice Gerry Alexander and Justices Susan Owens, Charles Johnson, Bobbe Bridge and Mary Fairhurst joined Justice Madsen's opinion.

Writing in dissent for himself and Justice Richard Sanders, Justice James Johnson concluded that the taking of the portions of the parcel not needed for the station violated Article I, Section 16 of the Washington Constitution. He emphasized that the plain terms of that provision mandated that whether private property be taken for public use "shall be a judicial question . . . without regard to any Legislative assertion that the use is public." Justice Johnson maintained that an easement for use of the entire parcel during construction of the station, coupled with just compensation for rent use, was appropriate. However, once construction concluded, the excess land should be returned to the owners.

Following the court's decision, the Monorail Authority cancelled its plans to continue with the condemnation. But the court's decision in *HTK* stands. *HTK* is the Washington Supreme Court's first eminent domain decision following the U.S. Supreme Court's decision in *Kelo v. City of New London,* 545 U.S. 469 (2005).

Regional Transit Authority v. Miller, 156 Wn.2d 403 (2006)

In *Regional Transit Authority v. Miller*, the Washington Supreme Court ruled that an Internet posting on Sound Transit's website is sufficient to provide the required public notice that Sound Transit was conducting public hearings on proposed condemnation of private property.

Washington state law makes clear that government action leading to the taking of private property for public use must be proceeded by public notice procedures. Under RCW 35.22.288, "[s]uch procedure may include, but not be limited to, written notification to the city's official newspaper, publication of a notice in the official newspaper, posting of upcoming council meeting agendas, or such other processes as the [government entity] determines will satisfy the intent of this requirement." Sound Transit's own implementing resolution provides: "Whenever feasible, the Board Administrator shall furnish the Agenda for meetings of the Board and Committees to one or more local newspapers of general circulation in advance of such meetings."

Sound Transit initiated condemnation proceedings of private property following a public hearing where a posting on the Sound Transit website was the only notice to the public about the hearing. The web posting gave a generic description of the location of private property being considered for condemnation, but did not identify any specific lots. No notice to local newspapers or media was provided by Sound Transit.

Writing for a 5-4 majority of the court, Justice Mary Fairhurst concluded that Sound Transit's actions complied with existing requirements. According to Justice Fairhurst, the notice statute did not require Sound Transit to contact local newspapers. The majority, which included Justices Susan Owens, Charles Johnson, Barbara Madsen and

Bobbe Bridge, also asserted that Sound Transit's internal procedures about proper public notice do not govern the court's analysis of the issue. Furthermore, the majority held that identification of specific parcels of private property under consideration for condemnation is not required.

In his dissenting opinion, Justice James Johnson, joined by Justice Richard Sanders, stated that Internet website posting is not adequate notice to the public under the public notice statute. Justice Johnson further opined that Sound Transit violated due process by failing to follow its own internal notice procedures. Moreover, Justice Johnson asserted that meaningful judicial review by appellate courts requires that the trial court that heard the *Miller* case should have entered written findings of fact to explain the justification for the taking of public property.

Chief Justice Gerry Alexander filed a separate dissenting opinion stating that Internet notice was insufficient as a matter of due process. He concluded that the web posting should also have more specifically identified what parcels of private property were being considered by Sound Transit for condemnation.

Justice Tom Chambers joined the Chief Justice's dissent. He also joined Justice James Johnson's dissent, but concurred in judgment only.

Miller is the first case in the United States to hold that Internet website posting alone satisfies constitutional and statutory requirements for adequate public notice of government action.

***Washington State Public Disclosure Commission v. Washington Education Ass'n*, 156 Wn.2d 543 (2006)**

In *Washington State Public Disclosure Commission v. Washington Education Ass'n*, the Washington Supreme Court ruled that a state law requiring unions to obtain affirmative authorization from non-union members before expending their fees for political purposes was unconstitutional.

In 1992, Washington voters passed Initiative 134 (I-134), the Fair Campaign Act. A provision of I-134 prohibited labor unions that charge "agency shop fees" (fees paid by workers who are not members of the union) from using those fees for political purposes, unless they receive affirmative authorization by the non-member.

In a 6-3 decision authored by Justice Faith Ireland and joined by Justices Owens, Charles Johnson, Barbara Madsen, Bobbe Bridge and Tom Chambers, the court held that the effect of the statute was an "impermissible shift" of burden to the unions, and that the statute had the "practical effect of inhibiting one group's political speech (the union and supporting non-members) for the improper purpose of increasing the speech of another group (the dissenting non-members)." According to Justice Ireland, this "presumption of dissent" violated the First Amendment rights of both the unions' members and non-dissenting non-members.

Justice Richard Sanders, joined by Chief Justice Gerry Alexander and Justice Mary Fairhurst, wrote in his dissenting opinion that the majority was mistaken in finding that the unions had a constitutional right to withhold nonmembers' agency shop fees without being required to seek affirmative authority. The unions, Justice Sanders explained, only have a statutory right, not a constitutional right, to allow employers to withhold membership dues. More particularly, Justice Sanders insisted that, because the legislature could choose to repeal the law allowing union-withholding, it was "beyond comprehension to claim that the legislature, or the people acting through their sovereign right of initiative could not qualify these statutes" to ensure they were applied in a constitutional manner.

***Hangartner v. City of Seattle*, 151 Wn.2d 439 (Wash. 2004)**

In *Hangartner v. City of Seattle*, the Washington Supreme Court ruled that a public documents request asking for "all" documents was "overbroad." Therefore, the agency was not required to respond to the citizen's request for public documents under the terms of the Public Disclosure Act. The court also expanded the attorney-client privilege statute by applying it as an exemption to requests for public documents.

Chief Justice Gerry Alexander wrote the opinion for the court on behalf of a 5-4 majority, which included Justices Susan Owens, Bobbe Bridge, Mary Fairhurst and Faith Ireland.

Justice Charles Johnson wrote the dissenting opinion, joined by Justices Richard Sanders, Barbara Madsen and Tom Chambers, maintaining that the "overbroad exemption" appeared nowhere in the statute, but instead was made up out of whole cloth by the majority. Justice Johnson explained that, in fact, the only inquiry to be made by the agency is whether the party seeking documents made a clear request for "identifiable public records," the request's breadth being irrelevant.

In his dissent, Justice Charles Johnson also asserted that the "attorney-client privilege" statute exemption is directed at the attorney, not the agency. Justice Johnson concluded that the majority's incorporation of the "attorney-client privilege" within the Public Disclosure Act ignored the broader context of the statute.

As a result of the court's decision in *Hangartner*, Attorney General Rob McKenna subsequently introduced agency request legislation to fix the "overbroad" portion of the ruling. The Legislature adopted the legislation, and it was signed into law by the Governor. The new law directly answered the court's decision in *Hartgartner* by amending the Public Disclosure Act to forbid government agencies from denying public document requests for being overly broad.

Yousoufian v. Office of Ron Sims, 152 Wn.2d 421 (2004)

In *Yousoufian v. Office of Ron Sims*, the Washington Supreme Court held that the Public Disclosure Act's penalty provision only requires offending government agencies to pay one fine for each day it unlawfully withholds records from the public. Chief Justice Gerry Alexander, joined by Justices Susan Owens, Charles Johnson, Bobbe Bridge and Faith Ireland, rejected the argument of citizen-activist Armen Yousoufian that the Public Disclosure Act's penalty provision required offending government agencies to pay a penalty on a per record basis for every day the government agency unlawfully withheld the public records.

Yousoufian had requested all records pertaining to King County's proposed tax to finance the Seattle Seahawks' new football stadium, Qwest Field. The Public Disclosure Act provides, in pertinent part, that it "shall be within the discretion of the court to award such person an amount not less than five dollars and not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record."

Chief Justice Alexander ruled that the Public Disclosure Act did not require King County to pay a penalty for each record it unlawfully withheld from Yousoufian. Instead, the court ruled that King County should only have been fined for each day it unlawfully withheld all the records. As a result, the penalty levied against King County for unlawfully withholding the records totaled roughly $25,500. This fine was in contrast to the nearly $1.5 million Yousoufian would have received had the court ruled that King County should have been fined for each of the eighteen public records it unlawfully withheld.

Justice Mary Fairhurst, who joined the majority, also wrote a concurring opinion.

In his dissenting opinion, Justice Richard Sanders criticized the majority for refusing to assess damages based on a per record basis simply because the majority felt that the Legislature could not have intended the statute would yield the size of penalties Yousoufian was seeking. Justice Sanders maintained that the plain language of the statute leads to no other result than requiring government agencies to be forced to pay penalties on a per record basis for each day they withhold those records. According to Justice Sanders, "[t]he bottom line is that the purpose of any penalty is to *punish* current misconduct sufficiently to *deter* future misconduct."

Justices Barbara Madsen and Tom Chambers also penned short dissents from the majority's construal of the Public Disclosure Act penalty provision.

Sheehan v. Central Puget Sound Regional Transit Authority, 155 Wn.2d 790 (2005)

In *Sheehan v. Central Puget Sound Regional Transit Authority*, the Washington Supreme Court upheld Motor Vehicle Excise Taxes (MVET) collected by both Sound Transit and the Seattle Popular Monorail Authority in the face of several constitutional challenges.

Justice Susan Owens wrote the opinion of the court on behalf of a 7-2 majority, which included Chief Justice Gerry Alexander and Justices Charles Johnson, Barbara Madsen, Tom Chambers, Mary Fairhurst and William

Baker (serving Pro Tempore), upholding the Sound Transit and the Monorail Authority taxes against all challenges. Whether Sound Transit and the Monorail Authority's respective taxes were "excise taxes" (based on the use of vehicles) rather than "ad valorem taxes" (based upon mere vehicle ownership) was raised by the appellants who challenged the constitutionality of the governing authorities' taxes. Justice Owens asserted that both taxes were excise taxes on motor vehicles.

Justice Owens acknowledged that the enabling legislation providing Sound Transit and the Monorail Authority with taxing power was devoid of the term "annual," whereas other statutes conferring taxing power upon local authorities at other times had included that term. However, Justice Owens maintained that the presence of the term "annual" was not necessary to confer annual taxing power upon Sound Transit and the Monorail Authority. Rather, she concluded that both governing authorities' respective taxes were indeed excise taxes on motor vehicles, and that such excise taxes have long been understood to be collected annually.

Justice James Johnson wrote the dissenting opinion, with Justice Richard Sanders joining, in which he maintained that the statutory authority for Sound Transit and the Monorail Authority to collect taxes was limited to one-time collections rather than annual collections. Justice Johnson noted that the enabling legislation for both governmental authorities was devoid of the term "annual," whereas other statutes conferring taxing power to government authorities at various times expressly included that term. Justice Johnson cited prior Washington Supreme Court cases that held where there is any doubt about a legislative grant of taxing authority to local government, it must be denied. Ultimately, he concluded there was obvious doubt about the ability of Sound Transit and the Monorail Authority to levy taxes annually, and that those governmental authorities therefore lacked such an expansive taxing power.

Additionally, Justice Johnson asserted that the court record of the case was insufficient to be able to determine whether Sound Transit and the Monorail Authority's taxes were excise taxes on motor vehicles, or unlawful ad valorem taxes that had been improperly labeled. He suggested that additional proceedings before a trial court would be necessary to determine whether the taxes at issue were excise taxes.

Larson v. Seattle Popular Monorail Authority, 156 Wn.2d 752 (2006)

In *Larson v. Seattle Popular Monorail Authority*, the Washington Supreme Court again upheld the taxing authority of the Monorail Authority in the face of constitutional and statutory challenges.

Justice Barbara Madsen's opinion, joined by Chief Justice Gerry Alexander and Justices Susan Owens, Charles Johnson, Bobbe Bridge, Tom Chambers and Mary Fairhurst, held that the Monorail's Board could wield taxing power even though only two of the nine Board members were subject to popular elections. Justice Madsen concluded that, while local governments have no inherent taxing authority, the legislature may delegate taxing power to unelected local governments, so long as other procedural safeguards exist. The majority ruled that the statutorily-defined purpose of the Monorail, the tax-rate ceiling contained in the Board's enabling legislation and various regulations for tax collection were sufficient procedural safeguards to allow the Board to exercise taxing power.

Justice Madsen concluded that the Monorail's Motor Vehicle Excise Tax was indeed a valid excise tax, citing the court's previous decision in *Sheehan v. Central Puget Sound Regional Transportation Authority*. Furthermore, Justice Madsen and the majority ruled that the Monorail Authority properly taxed citizens using a Manufacturer's Suggested Retail Price (MSRP) schedule rather than the fair market value of motor vehicles. Justice Madsen noted that the term "fair market value" did not appear in the Monorail Authority's enabling statute.

In his dissent, Justice James Johnson, with Justice Richard Sanders again joining, stated that the Monorail Board could not exercise taxing power because it was not subject to popular elections. Citing the principle of "no taxation without representation," Justice James Johnson asserted that taxing power is an exclusively legislative power and, accordingly, the Monorail Board's wielding of taxing power violated the separation of powers.

Reiterating concerns he expressed in his dissent in *Sheehan*, Justice Johnson also wrote that the record was unclear as to whether the Monorail Motor Vehicle Excise Tax was truly a valid excise tax on the use of motor vehicles or merely an impermissible ad valorem tax upon the mere ownership of motor vehicles.

Finally, Justice Johnson concluded that the Monorail Board improperly taxed citizens according to the MSRP taxing schedule, set far above market value. He noted that the MSRP had been repealed by state voters in the same election year that Seattle voters approved creation of the Monorail Authority. Justice Johnson also cited the Monorail's stipulation earlier in the litigation that it had led voters to believe they would be taxed according to the market value of their vehicles.

City of Olympia v. Drebick, 156 Wn.2d 289 (2006)

In *City of Olympia v. Drebick*, the Washington Supreme Court ruled that Olympia's legislatively mandated traffic impact fee imposed on a new office building violated neither state statutory law nor the Takings Clause of Fifth Amendment of the U.S. Constitution, as alleged by property owner John Drebick.

The 6-3 majority, in an opinion by Justice Susan Owens and joined by Justices Charles Johnson, Barbara Madsen, Bobbe Bridge, Mary Fairhust and Mary Kaye Becker (serving Pro Tempore), ruled that the City was not required to demonstrate that the $132,328.98 traffic impact fee it imposed as a condition for approving Drebick's building permit for a new office building was roughly proportional to the amount of traffic the building would produce. Justice Owens wrote that the impact fees statute of the Growth Management Act (GMA) allowed Olympia to base its impact fees on area-wide infrastructure improvements without determining the direct impact of the particular project.

Justice Owens went on to assert that the "rough proportionality" requirements that local governments must adhere to in conditioning development approval on a property owner's dedication of a portion of land for public use, recognized by the U.S. Supreme Court in *Nollan v. California Coastal Commission*, 483 US 825 (1987) and *Dolan v. City of Tigard*, 512 US 374 (1994), do not apply to impact fees assessed under Washington law.

In the dissenting opinion, Justice Richard Sanders, joined by Justice James Johnson, concluded that the impact "fee" assessed against Drebick functioned as an excise tax to raise revenue, and that such a tax is forbidden under the impact fees statute of the GMA. Justice Sanders asserted that, under the statute, impact fees must be site-specific to a new development and its future impact, rather than merely a tax on development generally, with no connection to the actual future impact of the particular development. Furthermore, Justice Sanders asserted that the legislative history of the GMA suggested it was enacted to codify the same standards that the U.S. Supreme Court recognized in *Nollan* and *Dolan*.

Ferry County v. Concerned Friends of Ferry County, 155 Wn.2d 824 (2005)

In *Ferry County v. Concerned Friends of Ferry County*, the Washington Supreme Court upheld the decision of the Growth Management Hearings Board (Growth Board) that Ferry County failed to satisfy the Growth Management Act's "best available science" requirement.

The Growth Management Act requires counties to adopt critical areas ordinances by considering the "best available science." Ferry County listed only four local species as endangered, threatened or sensitive in its critical areas ordinance (the bald eagle, ferruginous hawk, peregrine falcon and lynx).

Justice Mary Fairhurst, writing for the 7-2 majority, which included Chief Justice Gerry Alexander and Justices Susan Owens, Barbara Madsen, Bobbe Bridge and Charles Johnson, stated that Ferry County failed to employ the best available science by ignoring the opinion of a habitat biologist with the Washington Department of Fish and Wildlife (DFW), as well as the views of the Colville Indian Tribe.

While acknowledging that the legislature had not clearly defined the term "best available science" or what it specifically requires, Justice Fairhurst maintained that the Growth Board rightfully relied upon the concerns of the DFW habitat biologist that Ferry County failed to list enough endangered, threatened or sensitive species in its

critical areas ordinance. The DFW habitat biologist suggested to Ferry County that it had wrongfully excluded bull trout from its list.

Justice Fairhurst asserted that Ferry County's reliance upon the expertise of a local wildlife biologist who had thirty years of prior experience in Alaska was insufficient to satisfy the "best available science" requirement. Justice Fairhurst further maintained that, under the Growth Management Act, Growth Board decisions should be overturned only if they are not supported by substantial evidence.

Justice Tom Chambers joined the majority and also wrote a concurring opinion.

In his dissent, Justice James Johnson, joined by Justice Richard Sanders, concluded that Ferry County satisfied the "best available science" requirement. More particularly, Justice Johnson maintained that the majority wrongly construed the "best available science" standard to require Ferry County to prove a negative (i.e., to prove that additional threatened, endangered or sensitive species exist in Ferry County). Noting Ferry County's limited resources, Justice Johnson asserted that the County was fortunate to have a resident wildlife biologist to consult in adopting its critical areas ordinance.

Justice Johnson stated that the Growth Board relied almost entirely upon the DFW's list of priority species, but that the record shows that the twelve species included in the DFW's list are not present in Ferry County. Moreover, Justice Johnson asserted that the GMA requires that courts reviewing Growth Board decisions are to give deference to county decision-making bodies, not to the Growth Board. Finally, Justice Johnson noted that the "best available science" requirement should take into account the resources of smaller counties and the scientific information that is actually available.

In re the Parentage of L.B., 155 Wn.2d 679 (2005)

In re the Parentage of L.B. represents the first time the Washington Supreme Court recognized a new category of parents known as "de facto" parents and placed them in parity with biological and adoptive parents in Washington State.

The case arose when the biological mother of L.B. denied her former same-sex partner any and all visitation with L.B. The court held that the former partner could raise a claim in court that she is a "de facto" parent deserving all the rights associated with a parent-child relationship.

Justice Bobbe Bridge wrote the court's opinion on behalf of a 7-2 majority that included Chief Justice Gerry Alexander and Justices Susan Owens, Charles Johnson, Barbara Madsen, Tom Chambers and Mary Fairhurst. Justice Bridge's opinion concluded that the Uniform Parentage Act (UPA) is not the exclusive source of laws governing parent-child relationships. Justice Bridge maintained that state common law (i.e., rules of decision handed down by the courts) recognized a "de facto" parent status beyond the provisions of the UPA. She cited recent cases in Wisconsin and Massachusetts recognizing "de facto" parents as persuasive authority supporting her opinion for the majority.

According to the court majority's holding, the former partner of L.B.'s biological mother now has standing to claim that she is a "de facto" parent entitled to the same rights as a biological or adoptive parent. Justice Bridge went on to state that, even if the former partner of L.B.'s mother failed to establish "de facto" parent status in this particular case through further lower court proceedings, she could potentially establish visitation rights as a "psychological" parent under Washington common law.

In his dissent, Justice James Johnson, joined by Justice Richard Sanders, asserted that the legislature intended the UPA to be the exclusive source for determining parentage in this state. He argued that the UPA nowhere recognizes "de facto" parents, and that the courts cannot create a category of "de facto" parents without violating the separation of powers. Justice Johnson noted that the UPA unambiguously defines a "parent" and a "parent-child relationship," and that the former partner in this case does not qualify under any of the five situations expressly listed under the state.[7] In addition, Justice Johnson found that the statute provides absolutely no definition of "de facto" parent. Finally, Justice Johnson called attention to the Washington Supreme Court's decision of *In re Custody of Brown*,

153 Wn.2d 646 (2005), decided earlier that year. The court in *Brown* declined the invitation to establish a "de facto" parent category in Washington law.

Andersen v. King County, 138 P.2d 963 (Wash. 2006)

In *Andersen v. King County*, the Washington Supreme Court upheld the state's Defense of Marriage Act (DOMA) and the statute's definition of marriage as the union of one man and one woman.

Writing the plurality opinion for a 5-4 majority, Justice Barbara Madsen, joined by Chief Justice Gerry Alexander and Justice Charles Johnson,[8] concluded that DOMA was rationally related to the government's recognition of the exclusive procreative capacity of one man and one woman and to the government's interest in promoting marriage for the raising of children. Justice Madsen wrote that DOMA's definition of marriage as the union of one man and one woman does not violate the Washington Constitution's Privileges & Immunities Clause because homosexuals do not constitute a suspect classification for constitutional purposes and because there is no constitutional right to marry a person of the same sex. Justice Madsen likewise concluded that DOMA does not violate the Equal Rights Amendment because the statute does not favor one sex over another sex, but treats everyone equally. Additionally, Justice Madsen wrote that DOMA does not violate the right to privacy under the Washington Constitution. Her plurality opinion stressed that the definition of marriage is a legislative decision, and that the Legislature may permissibly change the definition of marriage.

Chief Justice Gerry Alexander, who joined the majority, also wrote a short concurrence where he noted that the court was called to decide whether the Washington Constitution requires DOMA to be overturned. Chief Justice Alexander concluded that the Legislature is free to keep or revise state laws concerning marriage.

Justice James Johnson, joined by Justice Richard Sanders, wrote a separate concurring opinion. Justice Johnson's opinion provided a different Privileges & Immunities Clause analysis, concluding that there is no right to marry a person of the same sex that belongs to every person by virtue of citizenship. Justice Johnson asserted that there is a fundamental right to marry, but marriage has always been understood as the union of one man and one woman. Justice Johnson provided an alternative equal protection analysis and concluded that DOMA is constitutional. His opinion stressed that the Legislature's adoption of DOMA is supported by several rational bases and is in furtherance of compelling state interests.

Justice Mary Fairhurst wrote the lead dissenting opinion. While not suggesting that homosexuals constitute a "suspect class" or that there is a fundamental right to marry a person of the same sex, Justice Fairhurst concluded that DOMA is not supported by a rational basis. Instead, she concluded that DOMA is premised upon irrational animus against gays and lesbians. Justice Fairhurst and her fellow dissenters would have declared DOMA unconstitutional and ordered the legislature to enact remedial legislation.

Justice Tom Chambers authored another dissenting opinion that included a Privileges & Immunities Clause analysis that was similar to Justice James Johnson's. However, Justice Chambers concluded that DOMA violates the Privileges & Immunities Clause nonetheless.

Justice Bobbe Bridge wrote a separate dissenting opinion, concluding that DOMA was unconstitutional. According to Justice Bridge, DOMA is motivated by irrational moral and religious animus directed against gays and lesbians.

T.S. v. Boy Scouts of America, 138 P.2d 1053 (Wash. 2006)

In *T.S. v. Boy Scouts of America*, the Washington Supreme Court held that neither the First Amendment to the U.S. Constitution nor Article I, Section 7 of the Washington Constitution protects all records maintained by the Boy Scouts of America (BSA) regarding volunteer eligibility from discovery requests made in the course of litigation.

Three plaintiffs filed suit against the BSA, two local BSA councils and former scoutmaster Bruce Phelps for damages for sexual abuse allegedly committed by Phelps. The BSA appealed a trial court's discovery order, requiring the BSA to produce files it had compiled about

volunteers who were considered ineligible to become BSA volunteers. The files numbered approximately 10,000, and some of them included allegations of sexual abuse of minors.

According to the Washington Supreme Court's decision in *Snedigar v. Hoddersen*, 114 Wn.2d 153 (1990), when a party to a lawsuit requests the disclosure of files implicating rights of privacy or free association, a heightened standard must be satisfied. Under *Snedigar*, the party in possession of records that it asserts are privileged must make an initial showing that disclosure of the requested materials will likely harm its rights. If such a showing is made, the party seeking discovery must then show the relevance and material nature of the items sought. It must also demonstrate that other reasonable efforts to obtain the information were unsuccessful. If the party seeking discovery meets that burden, the trial judge must balance the competing interests of both parties and make a decision on the allowable scope of discovery under the circumstances.

In this case, Justice Susan Owens authored the majority's opinion, joined by Chief Justice Gerry Alexander and Justices Charles Johnson, Barbara Madsen, Bobbe Bridge, Tom Chambers and Mary Fairhurst. The majority concluded that the trial court rightfully ordered the BSA to produce *all* of its files (not just Phelps's file). Rejecting the BSA's claims to the contrary, Justice Owens maintained that the trial court's decision did not trigger First Amendment (or Article I, Section 7) protections that apply to the records of political parties.

Noting that a BSA-informant privilege does not exist in the rules of evidence, Justice Owens asserted that *Snedigar* protections for political party membership and other associations do not apply to the BSA for purposes of its volunteer eligibility files. Justice Owens insisted there is a societal interest in protecting children from criminal assaults that weighs against the BSA's records being considered privileged under the rules of evidence.

Justice Richard Sanders wrote a dissenting opinion, joined by Justice James Johnson, concluding that Article I, Section 7 of the Washington Constitution requires that all the BSA's files be disclosed only if the plaintiffs seeking the files can satisfy the *Snedigar* standard. (Article I, Section 7 reads: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law.") Justice Sanders noted that Article I, Section 7 actually mentions the word "privacy" and therefore provides greater protections than both the First and Fourth Amendments to the U.S. Constitution. Justice Sanders found that the BSA files are kept in order to avoid using volunteers who do not meet their standards, and that many of the files contain private information that includes unsubstantiated rumors and hearsay.

State v. Cross, 156 Wn.2d 580 (2006)

In *State v. Cross*, the Washington Supreme Court upheld a sentencing jury's unanimous verdict that Dayva Cross receive the death penalty for murdering his wife and two of her daughters. Cross pleaded "no contest" to the murders, but denied he acted with premeditation.

Justice Tom Chambers wrote the opinion of the court for a 5-4 majority that included Chief Justice Gerry Alexander and Justices Bobbe Bridge, Mary Fairhurst and Faith Ireland. Justice Chambers maintained that the trial judge presiding over the jury selection for Cross's sentencing did not commit error by excluding certain members of the jury panel who indicated their general opposition to the death penalty. Writing for the majority, Justice Chambers upheld Cross's death sentence in the face of several other legal claims.

In enacting RCW 10.95.130(2)(b), the Legislature directed the Washington Supreme Court to review "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Justice Chambers maintained that this review requires a comparison of Cross's case with sentences imposed in other cases, not sentences actually executed in other cases. Ultimately, Justice Chambers concluded that Cross's death sentence satisfied the court's proportionality review.

Chief Justice Gerry Alexander, who joined the majority, wrote a short concurrence.

Justice Charles Johnson authored the dissenting opinion, which was joined by Justices Richard Sanders, Susan Owens and Barbara Madsen, maintaining that Cross's death sentence should be reversed. According

to Justice Johnson, Cross's death sentence was disproportionate to similar cases in violation of RCW 10.95.130(2)(b). In particular, Justice Johnson pointed to the decision by the King County prosecutor not to seek the death penalty for Green River Killer Gary Ridgeway, who pleaded guilty to forty-eight counts of aggravated first degree murder. Justice Johnson also pointed to the decision by the Spokane County prosecutor not to seek the death penalty for Robert Yates, who pleaded guilty to fourteen counts of premeditated first degree murder.

Justice Johnson concluded that there was no rational explanation for why Cross should receive the death sentence for committing three murders, whereas Ridgeway, Yates and other mass murderers received lesser sentences despite the greater severity of their crimes.

Endnotes

[1] The Federalist No. 47 (James Madison) (concerning the particular structure of the new government and the distribution of power among its different parts).

[2] The Federalist No. 78 (Alexander Hamilton) (concerning the judiciary department).

[3] *See Marbury v. Madison*, 5 US (1 Cranch) 137, 177 (1803).

[4] Wash. Const. Art. IV, § 1.

[5] Justice Charles Smith is no longer a sitting Justice on the court.

[6] Justice Faith Ireland is no longer a sitting Justice on the court.

[7] A mother-child relationship is established: (1) when a woman gives birth to a child, (2) through an adjudication of maternity, (3) through adoption, (4) by a surrogate parentage contract, or (5) by an affidavit and physician's certificate stating a person's intent to be bound as a parent of a child born through alternative reproductive medical technology. *See* 155 Wn.2d at 718, *citing* RCW 26.26.101.

[8] Justices James Johnson and Richard Sanders concurred in result only, authoring their own concurring opinion.

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FORTHCOMING DECISIONS FROM THE WASHINGTON SUPREME COURT

Below are short summaries of a handful of significant cases that have been argued before the Washington Supreme Court, but have not yet been decided:

In ***SuperValu Holdings, Inc. v. Department of Labor & Industries***, the Washington Supreme Court will decide whether or to what extent the Department of Labor & Industries (L&I) can regulate business-place ergonomics. In 2003, Washington voters passed Initiative 841, repealing ergonomics rules promulgated by L&I in 2000. L&I argued before the court that, even in the absence of the repealed rules, it has the authority to regulate ergonomics pursuant to its own general rule (referred to as the "General Duty Clause" in the federal Occupational Safety and Health Act). In its briefing to the court, L&I insisted that it has even broader authority to regulate ergonomics under its general duty powers than it did through the now-repealed ergonomics rules.

In ***Daniel v. State***, the Washington Supreme Court will decide whether convicted criminals who have served their prison or jail sentences, but who have not satisfied all of their financial obligations, are being unconstitutionally deprived of their right to vote. In addition to incarceration, many convicted criminals are also required to pay fines, restitution to victims or court costs as part of their punishment. Washington State law currently provides that convicted criminals who have served their assigned period of incarceration, but who have not satisfied all of the financial requirements of their sentences, are not to be restored their right to vote until those financial requirements are met. The plaintiffs in this case contend that the Washington statute operates similar to a poll tax and is therefore in violation of the Washington Constitution's Privileges & Immunities Clause. Washington Attorney Rob McKenna personally argued for the statute's constitutionality before the court.

In ***Voters Education Committee v. Public Disclosure Commission***, the Washington Supreme

Court must decide the constitutionality of Washington public disclosure law's definition of "political committee" as well as its enforcement of that law against the Voters Education Committee (VEC). The VEC sponsored television ads criticizing former State Insurance Commissioner Deborah Senn. The ads ran approximately one week before the primary elections in which Senn was a candidate for Attorney General. After the Public Disclosure Commission filed an enforcement action, the VEC complied with disclosure requirements. The VEC's funding for the ads came from the U.S. Chamber of Commerce, but the VEC challenges the disclosure requirements as contrary to federal and state constitutional protections for freedom of speech.

In ***San Juan County v. No New Gas Tax***, the Washington Supreme Court will decide whether on-air comments and exhortations to listeners to donate money to a group gathering signatures for a proposed ballot initiative amounted to an "in kind" political contribution, requiring a filing with the Public Disclosure Commission. A Thurston County superior court judge held that talk-show hosts Kirby Wilbur and John Carlson (or their parent company, Fisher Broadcasting) made "in kind" contributions to the group named No New Gas Tax. That group gathered signatures for what became Initiative-912, which fought to repeal increases to the state's gasoline tax. San Juan County and three cities sued No New Gas Tax under the Fair Campaign Practices Act. No New Gas Tax argues that the superior court ignored Washington statutes and regulations exempting media commentary on political issues from public disclosure requirements. No New Gas Tax also challenges the ruling under the federal and state constitutions on a number of bases relating to the freedom of speech and the freedom of the press.

In ***State v. Gregory***, the Washington Supreme Court will decide whether to uphold the death sentence of Alan Gregory for aggravated first degree murder. Gregory was convicted by a jury for the brutal rape, robbery and murder of a woman in Pierce County. At the sentencing phase, the same jury voted to give Gregory the death penalty. Consolidated with Gregory's death sentence and conviction for murder is a conviction for a separate rape in Pierce County. The court must also decide whether to uphold that rape conviction. Gregory's defense attorneys have challenged the legality of Gregory's death sentence and murder and rape convictions on numerous grounds.

In ***Grant County PUD No. 2 v. North American Foreign Trade Zone, LLC***, the Washington Supreme Court must decide whether to uphold the Grant County PUD's condemnation of private land that it had previously leased from the private landowner for placement of diesel power generators. Also at issue in the case is whether the Grant County PUD satisfied public notice requirements prior to a public hearing and condemnation proceedings. Grant County PUD had purchased power generators during the energy crisis. However, energy prices later plummeted. As the Grant County PUD's lease term for the private land neared its expiration, and after negotiations for the purchase of the private land stalled, it initiated condemnation proceedings. NAFTZI argues that the Grant County PUD's condemnation is not a permissible government taking under the Takings Clause of the Washington Constitution. Grant County PUD argues that public power is a proper public use supporting the condemnation.

In ***1000 Friends v. McFarland***, the Washington Supreme Court must decide whether King County's critical areas ordinances are subject to local referenda. A King County trial court held that citizen Rodney McFarland's proposed referendum to overturn a critical areas ordinance passed by the County Council could not be placed upon the ballot. McFarland argues that referenda are allowed on critical areas ordinances under Washington law. Environmental groups, joined by King County, argue that referenda are not permitted on critical areas ordinances because they are required to be passed under state law, and thus are outside the citizens' referendum power.

ABOUT THE FEDERALIST SOCIETY

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